

Politics Above Law? The Tension between Democracy and Social Justice

Raul C. Pangalangan

This study confronts the fundamental misconception, especially in Asia, that democracy most naturally promotes social causes. The common intuition is that dictatorship is bad because the concentration of political power also fosters the concentration of economic bounties. Conversely, democracy should lead to social justice. After all, the majority, who are poor, should outvote the minority who are rich. When more people take part in decision-making, more people will benefit from those decisions. Broader political participation leads to widespread sharing of economic opportunities. Finally, it is assumed that democracy fosters transparency and deters corruption.

Strangely in Asia, all these don't hold. Populist democracy in politics actually fosters elite aggrandizement in markets. Democratizing power merely democratizes corruption and rent-seeking opportunities. When more people share political power, more people want a share of the loot.

In the Philippines, Thailand and Indonesia, one element stands out in the transition from military rule: the rise of courts and administrative agencies in deciding issues that, in typical democracies, are made by elected representatives. First and foremost, of course, the transitions are marked by the restoration of free elections. But there is a parallel growth of counter-majoritarian bodies – unelected, insulated by the Constitution from democratic majorities, and free to pursue a social reform agenda without having to rely heavily on popular support or woo political allies. Some of these agencies have succeeded, the others not. This paper asks why, at critical moments, these struggling democracies put their hopes not in popular politics but in counter-majoritarian institutions.

Methodological Note

Social Justice

I have broadened the term “social justice” to include anti-corruption and anti-abuse mechanisms, and thus the term “social causes.” In constitutional law discourse, “social justice” usually refers to non-discrimination and redistributive or corrective justice, and in Asia, it aims to rectify injustices against the poor and the marginalized.

However, the common theme among the Philippines, Thailand and Indonesia is that corruption issues stand at the core of substantive debate against political and economic disempowerment. A quote from an essay, though about India, is most apt: “At the root of India’s anticorruption protests lies a basic demand for dignity.”

And yet Indians are not satisfied with their [political] democracy. They feel their disillusionment ... against the exhausting indignities of daily corruption – against the police who have to be bribed to approve passport applications, against the clerks who demand money to reimburse ration cards or farming subsidies.... They have become fed up with a democracy that exists mainly in form rather than function.... What good is the vote when, to obtain their ordinary rights as citizens, Indians must live at the mercy of an unaccountable bureaucracy and police force? (Jyoti Thottam, *A Little Respect*)

A parallel quote from Thailand is apt because it similarly fuses social justice and social reform.

Social injustice must be eliminated at every level ... Corruption and malfeasance in the bureaucracy must be decisively prevented ... All exploitation must be done away with and the security of the people's life and property provided. (Baker and Pasuk Phongpaichit, *A History of Thailand*, 237, quoting a 1980s military call to "remove the basic causes for communism and dissent.")

The Indonesian Constitution recognizes social justice in its Preamble:

[T]o form a government of the state of Indonesia which shall protect all the people of Indonesia ... and to improve public welfare ... and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice, therefore the independence of Indonesia shall be formulated into a constitution (1945 Constitution of the Republic of Indonesia) (emphasis supplied).

In other words, while social justice traditionally covers "social and economic rights" to land, health care, education, and clean environment, for the purpose of this study of counter-majoritarian bodies, I have also included anti-corruption, because corruption distorts the democratic processes normally relied upon to protect these "social and economic rights." Accordingly, this paper also covers those agencies working in anti-corruption.

Counter-majoritarianism

Counter-majoritarianism is used in American constitutional law to confront the charge that judicial review is inherently undemocratic. Courts and administrative regulatory agencies override decisions by the elected branches, that is to say, by presidents and their cabinet, congressmen and senators. To enforce racial and gender equality, and to protect the environment, the unelected agencies oversee schools, hospitals, prisons, and

"clean earth" programs. But it is undemocratic for unelected judges to second-guess the judgment of elected officials.

Yet the most dramatic advances in civil rights — e.g., free speech and equal rights for racial and religious minorities, and women — were made by courts invoking the Constitution and defying public opinion. In other words, it took undemocratic courts to thumb their noses at the bigotry of the political majority.

Thus the counter-majoritarian theory. Politicians are accountable for day-to-day politics and, each election day, answer the people directly. On the other hand, judges answer to a loftier authority, the Constitution, the foundational social covenant that embodies a loftier set of norms deliberately insulated from shifting political majorities and not subject to compromise. If day-to-day democratic politics embodies the realm of our "baser [egoistic] selves," transacting in an open market, constitutional norms embody our "nobler [enlightened] selves," whose voice we entrust to constitutional organs.

Global versus local, Nation versus village communities

A final methodological point is on the use of "the Nation" as the starting political unit of analysis. This is not to ignore sub-national identities or ethnicities. Indeed in the Indonesian example below, the Constitutional Court stepped in to protect indigenous peoples' claims to their traditional forests. It shows that social justice includes protection against discrimination against vulnerable minorities. At the same time, the contrast between "the Nation" and localized voices parallels the contrast between the constitutional norms enforced by Constitutional Courts vis-à-vis political choices enforced by popular majorities. This paper precisely challenges first, the facile assumption that popular majorities are authentic. It suggests that they are in fact examples of "political ventriloquism" by well organized and noisy elites projecting their voices as that of "the people". Second, it challenges the attitude that unelected courts and administrative agencies can

channel the people's voice and, purporting merely to carry out constitutional duty, actually supplant the true democratic will expressed through the ballot with the dubious sovereign voice shouted in the streets.

Thailand: Democratic values and counter-majoritarian institutions

Starting from the 1930s, Thai politics has been a “tug-of-war between authoritarianism and democratization” (Muntarbhorn, *Asian Discourses of Rule of Law*, 346), and was marked by military rule at the height of the Cold War. Twice there has been a democratic interregnum. The first was the “slight flowering of democracy” during the student-led rejection of military dictatorship in October 1973, but this was reversed by the “military backlash” of October 1976. The second was what until the 2006 coup was seen as the slow buildup toward civilian government in the 1990s: an elected civilian government in 1990, the military coup in 1991, culminating in the use of excessive force against civilian protesters in May 1992 (“Black May”) that led to the high point of Thailand’s journey toward democracy, the 1997 Constitution, a “people-based” charter that protected many of the social causes that are the subject of this paper.

The 1997 Constitution restored civil and political rights, provided for equality and non-discrimination, and significantly, protected environmental rights of traditional communities “to conserve or restore their customs [and] participate in the ... exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law” (1997 Const. §46). Private individuals were given the direct right of action to sue the State to stop “any project or activity which may seriously affect the quality of the environment” (1997 Const. §56). These clauses have enabled people to stop construction projects, dams, and evictions from forests.

The government of Prime Minister Thaksin Shinawatra was democratically elected in 2001. Under his Thai Rak Thai (“Thais love Thais”) political party, for the first time in Thai history a civilian government was effectively in control over government. He was the first elected prime minister to complete his term and be re-elected into office. He adopted populist measures for the poor, including the 30 baht medical subsidy for all people, low-cost universal access to anti-retroviral HIV medication, the 1 million baht fund for every village, and a moratorium on debt collections from peasants. (At the same time, the issue of redistributing land ownership did not move forward, especially since the landowning classes were well represented in the parliament and the cabinet.)

Thaksin rode on the crest of populist pro-poor measures but faced corruption charges after his family sold its entire US\$1.88 billion stake in its telecommunications company to a Singaporean firm. The public was outraged that the family had avoided tax payments because the parliament had amended the rules on capital gains taxes, while there were also undertones of a sell-out of national control over a security-sensitive industry.

Responding to protests by the urban middle classes, Thaksin called for general elections in April 2006. Thaksin swept the elections but the King called on the judiciary to step in “to move democracy forward” (Baker and Pasuk Phongpaichit, *A History of Thailand*). On 19 September 2006, a bloodless coup d’etat ousted the Thaksin government, abolished parliament and the Constitutional Court, and set aside the 1997 Constitution.

The new 2007 Constitution actually maintained the counter-majoritarian institutions created in the 1997 Constitution, namely, the independent organs or “watch-dog bodies” (Harding, *Constitutional Court 122*) like the Constitutional Court, the National Human Rights Commission, the National Electoral Commission, the National Counter-Corruption Commission, the National Audit Commission, the Anti-Money Laundering Office, the Administrative Court and the Ombudsman – all intended to strengthen the checks and balances mechanisms against the abuse of power by the executive (Leyland, *Administrative Justice*, 230,

and Harding and Leyland, Thailand: A Contextual Analysis).

Institutional interventions into substantive economic policy

1. The Constitutional Court struck down four emergency executive decrees issued by the government during the Asian financial crisis, namely, to expand the powers of several financial institutions and enable them to settle debts.

2. The Constitutional Court held that the IMF letters of intent to secure emergency balance-of-payments support did not require prior parliamentary approval because these were not “treaties” under the Constitution because they were unilateral undertakings by the State and contained no contractual obligations.

3. In 2001, the National Human Rights Commission investigated the construction of a gas pipeline through the south of Thailand, over protests that it had entailed human rights violations (Muntarbhorn, Human rights, 341).

4. In 2013, the Administrative Court suspended a US\$11.25 billion mega-water management project on the grounds that the government cleared the project without an environmental impact assessment (EIA) and without sufficient public consultations. It would have entailed the dredging of a 500 kilometre canal or water diversion channel, with immense environmental effects on the central coastal provinces. Petitioner the Anti-Global Warming Association immediately stated that their next step was to ask the National Anti-Corruption Commission to prosecute the government officials involved.

5. The Administrative Court applied retrospectively the 2010 requirement of an Environment and Health Impact Assessment (EHIA) for certain industries (pursuant to the 2007 Constitution). A mining company had already received environmental clearances in 2008 but supervening requirements were issued in 2010. Despite the fact that experts

cleared the company of any environmental violations, the Court required the company to qualify anew under the new rules.

Constitutional Court: Judicial intervention in partisan politics

1. In 2001, the Court cleared Thaksin of charges that he filed an incomplete statement of assets and liabilities. His party had just won a historic parliamentary majority, but his incomplete disclosure would have disqualified him from office for five years. He prevailed by a slim margin on the defense that it was an honest mistake and clerical error.

2. In 2003, the Court held that the selection process that led to the appointment of the Auditor-General was unconstitutional. Significantly, the appointee refused to vacate the office solely on the basis of the Court’s order and insisted upon a royal dismissal. However, when another person was later nominated and the nomination was submitted to the King, he withheld his assent. The National Assembly did not hold a vote to override the royal veto and the Senate voted down the proposal to resubmit the nomination. Accordingly, the name of the dismissed Auditor-General was resubmitted after a memo was issued by the King’s private secretary advising them that “the situation [should] be resolved.”

3. In early 2006, the Court rejected a petition to impeach Thaksin for conflict of interest and improprieties in the sell-off of the telecommunications company, saying the petitioners had failed to present sufficient grounds.

4. In May 2006, the Court invalidated the parliamentary elections that Thaksin had won, on the ground of the positioning of voting booths, hailed as a landmark example of “judicial activism.” The Court also suspended the by-elections needed to fill seats that didn’t meet the required minimum 20 percent. The new elections, set for October 2006, were overtaken by the military coup.

5. In May 2007, the Court dissolved Thaksin's political party and banned its officers from politics for five years.

6. In December 2007, new elections were held under the new Constitution, won by the Thaksin-allied People Power Party. However, by September 2008, the Court dismissed Prime Minister Samak Sundaravej for a minor breach of a conflict of interest rule (for hosting two episodes of a cooking show while he was PM).

7. In December 2008, the Court disbanded the ruling People Power Party for electoral fraud, barred its leaders from politics for five years, and effectively ousted Prime Minister Somchai Wongsawat.

Indonesia: Institutional constraints on democracy

Indonesia began rebuilding its democracy after the fall of Soeharto in May 1998 but, significantly, did not discard its independence Constitution of 1945, which was drafted rather hastily to provide a charter of law that would govern Indonesia after the defeat of the Japanese at the end of World War II but before the old colonial powers returned. Ironically, that constitution was written under the so-called Old Order (1945-66) under its first President, Soekarno, who led what was essentially a leftist state, and endured through the New Order (1966-98) under President Soeharto, an officer who overthrew Soekarno in an anti-communist military coup and who ruled Indonesia with an iron fist for the next two decades.

One major influence in the Indonesian Constitution was the populist impulse to reject Western ideas, both liberal and socialist. It was embodied by Professor Raden Soepomo, for whom the Indonesian *negara hukum* installed the State as the "spiritual manifestation of the people, as a quasi-religious emanation of their racial and ethnic essence" but which did "not necessarily imply either representative democracy or separation of powers" (or *trias politika*, the separation of powers into the legislative, executive and judicial) (Lindsey, Rule of law, 292-3). Both Soekarno and

Soeharto "valorized [this interpretation] as innately Indonesian [because it was] paternalistic and communitarian ..." (Lindsey, Rule of law, 293).

Since the fall of Soeharto, the 1945 Constitution has been amended four times to strengthen Indonesian democracy. The first amendment, in October 1999, shifted legislative power from the president to the parliament and further constrained presidential powers. The second, in August 2000, effectively removed the presidential veto over legislation and codified human rights protection. The third and most important, especially for this study, in 1999, created a Constitutional Court in the European model, with the power of judicial review of legislation, allocating powers among State institutions, and dissolving political parties and resolving election disputes. The fourth, in 2001, finally gave the people the power to elect the president directly. (Lindsey, Rule of law, 298-312)

The Constitutional Court

The Constitutional Court (Mahkamah Konstitusi, hereinafter MK) has succeeded despite the political odds (Harding and Leyland, Two Case Studies 123 et seq.) and issued rulings rehabilitating the political rights of former communist cadres, striking down the retroactive application of the anti-terror law, abolishing the anti-subversion law and diluting the punishment of the equivalent of *lese majeste* laws protecting the president from defamation.

The constitutional drafters deliberately tried to limit public access to the MK by denying a complaint mechanism to enable individual citizens to protect their constitutional rights before the Court (Hendrianto, Institutional choice 170). The following survey of cases shows how the MK has reconciled the liberal individual right with the socialist-inspired "people's economy" (1945 Constitution art. 33; see Fenwick, Law and judicial review in Indonesia).

1. In 2004, the MK interpreted the principle of State control over economic activity, holding that while the 1945 Constitution, article 33, did not prohibit privatization of an enterprise impressed

with the public interest, the State cannot surrender control. The MK expressly invoked the “social justice” clause in the Constitution’s Preamble.

2. The MK declared that Law No. 22/2001 that relinquished State control over oil and gas prices as contrary to article 33 above. The MK held the oil and gas sector as important to the State and in which private enterprises may participate only through contractual concessions granted by the State. The MK applied the same principle in the Water Law case (Law No. 7/2004), upholding the law because the State retained control over natural resources.

3. Upon petition of the Gerak Lawan (or People’s Movement Against Neo-colonialism and Imperialism), the MK struck down the Investment Law (Law No. 25/2007) that allowed investors to have long-term rights of tenure and usufruct over land, citing article 33 above.

4. In 2012, the MK devolved from the central to some regional governments the power to identify which areas with mineral or coal potential are open for commercial mining and can be auctioned off. The MK construed rather strictly the Mining Law (Law No. 4/2009) requirement “after consultation with the regional government” to mean “after it is determined by the regional government.”

5. In 2012, the MK curtailed outsourced labor by invalidating the short-term hiring of workers without benefits. The Indonesian Workers Association sued on behalf of 16 million workers in the Business Process Outsourcing industry, who make up about 40 percent of the workforce but are excluded from benefits as full-time employees.

6. The MK ruled that implementation of International Standard Schools violated the principle of equal access to education, fostered social inequalities among students and, by using mainly English rather than Bahasa Indonesia, undermined unified national standards. These International Standard Schools are public entities designed to be internationally competitive, and are allowed to charge school fees to maintain their higher standards.

7. In 2012, the MK annulled the Oil and Gas Law (Law No. 22/2001), declaring the Production Sharing Contracts as “unconstitutional” and dissolving the government regulatory office of the “upstream oil and gas sector.” The MK held that the PSCS allowed foreign investors to control the oil and gas industry, in violation of article 33 which required government to manage the natural resources of the country “for the greatest benefit of the people.”

8. In 2012, the MK applied the constitutionally guaranteed “right to work and to receive fair and proper remuneration” and the manpower law (Law No. 13/2003) clauses on termination for cause and in case of bankruptcy. The MK held that the ground of “efficiency” did not suffice to justify termination, and only an actual and permanent (not a threatened or temporary) shutdown can justify termination of employees.

9. In 2013, the MK upheld the rights of indigenous peoples (IP) by excluding their customary forests from “State Forest Areas.” In a petition filed by the national IP organization, Aliansi Masyarakat Adat Nusantara (AMAN), it complained that the 1999 Forestry Act effected the “legal seizure” of IP lands and limited some 32,000 villages to “use-rights” within State Forest Areas. The MK excluded “customary forests” from the scope of “State Forests.” (In early 2013, the parliament considered a Draft Act on Eradication of Deforestation (RUU P2H) that may criminalize IP activities in the forests.)

The MK has also flexed its muscle on issues relating to non-economic but still substantive issues.

1. The MK has ordered a recount of the gubernatorial election in South Sumatra due to allegations of widespread cheating and the unethical use of social aid funding for community organizations for “systematic, structured and massive” operations to influence the vote.

2. The MK has also ventured into highly charged religious legislation, upholding a controversial

anti-blasphemy law in 2010, rejecting the challenge filed by the Wahid Organization that the Prevention of Blasphemy and the Desecration of Religions law was being used against the religious rights of minorities. The law enabled the Minister of Religion to ban a religious group that “deviates” from the teachings of a recognized religion. The MK upheld it as necessary to maintain public order and consistent with religious freedom under Pancasila. Some 150 people have since been punished and, after several Shiite were convicted in 2011 for blaspheming Sunni Islamic teaching, the MK was asked to reconsider this ruling in 2012.

Most significantly, the review of the blasphemy decision would not have been possible had it not been for a new law (Law No. 8/2011) amending the statute of the MK allowing a re-hearing of a case based on new arguments. (The new arguments in 2012-13 pertained to international protection for religion, in contrast to the 2010 arguments that relied mainly on local authorities, itself representing a radical shift in thinking.) The new law suggests that parliament was a willing accomplice of the MK to re-open the debate on blasphemy.

The KPK and the Anti-Corruption Court

The most successful and most highly regarded of the post-1998 counter-majoritarian bodies is the Corruption Eradication Commission (Komisi Pemberantasan Korupsi, or KPK) (Law No. 30/2002), which prosecutes cases before the Anti-Corruption Court (Pengadilan Tindak Pidana Korupsi, or Tipikor). The KPK holds a 100 percent conviction rate in the 86 cases of bribery and graft it has filed on government procurement and budgets, against powerful politicians. In September 2013, it was awarded the Ramon Magsaysay prize, Asia’s equivalent of the Nobel Prize, for public service.

In its most high profile case, the KPK accused a top police officer, Inspector General Djoko Susilo, of massive kickbacks in the procurement of driving simulators when he was chief of the National Police Traffic Corps. He had the gall to defy two summonses, and enjoyed the full backing

of his comrades in arms who insisted that they alone can investigate Susilo. They recalled security officers seconded to the KPK. The politicians joined the bandwagon: the parliament, political parties, and even the office of President Susilo Bambang Yudhoyono. The parliament froze the budget for the construction of a new KPK office.

In 2013, the parliament tried to weaken the KPK, proposing to amend the Criminal Procedures Code (KUHAP) to require all law enforcement agencies to obtain a court warrant before conducting a wiretap. While this was ostensibly a civil rights measure, it would hamper the KPK’s powers to investigate corrupt officials. Under current law, the KPK is the only law enforcement body allowed to conduct warrantless wiretaps. The requirement of a judicial warrant would allow court officials to tip off corrupt officials.

The National Police also attempted a frame-up of two KPK investigators for bribery and extortion, but their case fell apart after bugged conversations among the plotters exposed the set-up.

During the Susilo showdown, public opinion rallied around the KPK. There were signs of support from the military establishment itself, especially as the KPK arranged for detention facilities for Susilo. Again, this suggests that KPK draws its power from popular support and not just law.

Indeed, in 2006, the Constitutional Court itself joined in the erosion of the anti-corruption drive by invalidating the legal basis for the creation of the Tipikor (the Anti-Corruption Court) which was merely an emanation of the KPK enabling charter and was technically a branch of the Jakarta District Court (article 54(1) of the KPK Law). An author has described it as an “attempt to circumvent entirely a judicial system known to be complicit in protecting corruptors, and - at the very least - capable of being unresponsive or incompetent in the administration of justice.” (Fenwick, Search for accountability). It was impugned for violating the equal protection clauses and allowing a person to be punished differently under different laws. The Constitutional Court gave the

government three years within which to correct this constitutional defect (Tahyar, Indonesia's anti-corruption court, 279).

Not surprisingly, the KPK's powers have been seen as "too wide-ranging." An analyst has seen it as a deterrent to reform and initiative, that "the KPK's activism has become a deterrent to honest government officials taking a risk." A high-level government adviser has been quoted: "Bureaucrats don't want to touch infrastructure projects and many are delayed as a result [for fear of KPK investigation]." (<http://www.thehindu.com/todays-paper/tp-opinion/a-gecko-with-a-taste-for-corruption/article4980155.ece>)

The Human Rights Commission

The Human Rights Commission (or Komnas HAM) (Law No. 39/1999) was created in the aftermath of the Reformasi following Soeharto's fall and especially after Indonesia came under international scrutiny for human rights violations toward the end of the Indonesian occupation of East Timor. It was the first government institution established to deal exclusively with human rights, and enjoyed much prestige during its early years. However, while the jurisdiction of the Human Rights Court was all-encompassing, it was preoccupied by cases arising from East Timor (Cammack, Indonesian Human Rights, 178), and has since declined with the flourishing of democracy.

Carving out effective institutions

The former Constitutional Court chief justice, Mahfud M.D. himself has lamented that the law enforcement bodies, namely, the police, prosecutors and courts, have not been effective, but he also recognized that the "new ones are relatively good," citing the MK, KPK, Judicial Commission and Financial Transaction Reports and Analysis Center. (Indonesia's Weak Institutions Spark Nostalgia for New Order, at www.thejakartaglobe.com/news/weak-institutions-spark-nostalgia-for-new-order. Mahfud made this statement in May 2013.

In October 2013, Mahfud's successor would be arrested by the KPK for alleged bribery. Chief Justice Akil Mochtar was arrested by the KPK

after investigators seized some US\$260,000 from his home, a sum linked to a case before the court to set aside the results of a regional election.

Common Themes

The central thesis of this study is that in Asia, we have appropriated the counter-majoritarian institutions and their rhetoric, but for entirely different reasons, namely, the outright failure of democratic elections to embody the popular will.

In contrast, the counter-majoritarian rationale emerged in the United States to explain how courts can override the democratic will. American discourse assumed that theirs was a genuine democracy and their dilemma was how unelected judges can be more powerful than electoral majorities. For instance, on racial equality in the Civil Rights era, it is assumed that the majority of voters truly wanted racial segregation. It therefore fell upon federal courts to thwart the popular will and enforce racial equality on the basis of what the constitution says rather than what the people said.

In Asia, we assume that our democracies are fundamentally flawed. So we turn to the courts and call upon our judges to secure the genuine voice of the majority. In Asia, courts are not a check on the popular power. They are its handmaiden, its channel, its spokesman. If the classic model of the American court is that they are counter-majoritarian, the idealized Asian court is majoritarian.

1. Institutionalization of the sense of community.

Both Thailand and Indonesia have embodied a sense of community in symbols or institutions that have transcended and survived periods of dictatorship and strife. For Thailand, that symbol was the monarchy. For Indonesia, it was the post-independence State and its 1945 constitution. For both, these institutions were broad enough to rise above changing rulers and governments.

These nations have expressed their identity/sense of community through formal State institutions, constitutions and laws. During the post-1997 transition in Thailand and the post-Soeharto transition in Indonesia starting 1998, both nations

codified into their respective constitutions the usual democratic practices (e.g., democratic elections) but in addition the counter-majoritarian agencies that will enable citizens to enforce accountability from their government and apply fundamental norms (e.g., respect for the environment, non-corruption, respect for human rights) against powerful people hitherto immune from scrutiny.

2. *Source of legitimacy: the democratic claim of counter-majoritarian institutions.* In democratic polities, legitimacy flows from the mandate of the people. Perhaps in Thailand, for true legitimacy, the people intuitively turn to the monarch more than to the democratic mandate. In Indonesia, there is no monarchy and, while the source of legitimacy is the 1945 Constitution as amended, the operative source of legitimacy is the post-1998 amendments that flow from the democratic restoration.

Significantly, in both nations, the counter-majoritarian agencies actually work hand-in-hand with organized civil society groups. Most of the test cases before the Indonesian constitutional court were filed by activist groups representing progressive causes or disadvantaged communities, which then mobilize public opinion through a free press (and nowadays, the Internet and social media). The Thai case is slightly different: most of the cases were similarly advocated by private groups but they were aligned with larger political partisans (pro- or anti-Thaksin). However, consistent with the Indonesian experience, the counter-majoritarian institutions were attuned to the public pulse and bent in the direction of political winds.

In other words, the unelected agencies purport to act in behalf of unorganized and inarticulate majorities, because the officials elected through free elections and democratic processes do not truly represent the people's will. Indeed, organized political groups are distrusted as self-interested lobbies that do not represent the community. Rather the sovereign will is seen as embodied in constitutional norms (that is to say, the social covenant), mobilized through public protests, and effected through constitutional courts and administrative agencies.

In its original Western milieu, the role of counter-majoritarian institutions was to help minorities assert themselves against majorities. In an Asian milieu, the role was the opposite: to help the true but unorganized political majorities expose the organized elites purporting to speak in their behalf ("political ventriloquism").

Therefore, in these Asian contexts, the counter-majoritarian courts were actually majoritarian. This may be good news in terms of democratic theory, but it's actually bad news for legal/constitutional theory. Had the United States followed this theory during its Civil Rights period, their courts would have bowed before racial, religious and gender prejudices.

The real irony therefore is that these institutions were created precisely to insulate decision-making from politics, but in Asia, the goal is to insulate them from politicians and invoke to a popular power beyond the command of politicians.

3. *Delicate balance between independence and "situatedness."* The experience of Indonesia is most telling. The KPK has stepped on powerful toes and inevitably antagonized the power players. Thus, the periodic attempts by the politicians to clip its wings. It has had to rely on popular mobilization and the press. The same applies to Thailand. Its Constitutional Court and Administrative Courts, when they decide, try to hew closely to what is popular. The dilemma is how to hear "the voice of the people." Is it the voice of the noisiest or most organized? Is it the voice of the most articulate in the media? Or is it the whisper of the King?

In other words, the institutions themselves are weak. Purely legal/constitutional sources of authority by themselves do not suffice. Institutions need the support of public opinion, which is amorphous and not as well organized as political parties and armies.

4. *Asian rationale for the rise of counter-majoritarian institutions.* Countries that have gone through periods of dictatorship are loathe to return to dictatorship and military-dominated

government, but having shifted to electoral politics, realize that democracy is no panacea, that voters cannot be relied upon to vote wisely, and that elected rulers may betray the democracy from which they draw their power. The counter-majoritarian institutions are the acceptable middle-ground; they are not dictatorial, sufficiently civilian, yet not hostage to shifting political alliances and are at least nominally drawing their legitimacy from a democratic constitution.

Closing Thoughts: Walzer's "connected critic"

As an Asian looking at Asian constitutionalism, I take the stance of Michael Walzer's "connected critic" who "manages to get himself inside, and enters imaginatively into local practices and arrangements." He is the "local judge, the connected critic, who earns his authority, or fails to do so, by arguing with his fellows — who, angrily and insistently, sometimes at considerable personal risk (he can be a hero too), objects, protests, and remonstrates."

He rejects the traditional social critic "wrenched loose from the parochial understandings of [his] own society and his ideas installed as if they possessed universal validity", exemplified by the "dispassionate stranger or the estranged native", the "Queen's Chinese, [the] westernized and Anglophile Indian, or a Parisian Marxist who happens to be Algerian."

Transplanted to Southeast Asia, the counter-majoritarian rationale has become the intellectual vehicle to strengthen republican institutions against essentially feudal elites who manipulate the democratic framework to perpetuate old family-based or mafia-type power networks. Thus the irony. Social and economic democracy depends more on government institutions strong enough to stand up to raw political power by organized groups, while trying to divine the sovereign will of the unorganized multitude.

Postscript

Indonesian update: The arrest by the anti-corruption commission of the Chief Justice of the Constitutional Court

In October 2013, the Indonesian anti-corruption body, the KPK, has ordered the arrest of Akil Mochtar, Chief Justice of the Constitutional Court (3 October 2013), for accepting a bribe in exchange for a favorable ruling ordering a re-vote in a district election marred by allegations of voter fraud.

This adds yet a different dimension to the debate. We have thus far looked at the clash between politics and law, between elected bodies and counter-majoritarian agencies, between raw popular power and republican institutions. However, the most recent episode poses a clash between two counter-majoritarian institutions.

But looks are deceiving. The KPK is actually carrying out the popular indignation against corruption. In other words, by official design, the KPK is counter-majoritarian — it is not elected and stands up against corrupt politicians in parliament and the executive branch. But in actual operation, the KPK is actually majoritarian, channeling the people's will and, even more important, enjoying the majority's support.

Can the Constitutional Court (MK) be similarly described? By official design, it is also counter-majoritarian. By actual operation, it is majoritarian. However, it is not as directly populist as the KPK. For sure, it has adopted populist rhetoric on the most progressive social debates about environment, mineral resource extraction, treatment of minorities, etc. But these are sophisticated social issues; they are not as visceral as anti-corruption. They do not spark the outrage of the people. They do not intuitively command the spontaneous allegiance of people. They are espoused by organized elites — progressive, yes, but still of the "political class" and not of the common folk. Indeed it is significant that although the MK has been populist and progressive on social and economic issues like the environment and indigenous peoples, it has been rather conservative and deferential to elites on civil and political issues like free speech and religious freedom.

Thus it can be argued that the KPK has prevailed over the MK in this case because the KPK's anti-corruption crusade aims at ethics, which is more basic than the loftier social causes embraced by the MK, e.g. social justice.

Thailand update: "Democratizing" the Senate: Constitutional court bars it, anti-corruption body punishes its supporters

In November 2013, the Thai Constitutional Court rejected the pro-Thaksin party's proposal to make the Senate fully elective. The post-2006 coup Constitution proposal would have restored the pre-2006 coup and made half the Senate seats appointive rather than elective. The pro-Thaksin legislators saw this as undemocratic, but on 7 January 2014, Thailand's anti-corruption agency ruled that 308 of the pro-government lawmakers had acted illegally in passing a bill to make the Senate an all-elected body. The ruling called for further investigation of the lawmakers. The BBC said: "In few other countries have a handful of judges played such a decisive role in reshaping politics as those sitting in Thailand's Constitutional Court." (Jonathan Head.)

In December 2013, protests by "democratic" forces forced the Prime Minister to dissolve the lower house of Parliament and hold elections on 2 February 2014. The government had announced an amnesty bill covering political offenders since the 2006 *coup* (excluding leaders), but the democrats rejected the bill and the proposed elections, and pushed for an unelected "people's council" to oversee reforms.

On 7 May 2014, after six months of political unrest, the Constitutional Court removed Prime Minister Yingluck Shinawatra who, in appointing a police chief, had "abused" her powers. On 22 May 2014, the Thai military staged a *coup d'état* against the caretaker government and established a junta called National Council for Peace and Order (NCPO). They set aside the 2007 Constitution, proceeded to detain political leaders from both camps, but were also met with resistance from anti-coup activists.

Social movements and constitutional agencies

I will attempt, within the limits of this study, to locate the place of social movements vis-à-vis counter-majoritarian institutions.

The most significant fact is that these cases typically have been initiated by precisely these social movements that have flourished with the restoration of democracy. In other words, especially in Indonesia, activist NGOs (that is to say, groups organized around causes or disadvantaged constituencies, but are not allied with partisan political parties) have filed many of the test cases.

These activist groups are rooted in the historical moments in the development of democracy in their respective countries. For Indonesia, that would be the human rights movement that led to the ouster of Soeharto in 1998, and which fostered the flowering of civil society groups advocating social reform. For Thailand, that would be the generation of activists who flourished during the democratic intervals in 1973-76 and 1990-92. However, it is possible that there is a gap between the so-called "political classes" that are ideologically advanced and the masses of the people upon whose raw power democracy relies.

For instance, going back to the showdown between the KPK and the MK, most probably the KPK will win in the eyes of the Indonesian public. But that merely points out the deeper problem when counter-majoritarian institutions born in the West are deployed in radically different conditions in Asia. These counter-majoritarian institutions were supposed to be insulated from political pressures, but when we adopt them in Asia, they can work only by being beholden to political movements! They must remain attuned to the public pulse, lest they become weak and vulnerable to pressure from the politicians. Their popularity is their best guarantee of independence and effectiveness.

But there will be times when these non-political institutions will be called on to defy the “hooting throng” — in other words, live up to their counter-majoritarian role. Then we will be forced to choose between two ways to divine the democratic will; whether we listen to the voice of the people when they speak through elections, or to the voice of the most organized groups when they speak through a free press, in free public assemblies and through activist courts. Then we confront the painful choice, between free elections that can be manipulated by moneyed elites, or on non-political institutions that can be shaped by well-organized lobby groups. When that comes, the befuddled Asian nations — Filipino, Thais and Indonesians alike — will rue the day they morphed counter-majoritarian bodies to channel populist politics.