

# Roundtable

## **Judicial Review in New Democracies: Constitutional Courts in Asian Cases**

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## INTRODUCTION

Constitutionalism has swept the world in the last one or two decades. Judicial review has become a popular and accepted constitutional institution along the way. By now, most countries in East Asia have adopted judicial review modeled on either the American or European system, or a mixture of both. Although various systems of judicial review have begun playing important functions in many constitutional regimes, the questions of why judicial review would be created and how it may function particularly in the context of East Asia remains to be answered fully. Professor Tom Ginsburg's book entitled "*Judicial Review in New Democracies: Constitutional Court in Asian Cases*"<sup>1</sup> was among the first attempts at inquiring such questions and even more importantly, putting them into the East Asian context. The College of Law, National Taiwan University is honored to have Professor Ginsburg to give his lecture on this very topic and to have many distinguished professors within and beyond Taiwan to join in the roundtable. It is hoped that this roundtable discussion may shed the light on positive explanations for the institution of judicial review and provide for thoughtful examinations and updates on judicial review developments in East Asia, particularly in Japan, South Korea and Taiwan.

### I. OPENING REMARKS

#### **PROF. JIUNN-RONG YEH**

Good morning, everyone. This morning, we are greatly honored to have many distinguished guests from the United States, Japan and Korea. We also have a special guest, Professor Yueh-Sheng Weng, who just retired as the President of the Judicial Yuan, to join in this roundtable. Most importantly, we are so honored to have Professor Tom Ginsburg, who is now a law professor at the University of Chicago Law School, to deliver his speech for our discussion. Chicago recognizes Tom's contributions in many areas, including international law, international politics, comparative constitutions, and legal institutions. I recognize that many American law professors have some interests in Asia, particularly in Taiwan. However, only Tom actually puts Taiwan in his book, which shows his strong interest in Asia, particularly in Taiwan. That is why he plans to stay in Taiwan for one month, learning

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1. TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (hereinafter *Judicial Review*) (2003).

more about Taiwan and analyzing Taiwan's dynamic democratization and reforms in legal institutions.

Let me introduce Professor Tom Ginsburg a little bit more. Professor Tom Ginsburg has worked in many places, including Thailand, Kyushu University, Iran-U.S. Claims Tribunal, and many other places, accumulating all kinds of experiences and obtaining better positions to analyze regional laws and legal institutions. Five years ago, Tom published his book entitled "*Judicial Review in New Democracies: Constitutional Court in Asian Cases*," which is the topic for our roundtable discussion today. This book was recognized by the American Political Sciences Association as the best book on law and the courts in 2004. We are so glad that Taiwan's system of judicial review is discussed in his analysis. This is remarkable. Because of this connection, we are very delighted to invite Tom to give us a talk and to have Professor Weng, former President of Judicial Yuan, to join in the discussion. He told me that he knew Professor Tom Ginsburg and that he actually had read this book and wanted to have a dialogue with Tom. Professor Weng recently retired from this law school. His students, law professors in this law school, put together the conference in honor of him, recognizing his contributions in the areas of judicial review and administrative law. I hope we will be able to rely on Professor Weng's experiences in many ways and continue to inform the world of Taiwan's experiences in this area.

Professor Cho from Korea has been my friend for many years. We are so glad to invite him to participate, not only in this lecture, but also in tomorrow's conference on Judicial Governance. This is a great opportunity for comparative analysis between Taiwan, Korea and Japan. Professor Kadomatsu from Japan will also discuss with us both today and in tomorrow's conference.

We have several local discussants. Let me start by introducing Professor Jau-Yuan Hwang. I think everyone here knows him. Professor Hwang teaches constitutional law and international law in this law school. Professor Tay-Sheng Wang is also our discussant. We recognize Professor Wang's special interests in Taiwan's legal history and hope that Professor Wang would provide his insight from this perspective. Professor Li-Ju Lee specializes in law and society, family law, and feminist jurisprudence. We invite her to provide her view from the sociological perspective. Professor Wen-Chen Chang actually is the one who labored to put us here today. She is also a discussant. She has cooperated with Tom in academic researches and has looked into this area for quite a while. I think she will give great comments on Tom's talk. I will stop here and invite Tom to give us this

lecture. Tom, please.

## II. SPEECH

### JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES

#### PROF. TOM GINSBURG

Thank you so much, Professor Yeh, for such a generous introduction, and thanks to Professor Chang for arranging my stay here. I am glad to come here and see my old friends from Taiwan, Japan and Korea. I very much appreciate your efforts to organize this symposium on my book. I especially want to thank Professor Yueh-Sheng Weng, who helped me so much during my research on this book and subsequently gave me access to decisions of the Grand Justices. It was a very distinguished honor. I would also like to thank him for taking time to come here.

I would like to begin by talking a little bit about my motivations in writing this book. One of the motives has to do with my feelings that East-Asia in general is not well-known in the English language literature. This region is however very central and very important in terms of studying democracy and constitutional laws, not just for regional countries, but also for other societies to understand democratization.<sup>2</sup> Students of democracy should recognize that Asia is actually a region in the world with most recently consolidated democracies. It very much deserves to be studied and understood. I think this is also true for the Council of Grand Justices in Taiwan (hereinafter *the Constitutional Court or the Grand Justices*) under the administration of Judicial Yuan, whose former president Professor Weng is with us today and which plays an important role. Thus, when I set out to understand judicial review, I really thought about lots of questions and wanted to include Taiwan in my study plan. It is a very important case worthy of global understanding, especially in tomorrow's conference on judicialization.

The question that I was asking in this book certainly is a basic one: why has the system of judicial review which has spread all over the world? For so many centuries, political theory has been grounded on the idea that democracy is supposed to be the voice of the people, namely the majority. Therefore, when you have the situation of nine or fifteen unelected judges

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2. See GINSBURG, *Judicial Review*, at 11-15.

deciding against majority decisions, that is fundamentally undemocratic.<sup>3</sup> Most scholars' work, until very recently, accepted this tension and recognized that the relationship between democracy and judicial review is one of contradictions. They fundamentally questioned the legitimacy of constitutional review and regarded it as problematic, and yet, if it is fundamentally undemocratic, why are we seeing such a tremendous spread of constitutional review today?

Democracy and judicial review have both spread around the world at almost the same time. There may be some causal relationship among the two phenomena which most scholars have not yet understood. Certainly, at a normative level, many law professors have developed complicated theories to explain why judicial review is acceptable even if is undemocratic. I did not, however, find these normative works completely satisfactory.<sup>4</sup> Instead, I would like to take a positive approach to judicial review and ask how things are, and why they are the way they are. Therefore, I attempted to develop a positive theory of constitutional review and analyze the timing of judicial review, why it was structured the way it was structured, and how it actually operated in various democratic societies. That is what I was trying to do in my book.

Normative theories understand the spread of constitutional review as being part of the spread of rights consciousness. In the 20<sup>th</sup> century, the story goes, after the World War II, people began to pay more attention to their rights. Social changes led people to demand constitutional review as one mechanism to protect their rights. Of course, the context of rights has changed over time, with attention shifting from classical political liberties to property rights and social and economic rights. It was driven and developed by the demands of respondents, namely the people. This is a typical story of constitutional review developed on the demand side.<sup>5</sup> You have a society which demands certain things, and political institutions respond by giving institutional power like constitutional review to protect rights. However, I did not find this story satisfactory for a number of reasons.

First of all, the theory suggests that people demand constitutional review because they care about their rights. But how would it explain those societies where there is no constitutional review but people still care about their rights, like Zimbabwe today? Do Zimbabwean people care less about their rights because their court is totally under the control of dictatorship? I do not

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3. See GINSBURG, *Judicial Review*, at 21; *see also* ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 188 (1989).

4. See GINSBURG, *Judicial Review*, at 21-22.

5. See GINSBURG, *Judicial Review*, at 11.

think so. Certainly, rights and the spread of rights consciousness would play a certain role in explaining the spread of constitutional review but it is ineffective to explain why we see constitutional review in some political systems but not in others.

The story mentioned above is focused on the demand side of institutional analysis rather than on the supply side. On the supply side, we have to explain why politicians are willing to produce constitutional review and why they set it up. To do this, one may adopt a simplified assumption that the people who design constitutions have some subjective interests in making institutional choices. I am not saying that everyone is self-interested all the time. Certainly not all constitutional designers' choices reflect their self-interest. However, it does seem to plausible to argue that to some extent, those who design institutions would consider their positions in the future politics when making constitutional choices. Sometimes they may wish to create an alternative forum in which to challenge government policies, if they anticipate some chance of being out of power. This basic theory is what I call "*insurance theory of constitutional review*."<sup>6</sup>

I think this analogy works to explain why you develop constitutional review and when you get it. The basic idea is this: when we have a situation of constitutional design, different parties will anticipate different positions in the post-constitution election. One anticipated situation may be a very divided political environment. The extreme illustration is the situation like South Korea in 1987, when the three political parties negotiated for the new constitution, none of them could predict that it would win the legislature in post-constitution election.<sup>7</sup> Under this circumstance, they might allow either presidency or judiciary to have a certain power to constrain the legislature in case they lose. If you do not think that you will win the legislature, you need another forum or arena to proclaim rights in order to limit the legislature. That is really what constitutional courts do. They provide another forum for constraints in the post-constitution election.<sup>8</sup> It is thus a form of political insurance.

We may think this form of political insurance a little bit like insurance market. Just as in an ordinary market, we know that present insurance in market transactions facilitates transactions that might not otherwise occur. For example, suppose Professor Yeh and I are about to make a deal, but I do

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6. See GINSBURG, *Judicial Review*, at 22-33.

7. See GINSBURG, *Judicial Review*, at 215; see also THE CONSTITUTIONAL COURT OF KOREA, *THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT (1988-1998)* 15-17 (2001).

8. See GINSBURG, *Judicial Review*, at 18, 22-25; see also Ran Hirschl, *The Political Origins of The New Constitutionalism*, 11 *IND. J. GLOBAL LEGAL STUD.* 71, 87 (2004).

not trust him and I am not sure about some future contingencies. In this case, I might not be willing to conclude the contract with him. However, if I can buy insurance from an insurance company to protect me from certain risks, I will be able to enter into the contract and benefit from the transaction. Here we can see how insurance helps market functions. In a very similar way, my political insurance theory argues that constitutional review facilitate constitutional transactions. It helps to make possible constitutional bargains that may not otherwise occur. When political parties negotiate the constitution, they cannot predict with complete accuracy what their position will be in post-constitutional politics, nor do they necessarily trust the other side. However, at least they all can agree that if a constitutional court exists, it might reduce the harm they might suffer from if they lose the post-constitutional election. It will reduce the risk of entering a constitutional bargain. In a sense, the insurance analogy suggests that the availability of constitutional review seems to make constitutions possible. A great deal of literature in comparative politics emphasizes how successful constitution-making reduces the stakes of politics. In the United States, for example, we use the constitution to take the divisive issue of religion out of politics, so that no groups will fear religious oppression in the event that they lose. That is the way that all constitutions work. By reducing the stakes of politics, constitutional review facilitates democratic politics. In this sense, constitutional review and democracy are not in tension. Rather, constitutional review helps democracy and help government function.

Other institutions may play a similar role. If you are a smart political party and you think you are not going to win in the next constitutional election, you may, for example, insist on proportional representations, or you may prefer human rights institution such as Ombudsman or Human Rights Commissions. There are other institutions that you can create and choose from. There are other forms of insurance contracts that you can buy in the market. However, the fact is that judicial review is relatively cheap –courts don't have a lot of personnel and overhead.<sup>9</sup> It is not like the second house of the legislature, which can also serve as a minority protection institution. In addition, judicial review has been adopted in many countries. If constitutional court is successful in one country, it is more likely for another country to learn about it and to adopt the institution because of its reputation.<sup>10</sup>

It is also particularly attractive in new democracies because their need

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9. See GINSBURG, *Judicial Review*, at 26.

10. See GINSBURG, *Judicial Review*, at 26.



for insurance is much greater. First of all, comparatively speaking, new democracies have greater political uncertainty than exists in authoritarian regimes. For example, the Kuomintang (hereinafter *KMT*) in Taiwan after democratization felt confident that they would win the next election, but they were less confident than they had been in the one-party period. Between 1985 and 1987, a certain possibility of losing was on the table. Therefore, the KMT might have tolerated more active constitutional review, as they expected that they would need the insurance associated with democratization. The basic theory is that they would demand more constitutional review during the period of institutional and democratic uncertainties. The situation of dispersed political power and more uncertainty is what I call political diffusion.<sup>11</sup>

I also argue the type of constitutional court created is a response to local political situations. Constitutional courts vary in terms of many dimensions. In France, until this year the constitutional court could only hear challenges to the constitutionality of laws before they are adopted, and ordinary citizens cannot go to the French constitutional court.<sup>12</sup> It was devised only to respond to political institutions like the President, the legislative minority, and other political oppositions. This is contrasted with the German system, in which citizens are allowed to make constitutional petitions.<sup>13</sup> These kind of design issue also responds to the demand of political insurance. The more divided political parties are, the more powerful constitutional courts may become, with more open access. The term of judges may be longer, and they may be able to issue separate concurring or dissenting opinions and become more independent as judges.<sup>14</sup>

All these are predictions that may be put to a test. I therefore offer various explanations in my book to test my theory. One set of tests is statistical.<sup>15</sup> I simply measure the strength of dominant political parties in many countries like Taiwan to see if they are associated with more powerful constitutional courts in terms of constitutional design. It turns out that they are. The second test is to look at very important cases of constitutional review, and to see if these cases help explain and understand the theory. I

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11. See GINSBURG, *Judicial Review*, at 19.

12. According to Articles 58, 59, 60 and 61 of Constitution of the Fifth French Republic, the powers of French Constitutional Council are divided into two categories: abstract review and consultation. For the text in English, see *International Constitutional Law, France Index*, [http://www.servat.unibe.ch/icl/fr00000\\_.html](http://www.servat.unibe.ch/icl/fr00000_.html) (last visited Aug. 31, 2008).

13. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 15-17 (1989).

14. See GINSBURG, *Judicial Review*, at 46-47.

15. See GINSBURG, *Judicial Review*, at 121, 125, 127, 128, 155.

think that insurance structure helps explain things in the United States, Germany, and South Africa. Finally, I look at the important cases of Taiwan, Korea and Mongolia in more detail to try to understand the operation of courts in new democracies.<sup>16</sup>

When political parties design a powerful constitutional court at the time of constitution design, no party is sure whether it will have power after the next election. Suppose one party afterwards becomes very strong and would be able to undermine the insurance design. They can do all sorts of things, such as to limit the jurisdiction of the court or to empower the President. Whether constitutional courts possess actual power after their establishment depends on the ongoing degree of political diffusion. This could be considered an objection to the insurance theory. Nevertheless, I do not think that this poses any fundamental problem for insurance theory. Insurance theory recognizes that the cost may be high in such situations. Once the constitutional court is set up, it is costly for a political party to constrain it. When Boris Yeltsin, for example, got rid of the first Constitutional Court in Russia because it was fighting against him, there were some costs. It made people outside of Russia think he was a kind of dictator. His past reputation was undermined.<sup>17</sup> I therefore do not think that this objection poses a fundamental problem for insurance theory.

Let me talk just a little bit about the Taiwanese case. In my opinion, the Taiwanese case is an important one. When the constitutional court was first set up, it was created under the Constitution of Republic China (hereinafter *the ROC Constitution*) in the mainland. At the time, it was actually a divided political situation, and the Communist Party, the Kuomintang, and other political parties got together to negotiate on constitution making and its institutional designs. It was proposed to have a constitutional court on the American model that is accessible for citizens and is relatively powerful with the explicit power of constitutional review.<sup>18</sup> However, by the time they adopted the ROC Constitution in Nanjing, the Communist Party withdrew from the alliance and the KMT led by Chiang Kai-Shek became the only one political party in power. They adopted a more constrained constitutional review, a more limited one. The Council of Grand Justices was able to function until a number of decisions went against the Legislature Yuan, and subsequently the Council was punished.<sup>19</sup> After that, the Grand Justices

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16. See GINSBURG, *Judicial Review*, at 106-157, 158-205, 206-246.

17. See GINSBURG, *Judicial Review*, at 101-104.

18. See GINSBURG, *Judicial Review*, at 116.

19. *J. Y. Interpretation No. 76* (1957/05/03). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

were pretty quiet. Sometimes they tried to constrain Chiang's regime, but they were unable to do so. One of the famous decisions was *Interpretation No. 86* in 1960, in which they decided to require that judicial administration be moved to the Judicial Yuan.<sup>20</sup> It was a very brave judicial decision in such a one-party regime, telling the executive that it should not run the court. Unfortunately, the Executive Yuan ignored this decision for twenty years. In this kind of situation, there was very little that the court could do. Interestingly, as democratization occurred, there was much more space for the court. More powers were given to the Grand Justices in Taiwan. For example, the 1992 Constitutional Amendment gave the Council an explicit power to dissolve political parties.<sup>21</sup> The Constitutional Amendment was inspired by the German system which gives the court the responsibility to decide whether a political party is unconstitutional.<sup>22</sup> After that, the Executive Yuan was no longer able to limit Democratic Progressive Party (hereinafter *DPP*).

A more recent constitutional reform aligned the timing of appointments to the Council of Grand Justices with presidential cycles in a staggered way, so that half of the justices retire every four years. This gives each President a chance to appoint some members of the Council. Therefore, we are witnessing certain power changes over time as the democracy proceeds, and the Council plays a very important role in democratizing Taiwan. This is a very influential story that other courts around the world should know and learn from. One good example is the way the Council dismantled the KMT institutions in unions and universities. In the past, teacher unions were –de facto– controlled by the KMT, and military personnel were in universities to offer military educations. The Grand Justices were able to dismantle the KMT dominance in unions and universities by asserting university and associational autonomies enshrined in the ROC Constitution.<sup>23</sup>

In addition, the Council did something that also appeared in many new democracies, which was to clean up criminal procedure. Criminal procedure

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20. *J. Y. Interpretation No. 86* (1960/08/15). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

21. Article 5 of the Additional Article of the Constitution of the Republic of China (hereinafter *the ROC constitution*) stipulated that a political party shall be considered unconstitutional if its goals or activities endanger the existence of the Republic of China or the nation's free and democratic constitutional order. For the text in English, see [http://www.president.gov.tw/en/prog/news\\_release/document\\_content.php?id=1105496084&pre\\_id=1105498701&g\\_category\\_number=409&category\\_number\\_2=373&layer=&sub\\_category=](http://www.president.gov.tw/en/prog/news_release/document_content.php?id=1105496084&pre_id=1105498701&g_category_number=409&category_number_2=373&layer=&sub_category=) (last visited Aug. 8, 2008).

22. See GINSBURG, *Judicial Review*, at 124; see also KOMMERS, *supra* note 13, at 223-229.

23. See GINSBURG, *Judicial Review*, at 149-151. *J. Y. Interpretation No. 373* (1995/02/24); *J. Y. Interpretation No. 450* (1998/03/27). For their text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

in dictatorial regimes often failed to protect human rights. Several important decisions rendered by the Grand Justices demanded legislative reforms of criminal procedures, and all were responded to by the Legislative Yuan.<sup>24</sup>

In achieving these gains, the Council used a very interesting style, in which they did not necessarily decide the substance but rather demanded that the political branches, which were democratically elected, respond and make the substantive decisions. The comparative literature has termed this as constitutional dialogues. Of course, the court can make the final decision, but its decisions are not always final: rather they are part of institutional conversations between the court and the legislature. The legislature passes laws, and the court may respond to the legislature saying that what it did was not quite right. Then the legislature may pass another law. Through this process, the court is not the final actor but at least plays an important role in joining parts of the conversation and helping the democracy develop.<sup>25</sup> My reading of another leading case by the Council, the nuclear power case,<sup>26</sup> shows that the Council's approach was to demand political communication rather than to replace democratic politics. In terms of judicial prudence and respect of democratic politics, I really think that many decisions of the Council provide some of the best examples globally and are worthy of appreciations and learning by other countries.

I would also like to discuss South Korea and to compare it with Taiwan. The constitutional-design situation in South Korea was much more divided. Three political parties competed with one another so they needed a relatively powerful court.<sup>27</sup> The South Korean Constitutional Court is in some instances similar to Taiwan's Council of Grand Justices in its decisions with regard to reforming criminal procedures, dismantling the authoritarian political structure<sup>28</sup>, and invalidating the Security Act.<sup>29</sup> All cases are very similar to certain counterparts here in Taiwan.

On the other hand, the Korean Constitutional Court has been able to wield more power. I think this was due to much more divided political situations in Korea. Political parties in Korea are traditionally weak, and the

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24. *J. Y. Interpretation No. 384* (1995/07/28); *J. Y. Interpretation No. 392* (1995/12/22); *J. Y. Interpretation No. 582* (2004/07/23). For their text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

25. Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracy: the Case of Taiwan*, 2(2) ASIA L. REV. 73, 86-87 (2005).

26. *J. Y. Interpretation No. 520* (2001/01/15). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

27. See Hirschl, *supra* note 8, at 88.

28. See GINSBURG, *Judicial Review*, at 228-232.

29. See GINSBURG, *Judicial Review*, at 236-238.

legislature is usually divided. The President serves a single term, and so is relatively weak in some ways. The legislature and the executive are also frequently divided with each branch being controlled by different political groups. There is thus much more institutional space for the Korean Constitutional Court to be more active than otherwise in normal democratic politics. Here is an example. In 2004, President Roh, who was very similar in many ways to President Chen Shui-Bian, was impeached by the South Korean legislature.<sup>30</sup> The Korean Constitutional Court had to confirm this impeachment and had to pronounce whether President Roh would stay or go. Interestingly however, an election was scheduled before the Court rendered the decision. The general public overwhelmingly voted for President Roh who was still very popular. But what the Court decided to do was very interesting. The Court contended that President Roh had violated the law and that in theory he could have been removed from the office. But such violation of law was too minimal to justify his removal. According to South Korean Constitution, however, there was not any clear basis for this opinion by the Court. The South Korean Constitution just states that if the President violates the law, he should be removed from the office. The Constitutional Court as a final decision maker interpreted constitutional provisions in such a way to give itself discretionary powers to decide on whether the President could stay or go. It was a very clever decision because it responded to politics that supported President Roh, but at the same time it expanded judicial powers in a significant way much like what Chief Justice John Marshall did in *Marbury v. Madison*.<sup>31</sup> In another case, President Roh initiated a move of the capital city away from Seoul, but the Court found such an initiative incompatible with the Constitution.<sup>32</sup> The reason they gave was very interesting. Although no provisions in the written Constitution prevents such a move of the capital city, the Court argued that the capital has been located in Seoul for such a long time that it became part of the “unwritten” Constitution. Therefore, the capital can not be relocated without constitutional change. The decision was pretty bold. The South Korean Constitutional Court relied on the unwritten constitution that could engender enormous judicial powers. In the way, this bold power exercised by the court was not quite justifiable, but it clearly showed us that divided politics to give the Korean Constitutional Court more space to act.

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30. The Impeachment of President (Roh Moo-hyun) Case, 16-1 KCCR 601, 2003 Hun-Ma 814, April 29, 2004. For the text in English, see <http://english.court.go.kr/> (last visited Aug. 11, 2008).

31. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

32. The Relocation of the Capital City Case, 16-2(B) KCCR 1, 2004 Hun-Ma 554 (consolidated), October 21, 2004. For the text in English, see <http://english.court.go.kr/> (last visited Aug. 11, 2008).

Due to my time constraint today, I will not go into too many details. Rather I would like to conclude with some comments on the significance of these cases. For many years, East-Asia was thought to be a region of authoritarianism where it was not possible for constitutional courts to constrain powerful leaders. This idea has been proved wrong in the past one or two decades. The story told in the past literatures certainly is no longer true, if it ever was, and East Asian culture is not a constraint. There may be some different cultural styles when it comes to the way constitutional review is exercised. But in terms of the fundamental institution, in my opinion, there are general political logics found in Taiwan, just as in Germany and in Zimbabwe, that allow us to develop a theory which explains the development of judicial review all over the world. This is really what I intended to do in my book.

### III. COMMENTARY

*Professor Jiunn-Rong Yeh:*

Let me introduce some of our guests before we invite our discussants to comment. Professor Carol Tan is from New Castle University in England. Also, I will introduce Ms. Fu-Mei Chang who I think many people know very well. She was my colleague in the Cabinet. Next, I would like to introduce Professor Chao-Chun Lin, over there. He is also one of our discussants for tomorrow's conference. Then, I would like to invite our discussants to provide their comments on Tom's speech. I would like to have Professor Cho as the first speaker since Tom discussed many Korean cases, and we are interested in knowing what has been going on in Korea. Last I would like to make sure that each commentator would have six to eight minutes for their respective comments. Professor Cho, please.

#### A. PROF. HONG SIK CHO

Thank you for your generous introduction, Professor Yeh. I am very much delighted to be here and listen to Professor Tom Ginsburg's presentation. First of all, I think Tom did a terrific job on his research about Asian countries. He collected, reshaped and even rebuilt a wonderful story about Asian legal, particularly constitutional, developments. I was so much surprised to see how deeply and profoundly he knew about the Korean legal regime historically and statistically. I really would like to give him a big applause. However, I have to do what I am expected to do here as a

commentator, namely, to criticize or at least to provide my comments on his works in a critical way. Thus, I have a couple of reservations about his conclusion.

Tom's conclusion is that domestic political diffusion provides a necessary condition for the development of judicial power. Throughout the history, there have been a large number of cases where political diffusion existed one way or another. But I would say, until the modern era, some forces other than judicial power have filled the vacuum of power. Therefore, some other conditions than political diffusion are needed to persuasively explain the emergence and development of judicial power.

My second reservation is concerned with power constraints. If any power successfully controls the state, there ought to be some mechanisms to *self-constrain* the power. There is a saying in Korea that absolute powers absolutely get corrupted. There is a very interesting story about Chinese warlords in Mancur Olson's second book entitled *the Rise and Decline of Nations*. Chinese warlords exploited their people only up to such an extent that they could maintain their power over them.<sup>33</sup> Olson's finding tells us a lot about power exercise and its constraints. Even an authoritarian regime may develop certain mechanisms to constrain its own power exercise. Thus we must enquire not only necessary conditions for judicial review to emerge but also other (sufficient) conditions that can explain why the court (instead of other organs) can play such power-constraining role, and that is why I have some reservations about Professor Ginsburg's conclusion.

Now I would like to discuss the insurance theory that Tom developed. It seems to me that the insurance theory is a quasi social-contract theory.<sup>34</sup> What is the difference between the insurance theory and the social contract theory? Both attempt to indicate that if we would like enter into contract, we would try to get some insurance by means of fundamental rights or judicial review. The insurance theory therefore tells us nothing more than the social contract view.

Next I would like to discuss about the Korean case. Korean legal historians have found a great deal of evidence documenting a different story about old Korea. For example, nowadays most Korean legal scholars agree

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33. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 147-50 (1982).

34. Social Contract theory was an attempt to legitimize the authority of the King over the society. The legitimacy of government is dependent upon a contract or agreement between the governor and the governed. The first attempt of social contract theory was made by Hobbes. After Hobbes, John Locke and Jean-Jacques Rousseau are the best known proponents of this enormously influential theory. See *generally*, *SOCIAL CONTRACT THEORY* (Michael Lessnoff ed., 1991).

that Koreans in *Chosun* dynasty were litigious.<sup>35</sup> Over the past thirty years, the so-called Hahm's thesis has prevailed, claiming that Koreans are non-litigious.<sup>36</sup> However, we now understand that Koreans are much more litigious than Dr. Hahm thought. If this is true, Korea has already been prepared culturally to take judicial power as such now exercised in the current regime.<sup>37</sup>

During Tom's presentation, Tom mentioned that political parties in Korea were weak. But I would contend that political parties in present Korea are getting more and more stabilized. Now, three Kims (Kim Young-Sam, Kim Dae-Jung, Kim Jong-Pil) have gone. When the National party, the ruling party now, survived the presidential election, other opposition parties organized together against the ruling party. In the future, I believe, there would be a two-party system in Korea, and that this two-party system would gradually become stabilized.<sup>38</sup>

*Professor Jiunn-Rong Yeh:*

Thank you very much, Professor Cho. Now I would like to invite Professor Kadomatsu as the next speaker.

#### B. PROF. NARUFUMI KADOMATSU

Thank for inviting me to participate in such an interesting discussion. I am deeply honored to be here and am particularly impressed by Professor Tom Ginsburg's insurance theory. It is very attractive. His theory explains many aspects of judicial review, and it is particularly interesting for present Japanese political circumstances and judicial review. Japanese politics had been dominated by the Liberal Democratic Party (hereinafter *LDP*) since 1955 until now, except for a short interval in 1993-1994. Recently, however, almost for the first time in the postwar history, the *LDP*'s rule is seriously

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35. See, e.g., Kun Yang, *Judicial Review and Social Change in the Korea Democratizing Process*, 41 AM. J. COM. L. 1, 8 (1992).

36. Professor Hahm argues that, traditional Korean society was a non-litigious society. See Hahm Pyong-Choon, *Religion and Law*, in *KOREA JURISPRUDENCE, POLITICS AND CULTURE* 95-96, 152, 177 (1986).

37. Some other scholars argue, however, there has been a "dramatic change in the attitudes of the Korean people toward litigation." Koreans are becoming more litigious, more willing to advance legal claims, and more willing to resort to the courts. See, e.g., Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. Ill. U. L.J. 71, 84 (1997).

38. For the development of party politics before 1999, please see Chun-Si Ahn, *Transformation of South Korean Politics and Prospects for Democratic Consolidation*, in *POLITICS AND ECONOMY OF REGIME TRANSFORMATIONS* 23, 23-40 (Chung-Si Ahn & Chon-Pyo Lee eds., 1999).



challenged. The party could be defeated by the Democratic Party of Japan (hereinafter *DPJ*) in the next general election.<sup>39</sup> Interestingly at the same time, we can also observe changing tendencies both in constitutional and administrative judicial review. While the Japanese judiciary had been famous (or infamous) in its passive attitude in judicial review, it seems that the tide has changed. Several recent case decisions of the Supreme Court and lower courts might indicate a more active role of judicial review in the future. It would be very exciting if the present situation in Japan could serve as another good example that verifies the adequacy of Professor Ginsburg's insurance theory. However, I must confess I still have doubts.

First of all, as Professor Ginsburg just said, the point of his argument is to put focus on the supply side of the institutions of judicial review rather than on the demand side, using the insurance model.<sup>40</sup> What does he mean then by the "suppliers" of the insurance? They are the politicians (constitutional drafters) as the "designers"<sup>41</sup> of the system. Now I would like to point out that not only the outside designers but also the daily inside operators are the "suppliers" of insurance. Insurance would be used only when it is beneficial for the contractual parties. Prof. Ginsburg has explained why it is beneficial for politicians to take out insurance, but the insurance should be lucrative also for insurance companies in order to be sustained as a business. If we would apply insurance model to the judicial review, we should also examine what would be the merits for the jurists (judges and lawyers) to engage in such activities. Where would the merits come from? What are conditions for enjoying such merits?

The second question is that who actually designs the system according to the insurance theory. I must confess that I actually know nothing about historical genesis of insurance, but I would assume that the institution has emerged rather spontaneously as a product of trial and error. Prof. Ginsburg has explained judicial review from the perspective of "designers," but I think he also agrees that the institution is also a product of trial and error, spontaneously emerging out of many judicial precedents. We should enrich this discussion with more empirical studies of the genesis of judicial review. What Professor Ginsburg has done is clearly an important step towards this end.

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39. In the election of Japanese House of Councilors in 2007, the ruling parties (the LDP and the New Komei Party) lost their majority in the Upper House. Although they still have a strong majority in the House of Representatives (the Lower House) and therefore can retain the government, the result of the divided Diet is a serious legislative deadlock.

40. See GINSBURG, *Judicial Review*, at 11, 25.

41. See GINSBURG, *Judicial Review*, at 22.

Now I come to the third and the last comment. When the politicians choose to buy “insurance,” they may not have to be highly risk-averse,<sup>42</sup> but they do have to care about various risks on a longer term basis. Perhaps politicians do act in such a way when they design the constitutions during the era of democratization or other transitional periods. In present Japan, however, I do not assume that major parties take judicial review seriously as an insurance for safeguarding their own interests.

The Japanese Supreme Court has announced parliamentary statutes to be unconstitutional only in 8 decisions. I would like to mention two recent examples. In one case, Japanese citizens living abroad won the right to vote in national elections.<sup>43</sup> The other more recent case, the Supreme Court invalidated the provision in the Nationality Law that disqualified children who were born out of wedlock to non-Japanese mothers and recognized by their Japanese fathers only after they were born. After the Supreme Court decision, such children are now recognized as Japanese.<sup>44</sup> The aforementioned cases certainly are important from the view point of human rights. I wonder, however, if these cases would be regarded equally as important by many politicians. Naturally they must be important stakes for some politicians who are engaged in human right issues, but I doubt if they are the majority. For the other politicians, those human right issues may not be so important “risks” that they choose to buy “insurance.”

Let me pick up another example. On September 11, 2002, the Japanese Supreme Court announced Articles 68 and 73 of the Law on Postal Service, which exempted and limited state tort liability for registered mail and special delivery mail,<sup>45</sup> unconstitutional. This important constitutional decision was nonetheless absent from the top page of *Asahi Shimbun*, one of the major newspaper in Japan. The general public did not seem to be interested in it at all. Here, judicial review is hardly associated with any political importance. Such being the case, there would be little motivation for politicians of both

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42. See GINSBURG, *Judicial Review*, at 27.

43. In 1998, the Diet amended the Public Offices Election Act to make it possible for Japanese nationals living overseas to participate in elections for members of both houses of the Diet. However, the Supplementary Provision, Article 8 stipulated that voters living abroad could vote only for members elected by proportional representation and could not vote for single-member elections for the House of Representatives or for councilors elected from prefectures. On September 14, 2005, the Supreme Court held the article 8 unconstitutional. For the text in English, see <http://www.courts.go.jp/english/judgments/text/2005.09.14-2001.-Gyo-Tsu-.No..82.,2001.-Gyo-Hi-.No..76.,2001.-Gyo-Tsu-.No..83.,2001.-Gyo-Hi-.No..77.html> (last visited Aug. 31, 2008).

44. The Supreme Court Decision June 5, 2008, see *Japan Times*, <http://search.japantimes.co.jp:80/cgi-bin/nn20080605a1.html> (last visited Aug. 31, 2008).

45. For the text in English, see <http://www.courts.go.jp/english/judgments/text/2002.09.11-1999.-O-.No.1767.html> (last visited Aug. 11, 2008).

sides to be careful designers of the institution of judicial review.

In conclusion, while Prof. Ginsburg's insurance theory is very interesting and seems to be a very good explanatory tool in certain political circumstances, but it is not certain how far we can generalize its implications. We would need probably more empirical studies to ascertain the scope of the theory. Thank you.

*Professor Jiunn-Rong Yeh:*

Let me take this opportunity now to introduce another professor in our audience, Professor Ming-Li Wang, who would also be our discussant for tomorrow's conference. Tom, I wonder whether you would like to respond to Professor Cho and Professor Kadomatsu first.

*Professor Tom Ginsburg:*

It is up to you.

*Professor Jiunn-Rong Yeh:*

Then I would suggest you respond to their comments first.

*Professor Tom Ginsburg:*

I would like to make sure that we have enough time for the roundtable, so I would not discuss every point now. I must thank both professors for their wonderful comments. Let me start with Professor Kadomatsu's comment. I think your story is interesting. The fundamental question is why we create courts to take up their judicial review functions and how courts respond to their tasks. I assume that institutions often have power, which they care about and would like to expand further. Obviously, it is not always true. Another interesting point is the reality that the Japanese Supreme Court is beginning to act, which I think shows that the system is perhaps undergoing gradual democratization. (Of course Japan is a democracy, but has not been a competitive one, with longstanding dominance of the LDP.)

Democratization gradually increases judicial power. In democratizing situations, courts would not –or not always– strike down very important statutes. But it does not necessarily mean that courts have not played important functions. Rather, we must examine the political dynamic as a whole, and that is what my insurance theory intends to do. For example, in

Taiwan, in 1986, the Council of Grand Justices first struck down a law which was not particularly important, but this action gradually elevated the Council's political salience.<sup>46</sup> Things like this just show us that courts may play important roles while not necessarily making any fundamental threats to the regime. Judicial powers may be gradually built up.

I would then very briefly respond to Professor Cho. Is insurance theory a social contract theory? Well, the social contract idea indeed sees a constitution as a kind of contract. But it is not necessarily a *social* contract. It could be, as in some dictatorships, that constitutions are a bargain by a few elite rather than the society as a whole. I actually think that my insurance theory provides a more refined prediction than general social contract theories.

### C. PROF. TAY-SHENG WANG

I would like to discuss to what extent Confucianism and Taiwan's unique political structure influence the development of judicial review in Taiwan, particularly from the perspective of a legal historian.

We have to examine Confucianism from both cultural and political viewpoints. According to Confucianism, the ruling class would lose their superiority if their decisions had been informed by written regulations. The ideal way of ruling is to allow a benevolent ruler or king to make decisions on a case-by-case basis for the benefit of the ruled.<sup>47</sup> In the practice of imperial China, legal decisions of the emperor and his officials were not restricted by the written regulations because in theory, like father and son within a family, the emperor and officials must be free in making their decisions for the best interests of the ruled. As a result, the king and officials could govern the general public without constraints. For the general public in imperial China, rule by law was not desirable because the law always meant punishments, and more importantly, it was believed that the king and officials would be kind in taking care of lives of the ruled. In Taiwan, the ethnic Chinese became dominant on the island in the late nineteenth century, and the majority of officials were also ethnic Chinese. Consequently, the general public in Taiwan still accepted the political fiction of father and son, although I agree that Confucian influences were not so strong in an immigrant society like Taiwan and was even less strong than that in Korea,

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46. *J. Y. Interpretation No. 201* (1986/01/03). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

47. See also Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 *LAW & SOC. INQUIRY* 763, 766-67 (2002).

as Prof. Ginsburg said in the footnote of his book.<sup>48</sup>

After 1895, however, the rulers in Taiwan became Japanese. In sharp contrast with the ruling Japanese who were culturally different from ethnic Chinese, the identity of “Taiwanese” emerged. The close relationship and family fiction between the rulers and the ruled, which supported the Confucian-style government in the past, began to decrease in the Japanese era. The Taiwanese became ready to receive rule by law, which was based on the distrust towards the government. However, the Meiji Constitution, shaping the rule by law in colonial Taiwan, was drafted by the Japanese, rather than the Taiwanese. In other words, the Taiwanese were unable to establish necessary institutions in the constitutional framework. The design of colonial parliament was rejected in the Japanese constitutional order. It was not possible to adopt judicial review that had not even existed in the Meiji Constitution. Nevertheless, the majority of laws in the Japanese era followed modern European laws based on individualism and capitalism. The Taiwanese people were thus often benefited from applying those laws. That was a strong incentive for the Taiwanese to abide by law. This point has also been made in my book entitled “*Legal Reform in Taiwan under Japanese Colonial Rule, 1895-1945: The Reception of Western Law*.”<sup>49</sup>

The politics of Taiwan changed again in 1945. It was necessary to analyze the legal development of postwar Taiwan from both the KMT side and the native Taiwanese side. With the strong legacy of Confucian-style government, the KMT regime did not respect the constitutionalism until late 1947. According to the 1931 provisional Constitution promulgated by the KMT regime, the organization in charge of interpreting such a provisional Constitution was the KMT, which was a political body rather than a judicial one.<sup>50</sup> The 1946 Constitution was therefore a big change for the KMT regime because it adopted not only constitutionalism but also the design of judicial review. Without the experience of the rule by law, the KMT regime chose to carry out the rule of law, at least on the book. Was the KMT regime ready? In addition, during the period between 1945 and 1949, while Taiwan was in fact a province of the Republic of China (hereinafter *ROC*), it was nonetheless quite different from other provinces of the *ROC*. Although the native Taiwanese were ethnic Chinese, they regarded mainlanders as “the other” in accordance with their experiences in the Japanese era, especially

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48. See GINSBURG, *Judicial Review*, at 19.

49. TAY-SHENG WANG, *LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895-1945: THE RECEPTION OF WESTERN LAW* (2000).

50. Tay-Sheng Wang, *The Legal Development of Taiwan in the 20<sup>th</sup> Century: Toward A Liberal and Democratic Country*, 11(3) PAC. RIM L. & POL'Y J. 531, 542 (2002).

after the February 28 Incident in 1947, in which thousands of native Taiwanese were killed by the KMT's army.<sup>51</sup> Unlike in other provinces of the ROC, the close relationship and the family fiction of Confucian-style government was not practicable in Taiwan. Again, the Taiwanese had great potential to receive the rule of law, with the judicial review. It is worth noticing, however, that the 1946 Constitution was drafted in a hurry; the native Taiwanese did not seriously discuss it and therefore had no chance to understand the meaning of rule of law and of judicial review.

In 1953, the Grand Justices promulgated *Interpretation No. 31* to recognize the legality of the representatives without re-elections.<sup>52</sup> This interpretation was bad from the viewpoint of substantive democracy, but was good in confirming the important status of judicial review in the constitutional order. The KMT regime that lacked the experience of judicial review used this new constitutional device just because it could utilize and control the results of constitutional interpretations through the appointment of Grand Justices, but not because any political diffusion had existed then. In addition, at the time when *Interpretation No. 31* was rendered, the general public did not feel appreciation for judicial review.

That being said, however, the political situation gradually changed in postwar Taiwan. In 1990, the Grand Justices, whose competence had been recognized in *Interpretation No. 31*, promulgated *Interpretation No. 261* to demand the re-election of all representatives in the national institutions and promoted the democratization of Taiwan.<sup>53</sup> At this moment, the judicial review virtually played its role in liberal democracy on two grounds. First, after the 1970s, an increasing number of legal scholars spread constitutional theories based on the concept of liberal democracy, some of whom then became the Grand Justices due to their prestigious status in the society. Secondly, after the last dictator, President Chiang Ching-Kuo, died, there did exist certain political diffusions in Taiwan. After 2000, the political diffusion between the DPP and the KMT has allowed judicial review to be even further active. However, now I cannot predict whether the fact that the KMT completely controls the legislative and executive branches would undermine judicial review or not. If the KMT continues to control over the appointment of the Grand Justices, it may possibly continue to utilize judicial review to

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51. The *February 28 Incident* in 1947 was the first massive killings carried out by the KMT army in Taiwan. GEORGE H. KERR, *FORMOSA BETRAYED* 254-311 (1965).

52. *J. Y. Interpretation No. 31*. (1954/01/29). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

53. *J. Y. Interpretation No. 261* (1990/06/21). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

legally justify its own political interests.

#### D. PROF. JAU-YUAN HWANG

It is my honor to be here as one of the discussants to comment on Professor Ginsburg's presentation. Professor Ginsburg develops an interesting theory of political insurance to explain why Taiwan adopted the centralized judicial review in 1946 during the negotiations between the KMT and the Chinese Communist Party (hereinafter *CCP*). Being an insightful observation, the application of insurance theory to the creation of judicial review in the ROC Constitution, however, has two flaws, in my opinion. The first one is historical and political, and the other is theoretical.

First, on the historical side, there were in fact many debates on the very issue of whether or not the ROC Constitution did adopt the centralized judicial review. There were some evidences pointing to the contrary conclusion. One important piece of fact was that the ROC Constitution was drafted, to a significant degree, by an academic fellow –Mr. Chang, Chun-Mai.<sup>54</sup> He was a leader of another opposition party (Democratic Socialist Party) in the 1940s. It should be interesting to note that, right before he wrote the ROC Constitution, Chang gave a series of lectures on the new Constitution for China then, in one of which he discussed about the judicial powers. In that lecture, he provided a lengthy introduction and placed great emphases on judicial independence of ordinary courts. Only at the very end of that lecture he addressed the issue of judicial review. Interestingly, what he mentioned was mainly about the U.S. system and not the centralized Austrian system.<sup>55</sup> He even gave a detailed account of *Marbury v. Madison* and then presented a number of cases by the U.S. Supreme Court that struck down legislations during the New Deal era of the 1930s. He did spoke to a detailed degree about the U.S. system. Having looked at this piece of evidence, I just wonder which system, centralized or decentralized, would have been adopted by those constitutional framers at that time in China?

The second piece of evidence was that, right after the adoption of the ROC constitution in December 1946, the Legislative Yuan passed the Organic Act of the Judicial Yuan in March, 1947. This Act stipulated that the Judicial Yuan consist of nine Grand Justices.<sup>56</sup> The number of Grand

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54. CHUN-MAI CHANG, CHUNGHUA MINKUO MINCHU HSIENFA SHIHCHIANG (TEN LECTURES ON THE DEMOCRATIC CONSTITUTION OF THE REPUBLIC OF CHINA) 99-110 (1947, reprint in 1997) (in Chinese).

55. *Id.* at 108-110.

56. Ssufayuan tsuchihfa (Organic Act of the Judicial Yuan) was passed on March 31, 1947. The

Justices was exactly the same as that of Justices in the U.S. Supreme Court. This Act also provided that the Judicial Yuan consist of four different panels in charge of civil, criminal, administrative, and civil servant issues, respectively. Several months later, however, due to the resistance of the then-sitting Supreme Court Justices at the time, the Legislative Yuan revised this Act and increased the number of Justices from nine to seventeen.<sup>57</sup> Meanwhile, the new law also made the Supreme Court the highest court of last instance, separate from the Judicial Yuan. I believe this was an important twist, which is worth further research. And the above development might suggest different readings of the ROC constitution's design of judicial review. This is the first part of my comment.

My second part of comment is about the theoretical implications of Professor Ginsburg's insurance theory. The insurance theory sounds interesting and innovative, but in my view, the system of judicial review did not matter that much for those key political actors in China around the time of constitution-making in 1946. If we look at the negotiations between the KMT and the CCP in 1946 either at the National Assembly or the Political Consultative Conference, we will find only one out of the twelve principles of constitutional drafting was about the issue of judicial power.<sup>58</sup> Furthermore, even this principle concerning judicial power addressed nothing on judicial review. It focused more on the issues of judicial independence, judicial organization, fair and open trials, and due process.<sup>59</sup> Against this background, I would argue, the power of judicial review might not even be an issue at all for the major political parties in China at the time. I really doubt either the KMT or CCP would even think of using the judicial power as leverage on the political branches. What both the KMT and CCP were not interested in might happen to provide some sort of leeway or breathing space for those people like Mr. Chang. And it might explain why Mr. Chang, leader of a small political party, could have the opportunity to write, or at least try to write, his own ideas about the judicial review system in the U.S. into the ROC Constitution of 1947.

In the interest of time, I would like to end here and I hope my above

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number of Grand Justice was nine. For the text of this law (in Chinese), see <http://db.lawbank.com.tw/FLAW/FLAWDAT0801.asp?lsid=FL000086&ldate=19470331> (last visited Aug. 9, 2008).

57. Ssufayuan tsuchihfa (Organic Act of Judicial Yuan) was first amended on December 25, 1947. The number of Grand Justice was increased from nine to seventeen. For the text of this revised law (in Chinese), see <http://db.lawbank.com.tw/FLAW/FLAWDAT0801.asp?lsid=FL000086&ldate=19471225> (last visited Aug. 9, 2008).

58. Chungkuo Chihhsien-shih Tzuliao Huipien, (Collection of Documents and Data in Relation to the History of Chinese Constitution) 592 (Chuan-Chi Miu ed., 1989) (in Chinese).

59. *Id.* at 592.



observations could invite more feedbacks from our distinguished speaker, Professor Ginsburg. Many thanks to all of you.

**E. PROF. LI-JU LEE**

Thank you for having me. Professor Ginsburg presents a wonderful story about the development of judicial review in the new democracies. He provides a plausible argument, the “insurance model,” to explain the close relationship between the strategic political actors and judicial review in several East Asian countries.

In fact, the development of judicial review is never able to stay away from tensions between the legislature and the executive, and never immune from the strategic agenda and performance by political actors. Not only happened in the new democracies of East Asia, it is also evident in Europe and the U.S. Then, what makes the development of judicial review in these East Asian new democracies unique, especially in the case of Taiwan? As Professor Ginsburg’s research correctly points out, it is the role of judicial review in democratization that makes the Taiwanese story special. From the perspective of the “supply” side, Professor Ginsburg attributes the development of judicial review to the various political actors’ seeking insurance of their own interest. This is a great story with a convincing argument. However, I would like to direct your attention to the “demand” side of story which Professor Ginsburg chooses not to tell. I don’t mean to criticize Professor Ginsburg’s choice. Instead, it is meant to add a few points to his story.

The “demand” side of story is from the perspective of “the people” or “the society.” In any new democracies, the political transition comes from the fact that the people take the center stage in politics. The demand or reaction from the society, therefore, constitutes one critical force to reconstruct the political institutions, including that of judicial review. In addition, any strategic political actor, especially in the new democracies, could not truly insure their interest or political future by ignoring social demand and public support. Therefore, to include the society and people into the picture not only completes the puzzle, but also enriches the understanding of the supply side of the story, which Professor Ginsburg’s theory focuses on.

The interaction between the society and judicial review could be approached by considering the concern over legitimacy. In Taiwanese experience, the development of judicial review has been driven by two

claims of legitimacy,<sup>60</sup> representing two different forces of institution-making.

In the authoritarian KMT regime, there was a huge gap between the government and the society. The concept of legitimacy also had different meanings to the KMT government and to the people of Taiwan. The KMT claimed that it was the only legitimate government representing China, rather than the Taiwanese people or the rule of law.<sup>61</sup> The Council of Grand Justices, created by the original Constitution, was called upon to confirm the KMT's version of legitimacy. The Council did just that to endorse the KMT regime by rendering *Interpretation No. 31*.<sup>62</sup> It was not until *Interpretation No. 261* did the Council of Grand Justices announce its change of heart to embrace the people's version of legitimacy and support the political transformation to democracy. By assuming the role in facilitating the process of democratization, the Council began to "reinvent" its claim of legitimacy.<sup>63</sup> Since then, the face of judicial review in Taiwan has never been the same.

In the new democracy, the Council of Grand Justices continues its new journey of institution-building and earning public trust. In order to do so, the Council has to demonstrate to the society that it is an independent political and legal institution, critical in asserting the rule of law and protecting fundamental rights. Actively engaging in the dialogue over social issues and public policies such as gender equality,<sup>64</sup> labor protection,<sup>65</sup> social security,<sup>66</sup> and education,<sup>67</sup> the Grand Justices have gradually proved their value. The increase of citizen petitions and press coverage of the Interpretations indicates the Council's closer tie to the society. In order to sustain its own legitimacy and cultivate public trust, the Council of Grand

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60. See, e.g., Jiunn-Rong Yeh, *The Cult of Fatung: Representational Manipulation and Reconstruction in Taiwan*, in *THE PEOPLE'S REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION* 23-27 (Graham Hassall & Cheryl Saunders eds., 1997).

61. Jiunn-Rong Yeh, *Constitutional Reform and Democratization in Taiwan: 1945-2000*, in *TAIWAN'S MODERNIZATION IN GLOBAL PERSPECTIVE* 55-57 (Peter Chow ed., 2002); see also Jiunn-Rong Yeh, *Changing Forces of Constitutional and Regulatory Reform in Taiwan*, 4 *J. CHINESE L.* 83, 85-88 (1990).

62. *J. Y. Interpretation No. 31*. (1954/01/29). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

63. *J. Y. Interpretation No. 261* (1990/06/21). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

64. *J. Y. Interpretation No. 365* (1994/09/23). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

65. *J. Y. Interpretation No. 578* (2004/05/21). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

66. *J. Y. Interpretation No. 570* (2003/12/26). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

67. *J. Y. Interpretation No. 382* (1995/06/23). For the text in English, see <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp>.

Justices has established itself as a visible and important political institution, countering the legislature and the executive branch.

There is another point worth making. The legal community has played an important role in the transformation of the Council of Grand Justices. In addition to its active participation in the process of democratization, the legal community has great and direct influences on the design and operation of judicial review in Taiwan. This should be another interesting dimension to look at. I would talk more on the impact of the legal community and Taiwanese internal legal culture should I have more time. But my time is up. I should stop right here.

#### F. PROF. WEN-CHEN CHANG

I share very much with most of what Tom lectured today. Like Tom, I have searched for positive explanations of why we have witnessed many active constitutional courts that exercise strong judicial powers around the globe.<sup>68</sup> Any positive theory for judicial review must provide effective and valid accounts for the global burgeoning of judicial review, and indeed many diverse explanations have been provided. Tom's insurance theory is one among the many.

I agree with Tom that the insurance theory and in particular, political diffusion may well explain for the development of the South Korean Constitutional Court and its continual institutional prominence. However, I share the concerns expressed by my colleagues with whether or not Tom's insurance theory may account for the power expansion of the Constitutional Court in Taiwan. The reasons that the Council of Grand Justices was invested with strong powers during the earlier years of democratization were in no way due to competitive power politics or political diffusion. During those years, the KMT was strong and it remained its great strength even after democratization.

As for the 1992 constitutional amendment that Tom mentioned in his lecture, it was not really intended to empower the Council by giving it the power to dissolve unconstitutional political parties. Rather, it was a clear attempt by the dominant KMT to undermine the emerging DPP, whose party

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68. My first attempt was the writing of my JSD dissertation. *See generally* WEN-CHEN CHANG, *TRANSITION TO DEMOCRACY, CONSTITUTIONALISM AND JUDICIAL ACTIVISM: TAIWAN IN COMPARATIVE CONSTITUTIONAL PERSPECTIVE* (hereinafter *Transition to Democracy*) (JSD Dissertation, Yale Law School) (2001) (arguing that negotiated democratization and its resulted incremental constitutional reforms have provided unexpected institutional space for judicial review developments). For a shorter piece, *see* Chang, *supra* note 25.

platforms included seeking for Taiwan's independence that was outlawed at the time and even risked of being founded as unconstitutional. The dominant political thinking at the time was that if any independence-inclined political party emerged on political stage, this particular constitution provision would operate as an effective device against such developments.<sup>69</sup> It was due to this particular political manipulation that certain powers were placed in the hand of Grand Justices. I provide this story not to curtail Tom's theory but only to clarify that judicial review in Taiwan was not developed out of political diffusion but, instead, out of political domination by the KMT. It was only normal for any dominant political party to manipulate constitutional devices in order to hold onto the power.

My explanation for the power expansion of Grand Justices is linked to the pattern of democratization and constitutional reforms.<sup>70</sup> The underlying issue is really about how, in particular situations, democratization and the rule of law may proceed further. I argue that it was really due to negotiated democratization and its resulting incremental constitutional reforms that in turn left a great deal of constitutional inconsistencies that require judicial solutions and thus incidentally empower the Council. Faced with unprecedented political turbulence, the dominant political party in the authoritarian regime needed to do something in response to demands of the opposition as well as the society. They must take some actions and be able to give up something to a certain extent. By somehow reluctantly giving up, political deals and subsequent reforms would not be entirely clear, thus leaving a great deal of ambiguities or inconsistencies subject for judicial interpretations or even interventions. As a result, constitutional courts are unexpectedly empowered to enter into political centers. I provide this line of explanations to account for Taiwan's judicial expansions in my JSD dissertation with which Tom is familiar. The incremental constitutional reforms bargained mainly between the KMT and the DPP generated constitutional inconsistencies and even institutional discrepancies mostly with regard to governmental structure. This in turn gave rise to an unprecedented opportunity for judicial intervention.

As a result, the Council was flooded with many important constitutional cases that would place strong impact on subsequent political developments. What we have been witnessing is that the Council did take its chance to intervene into politics and subsequently enlarged its own political space. But

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69. Wen-Chen Chang, *Transition to Democracy*.

70. *See id.* (arguing that negotiated democratization and its resulted incremental constitutional reforms have provided unexpected institutional space for judicial review developments).

at the same time the Council has been always running the risk of political setbacks if it displeases any major political powers. Thus, in the sense, it confirms the observation that the judicial review in Taiwan is less strong than that in South Korea despite the fact that both can be deemed as successful.<sup>71</sup> Here, I must stress again that I agree with Tom's observed link between the relationship of the extent of political competition and the exercise of judicial power. The more competitive politics is, the stronger judicial review is accepted. In Taiwan, political competitions were never strong as the DDP did not become the biggest party until 2000, and even then, it did not hold the majority. The KMT alliance has remained the majority in the Legislative Yuan since. That is why we have experienced rather constrained judicial review in Taiwan, and much stronger one due to competitive power politics in South Korea.

Given the constraints in its power, then, why has the Council of Grand Justices still been capable of playing some important roles in constitutional developments both in the past and the present? I think it was because the KMT regime in Taiwan particularly in the past needed constitutional legitimacy to survive political competition with China. It was a very clever utilization of the Council to represent the Chinese legitimacy.<sup>72</sup> Thus the institutional prominence of the Council represented not as the embodiment of rule of law but as a typical the instrumental use of the judiciary in any nominal constitutional regime. In the interest of time, I would like to conclude by stressing once again the importance of developing positive theories for judicial review, and that there ought to be different positive explanations that account for the emergence of the judicial review in various contexts. Thank you.

#### IV. GENERAL DISCUSSIONS AND RESPONSE

*Professor Jiunn-Rong Yeh:*

Given the wide spread of judicial review in new democracies and around the world, we are indeed in great search for effective theories of general application. Tom provides us with a very interesting theory and some of my colleagues came up with different ones. This is no surprise and quite understandable. Even in a given society like Japan, Korea, or Taiwan, it may not be easy to come up with a single theory of general application due to

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71. See Hirschl, *supra* note 8, at 88.

72. Wen-Chen Chang, *Transition to Democracy*.

divergent factors. We admire Tom's wisdom, and at the same time we may come up with further evidence and hard facts for or against his theory.

Before we open up the floor for the audience, I would like to take up this opportunity to induce dialogues between Professor Weng, our respected retired Justice of the Council, and Tom. Let us take *Interpretation No. 261* for a great example. Various explanations may account for the decision of *Interpretation No. 261*, but it seems to me that certain stories have never been told. Something may be missing here in both judicial and academic texts. I would like to mention one element among the many in front of Professor Weng, that is, judicial leadership. When it comes to the leadership, most attentions are placed at political leadership between various political parties. However, judicial leadership that may wield strong influence within internal judicial discussions among justices of various ethnic backgrounds or political ideologies has often been overlooked. At the time of *Interpretation No. 261*, there was an unwritten agreement that only three Taiwanese were able to sit in the Council, including Professor Weng, Professor Yang, and Professor Chen. We could well imagine a voting like "three v. others" in the Council's decision making such as *Interpretation No. 261*, among others. How exactly would Professor Weng at the time be able to exercise his leadership and to transcend ethnic or any other ideological divides among justices? This line of stories has never been researched nor told. In United State, by contrast, internal judicial workings and the leadership by Chief Justices have been much more pronounced. The Warren Court or the Rehnquist Court, for example, has been famous for its unified opinions in a divided society. This reminds us of the great importance in understanding judicial leadership and how it is linked to the exercise of judicial review.

The other element is about institutional coincidence and unexpectedness in normal situations. For example, when *Interpretation No. 261* was about to reach the decision, Professor Weng dined with many colleagues and students including myself in a restaurant nearby this law school. What happened was that we all had diarrhea. Professor Weng was ill and even hospitalized at one time. His illness may have unexpectedly helped consolidate –one way or the other– divergent opinions in the Council. The untold story is what I called coincidence. Many elements could emerge. I would not intend to come up with a general theory, and that seems to be Tom's job. I wonder whether my colleagues from Japan and Korea may come up with parallel descriptions like the aforementioned one. Thus, my question is: given the different situations in Taiwan and in Korea, is it ever possible to apply the same theory to their respective establishment of constitutional courts and the successful exercise of judicial review? The Taiwanese Constitutional Court

was established in the 1940s, whereas the Korean Constitutional Court was instituted in the 1980s. Even due to their different timing of creation, how are we going to come up with the same theory for both?

Now I think it is time for us to open the floor discussion before Tom provides his final responses.

*Yi-Li Lee (National Taiwan University):*

My name is Yi-Li Lee. I have a question concerning the definition for Professor Ginsburg. Professor Ginsburg mentioned “East Asian Constitutionalism” many times in the lecture, and I always have some doubts on this very term. Based upon your theory, can you give me a clear definition with regard to the term? Is there any difference between East Asian Constitutionalism and the kind of constitutionalism developed in the West? How do you distinguish them? Thank you.

*Professor Jiunn-Rong Yeh:*

Professor Wang, please.

*Professor Ming-Li Wang (Graduate Institute of Industrial Economics, National Central University):*

First, I would like to thank Professor Ginsburg for his brilliant theory, though I think what actually happened here was a little more complicated. When the Constitutional Court was built, it was built at a time when there was no actual diversity in political parties. Grand as it was, the Constitutional Court was more for window dressing. It was so that those in power could conveniently do something and then turn around and ask: “am I doing right,” expecting a loud “yes” every time.

While I don’t think political parity helped shape our original Constitution, I do believe it helped facilitate its eventual acceptance. I have always of the opinion that the Constitution is akin to an “adopted” child to Taiwanese people, to whom the original Constitution –one written without meaningful representation from the islanders– was imposed upon. Indeed, many scholars, citizens and political parties rejected the original Constitution, calling for a new one all the time.

It was during the time of legitimacy crisis, and through the help of judicial review, people began to see –albeit gradually– the merits of the Constitution. It’s only after the people have witnessed how the Constitution

might actually work and protect their rights, and have the opportunity to made some necessary amendments, they began to accept the Constitution as their own, several decades after it was originally written. By then there was indeed much more political diversity. The fear of losing power for some political parties was also real. In this sense, I think the insurance theory applies to Taiwan well.

I still have a question for Professor Tom Ginsburg, however. When new democracies take up the design of judicial review, it seems that they prefer centralized constitutional court. In Taiwan's case, the original motive for an window-dressing institution may partly explain the preference for a centralized model, lest judges ran amok. Then the civil law tradition probably matters as well. And yet it's undeniable that diffused judicial review is very rare in new democracies. Since you have been studying so many new democracies and their institutional designs in a comparative perspective, I would like to know your take on this phenomenon and whether you think it would matter in any way. Thank you.

*Yen-Chun Chen (National Taiwan University):*

I have a question for Professor Ginsburg concerning the insurance theory. I think it is attractive, but it still confuses me. You mentioned in your lecture that political parties compete for power, and the dominant party would put more insurance in terms of constitutional institutions if they fear of losing power. Does it mean that the more political competition among political parties, the more insurance would be put into the pool? In that case, how would it render impacts on the development to the constitutional court?

*Chun-Yuan Lin (National Taiwan University):*

I have a question concerning the role of court and legal community. In Professor Ginsburg's theory, the establishment and the function of constitutional court is the product of politics, which depends on negotiations and conflicts between political parties. It seems that courts are passive, dependent, and subject to politics. I wonder whether the role of the court and legal community were underestimated. For example, the founders of the Constitutions in both Japan and Taiwan did not take constitutional courts seriously when they drafted the constitutions. In Korea, the Constitution prescribes that the Supreme Court decisions cannot be reviewed by the Constitutional Court, and the Supreme Court can nominate three candidates for justices of the Constitutional Court. The tension between the



Constitutional Court and the Supreme Court is thus serious in Korea but not in Taiwan. Based upon this observation, I wonder whether it can be fairly stated that legal communities play roles to some extent. Furthermore, courts are not necessarily passive but can be active. What role can courts play in political conflicts, especially in divided societies like Taiwan and Korea? Is it possible for courts to manipulate conflicts, give different bargaining powers upon different parties, or even to promote deliberations to resolve conflicts?

*Chin-ming Liang (University of Wisconsin Law School):*

New democracies tend to become divided societies. These divisions usually go to the court for resolution but also bring in great difficulties for it. Professor Ginsburg mentioned the Taiwanese Constitutional Court and the Korean Court. I would like to bring his attention to *Interpretation No. 520*, a case about the construction of the nuclear power plant. In that case, the court attempted to be inclusive and to reconcile conflicts between different voices. In the Korean example, however, the court tried to make its own decision. There may be two models under which the court legitimizes its decisions in the course of societal divisions. Courts may either make its own decision or shift the decision-making power back to political branches. Which way do you prefer? Do you have any example or empirical studies that may indicate one way is better than the other?

*Professor Jiunn-Rong Yeh:*

All these are great questions, and now I must give the floor back to Tom for his final response and conclusion.

*Professor Tom Ginsburg:*

Let me start from the last question concerning whether we have a theory for what the court should do in particular cases. There are a couple of questions here: should courts divide powers in the course of their decision-making? Should they give something to each side? Should they make their own decisions and lead the society forward? I do not think we have a good comparative theory to answer all these questions. Perhaps it was due to what Professor Yeh has described, too many divergent factors even including judicial leadership, which is really a kind of intangible factor and we do not really know what directions they take in various contexts. I think

what we have to do is to have more and more serious academic work including doctoral dissertations conducted. It is an interesting question to tackle but also very difficult. We should look at more specific decisions made in particular circumstances. It is a wide open area and I do not have sufficient answers at the present time.

Let me go back to Professor Wang's comment on Confucianism, and Ms. Lee's question about East Asian and Western Constitutionalism. I would like to draw your attention on another article of mine that discussed Confucian Constitutionalism.<sup>73</sup> Perhaps there is really a particular kind of East Asian constitutionalism. When you go back and look at the classical institutions which Professor Wang talked about a moment ago, they may look quite similar to the institution of constitutional review. In imperial China, the government was done by the wise, the magistrates never elected by the people. It was not democratic at all. These are what modern constitutional judges are. They are, ideally, the smartest people with whom we give great powers. In addition, the emperor was restrained not really by human institutions, but by the unwritten norms or fundamental rules of natural law. That is what judges do, too, sometimes. As I discussed earlier, in Korea, the court was able to rely on some unwritten constitutional norms for a decision in the capital city case. Even in the classical Confucian times, the King was constrained by unwritten norms. There were also some institutions in the classical China whereby governmental scholars and officials were supposed to warn the emperor when he did something wrong. My theory is that this function of remonstrance is actually what the most successful constitutional court judges do even today. They do not impose their decisions on the society, but they restrain political powers. They can say, you know, you got this wrong and it would be better if you did it in the other way. Some of the Grand Justices in the Council may have thought about their roles in this way.

But I would not like to go too far down the road of arguing for a special East Asian style. In the end, we are all similar and we are different. Different things exist in these different cultures but at the same times traditions may be changed over time. At least we know the system of judicial review has been developed very well just as in other places of the worlds. While cultural explanations offer interesting alternatives, I would not like to emphasize it too much.

Professor Hwang pointed out that we now have a unified government in

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73. Tom Ginsburg, *Confucian Constitutionalism? Globalization and Judicial Review in Korea and Taiwan*, 27(4) L. SOC. INQUIRY 763 (2002).

Taiwan, and Professor Cho pointed out that political parties are getting stronger in Korea. This is therefore the time for prediction. If you would like to examine how my theory works, let us meet again in five years. Predictably you would see less constitutional review in Taiwan, and less active review in Korea due to the consolidation of political power. By contrast, you may see stronger constitutional review in Japan if the current trend of political diffusion continues. Let us check and see again in five years.

I also want to reply to Professor Li-Ju Lee's very interesting comment. I think you have a wonderful sociological insight, because it really points out a reciprocal relationship between law and society, and between courts and social forces. It is a kind of recursive process for judicial decisions and judicial responses. You remind me of the wonderful sociological dimension that I do not take into adequate account in my book.

Professor Ming-Li Wang asked about the prevalence of concentrated judicial review and why it became so common in new democracies. The reason for the dominance of centralized judicial review is quite understandable. If you are in the situation of a new democracy, usually in that moment, you cannot fire all the judges. What you have are the bureaucracy and the judges who were appointed by your dictatorial predecessors. It makes no sense if you give them that kind of judicial review power. You would certainly prefer a more responsible and more accountable institution that is filled with fewer people so that you can get better personnel in it. It is often called a designated constitutional court. In some rare situations, you do see courts serve as a certain kind of guarantor for the old regime in transitions. One may have good reasons to dislike courts and rights, but when we see the benefits, we may actually prefer a constitution and a set of concrete rights protected by the court.

I would like to express my thanks to the comments provided by both Professor Wang and Hwang with regard to the history of constitution drafting. It is very interesting, and I will have to think about what it means. I suspect that it was accidental, and that in some way it was inconsistent with a typical one-party constitution that often has no constitutional court. Last but not the least I must thank everyone who provided critiques and comments of me. Thank you all.

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