ISSN 1812-6324

National Taiwan University Law Review

Volume 7 March 2012 Number 1

Articles

Roundtables

Student Note

National Taiwan University Law Review

Volume 7 **March 2012** **Number 1**

NTU Law Review

Vol. 7 No. 1, March 2012
Vol. 7 No. 2, September 2012

Published by:
College of Law, National Taiwan University
No. 1, Sec. 4, Roosevelt Rd., Taipei 10617, Taiwan
TEL: +886-2-3366-8962
FAX: +886-2-3366-8924
E-mail: ntulawreview@ntu.edu.tw

Edited & Distributed by:
Angle Publishing Co.
5F No. 18, Goan-Chian Rd. Taipei, 100 Taiwan
TEL: +886-2-2375-6688
FAX: +886-2-2331-8496
Postal Giro Number: 19246890
E-mail: anservice@mail.angle.com.tw
Subscription rates: NT $ 450 / per copy
Per year:

Taiwan	NT $ 950 (registered)
Europe, USA & Canada	USD $ 90 (registered)
Asia & Oceania	USD $ 90 (registered)

Checks in US dollars and handling fees of USD$45.
Remittance through banking transfer and handling fees of USD$30.

ISSN 1812-6324 GPN 2009504723

National Taiwan University Law Review

Volume 7, Number 1, March 2012

GUIDELINES FOR CONTRIBUTORS

The ***NTU Law Review*** is published twice a year, in March and September, by College of Law, National Taiwan University.

The ***Review*** welcomes unsolicited articles, translated works, student notes and book reviews on all aspects of legal issues, in particular, relating to or having connection or implication on Taiwan, China, Asia, or areas other than the above. However, the ***Review*** would like to make clear that papers need not be focusing on particular legal systems.

Submission:

1. The ***Review*** presumes that the manuscript submitted to the ***Review*** has not been, and will not be, submitted to elsewhere at the same time. If a paper is under review or had been published or accepted elsewhere, the ***Review*** will have to reject the submission.
2. The manuscript submitted shall include approximately five keywords and an abstract no more than 250 words. The citation format shall conform to The Bluebook: A Uniform System of Citation. A detailed reference list following American Psychological Association format shall be attached to the manuscripts. Starting from Vol. 6, No. 1 (Mar. 2011), the ***Review*** adopts consecutive pagination. It is advised that articles published with the ***Review*** be cited as consecutively paginated throughout the entire volume, including symposium, if any, in accordance with the Bluebook format, for example: Jaw-Perng Wang, *The Current State of Capital Punishments in Taiwan*, 6 NTU L. REV. 143, 143 (2011). However, articles published prior to Vol. 6 are required to indicate their publishing dates, for example: Cing-Kae Chiao, *Sexual Harassment in the Workplace in Taiwan*, NTU L. Rev., Mar. 2006, at 97, 97.
3. In transliterating non-English characters, where well-established forms do not exist, authors are advised to follow the Wade-Giles system for Chinese characters and the Hepburn system for Japanese.
4. Once a manuscript is published, responsibility for the factual accuracy of the paper rests upon its author(s). The ***Review*** provides no payment for contribution; however, twenty off-prints will be supplied to the authors free of charge.
5. The manuscripts must be typewritten, in Microsoft Office if possible. Electronic submissions are preferred. All submissions shall be addressed to: National Taiwan University College of Law, No.1, Sec.4, Roosevelt Rd. Taipei 10617, Taiwan. Email: ntulawreview@ntu.edu.tw

Review:
All manuscripts submitted shall undergo the anonymous review process.

Copyright:
Every author whose manuscript is accepted shall agree the College of Law, National Taiwan University and NTU Law Foundation to make proper use of the papers limited in the Letter of Authority; who refuses to sign the Letter of Authority, the ***Review*** may reject the contribution.

Internet Address:
The ***NTU Law Review's*** homepage is located at
http://www.law.ntu.edu.tw/ntulawreview/

National Taiwan University
Law Review
Volume 7, Number 1, March 2012

Contents

Articles

Roundtables

Student Note

Article

The Relation Between the Services Procurement and the Labor Legal System

Shuai-Liang Deng*

ABSTRACT

As a rule, government sectors obtain workers by way of services procurement. However, this practice de facto violated the Article 5 & 6 of the Labor Standards Act. Procurement refers to the dispatching of labor. The Labor Standards Act has been implemented in other foreign legal systems, but Taiwan has not enacted the Labor Dispatching Act. Moreover, it is a violation of the law to bypass the Labor Standards Act. A dispatched worker frequently provides service for several years in Taiwan; contrariwise, hiring a dispatched worker for such a long time is forbidden in other foreign legal systems. These problems were initially caused by the incorrect provisions in the Government Procurement Act. Secondly, these problems were caused by the chronic use of day workers. Therefore, our country should posthaste examine whether Taiwan has a faultless legal system that our public servants deserve.

Keywords: *Government Procurement Act, Services Procurement, Labor Legal System, Fixed-term Contract, Labor Dispatching*

* Associate Professor, Institute of China and Asia-Pacific Studies, National San Yat-sen University. E-mail: fclma@ms10.hinet.net.

CONTENTS

I. INTRODUCTION

The Government Services Procurement Act was promulgated on May 1, 1988. After being occasionally amended, it has already become the foundational legal framework that our government sectors adhere to when facing construction work, the purchase or lease of property, and the retention or employment of services. This Act is enacted to establish a fair and open system, to promote efficiency and the quality of mandating or employing workers.[1]

However, the Taiwanese government should contemplate on addressing services procurement in the Government Procurement Act. Although the procedure of procurement is provided in the Act, the specific content and its relation with the labor legal system at present must be reexamined since the core values of services procurement may not necessarily be destroyed by its procedures, but the potential offense of the procurement to the labor justice and the labor legal system should not be ignored.

No one has ever pondered over the advantages and disadvantages that the Government Procurement Act may bring from the perspective of services procurement. Furthermore, no papers or books are found so far to compile the impact on services procurement. This study focuses on the relation between services procurement and the labor legal system. Moreover, this article also outlines the clearer principles on the practice of services procurement to offer practitioners some reference when contemplating the Government Procurement Act and the development of public servants.

II. THE PRINCIPLES AND THE PROBLEMS OF THE GOVERNMENT SERVICES PROCUREMENT

According to Article 7(3) of the Government Procurement Act, the term "service" in this Act refers to professional services, technical services, information services, research and development, business operation management, maintenance and repair, training, labor and other services as determined by the responsible entity.[2] As a meanwhile, according to Article 2 of the same Act, the term "procurement" refers to the employment or mandate of the above-mentioned services. For instance, on June 14, 2006, the Directorate General of Budget, Accounting and Statistics (DGBAS) of Executive Yuan invited bids for the project 'Investigation of the Workers'

1. Government Procurement Act, arts. 1, 3 (1998) (amended 2011) (Taiwan) [hereinafter Government Procurement Act of Taiwan] (applying to all government sectors, including government owned business and public schools), *available at* http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030057.

2. *See id.*. art. 9(1) (indicating the Procurement and Public Construction Commission).

Wage System'. DGBAS obtained and mandated workers who were professionals in certain fields, and declared the expiration date would be on June 27 of the same year.

Based on the foundation of the original government procurement manners in Taiwan, the Government Procurement Act has also been implemented by WTO's GPA system.[3]

Taiwan's Government Procurement Act is also influenced by the system in the U.S. However, the development of the U.S. federal system is different from that in Taiwan. The differences can be observed in the history. In 1947 and 1949, the U.S. promulgated the Armed Services Procurement Act and the Federal Property and Administrative Services Act. In 1984, they announced the Federal Acquisition Regulation (FAR). The U.S. Government keeps advancing in the procurement field and the scope of it also keeps expanding. In 1988, the U.S. promulgated Public Law, paragraphs 100-697. The U.S. also established the Federal Acquisition Regulatory Council. According to the evaluation that the Federal Procurement Policy Office led in 1989, the related information that the government procurement requested has made contractors of government sectors spend over 289 million working hours every year. Moreover, just the tax data records and the documents provided have already become a big burden to the public sectors. With no exception, the situation is similar in Taiwan. In order to make procurements open and fair, social cost is required. In January 1997, the U.S. announced a new simplified procurement procedure—electronic commerce. Taiwan's Government Procurement Act also adopts a similar measure.[4]

The three principles are implied in the U.S. procurement system, namely the openness, the competitiveness and the credibility of government procurement. Of the above principles, the credibility principle is of importance to our country. Taiwan ought to treat suppliers with justice and fairness. To implement the government procurement system, the prerequisite is that the government procurement staff must obey the principles and thus illegal conduct such as corruption, bribery or other immoral behaviors should not be accepted. This is the only way to protect the suppliers and the benefits of the procurement sectors and to obtain the people's credibility, which will lead Taiwan to implement the government procurement without any obstacles.

Government procurement is a behavior that government sectors or

3. Evelyn Yueh-Tuan Chen, *Chengfu chi Tsaikou tsai Falu Shang Yiyi chih Yenchiu* [*A Study of the Legal Meanings of "Government" and "Procurement"*], 42 HUAKANG FATSUI [HUAKANG L. REV.] 1, 1-2 (2008).

4. Hsin-Yi Hsieh, *Meikuo Lienpang Tsaikou Kueifan Tihsi yu Taiwan Tichu, Talu Tichu Chengfu Tsaikou Tihsi chih Pichiao Yenchiu (Shang)* [*A Comparative Study between the Federal Procurement System of the US and the Government Procurement System of Taiwan and China (Part I)*], CHUANKUO LUSHIH [TAIWAN B. J.], Mar. 2009, at 116, 116-18.

organizations adopt to realize government functions and public benefits by way of obtaining goods, works and services with public funds. Public fund derives from the national tax; in other words, the expenditure of procurement is paid by taxpayers. It is a mechanism that aids government procurement by reinforcing expenditure management under the free market, and addressing the macro economy.

Moreover, Government procurement plays an important role in the national economic establishment. The progress of procurement performance is the most effective way to increase the credibility. The government established a "performance index" for evaluating the procurement performance. The Public Construction Commission (PCC) now defines the performance index of government services procurement as the implementation rate of every sector, such as the case amount, the final price, the public processing ratio, public processing ratio without reaching the predicted price, the ratio of electronic bids and so on. However, the author sees it disagreeable to include all the results in those ratios comprehensively. Hence, in order to build up the integrity of administration and procurement sufficiency, Taiwanese government should establish an internal index to meet the different needs of each sector.[5]

The procurement procedures in the U.S. comply with the Anglo-American Legal system. Lawmakers believe that complying with a strict and accurate procedure will be just and will also meet the needs of the public. However, our country should not ignore the practicalities of procurement. There are still a lot of restrictions; even if the procedure is correct, violations of the law may still happen. According to Article 2 and 3 of the Government Procurement Act, the "procurement content" and the "procurement sectors"[6] still need to be examined. In short, if the Taiwanese government only focuses on improving the procedures, Taiwan cannot uphold justice for the procurement.

Pursuant to the related regulations of the Government Procurement Act, the "services procurement" shall either be a contract of mandate or an employment contract. Pursuant to the Civil Law Article 528,[7] a contract of mandate is a contract whereby the parties agree that one of them commissions the other party to deal with his affairs, and the latter agrees to do so. However, whether or not the legitimacy of the contract of mandate is compliant with the labor legal system is questionable. That is to say, if a

5. Chun-Chieh Liu, Hui-Hua Pan & Gui-Xuan He, *Taitieh Kungcheng Laowu Tsaikou Chihsiao Chihpiao chih Yenchiu* [*A Study on Performance Measurement of Services Procurement of Taiwan Public Work*], TAITIEH TZULIAO CHIKAN [TAIWAN RAILWAY J.], Dec. 2006, at 1, 1.

6. Chen, *supra* note 3, at 11.

7. Civil Code, art. 258 (1929) (amended 2010) (Taiwan) [hereinafter Civil Code of Taiwan], *available at* http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=B0000001.

government sector breaches an employment contract after the services procurement, this will be acceptable. However, if a government sector procures services by contract of mandate, the procurement will violate the labor legal system because Article 2(6) of the Labor Standard Act stipulates that a "labor contract" only applies to an employer-employee relationship.

Pursuant to Article 2(6) of the Labor Standard Act, a "labor contract" denotes a contract that regulates the employer-employee relationship. In Article 2(6), the so called "worker" means a person who is hired by an employer to do a job for which wages are paid. In Article 2(6), and "employer" means the owner or responsible person of an enterprise or the person who represents the owner in dealing with labor matters. In other words, the labor contract in the Labor Standards Act only applies to an "employment relationship." Thus, if the government procures services by way of "mandate", it would violate the Labor Standards Act with a "right" procedure and it even go beyond the third services world which is forbidden in the Labor Standards Act.[8] In terms of "employment contract," the Labor Standards Act emphasizes 4 elements—the "relationship," "services providing," "management" and "wages." Once a contract of "mandate" occurs, the services providing and management will be altered, which means mandated relationship will not be valid because the Labor Standards Act will not apply to this situation. Therefore, the government sectors need to be vigilant when procuring services in order to evade replacing an "employment" contract with a "mandate" contract so the Labor Standards Act will not be distorted.

The Labor Standards Act is the most important and basic labor-related law in Taiwan. Any labor-related issue needs to be complied with the Labor Standards Act; those issues include general provisions of labor, labor contracts, wages, work hours, time off and leave of absence, child workers and female workers, retirement, compensation for occupational accident, apprentices, work rules, supervision and inspection, penal provisions and supplementary provisions. Hence, both the procedure and the procurement itself should not bypass the Labor Standards Act. Otherwise, the labor legal system will be distorted, and it will create several systems in one country.

Based on the previous statements, according to Article 2 of the Government Procurement Act,[9] procurement by government services will lead to a relationship of "mandate."[10] However, pursuant to Article 2 of the

8. Nowadays, there is an internationally "multinational & inter-regional" working type. That is to say, such as India and Sri Lanka gained the job opportunities from the U.S. by the way of call center to provide services to the U.S. The essence of this kind of labor relationship is "contract services". It is different from the "labor dispatching" in this paper.

9. Government Procurement Act of Taiwan, *supra* note 1, art. 2.

10. Chen, *supra* note 3, at 11 (discussing the definition of "procurement" in Government Procurement Act).

Labor Standards Act, only an "employment" relationship is allowed; so if the "mandate" services procurement becomes a loophole of the Labor Standards Act, it may violate or bypass the Act. Moreover, in the Labor Standards Act, the object of "employment" refers to a worker who is contracted by employment. In the employment relationship, the government must be one party, and the worker must be the other one. A third party shall not be involved in this relationship; otherwise, it may violate Article 6 of the Labor Standards Act which stipulates that no one may intervene in a labor contract of other persons for illegal interests.

As in practice, I have noticed for years that the government services procurement has obviously violated the provisions of the Government Procurement Act and even bypassed the Labor Standards Act. I hereby take the following two contracts as examples. The first one is "the Research of the Bureau of Labor Insurance Affairs in the Taiwan region and the outsourcing affairs management contract"[11] (hereinafter referred to as 'Labor Insurance Outsourcing Contract'); and the second one is "the Services Procurement of the Department of Health of Executive Yuan Contract, 2005"[12] (hereinafter referred to as 'Department of Health Services Contract'). Both contracts have disclosed several problems. Both the Labor Insurance Outsourcing Contract and the Department of Health Services Contract have a third party intervening between the workers and the competent authorities, namely the Bureau of Labor Insurance and the Department of Health. In addition, the workers are not "mandated" or "employed" by the competent authorities. The relationship between the competent authorities and the workers do not adhere to the Labor Standards Act. In other words, the practical services procurement has violated the Government Procurement Act and Labor Standards Act, and exceeded the limits of authority. Despites the two examples here, in fact, all the government sectors use the same aforesaid manner to obtain workers.[13] All the practitioners need to understand that the government sectors are violating

11. *Laokung Paohsien Chu Yehwu Yenchiu chi Shihwu Chuli Weiwai Tsoyeh* [*The Research of the Bureau of Labor Insurance Affairs in the Taiwan region and the outsourcing affairs management contract*], CHENGFU TSAIKOU WANG [GOV'T E-PROCUREMENT SYS.] (Jan. 28, 2005), http://web.pcc.gov.tw/tps/tpam/main/tps/tpam/tpam_tender_detail.do?searchMode=common&scope=F&primaryKey=1163547.

12. *Hsingcheng Yuan Weisheng Shu 94 Nientu Yehwu Weiwai An* [*The Services Procurement of the Department of Health of Executive Yuan Contract, 2005*], CHENGFU TSAIKOU WANG [GOV'T E-PROCUREMENT SYS.] (Mar. 21, 2005), http://web.pcc.gov.tw/tps/main/pms/tps/atm/atmAwardAction.do?newEdit=false&searchMode=common&method=inquiryForPublic&pkAtmMain=1166786&tenderCaseNo=9356315.

13. Readers please go online to search "services procurement", and then the readers will find out the practical situation. The author participated in the conference of labor dispatching act and policy study which was held by the Council of Labor Affairs on Dec. 7, 2010, and the author found out, unlike Germany, Japan and Korea, Taiwanese government has used a lot of dispatching workers for public affairs.

the labor legal system.

The services procurement contract is usually misconceived as the "labor dispatching contract" that is stipulated in Japan. However, Taiwan has not enacted the Labor Dispatching Act and the form of labor dispatching in Taiwan is in triangular relation because a third party usually intervenes between a worker and the government. The third party often replaces the role of the government and becomes the employer. It leads to a peculiar situation because the worker will work for the government, but the government is not the employer in fact. The workers will be embroiled in this situation and become the "unusual workers" or "the unofficial workers," which violates Article 5 of the Labor Standards Act, Article 5 which stipulates that no employer may, by force, coercion, detention or other illegal practices, compel a worker to do work. Under the above-mentioned circumstance, the workers may be dismissed arbitrarily by force where the workers' dignity will be swept away. Furthermore, compelling working is forbidden in the Labor Dispatching Act of Japan.[14] The Labor Standard Act of Japan stipulates that an employer shall not compel his employee to work by force, coercion, detention, or by any other unfair manners which is against the workers' mental or physical freedom.[15] Moreover, it provides that an employer shall not exploit an apprentice, student, or trainee who are in the process of training.[16] Nevertheless, the related law in Taiwan is inadequate; so the government's behavior of dispatching and using workers arbitrarily has made the Labor Standards Act become an armchair strategy because it cannot fulfill the labor justice for people. In 1985 the Japanese government enacted the "Labor Dispatching Act" to eliminate the phenomenon of employers "compelling workering" (the same as Article 5 of Taiwan's Labor Standards Act) and "indirect exploiting" (the same as Article 6 of Taiwan's Labor Standards Act). It has been amended 28 times.[17] The amendments were made mainly to address the problems mentioned above; however, it is not effective in eliminating the phenomenon of karoshi and "the new poor" which was caused by "compelling workering" and "indirect exploiting." As to Taiwan, it has not enacted any law or regulations on the dispatching of labor. As many scholars' opinions regarding this issue remain unresolved, only by referring to the experience of Japan, the author could predict the

14. *See* ROUDOU HAKENZIGYOU NO TEKISETU NA UNEI NO KAKUHO OYOBI HAKENROUDOUSYA NO SYUUGYOU NO SEIBINADO NI KANSURU HOURITSU [HAKEN GIRI] [Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers] 1985, art. 44 (Japan) [hereinafter Labor Dispatching Act of Japan]; ROUDOU KIJUNHOU [ROUDOU KIJUNHOU] [Labor Standards Act] 2008, arts. 5, 69 (Japan) [hereinafter Labor Standards Act of Japan].

15. Labor Standards Act, art. 5 (1984) (amended 2011) (Taiwan) [hereinafter Labor Standards Act of Taiwan], *available at* http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0030001.

16. Labor Standards Act of Japan, *supra* note 14, arts. 5, 69.

17. It was amended again on June 30, 2011, but the amendment hasn't been enacted.

future trend and challenges that Taiwan will meet.[18] The Labor Standards Act of Taiwan stipulates that a labor contract shall be an "employment" contract which only allows an employer-employee relationship. It is not appropriate to allow such a triangular relationship that is valid in Japan to occur in Taiwan because it will lead to a change of the definition regarding the employer-employee relationship.

Taiwan adopts the Roman civil legal system; thus, all labor affairs are regulated by the codified law for workers and employers to be adhered to. However, Taiwan has not promulgated the Labor Dispatching Act, and even the labor dispatching affairs obviously do not adhere to both the Government Procurement Act and the Labor Standards Act as well. Under these circumstances, the illegitimacy of labor dispatching is potentially hidden behind the Government Procurement Act, which leads to a haphazard labor legal system. It has affected the significance of the existence of labor legal system in Taiwan considerably. Unless the public agrees with a laissez-faire manner of labor obtaining, the practitioners should not ignore the dispatch form adopted by the government. Furthermore, the highest labor administrative competent authority should manage both the misapplication of labor dispatching and the illegitimacy of "indirectly exploiting" and "compelling laborers to do work."

The Labor Standards Act requires a labor contract to be in either fixed-term or non-fixed-term. A non-fixed-term contract shall not be replaced by a fixed-term contract. The government services procurement shall adhere to this legal principle instead of replacing a fixed-term contract with a non-fixed-term one, or making a "fixed-term dispatching contract" to dispatched workers.

The previous statements imply that violations of services procurement in Taiwan appear frequently. Herein the author would demonstrate the 2004 civil verdict, Chung-Lao-Su, No. 3, passed by the Taichung District Court of Taiwan (a lawsuit involving the chronic use of dispatched workers, which was sentenced on February 24, 2006). The core ideas of the verdict are:[19]

1. A dispatched worker is initially employed and contracted by a labor dispatching agency. With this employment relationship, the dispatching agency will assign the worker to work for another

18. For example, the Taiwan Telecommunication Network Trade Union sent Gong No. 017 to the Foundation of Chinese Labor-Management Affairs, which represents that a group of dispatched workers formed a union and asked for its own labor right. Taiwan Telecommunication Network Trade Union, Gong No. 017 (Jan. 19, 2011) (answering the request concerning dispatched customer service representatives' labor right raised by the Foundation of Chinese Labor-Management Affairs) (on file with author).

19. Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 93 Chung-Lao-Su No. 3 (Jan. 25, 2006) (Taiwan). The fowllowing paragraphs are translated by the author.

company—the so called client company. After being assigned to the client company, the worker will be under the supervision of the client company and be under its command. That is to say, dispatching is an indirect employment system rather than a normal and direct employment which signifies that a dispatching agency will intervene between a service provider and a receiver. The dispatched workers contract with the dispatching agency, so the client company is not the employer under the statute. The dispatched worker provides the same services as the formal employee for the client company; however, the client company is not the legal employer of the dispatched worker, and thus a client company is not obliged to provide any welfare, bonuses, allowances and staff education fee to the dispatched worker. It leads to unequal wages for equivalent job. Aside from bypassing the terminology that the Labor Standards Act applied to the employment contract, this situation also allows a client company to violate the rights of workers, namely, the solidarity right, collective action right and negotiation right. Nonetheless, due to the increasing need of boosting international competitiveness and the transformation of the industrial structure, labor dispatching has gradually become a new strategy that many nations use. Meanwhile, the structure of the labor market in our country also alters rapidly due to the transformation of the international business management environment. In the "small profit era," the basic objective for the employers is to reduce cost, including the biggest but the most uncontrollable cost of human resources. As a result, labor dispatching has become the most convenient way for many businesses to reduce cost. Since labor dispatching has become an international trend, our country should not act against the norm and deny the necessity of the dispatching system. Moreover, in the international business, protecting workers has also become a necessity to uphold a good employee-employer relationship. In order to improve the standard of workers' living, Article 153 of the ROC Constitution also stipulates the necessity of protecting workers. The labor dispatching system is thus required to uphold economic competitiveness and to protect the disadvantaged workers at the same time. Hence making the labor dispatching system more obtainable with "conditions" and avoiding employers from exploiting workers' rights by the principle of free contract should be regulated first.

2. The labor dispatching system can bring certain economic profits. Although labor dispatching may bring difficulties in

implementing the law on protecting workers, in order to safeguard job opportunity and economic benefits for workers, the only approach is to adopt labor dispatching appropriately to reduce the impact after the system was impleted in Taiwan. The labor dispatching is a triangular relationship involving a dispatching agency, a client company and a dispatched worker. A labor contract establishes the relationship between a dispatching agency and a dispatched worker; and the one between a dispatching agency and a client company is a services providing contract, which is very different from the employer-employee relationship in the current labor legal system. In the event that some employers might dismiss long-term employees and replace them with dispatched workers, or hire the original long-term contracted employees by way of dispatching instead, countries which enacted the Labor Dispatching Act have stipulated provisions to prevent the misapplication of the labor dispatching system. For instance, Article 6(1) of the Labor Dispatching Act of Korea pursuant to the provisions of Article 5(1), stipulates that the service term of a worker shall not exceed one year. If the dispatching employer, the client employer and the dispatched worker reach an agreement, they can extend the term, but not more than one year. Article 6(3) stipulates that if an employer hires a dispatched worker for more than two years, the dispatched worker shall be deemed a formal employee the day following the expiration date. This provision does not apply to certain workers who refuse to be a formal employee. Another example is Article 40(2)(2) of the Labor Dispatching Act of Japan which stipulates that the service term of a dispatched worker must not exceed one year except in specific circumstances as set out in the provisions. Article 40(5) stipulates that if a worker provides the same service for a client company or a dispatching agency in excess of 3 years and the client company receives the services from the same dispatched worker for more than 3 years; the client company must propose an employment contract if the client company wishes to continue to hire the same dispatched worker for the same service. Practice in Taiwan shows, according to Article 6 of the draft of the Labor Dispatching Act on the 6th proposal discussion of the 5th meeting 2nd session of Legislative Yuan, before the expiration date, if a dispatched worker wishes to continue providing the same service for a client company and the client company does not reject this, a labor contract will be deemed to be established

between the worker and the client company. A dispatched worker shall not provide service for the same client company for more than two years. Hence, the dispatching system only applies to non-long-term work. Moreover, pursuant to Article 9 of the Labor Standards Act, a contract for temporary, short-term, seasonal or special work shall be considered a fixed term contract. The above-mentioned types of work should be moderately obtainable for employers. Due to the close relation between the workload and the considerable demand of workers, obtaining workers by way of dispatching will be more convenient for employers.

3. The Labor Dispatching Act has not been enacted in Taiwan; however, in order to reduce the personnel cost for enhancing business competitiveness, all other countries have gradually approved the dispatching system. Although the dispatching system cannot safeguard the right of workers, it is still not a wise decision to terminate the system before Taiwan reaches a balance between protecting the workers' rights and executing the free contract principles. In any event, the relationship between a worker and an employer is interdependent. If Taiwan forbids the employer to reduce personnel cost by dispatching, Taiwan will not be able to increase its international competitiveness in the market. If there's no employer in the market, our workers will not have any job opportunities; and the Labor Act will become useless and unable to fulfill its purpose of safeguarding the workers.
4. According to the previous statements, the labor dispatching system is restricted to the service term and the scale of dispatching work. Under these circumstances, employers can mandate a dispatching agency to provide temporary, short-term, seasonal or specified work to dispatched workers. It neither misapply the free contract principles, nor conflict with public morality and the spirit of protecting workers.

The previous verdicts contained the following two statements: "a non-fixed-term contract shall not be replaced with a fixed-term contract;" and "a dispatching contract only applies to a short-term worker." According to the verdict, a monopoly business cannot run under the reliance of a short-term system. It shall hire more and more long-term workers due to the increasing social requirement. Otherwise, it will be regarded as bypassing the non-fixed-term contract in the Labor Standards Act. This kind of misapplication on dispatched workers should be invalid. In short, the verdict

presented that the misapplication of the dispatching system would damage the labor standards legal system. I believe that if this verdict is set as a precedent for the government sectors to examine the "dispatching" services procurement and contemplate on amending the Government Procurement Act of Taiwan in the future.

In my opinion, the practice of the Government Procurement Act is mostly via "dispatching." However, the dispatching system has eliminated the justice of the Labor Standards Act; under this circumstance, Taiwan has to reexamine the situation. Furthermore, Taiwan also has to examine whether the government endangers the public system by way of mandating the services to dispatching agency and dispatched workers.

To be more specific, according to Article 7(3) of the Government Procurement Act the term "service" means professional services, technical services, information services, research and development, business operation management, maintenance and repair, training, labor and other services as determined by the responsible entity. The above-mentioned services are, pursuant to the current provisions, public affairs that should be managed by public servants because at least a public servant has to satisfy all the qualifications to be a public servant and is authorized to handle legal public affairs. I highlight that, although the Government Procurement Act addresses services procurement, procuring services by way of "dispatching" will not adhere to the provisions. Moreover, this situation has violated the related labor contract provisions of the Labor Standards Act. Therefore, in my opinion, administrating "government services procurement" by way of "dispatching" is seriously damaging the national public human resources system.

III. The Examinations of the Problems of the Government Services Procurement

The system and practice problems of the government services procurement shall be examined with as follows.

A. *The transformation of the recruitment process of temporary workers by the government*

For a long time, without violating the law, the public workforce in Taiwan consisted of public servants, contracted workers and temporary workers. However, from a labor legal perspective, it can be observed that a non-public-servant who is a short-term worker usually becomes a long-term worker. The government contemplated this; however, after the government enacted the Government Procurement Act, they effectively complicated the

manner of obtaining non-public-servant workers. For instance, the Government of Tainan County obtains its temporary workers by way of "services procurement."[20] However, according to the current provisions, the obtainment of temporary workers has its own selection procedures and content. These include the "public selecting regulations of Changhua County Government and subordinate schools' contracted workers and temporary workers."[21] Even though they obtained workers by services procurements, the aforementioned guarding function of the selecting regulations would be useless. In short, due to the services procurement provisions in the Government Procurement Act, the circumstance of a non public servant worker providing public services is going through a new transition.

B. *Can "regular services" be obtained by services procurement? And what is the relation between "the services procurement of regular services" and a labor contract?*

According to Article 5 of the "Executive Yuan and Subordinate Agencies Contracted-Employment Regulations," the employment term of contract personnel is limited to one year.[22] However for those jobs that can be completed within one year, the employment term should be based on the actual required period of time. When the employment term needs to be more than one year, based on the original time scheduled for the plan, the contract of employment can be continued for another year at a time until the completion of the plan; if the employment term is over five years, the plan should be re-examined periodically for its cancellation. In short, for a contracted employed worker a fixed-term job is the limit, and a non fixed-term job only applies to public servants. However, if a non-public-servant who is a fixed-term worker can be obtained by way of services procurement, the non-public-servant who is a fixed-term worker will be regarded as a dispatched worker. Moreover, the government procures the regular services by way of inviting bids from human resources provision activities, so a successful bidding or a failed one will influence the regular service, which means that the regular services will naturally become the

20. *Tsaikou Fanpen Piaotan* [*The List of Modeled Contract of Service Procurement*], TAINAN HSIENCHENGFU [TAINAN COUNTY GOV'T], http://prc.tainan.gov.tw/u-form.asp (last visited Jan. 15, 2012).

21. *Changhuahsien Chengfu chi Soshu Chikung Hsuehhsiao Yuehpinku Jenyuan chi Linshih Yuehpinku Jenyuan Kungkai Chenhsuan Yaotien* [*The Public selecting regulations of Changhua County Government and subordinate schools' contracted workers and temporary workers*], DEP'T OF PERS., CHANGHUA CNTY. GOV'T., http://www.chcg.gov.tw/personnel/02law/law01_con.asp?law_id=36 (last .updated Jul. 12, 2006).

22. Executive Yuan and Subordinate Agencies Contracted-Employment Regulations, art. 5 (1972) (amended 1982) (Taiwan), *available at* http://law.moj.gov.tw/Eng/LawClass/LawHistory.aspx?PCode=S0110014.

"irregular" services. The Services Procurement Act allows the mandating or employment of services to be obtained by way of services procurement. A worker who is not public servant will be mandated by human resources provision activities through bidding. Therefore, it will remove the focus from temporary workers and even make the "regular services" become a "fix-termed" type. Article 59(2) of the Labor Contract Act of China stipulates that an entity shall not divide a continuous term of labor use into a couple of short-term dispatch agreements; however, Taiwan has not enacted the Labor Dispatching Act, and our government sectors ignored the misapplication of labor dispatching. And the so called "services procurement of regular services" means the government need not sign a "labor contract" and can even take the freedom of using workers. Essentially, obtaining public regular service workers by way of services procurement has completely changed the contractual relation in public services.

C. *The relationship between a "services procurement contract" and a "labor contract"*

According to Article 2 of the Government Procurement Act services procurement can be obtained by way of mandate or employment, so the services procurement shall be mandated services or employed ones.[23] However, regardless of the kind of services procurement contract, the first thing to be confirmed should be the identity of the opposite party of the government services procurement; and whether the party is the worker, or just a supplier who provides the worker. In terms of a labor contract, the party should be the worker himself. If the worker is not the services provider, it will violate the relation between a labor contract and a worker as stipulated by the Labor Standards Act and the provisions of the specificity of a worker in Article 484 of the Civil Code.[24] The aforementioned services procurement contract includes mandating and employing. Pursuant to Article 529[25] of the Civil Code, provisions of mandate shall apply to any contract concerning the performance of services which does not belong to any kind of other contracts provided for by the act. If the aforesaid services have its own specificity, then the contract of mandate should adhere to the regulations, and the counterparty of the contract should be the services provider himself instead of the worker provider. I believe that the Labor Dispatching Act of

23. Government Procurement Act of Taiwan, *supra* note 1, art. 2.

24. Labor Standards Act of Taiwan, *supra* note 15, arts. 2(6), 2(9); Civil Code of Taiwan, *supra* note 7, art. 484.

25. Civil Code of Taiwan, *supra* note 7, art. 529 ("With regarding to the provisions of Mandate shall apply to any contract concerning the performance of services which does not belong to any kind of other contracts provided for by the act.").

Japan aims to prevent the use of "human resources provision activities: (namely the worker provider.)"[26] But, our country legalizes the "human resources provision activities" in the Standard Industrial Classification of ROC, and allows "human resources provision activities" to replace workers' specific positions in a "labor contract." Taiwan has not enacted the Labor Dispatching Act, thus the government should examine a labor contract and the employer-employee relationship according to the "Labor Standards Act." Bypassing the Labor Standards Act should not occur and the government services procurement contract should adhere to it. In short, government services procurement contracts should comply with the current provisions in relation to the labor contract.

D. *The impact of the "services procurement" on the Labor Standards Act*

As mentioned earlier, a services procurement contract might not impact on the Labor Standards Act and a labor contract. However, the government allows the "human resources provision activities" to participate in bidding. The government ignored Article 8[27] of the Government Procurement Act which stipulates that that the term "supplier" referred to any natural person. Instead, the services procurement that the government obtains is used to supply routine works or regular services. When the number of workers is not few, it is more convenient for government sectors to obtain workers from juristic person (suppliers) because the workers will become the liability to the juristic person instead of to the government. Therefore, obtaining workers from juristic person (suppliers) by way of services procurement becomes the government's habitual dependence. I believe that procuring the non-public-servant worker from juristic person (suppliers) for public services definitely bypasses the Labor Standards Act and completely interferes with a labor contract. However, the public and even legal practitioners see this impact. In addition, due to its convenience, they even allow the government to transfer the responsibility assigned to them by the Government Procurement Act to the supplier who wins the bid; thus, the liability stipulated by the Labor Standards Act will be disrupted. For the sake of convenience, the provisions in the Labor Standards Act regarding "indirectly exploiting" and "compelling workers to do work" have been bypassed. In short, obtaining workers from worker suppliers has a huge implication on the effectiveness of the Labor Standards Act.

---

26 . *See* SHUAI-LIANG DENG, LAOTUNG HSINGCHENGFA LUN [A STUDY ON LABOR ADMINISTRATIVE LAW] 85-87 (2005).

27. Government Procurement Act of Taiwan, *supra* note 1, art. 8.

E. *The relation between a "services procurement contract" and a "services undertaking contract"*

As mentioned above, according to Article 2 of the Government Procurement Act the type of "services procurement contract" is either mandating or employing. A "services undertaking contract" means that one party agrees to provide services for the other party and once the services are completed the other party should give a wage. Comparing an "employing type of services procurement contract" to a "services undertaking contract," the "employing" and "undertaking" differs from one another. However, a "mandated services procurement contract" resembles a "services undertaking contract." In a mandated services procurement contract, one party mandates the counterparty to provide the services and the other party agrees to do it. That is to say, the only function of a "mandated services procurement contract" is providing services. In short, a services procurement contract is only for obtaining workers to assist in providing services. However, the purpose of a "services undertaking contract" is to finish a specific work. Hence, our public should not consider a "services undertaking contract" as a "services procurement contract." That is to say, if the government wants to obtain an undertaking services contract, it should obtain it by the "services procurement" in the Government Procurement Act. From another perspective, why does the Government Procurement Act clearly exclude services undertaking out of services procurement? The reason is that the dividing of services undertaking might lead to the outsourcing of public services. When the government administration is unable to manage or command, it might lead to a phenomenon of dividing public power or abandoning public power. To sum up, the government services procurement does not allow a services undertaking contract.

Hence, if the government sectors delegate the job of filing data or cleaning to personnel companies by way of services undertaking contracts, this will violate the Government Procurement Act which stipulates that if "the amount of data filing" or "the workload of cleaning" reaches a certain level, in order to provide a fair opportunity to suppliers and to make the government sectors obtain the best labor force, the government can only choose certain companies or individuals to do the services undertaking.[28] That is because it will deprive the government's opportunity and forcing the government to become the lowest bidder. Moreover, the Government Procurement Act stipulates that the type of services procurement is either employing or mandating.[29] Therefore, adopting an "undertaking contract"

28. *Id.* art. 67.
29. *Id*. art. 2.

will be forbidden by the law. In other words, the Government Procurement Act is expecting that under the circumstance of self-responsibility and self-management, government sectors will still not use the supplementary workers; thus preventing the "indirect exploitation" and "compelling labors to do work" from occurring in public services.

F. *The relation between a "services procurement contract" and a "labor dispatching services contract"*

A "labor dispatching services contract" refers to the workers that are provided by the "human resources provision activities." However, the legitimacy of a "labor dispatching services contract" on mandating or employing services still needs to be examined. As a matter of fact, according to Article 484 of the Civil Code,[30] the employer shall not transfer his right of the services to a third party without the consent of the employee. Pursuant to the Article, a dispatching agency and a worker should initially establish an employment contract that excludes undertaking and mandated relationship. Thus, the relationship of a "labor dispatching services contract" between a worker and an employer should be an employment contract. However, the problem is the content of the "labor dispatching services contract." Through this, practitioners can find that a labor dispatching contract assists workers to enter the labor force and gain job opportunities. That is to say, the content of a "labor dispatching contract" is to provide workers and sell workers as merchandise or products; so the relationship will be a "merchandise relationship" instead of an "employer-employee relationship." The Labor Dispatching Act in Japan was enacted in 1985 to resolve the problems in relation to human resources provision activities. Taiwan should not overlook the above-mentioned problems that the "labor dispatching services contract" brings. In short, if a "services procurement contract" adopts the manner of "labor dispatching contract," provisions preventing the potential problems of indirectly exploiting and compelling workers to do work in the services procurement contract will be necessary in the services procurement contract.[31]

G. *The different services procurement bidding winners procure the same workers. Under the circumstance, what will the impact be on the labor legal system?*

The government invites bidding regularly for services procurement,

30. Civil Code of Taiwan, *supra* note 7, art. 484.
31. DENG, *supra* note 26, at 85.

thus, the winners are not necessarily always the same. In practice, the bid winner differs; however, the government still wants certain procured workers. Under these circumstances, the new bid winner will successively hire the same workers, which amounts to continuity of a fixed-term contract. Those procured workers are essentially being "chronically faithful" to the public services. Does the long-term faithfulness have no meaning to the labor legal system? In Japan, Germany and China, they stipulate that any chronic worker has the right to change position.[32] That is to say, a dispatched worker has a chance to become a "formal employee." Although Taiwan has yet not enacted the Labor Dispatching Act, a worker who is not a public servant may still have a "contracted employment" type of contract. Although the employment type is not an ideal one in the system protecting labor, it is still better than relying on a services procurement contract. Therefore, the government sectors should consider giving opportunities for procured workers to be "contracted" under certain conditions. In short, a dispatched worker who is successively and chronically hired under the name of services procurement should be offered a new position from "non-fixed-term" to "formal employee."

H. *Can "services procurement" include "turn-key"?*

Article 24 of the Government Procurement Act[33] stipulates that an entity may, according to the needs of efficiency and quality, conduct the procurement on a turn-key basis. The term "turn-key" refers to the procurement of construction work or property by consolidating the procurement of the design and work, supply, installation, or maintenance within a certain timeframe, and others into a contract for tendering. The aforesaid provision about "turn-key" only applies to construction or property procurement; "services procurement" is not included. There are two probable reasons for this; one is that services cannot be divided, and the other may be that the turn-key will not be authorized by the government. In my opinion, taking into the above considerations, if services procurement includes "turn-key," it should be regarded as invalid, and which means if the primary execution, examination, management and evaluation are all managed by a dispatched worker from the beginning to the end, it will be deemed as "turn-key." This type of services procurement should be terminated.

On the balance of evidence, "services procurement" still has its own

32. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 33; Chunghua Jenmin Kunghekuo Laotung Hetung Fa [Labor Contract Act of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), art. 65 (China) [hereinafter Labor Contract Act of China].

33. Government Procurement Act of Taiwan, *supra* note 1, art. 24.

restrictions. The main point of the restrictions is to prevent the forfeiture of the right of public services, indirectly exploiting and compelling workers to do work and so on. However, in light of the above analysis, the current "services procurement" is completely uncontrolled; and our government recognizes the legitimacy of "human resources provision activities." The practice is different from that of other developed industrial countries;[34] and there is an immediate need for the termination of public services procurement in our country.

IV. THE "FIXED-TERM CONTRACT" SYSTEM RESTRICTION THAT THE GOVERNMENT SHOULD ADHERE TO FOR SERVICES PROCUREMENT

The regulation of services procurement in the Government Procurement Act in Taiwan only focuses on the procedures' strict procedural requirements and examination; there is no consideration of the legitimacy, the range or the level of the procurement, or the relations and restrictions between services procurement and other labor legal provisions. The Council of Labor Affairs only ignores the practical misapplications of the services procurement that violates the labor legal system.

I believe that government sectors need to consider aborting the ongoing "services procurement" to adopt the "fixed-term contract" in order to make services procurement consistent with the Labor Standards Act. In addition, the procuring of workers who are "continually" and "chronically" hired by the Bureau of Labor Insurance, Bureau of National Health Insurance, the visa section of the Ministry of Foreign Affairs, Household Registration Office and the government-owned enterprise should be strictly examined. To put it more specific, the administration should have certain standards including for safety. If the workers who are required by administration are all or mostly obtained by way of services procurement, when a dispatching agency does not want to provide or slothfully provides workers to the government, it will affect the national administration and inevitably lead to a crisis.

As a matter of fact, a "fixed-term contract" should be sufficient to be applied to services procurement. The term "temporary work" shall refer to work of an unexpected and non-continuous nature, not exceeding six months.[35] "Short-term" work shall indicate work expected to be

34. The references of the conference of labor dispatching act and policy study was held by the Council of Labor Affairs on Dec. 7, 2010.

35. *See* Enforcement Rules of the Labor Standards Act, art. 6(1) (1985) (amended 2009) (Taiwan) [hereinafter Enforcement Rules of the Labor Standards Act of Taiwan] (referring to the Article 14 of the Labor Standards Act of Japan, this regulation does not need to be defined with classifying. Moreover, the Article 9 of Labor Standards Act of Taiwan does not stipulate any authorization of administrative legislation), *available at*

accomplished within a short period of time, which is of a non-continuous nature and is not to exceed six months.[36] "Seasonal work" shall mean work for which the raw materials, source of materials or market is influenced by seasonal factors, and is of a non-continuous nature, and is not to exceed nine months,[37] and the "specified work" shall mean work which can be completed within a specified term and is of non-continuous nature, and is not to exceed one year without approval by the competent authority.[38] If services procurement only applies to the above-mentioned types of works, then the current bypassing the Labor Standards Act by dispatching can be avoided. I believe that services procurement as provided by the Government Procurement Act should not be misapplied to bypass the Labor Standards Act, but for obtaining the aforesaid fixed-term workers. Perhaps for this reason, the Labor Dispatching Act of Japan and China only deem a short-term worker as a dispatched worker.[39] To be more specific, the provisions of the Labor Dispatching Act of Japan stipulate that if a certain dispatched worker is continually hired for more than 3 year and is still needed to be hired after 3 years, the client company shall establish an employment contract with the worker. The provisions of China also provide that the dispatching service only applies to the temporary, assistant or substitute services.

As a matter of fact, there are differences between the "fixed-term contracted worker" and the "dispatched worker." The dispatched worker in Taiwan can be replaced at anytime, but a fixed-term contracted worker can only be replaced for certain legal problems. However, I have to highlight that any processes dealing with issues between employer and employee should be adhered to the Labor Standards Act. The dismissal of a worker based on an employer's own discretion is illegal. For instance, the Labor Dispatching Act in Japan and China both stipulate that this kind of situation are forbidden, otherwise the reason for replacing the employee must be stated in order to safeguard workers.[40] To be more specific, the Labor Contract Act in China stipulates that only if the worker's circumstance is complied with Article 39 and Article 40(1) & (2), the client company may be sent back to the labor dispatching agency by the worker, and then the dispatching agency shall terminate the contract with the dispatched worker in accordance with

---

http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0030002.

36. *Id.* art. 6(2).

37. *See id.* art. 6(3).

38. This regulation does not provide any power to competent authority. It should be refuted and it might violate the parent law. *See id.* art. 6(4).

39. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 40(5); Labor Contract Act of China, *supra* note 32, art. 66.

40. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 27; Labor Contract Act of China, *supra* note 32, art. 66-2.

the related provisions of this Act. In addition, the Labor Dispatching Act in Japan also stipulates that a client company shall not dismiss a worker due to the worker's nationality, religion, gender and union involvement.[41] Though replacing workers arbitrarily is not allowed internationally, the government in Taiwan should not process or procure services by "dispatched workers."

Article 18[42] of the Government Procurement Act stipulates three types of tender procedures including open tendering procedures, selective tendering procedures, and limited tendering procedures. In addition, Article 20[43] of the same act also provides that under the circumstance that the supplier's cost for preparation of a tender is high and where there is a recurring demand which an entity may apply for selective tendering procedures. Article 21[44] stipulates that the permanent list of qualified suppliers used for the procurement in connection with recurring demands shall contain at least six suppliers. Article 22(1)[45] also stipulates that under the circumstance where there is no tender in response to an open tender. A selective tender, an entity may apply limited tendering procedures. However, on the balance of evidence, I have found that the above-mentioned situations are consistent with the aforementioned verdict. For the recent 10 years, the government sectors have received services procurement from almost the same suppliers. The minority suppliers have monopolized certain labor markets of government sectors. Under these circumstances, have the government sectors violated the criminal law? Let's not discuss the question at present, but observe the aforementioned case about Taiwan Power Company. How could the TPC draw up the budget for replacing original employees with the recurring procurement with a low expense? Article 31(1) of the Government Procurement Act stipulates that an entity shall refund or return, without interest, the bid bond or guarantee money for the services procurement. The purpose of this provision is confusing and in vain. In practice, combining the stipulations in the Government Procurement Act with this provision actually results in a strange situation. If the suppliers are able to assemble a group of people whose expertise is qualified for a certain government sector, the suppliers can gain the benefits through the services procurement contract without paying the bid bond or guarantee money. As a matter of fact, anyone could establish a shell company or any one-person company in Taiwan if the person in charge can win the bid of services procurement. To be more specific, if the supplier asks the workers to pay their own labor and health insurance and pension, the suppliers can still

41. Labor Dispatching Act in Japan, *supra* note 14, art. 27.
42. Government Procurement Act of Taiwan, *supra* note 1, art. 18.
43. *Id*. art. 20.
44. *Id*. art. 21.
45. *Id*. art. 22, para. 1.

obtain job applicants and be qualified for the government's legal requirements, which means the suppliers can obtain a good business transaction without any cost.

V. THE PROBLEMS OF THE GOVERNMENT SERVICES PROCUREMENT

Although many serious violations have been made by the government services procurement, the most common violation is to procure supportive public workers by "dispatching" where the process of "employment" can gain supportive public workers too. Nevertheless, both actions of "employment" and "dispatching" are forbidden by law. The following paragraphs are the statements that the government sectors provide for explaining the violations.

1. In the end of Article 2 of Government Procurement Act, the sentence is finished with "etc," which shows that the government regarding "labor dispatching" as a short-term plan with the law.[46] I believe that the government has misunderstood that they can procure all kinds of services only if they follow the procedures that are stipulated in the Government Procurement Act. However, the services procurement only adopts the manner of either "mandating" or "employing." Moreover, the afore-mentioned "mandating" is forbidden in the Labor Standards Act because it only allows an employer-employee relationship. Therefore, labor dispatching is not a short-term plan enumerated by the law. According to the previous analysis, a "short-term plan" is just a malicious method of dividing "long-term" work. Pursuant to Article 21(3)[47] of the Government Procurement Act, deeming the recurring demand of services as "short-term" services is not consistent with the law. The relationship of services procurement is neither "mandating" nor "employing," but by a way of "dispatching." Therefore, the statement by the government does not adhere to the law. Even Article 59(2) of the Labor Contract Act in China (promulgated on Jan. 1, 2008) also expressly forbids this kind of dividing successive term into several short-term services dispatching agreements.

2. The government sectors claimed that "dispatched" workers stay in an illegal relationship on their own accord to gain "improper benefits" from dispatching agency. Even though the dispatching agency can replace or dismiss the dispatched worker, it is invalid because a dispatching agency is only a hypothetical employer. That is to say, the real problem is not between a "dispatched" worker and a dispatching agency; it should be the

46. *Id.* art. 2 ("The term 'procurement' as used in this Act shall refer to the contracting of construction work, the purchase or lease of property, the retention or employment of services, **etc**.") (emphasis added by author).

47. *Id.* art. 21(3).

government that bears the legal responsibility. In short, the government should not hire the "regular" public worker by a "legal" procurement procedure to cover the fact that they use certain specific suppliers.

3. The government claimed that the "dispatched" worker should be interviewed by the dispatching agency first, and the government will interview them again. However, in practice, the dispatching agency plays no roles here. Even if it does, it is still a formal interview that the government intends to make a third party intervene in the "services procurement." Therefore, as the preceding statement, such a conduct will violate Article 6 of the Labor Standards Act because there is another party that intervenes in a labor contract. The dispatching agency gains illegal interests, which means it also violates the Article 76 of the same act. An employer who violates Article 76 shall be imprisoned for a term not exceeding three years, detained or fined NT$ 30,000 or both. Therefore, the statement made by the government has only uncovered its violations and has no influence on the relationship between the "dispatched" worker and the government.

4. Furthermore, the government claimed that in compliance with the contract, the promotion request for the dispatched worker is proposed by the dispatching agency, and the proposal will later be reexamined by the government. However, on inquiry, the dispatched labor contract does not comply with the government services procurement. Besides the aforesaid statements, the government controls all the administrative details of the "dispatched" worker. That is to say, the promotion request might be applied for by the "dispatched" worker under the name of the dispatching agency. In short, the promotion that the dispatching agency proposes for the "dispatched" worker is a superfluous strategy of the government.

5. The government claimed that "dispatched" workers can be substituted by others or be transferred at any time. However, in the practice of the countries which have enacted the Labor Dispatching Act, such as Japan and China, employers will have to clearly state the circumstances under which the worker is substituted or transferred. Moreover, if the dispatched worker receives or encounters any improper treatment from the dispatching agency, they will be safeguarded under the protection of the law. Both China and Japan have adopted this approach. In other words, the arbitrary substituting and transferring that our government proclaimed are only reckless behavior without legal control. However, for their own profits, government sectors are accustomed to hire the same "dispatched" workers that they are accustomed to and familiar with; so substituting or transferring does not occur often. It is an abnormal situation because if the worker in those countries which have enacted the Labor Dispatching Act encounters this, the "dispatched" worker will be made a formal employee.

6. The government even quoted the Labor Dispatching Act in Japan to

argue that there is no "employment" relationship between the "dispatched" worker and the dispatching agency, and to contend that the right of the dispatching agency to command "dispatched" worker is given by the contract. According to those countries which have enacted the Labor Dispatching Act, the dispatched worker shall be supervised and receive the instructions of the dispatching agency. However, as mentioned previously, Taiwan has not enacted the Labor Dispatching Act and the misapplications of services procurement are definitely forbidden in the Labor Standards Act. The government's claim only allows prosecutors in Taiwan to investigate and determine which party should bear the responsibilities because Article 5 of the Labor Standards Act stipulates that no employer may, by force, coercion, detention or other illegal practices, and compel workering. Pursuant to Article 75 of the Labor Standards Act an employer who violates the provisions of Article 5 shall be imprisoned for a term not exceeding five years, detained or fined NT$ 50,000 or both. Therefore, the government has just poised for the prosecutors in Taiwan to investigate; it has no effect on the relationship with "dispatched" workers.

7. The government also claimed that the legal verification for using dispatched workers came from "technical services regulations for technical consultancy to process mandated services from various organizations" (hereinafter referred to as "technical services regulations").[48] The latest amendment of the "technical services regulations" was in 1997.[49] As a matter of fact, according to Article 7 of the Central Regulation Standard Act,[50] the aforementioned "technical services regulations" has remained valid despite the fact of the downsizing of the provincial government. However, since January 1, 2004, pursuant to Article 174-1[51] of the Administrative Procedure Act, all legal orders shall become inoperative. From the legal source of "technical services regulations," it can be observed that the "technical services regulations" should be inoperative; therefore, the statement that government proclaimed only uncovers this violation. Furthermore, the "technical services regulations" was aborted on August 16, 1999 by Executive Order No. 00631. Moreover, the "technical services regulations" applies to the "technical consultancy." The "worker" provides "professional skill" instead of "routine procedure," and thus, it is a contract

48. Ke Chikuan Weito Chishu Kuwen Chikou Chengpan Chishu Fuwu Chuli Yaotien [Regulations Governing the Entrustment to the Technological Consulting Organization Concerning Technological Service by Executive Yuan and Subordinated Agencies] (1999) (repealed 2004) (Taiwan), *available at* http://gisapsrv01.cpami.gov.tw/cpis/cpclass/appendix/bureaulaw.htm.

49. Taiwan Provincial Government, Fu-Chien 4 No. 118570 (Dec. 24, 1997).

50. Taiwansheng Chengfu Kungneng Yehwu yu Tsuchih Tiaocheng Chanhsing Tiaoli [Temporary Act on Function and Stucture Adjustment of Taiwan Provincial Government] (1998) (repealed 2005) (Taiwan), *available at* http://law.moj.gov.tw/LawClass/LawContent.aspx?PCODE=A0040012.

51. Administrative Procedure Act, art. 174-1 (1999) (amended 2005) (Taiwan), *available at* http://law.moj.gov.tw/Eng/LawClass/LawHistory.aspx?PCode=A0030055.

of "mandate" instead of a "dispatched" one; and it is a strange type of contract which is totally different from the "labor dispatching" in other countries.

8. The government claimed that after the "dispatched labor contract" expires, the worker shall leave; only a minority of workers will stay. If anyone wants to waive the right to leave and stay, it will not matter much; if one who wants to exercise their rights, it will be appropriate for sure. However, the "dispatching" dispute is in regards to a personal labor right; it is irrelevant to the "dispatched" workers' option of staying or leaving.

9. The government also stated that transferring a formal employee is in accordance with the "government sectors transferring regulations," and this does not apply to the "dispatched" workers. However, the government sectors usually transfer their staff according to their own regulations to avoid discord and having to follow more specific regulations. Nevertheless, the government sectors have been accustomed to arbitrarily transferring or changing the "dispatched" workers; thus, transferring dispatched workers with another manner is necessary for government sectors. However, this necessity does not consequently give the government sectors the right to deny the real position of the "dispatched" workers.

10. The government even required the "dispatched" workers to do the following work: (1) To prove that "no other person can substitute specific dispatched workers." On inquiry, this is stipulated in the labor dispatching contract. (2) To prove that they were "unable to refuse the command of government sectors." The common characteristic of an "employment contract" and a "labor dispatching contract" is that a worker should receive the instructions of the person who is in charge in practice, which means that the worker need not prove this. (3) To prove that the "dispatched" worker receives a certain transaction price for their service. However, in practice, after being exploited indirectly by the dispatching agency, the "dispatched" worker will get a wage which is usually unequal to that of a "same level" staff in the government sectors. Observing the verdict example,[52] the situation of unequal pay for equal jobs under the labor dispatching contract does not change the economic subordinate status of the accuser. As the preceding statement, the government should bear the criminal responsibility of violating the Article 79 of the Labor Standards Act. The "dispatched" worker should be compensated under criminal and civil law.

11. Finally, the government claimed that the labor dispatching contract is not related to the Labor Dispatching Act but to an anonymity contract which is regulated in the Civil Code; thus, among the dispatching agency, the client company and the "dispatched" worker, there is the freedom of

52. Zuigao Fayuan [Sup. Ct.], Civil Division, 81 Tai-Shang No. 347 (Feb. 27, 1992) (Taiwan).

contracts. However, Taiwan has not enacted the Labor Dispatching Act. Although the labor dispatching contract can be understood as an anonymity contract, there should be a legal regulation to stipulate that any contract should not violate the law. I believe that the anonymity contract is "intervening in a labor contract of other persons for illegal interests." This situation has distorted the Civil Code and the Labor Standards Act and bypassed the Labor Standards Act. In addition, before Taiwan promulgated employment services law, the government did not allow a business entity to employ foreign workers in order to safeguard the job opportunities for the domestics. Hence, before enacting the Labor Dispatching Act, we still need to question whether or not using dispatched workers will deprive the right of the workers in Taiwan.

In summary, the government's proclamations are meaningless. In my opinion, the government sectors should examine and discuss how to normalize the human resources system. Perhaps because of these troublesome cases that the government encountered in practice, since 2006 some of the sectors have started to conduct recruitment tests and have received passionate responses from society.[53] It is foreseeable that once the government sectors accumulate the recruit workers to a certain number, the "labor dispatching" problem will gradually disappear.

The Council of Labor Affairs explained that the legitimacy of the "human resources provision activities;"[54] according to the Standard Industrial Classification of ROC (6th revised edition, December 31, 1996), is edited in class 7901. The so called "human resources provision activities" refers to a person who engages in introducing occupations, any services involved in labor interposition, labor dispatching or recruitment of workers by mandate. Moreover, the letter from the Council of Labor Affairs[55] explains that since April 1, 1998 a supplier which obtains a tender of government services procurement, such as "human resources provision activities," should fulfill the employer obligation. In other words, even though Taiwan has not enacted the Labor Dispatching Act, the industrial classification allows "human resources provision activities" and "labor dispatching services." Moreover, in "human resources provision activities," the rights of the workers was studied and amended by the Council of Labor

53. *See* Chingchipu Panli Taitien Kungssu chi Chungyu Kungssu 95 Nien Hsinchin Chihyuan Chenshih Weiyuanhui [2006 Recruit Committee of Taiwan Power Company and CPC Corporation Organized by Ministry of Economic Affairs], *Chingchipu Panli Taitien Kungssu chi Chungyu Kungssu 95 Nien Hsinchin Chihyuan Chenshih Chienchang* [*2006 Recruit Announcement of Taiwan Power Company and CPC Corporation Organized by Ministry of Economic Affairs*] (June 9, 2006), http://www.taipower.com.tw/TaipowerWeb/upload/files/27/main_6_12_63.pdf.

54. Council of Lab. Aff., Executive Yuan, Lao-tung 1 No. 0970005320 (Mar. 3, 2008).

55. Council of Lab. Aff., Executive Yuan, Lao-tung 1 No. 047494 (Oct. 30, 1997).

Affairs and the Public Construction Commission of Executive Yuan.[56] That is to say, the right of the dispatched workers has been safeguarded. The industrial classification categorized the "dispatching" as a part of the "human resources provision activities;" however, I believe that although the dispatching services have the potential to survive in the future, Taiwan cannot adopt it at present without the Labor Dispatching Act. Though the introduction of foreign workers belongs to "human resources provision activities," the supply of the foreign workers still adheres to the Employment Services Act. Through the legal procedure of private employment services organization, it is allowed to supply; in the contrary, through a non private employment services organization, it will be illegal. Therefore, regulation of the labor dispatching in Taiwan is still waiting to be promulgated in order to implement the employments requirements and the legal administration.

Furthermore, the Council of Labor Affairs indicated that procurement services done by "labor dispatching" shall adhere to the Regulations of the Employment and Management of Temporary Workers of the Subordinate School Organizations of Executive Yuan (hereinafter Temporary Workers Regulations), Article 4.[57] This Article stipulates that if the sectors encounter the shortage of employees, they shall hire temporary workers by way of "outsourcing." The so called "outsourcing," according "the Plan of Outsourcing Public Affairs to the Civil,"[58] refers to the shift of the position of the government from a rower to a helmsman. Being trimmed and streamlined, the government will outsource the services to the public and utilize the civil resources effectively. However, outsourcing the public affairs effectively divides the relationship. The civil servants will follow the government's instructions, manage the services by themselves, administer the management of the workers and pay the wages also. The government will not play the role of an executor, which signifies that "outsourcing" is different from "labor dispatching" herein. The government services procurement and the administration of labor dispatching have still been managed by the government but the dispatching agency does not bear the responsibility to manage efficiency. Article 3 of the Temporary Workers Regulations stipulates that the temporary worker shall not receive any public affairs services, and also includes: (1) The temporary and fixed-term

56. *See* Enforcement Rules of the Labor Standards Act of Taiwan, *supra* note 35, art. 6(3).

57. Hsingchengyuan chi Soshu Ke Chikuan Hsuehhsiao Linshih Jenyuan Chinyung chi Yunyung Yaotien [The Regulations of the Employment and Management of Temporary Workers of the Subordinate School Organizations of Executive Yuan], art. 7 (2008) (amended 2009) (Taiwan), *available at* www.cpa.gov.tw/public/Attachment/911259381518.doc.

58. *See* Shu-Fang Shieh, *Tsung Williamson te Chiaoyi Chengpen Kuantien Lun Chengfu Shihwu Weiwai Kuanli* [*Reconsiderations about Government Service Contracting Out: Oliver E. Williamson's Transaction Cost Approach*], 2008 TASPAA HUOPAN KUANHSI YU YUNGHSU FACHAN KUOCHI HSUEHSHU YENTAO HUI [2008 COLLABORATIVE PARTNERSHIP AND SUSTAINABLE DEVELOPMENT] (May, 2008), *available at* http://web.thu.edu.tw/g96540022/www/taspaa/essay/pdf/018.pdf.

services; (2) Due to the quality of an organization or any specific requirement of the services, hire the temporary worker before this regulation takes effect by the ratification of the Executive Yuan.[59] As a matter of fact, other countries usually deem the dispatched worker as temporary worker; but our country often regards the relationship as an "informal" labor contract of which the term can be flexible. From this, it can be observed that those are two different concepts.

In short, considering the labor dispatching contract consistent with the Temporary Workers Regulations is a terrible misunderstanding.

Moreover, the Temporary Workers Regulations might violate Article 174-1 of the Administrative Procedure Act because the Temporary Workers Regulations only applies to the administration of temporary workers within money saving and normalizing services which should conform to the J.Y. Interpretation Nos. 443 and 526.[60] On inquiry, the Temporary Workers Regulations stipulates that if the services that the temporary worker receives do not belong to a part of the core services of its organization and the services are planned and time-phased, then the organization should hire other substitute workers; and if the services that the temporary worker receives is a long-term core services or is involved with public affairs, then the organization should delegate the service to a formal public servant, contracted employee or other substitute workers. However, in practice, the utilizing of long-term temporary workers and the formalizing of them has revealed many problems. The government has misapplied the Temporary Workers Regulations to hire temporary workers for public affairs instead of utilizing the employment system or the formal public servant system.

Compared with the civil verdict Chung-Lao-Su No. 3, 2006, Taichung District Court and the previous reviews, the civil verdict of Chung-Lao-Su No. 5, 2007, Kaohsiung District Court, (sentenced on June, 9, 2008)[61] had given a different explanation. This verdict focused on another perspective on labor dispatching. It contended that after the employer of the dispatching agency establishing a labor contract with the worker, under the agreement of the worker to maintain the contract relationship, the worker should provide services under the supervision of the client company. Thus, there will be no employer-employee relationship between the worker and the business entity

---

59. Hsingchengyuan chi Soshu Ke Chikuan Hsuehhsiao Linshih Jenyuan Chinyung chi Yunyung Yaotien [The Regulations of the Employment and Management of Temporary Workers of the Subordinate School Organizations of Executive Yuan], art. 3 (2008) (amended 2009) (Taiwan), *available at* www.cpa.gov.tw/public/Attachment/911259381518.doc.

60. J.Y. Interpretation No. 443 (1997) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=443; J.Y. Interpretation No. 526 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=526.

61. Kaohsiung Difan Fayuan [Kaohsiung Dist. Ct.], Civil Division, 96 Chung-Lao-Su No. 5 (June 9, 2008) (Taiwan).

but a services providing and supervision relationship instead. The obligation of an employer that comes after a contract will lay on the dispatching agency and the client company should pay the dispatching wage to the dispatching agency. However, when it comes to a labor contract, dismissal, wage or working regulations, the responsibility will lay on the dispatching agency. The dispatching agency thus transfers the right of claiming and the right of commanding to the client company which create the aforesaid strange relationship. Pursuant to Article 484 of the Civil Code the employer shall not transfer his right of the services to a third party without the consent of the employee.[62] Only if the dispatched employee agrees with the type of services based on the contract between the worker and the dispatching company, the labor dispatching be legal.

Along with economic development, social transition, international competitiveness and the industrial transitions, the labor dispatching system has been changing. Due to the advancing development of manufacturing techniques and the varieties of products, the employers need to hire a huge amount of professional workers. Thus, to reduce human costs and the size of enterprises, employers adopt one of the non-typical services contract systems. This non-typical labor contract is mediated by the client company to instruct workers; however, the non-typical contract relationship between the dispatching agency and the dispatched workers is very different from the traditional structure of the employer-employee relationship. Nevertheless, society has utilized this system and regarded it as normal. This kind of dispatching system may be the loopholes for the dispatching agency to gain illegal interest and result in unstable employment levels due to the great quantity of labor dispatching. The situation may blur the responsibilities that should lie on the employers; however, it still has advantages in saving human resources costs and has been flexible to transfer or deploy the high quality worker. Moreover, in many countries such as Germany, Japan, and even Taiwan all have utilized the labor dispatching system. The Taiwanese government cannot deny the necessity of labor dispatching when the industries structure has been changing under global competitions. Even though Taiwan has not promulgated the related labor dispatching law, the Taiwanese government still cannot still assume that the labor dispatching relationship does not exist and intentionally establish an employment relationship between the dispatched worker and the client company.

Based on the above paragraphs, the verdict of Kaohsiung District Court obviously did not consider "the service term" and "the scale of dispatching work" which were mentioned in the Taichung District Court verdict.[63] It

62. Civil Code of Taiwan, *supra* note 7, art. 484.

63. Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 93 Chung-Lao-Su No. 3 (Jan. 25, 2006) (Taiwan).

seemed to explain why regulating labor affairs via civil contract could replace the appropriate formalities of the legal labor system.

VI. THE LABOR DISPATCHING ADJUSTMENTS THAT THE GOVERNMENT SHALL ADHERE TO WHEN PROCURING SERVICES

The government procures services by labor dispatching; however, our country has neglected to address the situation and even deemed it an appropriate option. I believe that Taiwan still needs to clarify the misunderstanding and misapplication of labor dispatching system and to encourage our government to modify the system.

1. Firstly, if the practitioners encounter any problem with labor dispatching, they will usually directly go into the discussion of the contract's validity of its detail without discussing the legitimacy of the practice. It is because our country adopts the civil legal system. All administrations should adhere to the national provisions, autonomous legislation included. The labor administration is a part of the national administration; thus, it should certainly adhere to the national provisions. However, Taiwan has not enacted the Labor Dispatching Act; so, the labor dispatching system should be inoperative in Taiwan. Likewise, without the Employment Services Act, foreigners in Taiwan would not be able to work; and hiring foreigners would be unlawful. The Employment Services Act is for safeguarding the job opportunities for native workers. Nevertheless, the Labor Standards Act and all the other labor regulations do not apply to the labor dispatching system. The system is different from the current and the typical labor contract; thus, Taiwan must enact a law to legalize it and to conform with the civil legal system without disrupting the social order. Presently, legal practitioners cannot solve the problems where the labor dispatching brings, but they can also neglect the fact that the labor dispatching system does not adhere with the Labor Standards Act. Due to the shortage of related provisions about labor dispatching, I believe that it should be illegal; otherwise, our country shall adhere to the Labor Standards Act, or to replace our system with the Anglo-American legal system to give all the authorities to employers and employees.

2. Secondly, although Taiwan has already created a labor legal system, the practitioners and the legal practitioners usually disregard the misapplication of replacing the concept by the Civil Code. People think that the labor dispatching contract refers to the "anonymous contract" which is prescribed by the Civil Code or the "transferring the right of the services contract" which is stipulated in Article 484 of the Civil Code.[64] However,

64. *See* Gaodeng Fayuan [High Ct.], Civil Division, 94 Lao-Shang No. 7 (Sept. 22, 2005)

our country has promulgated the Labor Standards Act and other labor legal regulations; so what exactly should the relation between the Civil Code and labor legal regulations be? For instance, the Labor Standards Act stipulates the type of labor contract is either with "fixed-term" or with "non-fixed-term." But, could it be legal to establish a third type adhering to the Civil Code? Should the Civil Code provisions related to the employment contract be a supplement to the Labor Standards Act? Or should the "employment relationship of the Civil Code" and other types of contracts as per the Civil Code be deemed accurate? Since our country adopts the civil legal system, and the Civil Code was enacted before the Labor Standards Act and other legal regulations; thus, I believe that the labor legal system has a certain purpose, and this purpose should not be interpreted with the original concept from the Civil Code. Pursuant to Article 1 of the Labor Standards Act, matters not herein provided shall be governed by other applicable laws. The Labor Standards Act has divided the labor contract into two types, which means that the Act intends to exclude any possibility of a third type. Take Japan and China as an example, the Labor Standards Act and other labor legal regulations are applying to all sorts of jobs.[65] The practitioners in Taiwan claim that the third type of the contracts could be interpreted from the Civil Code; however, it would be deemed invalid in Japan and China. These two countries have respectively enacted the Labor Dispatching Act and the Labor Dispatching Regulations to regulate labor dispatching affairs.[66] Hence, Taiwan should not construct the order of labor dispatching with the conception of the Civil Code.

3. The practitioners often explain the labor dispatching contract using the concepts of a "typical labor contract" and a "non-typical labor contract"[67] The common English antonyms for of the word "typical" are "untypical" and "atypical." The term "untypical" simply means something that is not representative or characteristic of a particular type. The term "atypical" means something that is not conforming to a particular type, or something that is abnormal or irregular. If the labor dispatching contract is categorized

(Taiwan); Taoyuan Difang Fayuan [Taoyuan Dist. Ct.], Civil Division, 94 Lao-Su No. 5 (Oct. 13, 2005) (Taiwan); Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 92 Chung-Su No. 776 (June 7, 2004) (Taiwan).

65. *See* Labor Standards Act of Japan, *supra* note 14, art. 9; Labor Contract Act of China, *supra* note 32, art. 2.

66. *See* Labor Dispatching Act in Japan, *supra* note 14 (containing 75 articles in total, legislated on July 5, 1985, and last amended on July 6, 2007); Labor Contract Act of China, *supra* note 32, arts. 57-67, 92.

67. *See* Tung-Hsuan Yang, *Taiwan Laotung Paichienfa Lifa chih Chuyi: Chihui yu Fenghsien te Pingheng* [*Suggestions on the Legislation of Taiwan Dispatched Employment Laws: A Balance of Opportunities and Risks*], 138 WANKUO FALU [FORMOSA TRANSNAT'L L. REV.] 32, 32-33 (2004); Chin-Chin Cheng, *Meikuo Paichien Laotung Fachih chih Yenchiu* [*A Study on the Labor Dispatching System of the U.S.*], TAIWAN LAOTUNGFA HSUEHHUI HSUEHPAO [LAB. L.J.], Nov. 2000, at 123-24.

as the latter, what will the true definition of the contract be? That is to say, the practitioners have not explained whether the labor dispatching contract is legal or not. Moreover, the original wording of non-typical labor contract can be seen in the verdict or group negotiations in the Anglo-American legal system countries while the one can also be found in the civil legal system and its provisions. Nevertheless, the practitioners in Taiwan have disregarded the civil legal system and categorized the labor dispatching contract into a "non-typical" labor contract in light of the provisions in the Civil Code. Even though the Council of Labor Affairs has drafted the Labor Dispatching Act,[68] it is usually stonewalled by the current situation and there are no further advances or the courage to implement it. In my opinion, our country should not neglect the non-typical labor contract, especially when our country considers the Taiwan Railway as the employer of porters and foreman.[69] The practitioners and legal practitioners should insist on justice and call for the enactment of a new law instead of neglecting the third contract type that appears beyond the Labor Standards Act and the current labor legal regulations. As mentioned above, a non-typical type of labor contract is excluded from the legal system of all other countries because they have all regulated the labor dispatching system; and our government should not disregard this fact. As a matter of fact, workers in Japan who are involved in labor dispatching are regulated by the Labor Dispatching Act. The Labor Contract Act of China also provides that the labor dispatching function should adhere to the company law. The registered capital should not be less than five hundred thousand RMB, and they even stipulated that the client company should not establish a labor dispatching function or require dispatched workers from affiliated unit.[70] Moreover, although Article 2 of the Labor Dispatching Act of Japan divided the labor dispatching services into "general labor dispatching services" (Article 4) and "specific labor dispatching services" (Article 5), only the latter will provide long-term dispatching services. The aforesaid "general labor dispatching services," namely the registration type of labor dispatching services, is usually in an unstable (shaky) employer-employee relationship. Therefore, Japan adopts a "permit system" of administrative management.[71] Article 58(1) of the Labor Contract Act of China stipulates that the labor dispatching agency is an "employing organization" instead of the Japanese-typed "general labor dispatching services."

---

68. *See* DENG, *supra* note 26, 150-60.

69. *See* SHUAI-LIANG DENG, LAOTZU SHIHWU YENCHIU [A STUDY ON EMPLOYER-EMPLOYEE AFFAIRS] 115-18 (1993).

70. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 5; Labor Contract Act of China, *supra* note 32, art. 57.

71. *See* KAZUO SUGENO, ROUDOUHOU [LABOR ACT] 196 (2d ed. 1988).

4. The practitioners claim that the labor dispatching contract is divided into the "continuously employing type" and "registration type,"[72] and claimed that these are legal. The practitioners even allow the "continuously employment type" before considering the labor dispatching legal system in China and Japan.[73] The Labor Dispatching Act of Japan not only adopts different approaches to manage the "general labor dispatching services" and "specific labor dispatching services," but also clearly stipulates that the dispatched worker refers to the worker employed by an employer to provide specific services. The relationship between the dispatched worker and the dispatching services is "employment,"[74] and the "employment" should be the basic premise of the "general labor dispatching services" and "specific labor dispatching services." Moreover, the Labor Contract Act of China also stipulates that the labor dispatching organization should establish a fixed-term contract for at least 2 years with the dispatched worker and pay wages each month.[75] That is to say, the dispatched worker should be the worker of the dispatching organization and an employer-employee relationship consistent with the labor legal system should exist between the worker and labor dispatching organization. Japan also regards the "registration type" as a misapplication of the labor dispatching regulations.[76] China has even halted this type of service relationship when they started to stipulate the Labor Contract Act.[77] On the other hand, the practitioners in Taiwan ignored the problem that the "registration type" of labor dispatching may bring. The dispatching organization usually searches for workers again after they get the services by "services undertaking." As a matter of fact, "services undertaking" and "turn-key" are not illegal; however, utilizing "services undertaking" ("turn-key") as the core of labor dispatching is not the original purpose of labor dispatching because the system of labor dispatching means to dispatch workers for the client company to utilize and manage, which is different from undertaking. Moreover, the "registration type" is almost like a "labor servant market." If the worker is not covered by

72. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 5(1); Labor Contract Act of China, *supra* note 32, arts. 57, 67.

73. *See* Chin-Chin Cheng, *Tsung Meikuo Laotung Paichien Fachih Kan Wokuo Laotung Paichien Fa Tsaoan* [*A Comparative Study on the Laws Governing Dispatched Employment in the U.S. and the Dispatched Employment Bill in Taiwan*], 10 KUOLI CHUNGCHENG TAHSUEH FAHSUEH CHIKAN [NAT'L CHUNG CHENG U. L.J.] 37, 40-41 (2003).

74. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 2(2).

75. Labor Contract Act of China, *supra* note 32, art. 58(2).

76. In 1985, the Labor Act was legislated on the purpose of averting the shortcoming of "labor supply services." There's one thing should be noticed—the appearance of "labor dispatching" comes from "labor supplying". However, the market characteristic of "labor supplying" is very different from the sacred insistence of "labor dispatching" act. *See* KENICHIROU NISHIMURA, HATARAKUHITO NO HOURITSU NYUMON [LEGAL INTRODUCTION OF LABOR] 228 (2006); ROUDOUSYA HOGOHOU [PROTECTING LABOR ACT] 35, 38, 56, 203, 209 (Takezi Tsunetou ed., 1989).

77. *See* Labor Contract Act of China, *supra* note 32, arts. 57-58.

health insurance while working, it would be difficult for the client companies to acquire certain number of workers regularly. The practitioners deemed the "registration type" contract as the fixed-term contract; and deemed the "continuously employing type" contract as the non-fixed-term contract.[78] I believe that the practitioners should reexamine the practical fact which is that our country has not enacted the Labor Dispatching Act, and nearly all the practices of labor dispatching are categorized as the "registration type." Even the dispatched workers who should not be obtained due to the registration in the Government Procurement Act and the workers who work for the public services are all "registration type" workers. Therefore, how can the Taiwanese government keep neglecting the "registration type" labor contract while the legal system is different from Japan and China? Specifically, our country should not disregard the "registration type" labor contract which is a loophole to the current legal system. Furthermore, the "registration type" labor contract has become a tool to exploit dispatched workers with low wages.[79] However, if the "registration type" of labor dispatching is necessary in the future, our country could consider adopting the approach of Japan to provide strict provisions and adequate protection for dispatched workers.

5. Many of the practitioners regard the followings as dispatched workers: "the saleswoman in department store is the dispatched worker of the department store,"[80] "transferring among business", "working abroad" and the aforesaid "services undertaking."[81] as explained by practitioners. I believe that, in order to create a new legal management standard, people who care about labor dispatching should establish a concept to distinguish the terms "broker," "agent," "representative," "undertaking" and "employing" from "labor dispatching." Please see the illustration below.

The above illustration presents a simple and clear relationship between the three parties. Even the aforesaid provision "transferring the right of the services contract" of the Article 484 of Civil Code[82] cannot explain the triangular relationship. The triangular relationship of the illustration above is

78. Chun-Yen Chiu, *Laokung Paichien Fachih chih Yenchiu: Yi Jihpen Laokung Paichien Fa Weili* [*The Study of Labor Dispatching Act: From the Point of View of Labor Dispatching Act of Japan*], 1 TAIWAN LAOTUNGFA HSUEHHUI HSUEHPAO [LAB. L.J.] 1, 1, 33 (2000).

79. *See* Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 93 Chung-Lao-Su No. 3 (Jan. 25, 2006) (Taiwan).

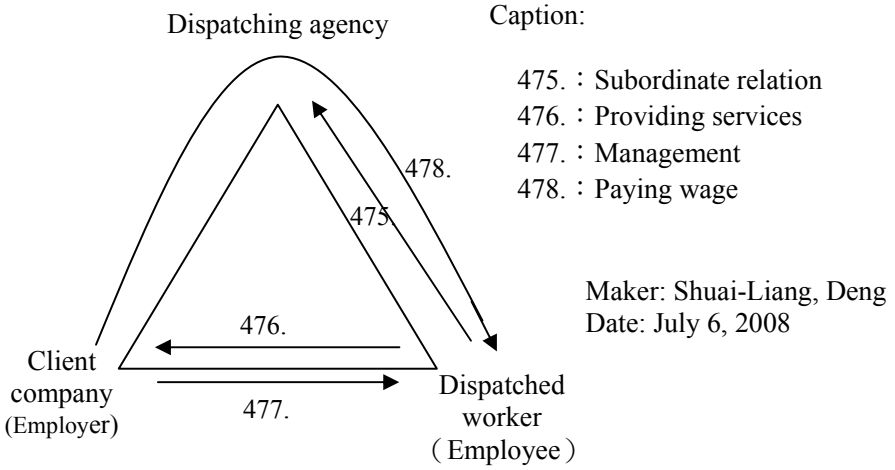
80. Chiu, *supra* note 78, at 36-37.

81. *See* Hsin-san Chen, Woguo Laotung Paichien Hsiangkuan Falu Wenti chih Yenchiu [A Study on the Regulations Related to Labor Dispatching] (June, 2006) (unpublished LL.M. thesis, National Chung Cheng University) 18-20, *available at* http://ndltd.ncl.edu.tw/cgi-bin/gs32/gsweb.cgi?o=dnclcdr&s=id=%22094CCU05227026%22.&searchmode=basic.

82. Civil Code of Taiwan, *supra* note 7, art. 484.

stipulated in the labor dispatching legal system of Japan and China.[83] Taiwan has not enacted the Labor Dispatching Act. Our country should not use other explanations to confuse the practice and hinder the enactment of the Labor Dispatching Act.

The Illustration of the triangular relationships of dispatched labor contract



6. The practitioners have various explanations about the employer of the labor dispatching contract. Some claim it is a "double labor relationship."[84] Some doubt the identification of the employer of the dispatched labor contract and the possibility of "compelling workers to do work" and "indirectly exploiting;"[85] others, even the legal practitioners have different views on the identification of the employer of labor dispatching.[86] The author believes that if the relationships of the "Illustration of the triangular relationships of dispatched labor contract" can be consistent with the concept in Japan and China, the employer can be regarded as the dispatching agency. In terms of "indirect exploiting," it can be judged by the wage. The wage is given by the dispatching agency instead of the client company. If the worker is exploited, the dispatching agency should bear the responsibility. Therefore, in order to keep their jobs, the workers might surrender under the

83. *See* Labor Dispatching Act of Japan, *supra* note 14; Labor Contract Act of China, *supra* note 32.

84. *See* CHENG-GUAN HUANG, LAOTUNGFA [LABOR ACT] 285 (1996).

85. *See* Chin-Chin Cheng, *Paichien Laotung chih Falu Kuanhsi yu Hsiangkuan Falu Wenti chih Yenchiu* [*A Study on the Related Legal Problems and Connected Questions of Labor Dispatching Act*], 2 KUOLI CHUNGCHENG TAHSUEH FAHSUEH CHIKAN [NAT'L CHUNG CHENG U. L.J.] 237, 248 (1999).

86. Taoyuan Difang Fayuan [Taoyuan Dist. Ct.], Civil Division, 94 Lao-Su No. 5 (Oct. 13, 2005) (Taiwan) (stating that the dispatched labors shall not prosecute the client company with the employer responsibility provisions of Article 59(1) of the Labor Standards Act).

command of the client company. To see the management of the client company from a legal point of view, the transferring, dismissal, wage reduction or discontinuation of a dispatched worker's contract should be examined again to see whether it is related to the client company. Therefore, the dispatching agency will have no excuse to evade their responsibilities. To avoid controversy, the dispatching labor legal provisions of Japan and China require the client company to give explanation and reason for any action that the client company undertakes in regards to dispatched workers. The workers right of appeal is also protected.[87] Hence, it is a pity for the practitioners to concentrate on legal interpretation when our country is not even contemplating on enacting the Labor Dispatching Act. According to the abovementioned provisions of the Labor Contract Act of China, both the dispatching agency and the client company should explain in detail the work required in order to prevent the situation of compelling workers to do work. The legal device of Japan and China is designed for this purpose.

7. Some practitioners even claim that under no condition can the dispatched worker demand for "equal wage for equal job" because the labor dispatching contract implies an unequal status between the dispatched worker and the formal employee; as there is no employment or working relationship between the dispatched worker and the client company.[88] This seems to mean that the unequal treatment is naturally permissible in the relationship created by the labor dispatching contract; and it also seems to imply that the core idea of the labor dispatching contract is for a client company (employer) to obtain dispatched workers at a lower cost easily. However, the legal provisions in both Japan and China all stipulate that the dispatched worker must receive the same wage as the formal employee.[89]

---

87. *See* Labor Dispatching Act of Japan, *supra* note 14, arts. 26-28; Labor Contract Act of China, *supra* note 32, arts. 60-63.

88. Cheng, *supra* note 85, at 248.

89. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 44(1); Labor Standards Act of Japan, *supra* note 14, art. 3 (stipulating equal wage for equal work); Labor Contract Act of China, *supra* note 32, art. 63. Though the dismissed worker in the issue of the Nichibou Kaiduka factory is a communist, the dismiss reason does not violate the Constitution, Article 14 and the Labor Standard Act, Article 3 which both provided the principle of equality. That is to say it is not involved in social status issue. In the "Mitsubishiziushi" verdict made by Supreme Court of Japan on Dec. 12, 1973, the Court stated that even under the condition of "equal treatment", whether a worker is being employed shall not be explained by the Labor Standard Act, Article 3. *See* Shyuben Katou, *Kintou Taiguu* [*Equal Treatment*] *in* ROUDOU HANREI HYAKUSEN DAIYONHAN [SELECTED CASES OF LABOR AFFAIRS] 28-29 (Ogisawa Kiyohiko ed., 1981). In "Maroko Horn" verdict made by the Ueda Branch of Nagano District Court on Sept. 3, 1996, it stated that the wage gap between "formal employee" and "temporary worker" doesn't violate the "equal treatment", "equal wage for equal job" and even the "public order" because the difference between "formal employee" and "temporary worker" comes from the content difference in the contract. It is not resulted from the "social status" in Labor Standard Act, Article 3. Moreover, there's no legislation of "equal wage for equal job" and the annual merits system also reflects the situation of "unequal wage for equal job". And this kind of situation never violates the public order in Japan from the very beginning. *See* HIROSHI TOI, KAISEI ROUDOU KIJUNHOU [THE AMENDMENT OF LABOR STANDARDS ACT] 42 (1999). *See also* HIROSHI TOI, KAISEI ROUDOU KIJUNHOU [THE

The Labor Dispatching Act of Japan provides that all businesses shall not give unequal treatment to dispatched workers and to allow the situation of compelling workers to do work or indirectly exploiting. The Labor Contract Act of China obligates equal treatment even clear, stipulating that the dispatched worker should get equal wage while providing the same services as the employee who does the same job. Where there is no employee doing the same job, the wage should be the same as an employee who works in a similar work-place or who has a similar work position.[90] Moreover, the provisions of China also strictly stipulate that a business shall confirm the timeframe with the dispatching agency by the actual necessity[91] and shall not establish several successive dispatched agreements by way of dividing the term. China also provides that work not belonging to the dispatched job shall not be counted as dispatched work.[92] After studying the provisions of these two countries, it can be construed that labor dispatching can be used in unforeseeable circumstances and to obtain professional workers. Once the task is done, the relationship will be over. Government authorities would not deviously seek to decrease cost by allowing people to use dispatched laborers; and all government authorities would prohibit unequal treatment to protect the rights of dispatched workers. As "the illustration of the triangular relationships of labor dispatching" shows, the relationship of labor dispatching cannot be controlled by the current labor legal system. It would be hard for the current labor legal system to regulate the responsibilities of the client company. However, it would be possible to resolve the twisted triangular relationships and the shortcomings of our labor legal system by contemplating the provisions of other countries and also by using common law/precedents to identify the "employer" responsibilities of the client company. Essentially, it is the biggest fault of our country to allow the unequal treatment in the labor dispatching contract.

8. Finally, I believe that researching the labor dispatching legal systems in different countries is needed. Take China—another country which adopts the civil legal system countries—as an example; though China promulgated the labor dispatching law a little bit later than other countries, the effect of its provisions in other countries as seen in legal reviews is impressive. Out of

---

AMENDMENT OF LABOR STANDARDS ACT] 42-45 (1999) (stating that both jurisdiction of Japan and China adopted the idea about "equal wage for equal job", and the former part of Article 6 of the Labor Contract Act of China mandated that dispatching workers enjoying the right of receiving the equal wage while doing the equal job); BAO-HUA DONG, SHIHDA JETIEN SHIHCHIEN TOUSHIH LAOTUNG HETONG FA [TO STUDY THE LABOR CONTRACT ACT THROUGH THE 10 HOT ISSUES] 471 (2007) (claiming that eliminating the fault though this paper only takes reference of China's legal system).

90. *See* Labor Dispatching Act of Japan, *supra* note 14, art. 44(4); Labor Contract Act of China, *supra* note 32, art. 59(2).

91. *See* Labor Contract Act of China, *id*.

92. Taoyuan Difang Fayuan [Taoyuan Dist. Ct.], Civil Division, 94 Lao-Su No. 5 (Oct. 13, 2005) (Taiwan).

eleven articles written in other countries, only one article criticized the provisions of China. It is surprising that the order of labor dispatching management can be established with such provisions. However, the effects of the labor dispatching provisions of China still needs to be observed as its long-term effects is still to be seen. China categorized the labor contract into three types. First is a "non-fixed-term type," the second is one a "fixed-term type" and the last one is a type of a term which is "based on the completion of a certain job." The labor dispatching contract falls into the last category. In other words, China regards the labor dispatching contract as the contract that exists from the beginning of that relationship different from Japan. To be more specific, in addition to the labor contract (fixed-term and non-fixed-term) as provided in the Labor Standard Act, Japan also provided for dispatched labor contracts in Labor Dispatching Act. The labor dispatching contract of Japan is an "extended" contract which is extended from a fixed-term contract. On the contrary, a dispatched labor contract of China coexists with a fixed-term and a non-fixed-term contract. The labor dispatching contract of China does not only address the temporary or long-term problems but also focuses on the function and the future performance of labor dispatching. Furthermore, the labor dispatching legal system has protected the wage and all the rights of dispatched workers. It seems that the labor dispatching legal system of China has met the need of the current situation in China, such as social mobility, convenience and the needs of professional workers. However, in Taiwan, all aspects of labor dispatching are still vague. All the efforts that society contributes seem to fall short of giving justice to the purpose of the Labor Standards Act. In practice, workers are being treated badly; even the foreign workers are accepted to do dispatching works.[93] China's standard of labor justice seems unachievable for Taiwan now.

VII. CONCLUSION AND SUGGESTIONS

From the discussion above, the Government Procurement Act affects the labor legal system directly. A third party clearly intervenes in the labor contract of "services procurement," and our government should not tolerate the injustice and the manner of indirect exploitation by obtaining supplementary workers to provide "chronic" or "regular" public services. Moreover, the Government Procurement Act should be reexamined by our country because, instead of providing justice, the Act only focuses on the procedures; and the "regular procurement" allowed has violated the labor legal system. The Council of Labor Affairs should contemplate on the

93. *See* Zuigao Hsingcheng Fayuan [Sup. Admin. Ct.], 94 Pan No. 881 (June 23, 2005) (Taiwan).

problem. Furthermore, the flawed provisions in the Government Procurement Act have resulted in mismanagement by the government sectors. Also the faults that our Council of Labor Affairs created are not corrected, but which regulation leads to two problems. The first is the misapplication of labor dispatching when the government procure services; and the other is, the arbitrary hiring of supplementary workers by "employment" or "labor dispatching" by government sectors.

Contracted workers, temporary workers and dispatched workers are the main non-typical workers that the government obtains. If obtaining dispatched workers is the correct manner to obtain typical workers, why does the government not acquire contracted workers by the same manner since contracted workers and temporary workers do not need to be recruited by way of the Government Procurement Act? All kinds of manners are acceptable, as long as they could fulfill the openness and fair justice of the Government Procurement Act. Even though Taiwan has enacted the Government Procurement Act, the Taiwanese government does not obtain non-typical workers by following the procedures stipulated in the Act. Whether workers should be obtained by contracting or by dispatching is hard to decide yet because the standard is hard to define. At present, the contracted workers are non-typical workers; however, if the government obtains them by dispatching, the workers may receive more advantages. According to the provisions, labor and health insurances are required for dispatched workers and the insurance and retirement welfare are what contracted workers need immediately, so at least these problems would be addressed. I am the most reluctant one to suggest transforming contracting to dispatching, but I can only suggest this because this would bring the least impact and damage.

Moreover, I have to emphasize again that labor dispatching still has a lot of issues in Taiwan, let alone the bigger problems that services procurement might bring. This paper utilizes the understanding of the Taichung District Court to advocate terminating the unnecessary misconceptions.

The various ideas that the verdicts presented were extremely different. Using the provision of the Civil Code to regulate labor affairs is the core reason why labor justice cannot be fulfilled. In order to resolve the complicated problems, I suggest that before Taiwan enacts the Labor Dispatching Act, the Taiwanese government should prohibit obtaining workers for public services; and the government sector which hires the "dispatched" workers should be prosecuted for its violations. On the other hand, if the government sectors regard hiring the dispatched worker as necessary, the illegal successive hiring by the "contracted employment regulations" should otherwise be banned. Moreover, contracted employed workers should be regarded as in "services procurement" and their rights

should also be safeguarded as the rights of dispatched workers. The next step should be to urge the government, especially the Executive Yuan or the Council of Labor Affairs to make a draft of "government services procurement contract (a model)" for the public to follow. Furthermore, the rights of a dispatched worker contained in the model should be the same as the rights of a normal contracted worker; and it should apply to all the labor legal systems because the rights of dispatched workers in the foreign countries is safeguarded in this manner too. The Labor Contract Act of China also has the same provision.

In addition, if the government sectors cannot accomplish the above actions, the public prosecutors should exercise their power and authority to examine the government sectors for the misapplication of dispatched workers or the intentional acquisition of illegal benefit from certain suppliers. After all, the labor justice system is the workers' last resort. However, under the services procurement, there are a great number of dispatched workers. They have been on trial for a long time because they try to appeal for protection on their own. The huge costs associated with lawsuits have become a terrible burden for them, and some of them are feeling excruciatingly helpless in the abject abyss. I hope that the government can offer help regularly and stop abusing the dispatched workers for convenience.

REFERENCES

Administrative Procedure Act, art. 174-1 (1999) (amended 2005) (Taiwan). Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawHistory.aspx?PCode=A0030055

Chen, E. Y.-T. (2008). Chengfu chi tsaikou tsai falu shang yiyi chih yenchiu [A study of the legal meanings of "government" and "procurement"]. *Huakang Fatsui* [*Huakang Law Review*]*, 42*, 1-21.

Chen, H.-s. (2006). *Woguo laotung paichien hsiangkuan falu wenti chih yenchiu* [*A study on the regulations related to labor dispatching*] (Unpublished LL.M. thesis). National Chung Cheng University, Chiayi, Taiwan. Retrieved from http://ndltd.ncl.edu.tw/cgi-bin/gs32/gsweb.cgi?o=dnclcdr&s=id=%22094CCU05227026%22.&searchmode=basic

Cheng, C.-C. (1999). Paichien laotung chih falu kuanhsi yu hsiangkuan falu wenti chih yenchiu [A study on the related legal problems and connected questions of labor dispatching act]. *Kuoli Chungcheng Tahsueh Fahsueh Chikan* [*National Chung Cheng University Law Journal*]*, 2*, 237-256.

Cheng, C.-C. (2000). Meikuo paichien laotung fachih chih yenchiu [A study on the labor dispatching system of the U.S.]. *Taiwan Laotung Fa Hsuehhui Hsuehpao* [*Labor Law Journal*]*, 1*, 123-150.

Cheng, C.-C. (2003). Tsung Meikuo laotung paichien fachih kan wokuo laotung paichien fa tsaoan [A comparative study on the laws governing dispatched employment in the U.S. and the dispatched employment bill in Taiwan]. *Kuoli Chungcheng Tahsueh Fahsueh Chikan* [*National Chung Cheng University Law Journal*]*, 10*, 37-98.

Chengfu Tsaikou Wang [Government e-Procurement System]. (2005, January 28). Laokung Paohsien Chu yehwu yenchiu chi weiwai tsoyeh [The research of the Bureau of Labor Insurance Affairs in the Taiwan region and the outsourcing affairs management contract]. Retrieved from http://web.pcc.gov.tw/tps/tpam/main/tps/tpam/tpam_tender_detail.do?searchMode=common&scope=F&primaryKey=1163547

Chengfu Tsaikou Wang [Government e-Procurement System]. (2005, March 21). Hsingcheng Yuan Weisheng Shu 94 nientu yenwu weiwai an [The services procurement of the Department of Health of Executive Yuan Contract, 2005]. Retrieved from http://web.pcc.gov.tw/tps/main/pms/tps/atm/atmAwardAction.do?newE

dit=false&searchMode=common&method=inquiryForPublic&pkAtmMain=1166786&tenderCaseNo=9356315

Chingchipu Panli Taitien Kungssu chi Chungyu Kungssu 95 Nien Hsinchin Chihyuan Chenshih Weiyuan Hui [2006 Recruit Committee of Taiwan Power Company and CPC Corporation Organized by Ministry of Economic Affairs]. (2006, June 9). Chingchipu panli Taitien Kungssu chi Chungyu Kungssu 95 nien hsinchin chihyuan chenshih chienchang [*2006 Recruit announcement of Taiwan Power Company and CPC Corporation organized by Ministry of Economic Affairs*]. Retrieved from http://www.taipower.com.tw/TaipowerWeb/upload/files/27/main_6_12_63.pdf

Chiu, C.-Y. (2000). Laokung paichien fachih chih yenchiu: Yi Jihpen Laokung paichien fa weili [The study of labor dispatching act: From the point of view of labor dispatching act of Japan]. *Taiwan Laotungfa Hsuehhui Hsuehpao* [*Labor Law Journal*]*, 1*, 1-68.

Chunghua Jenmin Kunghekuo Laotung Hetung Fa [Labor Contract Act of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), arts. 2, 56-67, 92(China).

Civil Code, arts. 258, 484, 529 (1929) (amended 2010) (Taiwan). Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=B0000001

Council of Lab. Aff., Executive Yuan, Lao-tung 1 No. 047494 (Oct. 30, 1997) (Taiwan).

Council of Lab. Aff., Executive Yuan, Lao-tung 1 No. 0970005320 (Mar. 3, 2008) (Taiwan).

Deng, S.-L. (1993). *Laotzu shihwu yenchiu* [*A study on employer-employee affairs*]. Taipei, Taiwan: Wu-Nan Book.

Deng, S.-L. (2005). *Laotung hsingchengfa lun* [*A study on labor administration law*]. Kaohsiung, Taiwan: Foundation of Chinese Labor Management Affairs.

Department of Personnel, Changhua County Government. (2006, Jul. 12). Changhuahsien Chengfu chi soshu chikung hsuehhsiao yuehpinku jenyuan chi linshih yuehpinku jenyuan kungkai chenhsuan yaotien [The public selecting regulations of Changhua County Government and subordinate schools' contracted workers and temporary workers]. Retrieved from http://www.chcg.gov.tw/personnel/02law/law01_con.asp?law_id=36

Dong, B.-H. (2007). *Shihda jetien shihchien toushih Laotung Hetong Fa* [*To*

study the Labor Contract Act through the 10 hot issues]. Beijing, China: Law Press.

Enforcement Rules of the Labor Standards Act, arts. 6(1), 6(2), 6(3), 6(4) (1985) (amended 2009) (Taiwan). Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0030002

Executive Yuan and Subordinate Agencies Contracted-Employment Regulations, art. 5 (1972) (amended 1982) (Taiwan). Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawHistory.aspx?PCode=S0110014

Gaodeng Fayuan [High Ct.], Civil Division, 94 Lao-Shang No. 7 (Sept. 22, 2005) (Taiwan).

Government Procurement Act, Arts. 1-3, 8, 9(1), 18, 20-22, 24, 67 (1998) (amended 2011) (Taiwan). Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030057

Hsieh, H.-Y. (2009). Meikuo lienpang tsaikou kueifan tihsi yu Taiwan tichu Talu tichu chengfu tsaikou tihsi chih pichiao yenchiu (shang) [A comparative study between the federal procurement system of the US and the government procurement system of Taiwan and China (Part I)]. *Chuankuo Lushih* [*Taiwan Bar Journal*]*, 13*(3), 116-131.

Hsingchengyuan chi Soshu Ke Chikuan Hsuehhsiao Linshih Jenyuan Chinyung chi Yunyung Yaotien [The Regulations of the Employment and Management of Temporary Workers of the Subordinate School Organizations of Executive Yuan], arts. 3, 7 (2008) (amended 2009) (Taiwan). Retrieved from www.cpa.gov.tw/public/Attachment/911259381518.doc

Huang, C.-G. (1996). Laotungfa [Labor Act]. Taipei, Taiwan: Angle.

J.Y. Interpretation No. 443 (1997) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=443

J.Y. Interpretation No. 526 (2001) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=526

Kaohsiung Difan Fayuan [Kaohsiung Dist. Ct.], Civil Division, 96 Chung-Lao-Su No. 5 (June 9, 2008) (Taiwan).

Katou, S. (1981). Kintou taiguu [Equal treatment]. In O. Kiyohiko (Ed.), *Roudou hanrei hyakusen daiyonhan* [*Selected cases of labor affairs*] (pp. 28-29). Tokyo, Japan: Yuhigaku.

Ke Chikuan Weito Chishu Kuwen Chikou Chengpan Chishu Fuwu Chuli Yaotien [Regulations Governing the Entrustment to the Technological

Consulting Organization Concerning Technological Service by Executive Yuan and Subordinated Agencies] (1999) (repealed 2004) (Taiwan). Retrieved from http://gisapsrv01.cpami.gov.tw/cpis/cpclass/appendix/bureaulaw.htm

Labor Standards Act, arts. 2, 5, 9 (1984) (amended 2011) (Taiwan). Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0030001

Liu, C.-C., Pan, H.-H., & He G.-X. (2006). Taitieh kungcheng laowu tsaikou chihsiao chipiao chih yenchiu [A study on performance measurement of services procurement of Taiwan public work]. *Taitieh Tzuliao Chikan* [*Taiwan Railway Journal*]*, 328*, 1-30.

Nishimura, K. (2006). *Hatarakuhito no houritsu nyumon* [*Legal Introduction of Labor*]. Tokyo, Japan: Yuhigaku.

ROUDOU HAKENZIGYOU NO TEKISETU NA UNEI NO KAKUHO OYOBI HAKENROUDOUSYA NO SYUUGYOU NO SEIBINADO NI KANSURU HOURITSU [HAKEN GIRI] [Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers] 1985, art. 2(2), 5, 26-28, 33, 40(5), 44 (Japan).

ROUDOU KIJUNHOU [Labor Standards Act] 2008, arts. 3, 5, 9, 14,69, (Japan).

Shieh, S.-F. (2008, May). Tsung Williamson te chiaoyi chengpen kuantien lun chengfu shihwu weiwai kuanli [Reconsiderations about government service contracting out: Oliver E. Williamson's Transaction cost approach]. *2008 TASPAA huopan juanhsi yu yunghsu fachan kuochi hsuehshu yentao hui* [*2008 collaborative partnership and sustainable development*]. Symposium conducted at the meeting of the Taiwan Association for School of Public Administration and Affairs of Tainan City, Taiwan. Retrieved from http://web.thu.edu.tw/g96540022/www/taspaa/essay/pdf/018.pdf

Sugeno, K. (1988). *Roudouhou* [*Labor Act*] (2d ed.). Tokyo, Japan: Koubundou.

Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 93 Chung-Lao-Su No. 3 (Jan. 25, 2006) (Taiwan).

Taichung Difang Fayuan [Taichung Dist. Ct.], Civil Division, 92 Chung-Su No. 776 (June 7, 2004) (Taiwan).

Tainan Hsienchengfu [Tainan County Government]. (2012, January 15). Tsaikou fanpen piaotan [The list of modeled contract of service procurement]. Retrieved from http://prc.tainan.gov.tw/u-form.asp

Taiwan Provincial Government, Fu-Chien 4 No. 118570 (Dec. 24, 1997).

Taiwan Telecommunication Network Trade Union, Gong No. 017 (Jan. 19, 2011).

Taiwansheng Chengfu Kungneng Yehwu yu Tsuchih Tiaocheng Chanhsing Tiaoli [Temporary Act on Function and Stucture Adjustment of Taiwan Provincial Government] (1998) (repealed 2025) (Taiwan). Retrieved from http://law.moj.gov.tw/LawClass/LawContent.aspx?PCODE=A0040012

Taoyuan Difang Fayuan [Taoyuan Dist. Ct.], Civil Division, 94 Lao-Su No. 5 (Oct. 13, 2005) (Taiwan).

Toi, H. (1999). *Kaisei roudou kijunhou* [*The amendment of Labor Standards Act*]. Tokyo, Japan: Yuhigaku.

Tsunetou, T. (Ed.) (1989). *Roudousha hogohou* [*Protecting labor act*]. Kyoto, Japan: Minerva Syobou.

Yang, T.-H. (2004). Taiwan laotung paichienfa lifa chih chuyi: Chihui yu fenghsien te pingheng [Suggestions on the legislation of Taiwan dispatched employment laws: A balance of opportunities and risks]. *Wankuo Falu* [*Formosa Transnational Law Review*]*, 138*, 32-49.

Zuigao Fayuan [Sup. Ct.], Civil Division, 81 Tai-Shang No. 347 (Feb. 27, 1992) (Taiwan).

Zuigao Hsingcheng Fayuan [Sup. Admin. Ct.], 94 Pan No. 881 (June 23, 2005) (Taiwan).

論勞務採購與勞動法制之關係

鄧 學 良

摘 要

政府部門常以勞務採購方式，運用政府採購法獲得所需的人力。如此的勞動力取得方式，實已涉及違反勞動基準法第5條與第6條之問題。前述採購之作法，雖然狀似外國法制中之勞動派遣，然而在我國目前無勞動派遣法的情況下，是屬於遁逃勞基法規範的脫法行為。況且將勞動派遣人力一用十餘年，亦為外國法制明文禁止之行為。這些問題的發生源自於政府採購法對勞務採購的不當設計，次則因政府長期慣於使用臨時人力造成。準此，本文主張我國宜儘早檢討公務人力應有之完整制度。

關鍵詞：政府採購法、勞務採購、勞動法制、定期契約、勞動派遣

Article

A More Economic and Cross-Jurisdiction Study on Patent Pools

Kung-Chung Liu*

ABSTRACT

This paper traces the growing acceptance of the more economic approach to IPR and competition law in state practices, and summarizes its characteristics. It then compares how five jurisdictions weigh the IPR licensing agreements against competition law in the context of patent pools, which have become critically effective mechanism for both patent enforcement and the deployment of new technology. It further analyzes the major difference found, namely the abuse of a dominant position by patent pools, and how to look at this difference and even how to harmonize it. It then moves on to study the impact of antitrust violation by patent pools on the cease-and-decease request based on IPR and on the licensing agreements. The concluding section brings forward three points worthy of further attention: the transparency of patent pools toward competition authorities, the need of maintaining comprehensive guidelines on IPR licensing agreements, and the effects that the more economic approach should pursue.

Keywords: *IPR, Competition Law, Patent Pool, Patent Enforcement, More Economic Approach, Per Se Rule, Rule of Reason, Abuse of Dominance*

* Research Professor, Institutum Iurisprudentiae, Academia Sinica; Professor, Institute of Law for Science and Technology, National Tsing Hua University; Adjunct Professor, Graduate Institute of Intellectual Property, National Chengchi University. E-mail: liukc@gate.sinica.edu.tw.

CONTENTS

I. INTRODUCTION

The traditional and normative view on the relationship between intellectual property rights (hereinafter IPR) and competition law[1] was that IPR was an 'exception' to competition law which applied only where IPR was used to constrain competition outside the scope of the exclusive right.[2] However, the dominant theory has evolved and now perceives a complementary relationship between IPR and competition law, with both sharing the common goal of promoting innovation and enhancing consumer welfare while balancing the interests of IPR holders on the one hand and the public interest,[3] competition in particular, on the other.

Nonetheless, different jurisdictions interpret and apply this complementary relationship differently when assessing the legality of various IPR licensing agreements. These differences can undermine cross-border IPR enforcement, the certainty and legitimacy of the IPR, and have ramifications on the development and use of new technologies. To bridge these differences, a more economic approach has been advocated, which takes into consideration the competitive effects of licensing agreements and supplements the ultimate legal judgment with objective measurement and evaluation, without however ignoring other values and normative concerns.

This paper endeavors to trace and confirm the growing acceptance of the more economic approach to IPR and competition law in state practices, and to pinpoint its characteristics. It then proceeds to compare how five jurisdictions (USA, EU, Japan, Korea and Taiwan) weigh the IPR licensing agreements against competition law in the context of patent pools, which

---

1. More than 100 countries around the world have adopted competition law in one way or another. *See* Christopher Bellamy, *Foreword* to BELLAMY & CHILD: EUROPEAN COMMUNITY LAW OF COMPETITION, at ix (Peter Roth & Vivien Rose eds., 6th ed. 2008).

2. *See* SHITEKI-DOKUSEN NO KINSHI OYOBI KŌSEITORHIKI NO KAKUHO NI KANSURU HŌRITSU [DOKUKINHŌ] [ACT ON PROHIBITION OF PRIVATE MONOPOLIZATION AND MAINT. OF FAIR TRADE] 1947, art. 21 (Japan) ("The provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the Copyright Act, Patent Act, Utility Model Act, Design Act or Trademark Act."); Fair Trade Act, art. 45 (1991) (amended 2011) (Taiwan), *available at* http://law.moj.gov.tw/Eng/LawClass/LawSearchNo.aspx?PC=J0150002&DF=&SNo=45; Dokjeom gyuje mit gongjeong geooraeae gwanhan beobyul [Monopoly Regulation and Fair Trade Act], Act No. 6651, Jan. 26, 2002, art. 59 (S. Kor.); Fanlungtuan Fa [Anti-monopolization Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 55 (China) (going a step further in prohibiting the abuse of IPR that eliminates or restricts competition, and "[t]his Law does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law.").

3. Josef Drexl et al., *Comments on the Draft Technology Transfer Block Exemption Regulation*, 35 INT'L REV. INTELL. PROP. & COMPETITION L. 187, 187-88 (2004); Josef Drexl, *Is there a 'more economic approach' to intellectual property and competition law?*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW 27, 35 (Josef Drexl ed., 2008).

have become critically effective mechanism for both patent enforcement and the deployment of new technology. This paper further analyzes the major difference found, namely the abuse of a dominant position by patent pools and how to look upon and even harmonize it. It then moves on to study the impact of antitrust violation by patent pools on the cease-and-decease request based on IPR and on the licensing agreements. The concluding section brings forward three points worthy of further attention: the transparency of patent pools toward competition authorities, the need of maintaining comprehensive guidelines on IPR licensing agreements, and the effects that the more economic approach should pursue.

II. THE ADOPTION OF THE MORE ECONOMIC APPROACH

To approach IPR from a more economic approach represents a sensible departure from the old-school "form(norm)-based" legalist dogma that failed to explain the rationale behind the IPR regime establishment and its shifting dynamics. An economic approach can help clarify IPR as absolute or natural rights and place it more reasonably in the ecology of numerous exchanges and mutual enrichment between the public and private sectors. Economically speaking, IPR is there to remedy market failure due to the nature of ipublic goods nature and not to engender market failure. In other words, IPR is not meant to cause monopoly power as such, nor does it guarantee profit for or recoupment of investment.[4] Competition-oriented legislation and interpretation of IPR is conducive to the promotion of competition in general and also an effective tool to put IPR in the evenhanded role of balancing competing interests.[5] As will be explained in the following, the more economic approach is gaining wider acceptance by nations around the world.

A. *USA*

The wholesale economic approach to IPR originates from the

4. *See* Drexl et al., *supra* note 3*, at* 45-46, 50-51.

5. Anti-Counterfeiting Trade Agreement art. 27, ¶ 3, Oct. 1, 2011, USTR-2010-0014 [hereinafter ACTA] ("Each Party shall endeavor to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition . . . . "), *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf. ACTA is probably the first international treaty to mention "preserving competition" in the context of IPR. Of course, whether this is just a lip service, remains to be seen. For related discussion, *see* ROBERTO D'ERME ET AL., OPINION OF EUROPEAN ACADEMICS ON ANTI-COUNTERFEITING TRADE AGREEMENT (2011), *available at* http://www.statewatch.org/news/2011/jul/acta-academics-opinion.pdf; EUROPEAN COMMISSION, COMMENTS ON THE "OPINION OF EUROPEAN ACADEMICS ON ANTI-COUNTERFEITING TRADE AGREEMENT" (Apr. 27, 2011), *available at* http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf.

Department of Justice (hereinafter 'DOJ') of the United States when it appointed the UC Berkeley economics professor Richard Gilbert as its Deputy Assistant Attorney General for Economics in 1993, who was the driving force behind the famous "Antitrust Guidelines for the Licensing of Intellectual Property" (hereinafter 'U.S. Guidelines') in 1995 by the DOJ and the Federal Trade Commission (hereinafter 'FTC'). The Guidelines continue and amplify the trend set by the 1986 watershed case of Windsurfing International, Inc. v. AMF, Inc., in which the alleged infringer in resorting to patent misuse was required to 'show that the patentee has impermissibly broadened the "physical or temporal scope" of the patent grant with anticompetitive effect, marking a clear deviation from the 1960s and 1970s when courts adopted per se rule of patent misuse and routinely refused to enforce patents where extension of the monopoly-type abuse was demonstrated, without requiring evidence of anticompetitive effect.

More than a decade later, the DOJ and the FTC issued in April 2007 the "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition" Report (hereinafter 'AE & IPR Report') which maintains that the U.S. Guidelines are an integral part of their analysis of IPR and antitrust issues.[6] The AE & IPR Report analyzes in great length the antitrust considerations for many licensing agreements, including patent pools, which makes it the most authoritative and discussed document in the field.

B. *EU*

The economic approach to IPR was uttered in Europe when the esteemed German Max Planck Institute for Foreign and International Patent, Copyright and Competition Law appointed new directors and changed its name that includes "Intellectual Property and Competition Law" (hereinafter 'Max Planck Institute') in 2002. The overall research profile of the Max Planck Institute as posted on its website states clearly "intellectual property should correctly be understood within the context of competition law". The Max Planck Institute's approach influences or inspires many European scholars.[7] A latest manifestation of such inspiration is seen in the Proposals

6. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) [hereinafter AE & IPR REP.], *available at* http://www.justice.gov/atr/public/hearings/ip/222655.pdf. Prior to the AE & IPR Report, the FTC issued a report entitled "To promote Innovation: The Proper Balance of Competition and Patent Law and Policy," to present its conclusions about and recommendation for the improvement of patent system to work with competition in the proper balance. *See* FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

7. *See*, *e.g.*, Christophe Geiger et al., *Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law*, 1 J. INTELL. PROPERTY, INFO. TECH. & ELEC. COM. L. 119 (July, 2010),

for Amendment of TRIPS by several European universities in cooperation with the Max Planck Institute which proposed a new Article 8b into the TRIPS Agreement to specifically address the interface between IPR and competition law.[8]

Beginning from the 1999 Umbrella Regulation on vertical agreements, the European Commission started to depart from the previous legalistic approach and introduced the new market-share approach.[9] The European Commission takes up an "economic-based approach" to IPR most notably in its Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (Technology Transfer Block Exemption Regulation, hereinafter 'EU TTBER'),[10] which replaces the 1996 Block Exemption Regulation on Technology Transfer Agreements. On the same day, the Commission issued the "Guidelines on the application of Article. 81 of the EC Treaty to technology transfer agreements" (hereinafter 'EU Guidelines') in order to provide guidance on the application of the EU TTBER as well as on the application of Article 81 to technology transfer agreements that fall outside the scope of the EU TTBER.[11]

---

http://www.jipitec.eu/issues/jipitec-1-2-2010/2621/Declaration-Balanced-Interpretation-Of-The-Three-Step-Test.pdf.

8. The Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS], *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm. The proposed new Article 8(b) titled "Interface Between Intellectual Property Rights and Competition Law" stipulates:

> 1. For the purposes of maintaining a fair balance between intellectual property rights and free competition: (a) Members shall provide for legislative or administrative measures, in particular, in the form of limitations of the rights or in the form of compulsory licenses, if the use of the product protected by an intellectual property right is indispensable for competition in the relevant market, unless the application of such measures would have a significantly negative effect on the incentives to invest in research and development; (b) Members should further provide for remedies if the use of an intellectual property right results in the abuse of a dominant position on the relevant market or in behaviour violating anti-trust principles. 2. To the extent that compliance with para. 1 depends on the establishment of an efficient system for control of competition, Art. 8.3 shall apply mutatis mutandis.

INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS 455 (Annette Kur & Marianne Levin eds., 2011).

9. Drexl et al., *supra* note 3, at 29.

10. Commission Regulation No. 772/2004, On the Application of Article 81(3) of the Treaty to Categories of Technology Transfer Agreements, 2004 O.J. (L 123) 11 [hereinafter EU TTBER], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0772:EN:HTML. All references to Articles 81 and 82 EC should be understood as references to the current Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter TFEU) as renamed by the Treaty of Lisbon, which entered into force on 1 December 2009. Article 101(1) prohibits cartel activities, (2) declares such activities automatically void, and (3) provides exceptions under certain conditions. Article 102 outlaws the abuse of dominant market position.

11. *Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements*, 2004 O.J. (C 101) 2 [hereinafter Guidelines on the Application of Art. 81], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0002:0042:EN:PDF. The EU TTBER has a rather limited scope of application. First, the Council Regulation 19/66 did not empower the Commission to block exempt technology transfer agreements concluded between more than two

C. *Japan*[12]

Article 21 of the Japanese Antimonopoly Act precludes the provisions of this Act from applying to acts recognizable as the exercise of rights under IPR law. The Japan Fair Trade Commission published the Guidelines for Patent and Know-how Licensing Agreements under the Antimonopoly Act on 30 July 1999. This was replaced by the Guidelines for the Use of Intellectual Property under the Antimonopoly Act (Japanese Guidelines) issued on 28 September 2007.[13] The Guidelines are applicable to those intellectual property rights that are concerned with technology. They are meant to comprehensively specify the principles by which the Antimonopoly Act is applied to restrictions pertaining to the use of technology.[14] In the Japanese Guidelines, the categorical classification has been diminished and a more flexible and economic approach has been adopted.[15]

D. *Korea*

Article 59 of the Korean Monopoly Regulation and Fair Trade Act states that the provisions of this Act shall not apply to any act deemed to be an exercise of rights under the Copyright Act, Patent Act, Utility Models Act, Design Act, or Trademark Act. The Korean Fair Trade Commission (hereinafter 'KFTC') issued Review Guidelines on Undue Exercise of Intellectual Property Rights in 2000 (last amendment on 31 March 2010,

---

undertakings. Consequently the EU TTBER only deals with technology transfer agreements between a licensor and a licensee (Recital 19). Second, the EU TTBER does not cover all IPR and is limited to licensing agreements that involve patent (including patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates) know-how, software copyright or the mix thereof (Article 1). Third, the EU TTBER excludes licensing agreements that set up technology pools (pooling of technologies with the purpose of licensing the created package of IPR to third parties) (Recital 7). However, to those technology transfer agreements concluded between more than two undertakings, including patent pools, which are of the same nature as those covered by the EU TTBER, the Commission will apply by analogy the principles set out in the EU TTBER (Guidelines on the Application of Art. 81 ¶ 40). EU TTBER, *supra* note 10, Recitals 7, 19, art. 1; Guidelines on the Application of Art. 81, ¶ 40.

12. For a comprehensive description of the development of the interface between IPR and competition law in Japan before 2005, *see* Christopher Heath, *The Interface Between Competition Law and Intellectual Property in Japan*, *in* THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY 250, 250-311 (Steven D. Anderman ed., 2007).

13. JAPAN FAIR TRADE COMM'N, GUIDELINES FOR THE USE OF INTELLECTUAL PROPERTY UNDER THE ANTIMONOPOLY ACT (2007) [hereinafter GU], *available at* http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/070928_IP_Guideline.pdf.

14. *Id*. pt. 1(2).

15. Junko Shibata, *Patent and Know-how Licenses Under the Japanese Antimonopoly Act*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW 201, 211 (Joseph Drexl ed., 2008).

hereinafter 'Korean Guidelines').[16] The Korean Guidelines also follow an economic approach. It is stated as one of its basic principles that,

> [I]n the event that the exercise of intellectual property rights produces the effects of impeding fair trade and improving efficiency at the same time, such exercise shall, in principle, be reviewed by comparing its positive and negative effects to determine whether or not the exercise is contrary to the Act. If the effect of improving efficiency outweighs the effect of impeding fair trade, it may be determined that the said exercise is not a breach of the Act.[17]

E. *Taiwan*

The Taiwanese FTA[18] prohibits the abuse of dominant market position (Article 10) and the forming of cartels (Article 14). In addition, the FTA also prohibits certain activities that are likely to restrain competition or to impede fair competition in relevant markets (Article. 19). With regard to the relationship between IPR and competition law, Article 45 of the FTA reads: "No provision of this law shall apply to any proper conduct in connection with the exercise of rights pursuant to the provisions of the Copyright Law, Trademark Law, or Patent Law."

The Taiwan Fair Trade Commission (hereinafter 'TFTC') promulgated Guidelines on Technology Licensing Agreements (hereinafter 'Taiwanese Guidelines') on 20 January 2001,[19] to explain how it would treat patents and/or know-how licensing agreements according to the FTA as a whole.[20] The Taiwanese Guidelines were revised in 2005 and 2007 exclusively for formatting reasons. In February 2009 the Taiwanese Guidelines were in part substantially amended, deleting the so-called gray clauses, leaving white clauses unchanged and expanding the coverage of the examples of prohibited clauses while completely relaxing the previous rigid stance of illegal per se. This was a move that implicitly followed the European Commission and the more economic approach. Its review and analysis

16. Review Guidelines on Undue Exercise of Intellectual Property Rights (2000) (amended 2010) (S. Kor.), *available at* http://eng.ftc.go.kr/files/static/Legal_Authority/Review%20Guidelines%20on%20Undue%20Exercise%20of%20Intellectual%20Property%20Rights.pdf.

17. *Id.* II(2)(C).

18. Fair Trade Act (1991) (amended 2011) (Taiwan), *available at* http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=J0150002.

19. Fair Trade Commission Disposal Direction (Guidelines) on Technology Licensing Arrangements (2001) (amended 2009) (Taiwan), *available at* http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=746&docid=10254.

20. *See id*. point 2.

emphasize on possible or actual restraint of competition or unfair competition created by such arrangements in the relevant goods, technology and innovation markets.[21]

III. THE CHARACTERISTICS OF THE MORE ECONOMIC APPROACH

There are at least three major features of the more economic approach to IPR and its licensing agreements, namely recognition of the economics of IPR, the intervention threshold and rule of reason.

A. *Recognition of the Economics of IPR*

The economics of IPR lies in its fundamental function of enhancing innovation and the development of new products and services (hereinafter 'dynamic competition'), and in its inherent characteristics such as the ease of misappropriation, high fixed costs exacerbated by low/zero marginal costs, uncertainty of right's boundary (claim interpretation in patent law, the likelihood of confusion and dilution in trademark law, the case-dependence of fair-use defense in the copyright law), and the value of IPR depends on combination of other factors of production.[22] If access to IPR is denied, the level of innovation would in principle be adversely impacted, as opposed to the denial of access to tangible property.[23]

The economics of IPR could legitimately take on different facets and paradigms in the highly connected global economy, especially when essential IPR that involves network effects, compatibility (not in the least backward compatibility), de jure or de facto standards, and popularity-induced indispensableness (e.g. pachinko machines in Japan) is at stake and possessed by dominant market players. As internal regulatory failures of IPR may exclude dynamic competition,[24] it is incumbent on IPR specialists to reform the IPR regime from within by following the more economic approach. In the patent field, it would be desirable to recognize that the maintenance of competition is a public policy objective worthy of protection via compulsory patent licensing.[25] Just as Reto Hilty convincingly argues that there are inherent competition policy considerations

21. *See id*. points 4(C)(ii) & 4(C)(vi).

22. AE & IPR REP., *supra* note 6, at 4.

23. Drexl et al., *supra* note 3, at 49-50; Reto Hilty, *Patent Enforcement*, *in* THE ENFORCEMENT OF PATENTS 11 (Kung-Chung Liu & Reto Hilty eds., Max Planck Series on Asian Intell. Prop. Set, 2011).

24. Drexl et al., *supra* note 3, at 53.

25. Kung-Chung Liu, *Rationalizing the Regime of Compulsory Patent Licensing by the Essential Facilities Doctrine*, 39 INT'L. REV. INTELL. PROP. & COMPETITION L. 757, 773 (2008); Rupprecht Podszun, *Lizenzverweigerung—Ernstfall im Verhältnis von Kartell- und Immaterialgüterrecht*, *in* JAHRBUCH KARTELL- UND WETTBEWERBSRECHT 57, 74 (Peter Matousek et al. eds., 2010).

in the compulsory licensing regimes both in the Berne and Paris Convention, compulsory patent licensing according to patent law (e.g. Article 24(1)(2) of the German Patent Act) also allows the intervention of compulsory licensing to eliminate problematic situations from the viewpoint of competition policy.[26]

In order to pursue the realization of such a goal, countries need to free themselves from the seemingly binding TRIPS Agreement. Commendably, the German Supreme Court took a liberal stance in interpreting the TRIPS Agreement in the "Orange-Book-Standard" case (May 6, 2009) decision.[27] It started from the assumption that Article 31 of the TRIPS Agreement in principle grants the right to use the patent without authorization from the patentee, so long as the permission is based on the circumstances of individual cases. In addition, condition of Article 31(b) (on reasonable commercial terms and conditions) is satisfied if the patent infringer prior to the commencement of use has tried fruitlessly to acquire a license on non-discriminating terms (Paragraph 28 of the decision).[28]

B. *Intervention Threshold*

IPR agreements would only harm competition if there was sufficient market power. Thus it is a popular practice among countries to set up intervention threshold (safety zone or harbor) that would exclude IPR agreements of minor market significance from scrutiny. Under the U.S. Guidelines (section 4.3), except under extraordinary circumstances, the DOJ and the FTC will not challenge a restraint in an IPR licensing arrangement if (1) the restraint is not prima facie anticompetitive[29] and (2) the licensor and

---

26. Reto Hilty, *Renaissance der Zwangzlizezen im Urheberrecht? Gedanken zu Ungereimtheiten auf der urheberrechtlichen Wertschöpfungskette*, 111 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 633, 641-42 (2009) (Ger.). Richard Li-Dar Wang argues for a compulsory license system that charges reach-through royalties, which are measured by the contribution that patented research inputs make to the individual research. *See* Richard Li-Dar Wang, *Biomedical Upstream Patenting and Scientific Research: The Case for Compulsory Licenses Bearing Reach—through Royalties*, 10 YALE J.L. & TECH. 251, 251 (2008).

27 Bundesgerichtshof [BGH] [Federal Court of Justice] May 6, 2009, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNG-REPORT ZIVILRECHT [NJW-RR] 1047, 2009 (Ger.).

28. Kuei-Jung Ni also argues for the freedom of Members to decide on the grounds for compulsory licensing, especially from the perspective of the Vienna Convention on the Law of Treaties. *See* Kuei-Jung Ni, *WTO Huiyuan Sheting Chiangchih Shouchuan Shihyu te Chuanhsien: Yi Weiyehna Tiaoyuehfa Kungyueh chih Chiehshih Yuantse Fenhsi Feilipu CD-R Chuanli Tehsu Shihshih Shihyu yu TRIPS te Hsiangkuanhsing* [*The Competence of a WTO Member in Determining the Grounds for Compulsory Licensing: The Compatibility of the Ground for Triggering Compulsory Licensing on Philips' CD-R Patents with the TRIPS Agreement in Light of the Vienna Convention on the Law of Treaties*], KUOLI TAIWAN TAHSUEH FAHSUEH LUNTSUNG [NTU L. J.], Sept. 2010, at 369, 415-16.

29. According to footnote 30 of the U.S. Guidelines, "facially anticompetitive" refers to restraints that normally warrant per se treatment, as well as other restraints of a kind that would always or almost always tend to reduce output or increase prices. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N,

its licensees collectively account for no more than 20% of each relevant market significantly affected by the restraint. The EU block exempts technology agreements by parties whose combined market share does not exceed 20% on the affected relevant technology and product market when they are competing undertakings. Where the undertakings parties to the agreements are not competing undertakings and the market share of each of the parties does not exceed 30% on the affected relevant technology and product market, the block exemption will also apply (Article 3 EU TTBER).

The Japanese Guidelines adopt a 20% threshold of sorts.[30] The Guidelines list cases where restrictions may have major impacts on competition (acts between competitors and when influential technologies are involved) and cases where restrictions are deemed to have minor effect in reducing competition. In principle, restrictions pertaining to the use of technology are deemed to have a minor effect in reducing competition when the entrepreneurs using the technology subject to the restrictions in the business activity have a share in the product market of 20% or less in total. This is not applicable however to the conduct of restricting sale prices, sales quantity, market share, sales territories or customers for the product incorporating the technology or to the conduct of restricting research and development activities or obliging entrepreneurs to assign rights or grant exclusive licenses for improved technology.[31] The impact of a particular restriction on competition in the technology market is also deemed to have a minor effect in reducing competition if the product share is in principle 20% or less in total.[32]

C. *Rule of Reason over Per Se Rule*

There are two types of per se rule: per se illegal and per se legal. Per se rule has its appeal and drawbacks. It can provide better legal certainty, but at the same time its rigidity is a mismatch for market and commercial realities. So following the more economic approach, the rule of reason gradually triumphs over the per se rule.

ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 22 n.30 (1995), *available at* http://www.justice.gov/atr/public/guidelines/0558.pdf.

30. *See* Ting-Tong Yen, *Jihpen Tuchan Chinchihfa Tuiyu Chishu Shouchuan Hsingwei chih Kueifan—Chienlun tui Wokuo Kungpingfa Kueifan chih Chishih* [*The Rules of Technology Licensing Agreements Under Japanese Antimonopoly Law—Reflections on Taiwan's Fair Trade Act*], KUNGPING CHIAOYI CHIKAN [FAIR TRADE Q.], July 2009, at 99, 108; Masako Wakui, *Standardisation and Patent Pools in Japan*, *in* VALUING INTELLECTUAL PROPERTY IN JAPAN, BRITAIN AND THE UNITED STATES 81, 99 (Ruth Taplin ed., 2004).

31. One referee inquires why the 20% threshold does not apply to such conducts. The Japanese Guidelines do not provide further explanation. Presumably it is because such conducts are in themselves cartels which are strictly prohibited. GU, *supra* note 13.

32. *Id.* pt. 2(5).

1. *Per Se Illegal Rule Phasing Out*

With regards to the per se illegal rule, the U.S. DOJ had in the 1970s demonstrated a general hostility toward patent licensing and ultimately promulgated a list of "Nine No-Nos" that were presumed per se violations of the antitrust laws.[33] However, the tide changed; by the early 1980s the DOJ began to repudiate the Nine No-Nos which were replaced by the 1995 Guidelines. The 1995 Guidelines basically take a rule of reason approach in the vast majority of cases. The per se illegal rule will only be applied in some cases where the courts have concluded that a restraint's "nature and necessary effect are so plainly anticompetitive" and accorded it an unlawful per se treatment (such as naked price-fixing, output restraints, and market division among horizontal competitors, as well as certain group boycotts and resale price maintenance) and that particular restraint does not in fact contribute to an efficiency-enhancing integration of economic activity. As a matter of fact, these per se illegal agreements are already illegal due to being illegal cartel or prohibited by law.

The EU TTBER follows the U.S. experiences and limits the hardcore clauses that are excluded from the benefit of block exemption and subject to individual assessment by the Commission to only the fixing of prices charged to third parties (Article 4).[34] Even according to Paragraph 75 of the

---

33.

> [T]he Nine No-Nos were: 1. Requiring a licensee to purchase unpatented materials from the licensor (tying). 2. Requiring a licensee to assign to the licensor patents issued to the licensee after the licensing arrangement is executed. 3. Restricting a purchaser of a patented product in the resale of that product. 4. Restricting a licensee's freedom to deal in products or services outside the scope of the patent. 5. Agreeing with a licensee that the licensor will not, without the licensee's consent, grant further licenses to any other person. 6. Requiring that the licensee accept a "package" license. 7. Requiring royalties not reasonably related to the licensee's sales of products covered by the patent. 8. Restricting the licensee's sales of (unpatented) goods made with the licensed patented process. 9. Requiring a licensee to adhere to specified or minimum prices in the sale of the licensed products.

Daniel P. Homiller, *Patent Misuse in Patent Pool Licensing: From National Harrow to "The Nine No-Nos" to Not Likely,* DUKE L. & TECH. REV. ¶ 13 (2006), *available at* http://www.law.duke.edu/journals/dltr/articles/pdf/2006dltr0007.pdf.

34. Among other things, Article 4 of the EU TTBER provides:

> 1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of a party's ability to determine its prices when selling products to third parties; . . . 2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties . . . .

EU TTBER, *supra* note 10, art. 4.

EU Guidelines, the Commission considers "that in the context of individual assessment hardcore restrictions will only in exceptional circumstances" fulfill the four conditions of the exception to the prohibition, and the term illegal per se was never used.

In parallel to the above-mentioned development, the Taiwanese Guidelines completely abolished the per se illegal position in 2009. The determination of the listed examples of prohibited clauses in Point 6 is either subject to the condition that it is "in a manner sufficient to influence the functions of the relevant market" or it is "likely to lessen competition or to impede fair competition in relevant markets."

Nevertheless, for countries on the importing side of the IPR licensing trade and undertakings, the per se illegal rule might have a special attraction as a tool to strengthen their bargaining position vis-a-vis powerful licensors from advanced countries, and to bluntly refuse certain clauses and lessen the burden of proving anticompetitive effects.[35] The Proposals for Amendment of TRIPS take a similar view in demanding members to take measures to prevent specific licensing practices without inquiring their anti-competitive effects: "Members shall adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of the Member concerned."[36]

2. *Per Se Legal Rule Remains a Rarity*

The per se legal rule, such as the White Clauses once enshrined in the EU TTBER, the Japanese Guidelines of 1999 and the still existing Point 5 in the Taiwanese Guidelines (Point 5), remains a rarity. Such a rule can turn out to be a straightjacket in practice, due to the fact that undertakings will be misled into believing that only those clauses listed are exempted and therefore avoid other clauses that are not listed, although they might in fact be procompetitive.[37]

---

35. According to § 39(1) of the Thai Patent Act, patentees may not impose restriction or any royalty term which is unjustifiably anti-competitive. Restrictions or terms which are unjustifiably anti-competitive shall be prescribed in the Ministerial Regulations. Patent Act B.E. 2522, § 39(1) (1979) (amended 1999) (Thai.).

36. TRIPS, s*upra* note 8, art. 40.

37. That is why the Max Planck Institute asserts in its Comments on the Draft Technology Transfer Block Exemption Regulation that with the abolition of the White Clauses, undertakings gain significantly more contractual leeway. *See* Drexl et al., *supra* note 3, at 188-89.

IV. PATENT POOLS IN THE ASSESSMENT OF NATIONAL AUTHORITIES

Patent pools are joint licensing agreements between plural right holders and licensees for a large number of patents with one royalty formula and package licensing of patents. This section will contrast the main viewpoints expressed by national agencies and thereby expose their common ground and divergence.

A. *USA*

1. *DOJ and FTC: Including Substitute Patents Not Presumptively Anticompetitive*

The U.S. Guidelines provide only a broad-brush assessment of patent pools: patent pool arrangements may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. However, pooling arrangements can have anticompetitive effects in certain circumstances. For example, collective price or output restraints in pooling arrangements, such as the joint marketing of pooled IPR with collective price setting or coordinated output restrictions, may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants.[38] The Guidelines stop short of shedding light on the competitive effects of including substitutes within a patent pool. But the DOJ's favorable business review letters regarding patent pools relied heavily on assurances from the parties that the pools contain only complementary patents; and the FTC's Summit-VISX Complaint challenged the combining of patents in a pool that were alleged to cover substitute technologies.[39]

However, the AE & IPR Report discusses this issue in detail and states that the Agencies' previous guidance should not be interpreted to exclude the possibility of including some substitutes in the pool and the Agencies will consider the inclusion of some substitutes as one of the many factors in their rule of reason analysis of any pooling agreement.[40] In other words, including substitute patents in a pool does not make the pool presumptively anticompetitive; competitive effects will be ascertained on a case-by-case basis.[41]

---

38. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 29, at 28.
39. AE & IPR REP., *supra* note 6, at 76.
40. *Id.* at 78.
41. *Id.* at 9.

2. *CAFC: Rule of Reason Analysis of Any Pooling Agreement*

The Court of Appeals for the Federal Circuit (hereinafter 'CAFC') expresses a similar rule of reason analysis of any pooling agreement in the long-running dispute over the patent package licenses offered by U.S. Philips Corp. on behalf of the CD-R patent pool[42] to compact disc makers, such as Princo, for compliance with the CD-R/RW standards.[43] After years of

42. Philips, Sony and Taiyo Yuden have developed standards through a series of Red Book, Yellow Book and Orange Book, pooled their patents on CD-R together and started to jointly license the pooled patents through a Joint Licensing Agreement (JLA) in 1992 with one royalty formula: 3% of the net sales price and not lower than 10 JPY. Philips was designated as the sole contact for licensing the pooled patents. The market price of a CD-R at the time the licensing agreements were entered into was approximately 300 JPY. As the market price of CD-Rs dropped drastically. The retail price of a CD-R disc was around USD 50 to USD 60 when it was first put on market in the early 1990s. When production started to gain momentum, the retail prices decreased to a level of around USD 10 to USD 15. By 1997, the trade price for a CD-R disc dropped significantly to around USD 2.55. By 2000, the worldwide prices for a CD-R disc fell further to USD 0.44 and continue to fall to USD 0.2 in 2006. *See Examination Procedure Concerning an Obstacle to Trade, Within the Meaning of Council Regulation (EC) No. 3286/94, Consisting of Measures Adopting by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu Affecting Patent Protection in Respect of Recordable Compact Discs*, ¶¶ 34-35 (Jan. 30, 2008) [hereinafter TBR REP.], *available at* http://trade.ec.europa.eu/doclib/docs/2008/january/tradoc_137633.pdf. The minimum royalty of 10 JPY became unbearable. However, Philips et al. refused to accommodate the repeated requests from Taiwanese licensees to lower the minimum royalty. Such licensing agreements and related practices have been challenged at least in Germany, Taiwan, and USA from the perspective of antitrust law.

43. At first the International Trade Commission (ITC) found Philips misused its patents, which was overruled by the CAFC. The CAFC remanded the case to the ITC for further proceedings because it had not addressed all the grounds on which the administrative law judge had based his ruling. On remand, the ITC first rejected Princo's argument that Philips committed patent misuse by combining with its horizontal competitors to fix the price of patent licenses in the market for licensing CD-R/RW patents. The ITC found that there was no evidence in the record that the patents in the joint package licenses covered technologies that were close substitutes, or that the pool licensors would have competed in the technology licensing market absent the pooling arrangements. Consequently, the ITC found that the joint package licenses had not been shown to constitute horizontal price fixing. In particular, the ITC rejected Princo's argument that Sony's Lagadec patent should not have been included in the patent packages. The ITC noted Philips's contention that claim 6 of the Lagadec patent covered a portion of the Orange Book standard and therefore was technically a "blocking patent," and explained if Philips was correct that Lagadec was a necessary part of the Orange Book patent package, then "no misuse flows from including the [Lagadec] patent in the joint licenses." Even if a license to the Lagadec patent was not necessary to manufacture Orange-Book-compliant discs, there was no merit to Princo's theories of patent misuse based on the Lagadec patent, because "there has been no showing that the Lagadec…patent competes with another patent in the pool, no showing that the pool licensors would have competed in the technology licensing market absent the pooling arrangement, and no showing of the anti-competitive effect required under a rule of reason analysis." With respect to the contention that including the Lagadec patent in the license packages enabled Philips to secure Sony's adherence to the Orange Book standards and thereby foreclose competition, the ITC found it speculative and unsupported by the evidence. Because there was no evidence that Sony would have entered the CD-R/RW market with a system based on the Lagadec technology and no evidence that such a system would have become a significant competitive force in that market, the Commission held that theory insufficient to support a finding of patent misuse. On Princo's appeal, a divided panel of the CAFC ruled against the ITC and Philips. Although the panel rejected several of Princo's arguments, it vacated the ITC's remedial orders and remanded the case for further proceedings on one issue: (1) whether Lagadec was a potentially workable alternative to the Orange Book technology and (2) whether Princo has established that Sony and Phillips agreed that Lagadec would not be licensed in

litigation, the CAFC, sitting en banc, upheld on 30 August 2010 the ITC's rejection of Princo's defense of patent misuse by an 8 to 2 vote for the following reasons and affirmed the ITC's orders granting relief against Princo:

(a) No Patent Misuse by Inducing a Third Party Not to License Its Separate, Competitive Technology

Given that the patent grant entitles the patentee to impose a broad range of conditions in licensing the right to practice the patent, the doctrine of patent misuse "has largely been confined to a handful of specific practices by which the patentee seemed to be trying to 'extend' his patent grant beyond its statutory limits."[44] Patent misuse is not available to a presumptive infringer simply because a patentee engages in some kind of wrongful commercial conduct, even conduct that may have anticompetitive effects.[45]

For the CAFC the decisive question was: When a patentee offers to license a patent, does he/she misuse that patent by inducing a third party not to license its separate, competitive technology? The CAFC opines that Princo has not pointed to any authority suggesting that such a scenario constitutes patent misuse, and nothing in the policy underlying the judge-made doctrine of patent misuse would support such a result.[46] The Orange Book licensing agreements control what the licensees may do; the purported agreement between Philips and Sony controls what Sony may do. Princo's underlying complaint is not that its license to the Raaymakers patents is unreasonably conditioned, but that the Lagadec patent has not been made available for non-Orange-Book uses. And that is not patent misuse under any court's definition of the term. If the purported agreement between Philips and Sony not to license the Lagadec technology is unlawful, that can only be under antitrust law, not patent misuse law; nothing about that agreement, if it exists, constitutes an exploitation of the Raaymakers patents against Philips' licensees.[47]

(b) Agreement Not to License Competing Technology Analyzed Under the Rule of Reason

Philips and Sony acted legitimately in choosing not to compete against

---

a manner allowing its development as competitive technology. *See* Princo Corp. v. Int'l Trade Com'n , 563 F.3d 1301 (Fed. Cir. 2009). Philips, Princo, and the ITC all filed petitions for rehearing en banc. The court granted the petitions filed by Philips and the ITC, but denied the petition filed by Princo. Although Philips and the ITC have raised a number of issues in their petitions and in their briefs on rehearing en banc, CAFC address only one—Philips's argument that regardless of whether Philips and Sony agreed to suppress the technology embodied in Sony's Lagadec patent, such an agreement would not constitute patent misuse and would not be a defense to Philips's claim of infringement against Princo.

44. Princo Corp. v. Int'l Trade Com'n, 616 F.3d 1318, 1329 (Fed. Cir. 2010).

45. *Id.*

46. *Id.* at 1331.

47. *Id.* at 1333.

their own joint venture. Princo failed to show that the asserted agreement had any anticompetitive effects because, as the ITC found, the Lagadec technology was not a viable potential competitor to the technology embodied in the Raaymakers patents.[48] Research joint ventures such as the one between Philips and Sony can have significant procompetitive features, and it is now well settled that an agreement among joint venturers to pool their research efforts is analyzed under the rule of reason.[49]

Cooperation by competitors in standard-setting "can provide procompetitive benefits the market would not otherwise provide, by allowing a number of different firms to produce and market competing products compatible with a single standard." Congress has recognized those procompetitive features and has directed that the activities of a "standards development organization while engaged in a standards development activity" are subject to the rule of reason.[50]

What Princo had to demonstrate was that there was a "reasonable probability" that the Lagadec technology, if available for licensing, would have matured into a competitive force in the storage technology market. It was not enough that there was some speculative possibility that Lagadec could have overcome the barriers to its technical feasibility and commercial success and become the basis for competing disc technology.[51] Princo has failed to show that the putative agreement between Sony and Philips not to license the Lagadec technology for non-Orange-Book purposes had any market effect at all—actual or prospective. The record and the findings of the ITC made it clear that the Lagadec technology lacked both the technical and the commercial prospects that would have made it a possible basis for a product that could compete with Orange-Book-compliant discs.[52]

B. *EU*[53]

The EU TTBER is of the opinion that the vast majority of licensing agreements is pro-competitive,[54] and therefore blocks exempt from the prohibition of Article 81(1) those technology transfer agreements that do not exceed the market thresholds and do not contain hardcore restrictions.

---

48. *Id.* at 1334.
49. *Id.* at 1334-35.
50. *Id.* at 1335-36.
51. *Id.* at 1338.
52. *Id.* at 1340. For a well-grounded critique of the decision that abridged patent misuse and created gap with antitrust law, *see* Richard Li-Dar Wang, *Deviated, Unsound, and Self-Retreating: A Critical Assessment of the* Princo v. ITC *en banc Decision*, 16 MARQ. INTELL. PROP. L. REV. 51, 51-79 (2012).
53. For a detailed overview of the EU situation, *see* GUY TRITTON, INTELLECTUAL PROPERTY IN EUROPE 888-912 (3d ed. 2008).
54. Guidelines on the Application of Art. 81, *supra* note 11, ¶ 17.

Consequently, the EU TTBER moves away from the approach of listing exempted clauses to an economics-based approach that distinguishes agreements between competitors from agreements between non-competitors (Recital 4 EU TTBER).[55] There is no presumption that technology transfer agreements falling outside of the block exemption are caught by Article 81(1),[56] they just need to be individually exempted by the Commission.

1. *Highly Intolerance of Patent Pools with Substitute Technologies*

As a general rule, the European Commission seems highly intolerant of patent pools which include substitute technologies and reverts almost to the illegal per se rule. According to the EU Guidelines, the competitive risks and the efficiency enhancing potential of technology pools depend to a large extent on the relationship between the pooled technologies and their relationship with technologies outside the pool. Therefore, two basic distinctions must be made: (a) between technological complements and substitutes; and (b) between essential and non-essential technologies.[57]

For the Commission, the inclusion in the pool of substitute technologies restricts inter-technology competition and amounts to collective bundling. Moreover, where the pool is substantially composed of substitute technologies, the arrangement amounts to price fixing between competitors. As a general rule the Commission considers that the inclusion of substitute technologies in the pool constitutes a violation of Article 81(1).[58] In addition, when patent pools support an industry standard or establish a de facto industry standard, they can result in a reduction of innovation by foreclosing alternative technologies by making it more difficult for new and improved technologies to enter the market.[59]

When a pool is composed only of technologies that are essential and therefore by necessity also complements, the creation of the pool as such generally falls outside Article 81(1), irrespective of the market position of the parties. However, the conditions on which licenses are granted may be

55. EU TTBER, *supra* note 10, Recital 4.

56. Guidelines on the Application of Art. 81, *supra* note 11, ¶ 37.

57. *Id.* ¶ 215. Two technologies are complements when they are both required to produce the product or carry out the process to which the technologies relate. Conversely, two technologies are substitutes when either technology allows the holder to produce the product or carry out the process to which the technologies relate. A technology is essential if there are no substitutes for that technology inside or outside the pool and the technology in question constitutes a necessary part of the package of technologies for the purposes of producing the product or carrying out the process to which the pool relates. A technology, for which there are no substitutes, remains essential as long as the technology is covered by at least one valid IPR. *See id*. ¶ 216.

58. *Id.* ¶ 219.

59. *Id.* ¶ 213.

caught by Article 81(1).[60] For example, where non-essential but complementary patents are included in the pool there is a risk of foreclosure of third party competitive technologies. In addition, the inclusion of technologies which are not necessary for the purposes of producing the pool-related product(s) or carrying out the process(es) will also force licensees to pay for technology that they may not need. When a pool encompasses non-essential technologies, the agreement is likely to be caught by Article 81(1) where the pool has a significant position on any relevant market.[61]

2. *Refusal to License the Pooled IPR: Concern About Competition in the Downstream Market*

According to the EU Guidelines, pools that hold a strong position on the market should be open and non-discriminatory[62] and where the pool has a dominant position on the market, royalties and other licensing terms should be fair and non-discriminatory and licenses should be non-exclusive.[63] It remains to be seen whether "pools that hold a strong position on the market should be open and non-discriminatory" means no refusal to license the pooled IPR by patent pools with dominant market position.

Noteworthy, however, is the "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" published on 9 February 2009 (EU Guidance Paper).[64] The EU Guidance Paper though only relates to abuses committed by single dominance (an undertaking holding a single dominant position) and excludes collective dominance (by two or more undertakings),[65] lists refusal to supply as abuse among other specific forms of abuse, such as exclusive dealing, tying and bundling, predation and margin squeeze.[66]

---

60. *Id.* ¶ 220.
61. *Id.* ¶ 221.
62. *Id.* ¶ 224.
63. *Id.* ¶ 226.
64. Communication from the Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 2, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF.
65. *Id.* ¶ 4. The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant market. *See id.* ¶ 14.
66. The EU Guidance Paper understands the concept of refusal to supply as covering a broad range of practices, such as a refusal to supply products to existing or new customers, refusal to license IPR, including when the license is necessary to provide interface information, or refusal to grant access to an essential facility or a network. *See id.* ¶ 78. Likewise, it is not necessary for there to be actual refusal on the part of a dominant undertaking; "constructive refusal" is sufficient. Constructive

> The Commission will consider an enforcement priority if all the three following circumstances are present: "the refusal relates to a product or service that is objectively necessary for undertakings to be able to compete effectively in a downstream market, the refusal is likely to lead to the elimination of effective competition in the downstream market, and the refusal is likely to lead to consumer harm.[67]

It is highly likely for the Commission to apply mutatis mutandis this standard to refusal to license the pooled patents by patent pools.

C. *Japan*

1. *Highly Intolerance of Patent Pools with Substitute Technologies*

According to the Japanese Guidelines, a patent pool can be useful in encouraging the effective use of technologies required for business activities and a patent pool itself does not immediately constitute an unreasonable restraint of trade. It is an unreasonable restraint of trade if the parties holding the rights to the substitute technologies in a particular technology market establish a patent pool and jointly set forth licensing conditions (including the scope of use of technologies) for their rights to substitute technologies and substantially restrain competition in the field of trade associated with these technologies. The Japanese Guidelines then refer to the scenario of a refusal to license by patent pools: "where entrepreneurs participating in a patent pool refuse to grant a license to any new entrant or any particular existing entrepreneurs without any reasonable grounds, to hinder it from using the technology, the restriction may fall under the exclusion of business activities of other entrepreneurs."[68]

---

refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply. *See id.* ¶ 79.

67. *Id.* ¶ 81.

68. GU, *supra* note 13, pt. 3(1)(i). In addition, consequent to the enactment of Law No. 51 of 2009 for amending the Antimonopoly Act in June 2009, the JFTC formulates on 18 October 2009 the "the Guidelines for the Exclusionary Private Monopolization under the Antimonopoly Act," which include refusal to supply as one of the four typical exclusionary conducts. The Japanese Exclusion Guidelines in principle respect an entrepreneur's discretion to select to whom and on what conditions it supplies products. However, if an entrepreneur carries out, beyond reasonable degree, refusal to supply, imposing restriction on the quantity or contents, or applies discriminatory treatment to the condition or implementation of supply in the upstream market concerning a product necessary for the trading customers to carry out business activities in the downstream market, such conduct may cause difficulty in the business activities in the downstream market of the trading customers who are unable to easily find an alternative supplier in the upstream market, and may undermine competition in the downstream market. Thus, carrying out refusal beyond reasonable degree concerning a product necessary for the trading customers to carry out business activities in the downstream market may fall

2. *If Refusal to License the Pooled IPR Substantially Restrains Competition: Private Monopolization*

The Japanese Guidelines also deal with the issue of refusal to license the pooled IPR s from the perspective of private monopolization pursuant the Antimonopoly Act. Restrictions by the right-holder to a technology such as not to grant a license for the use of the technology to an entrepreneur (including cases where the royalties requested are prohibitively expensive and the licensor's conduct is in effect equivalent to a refusal to license) is seen as an exercise of rights and normally constitutes no problem. However, if any such restriction is found to deviate from or run counter to the intent and objectives of the IPR systems, it is not recognizable as an exercise of rights. It then constitutes private monopolization if it substantially restrains competition in a particular field of trade and an infringement of Article 3 (prohibition of private monopolization or unreasonable restraint of trade) occurs.[69] In practice, in the 1997 pachinko game machines case the JFTC has found the refusal to license patents owned by 10 pachinko-manufacturing companies and administered by an association (Japan Amusement Machine Patent Managing Federation) to other pachinko-manufacturing companies a violation of Article 3 of the Antimonopoly Act.[70]

D. *Korea*

1. *Patent Pools with Substitute Technologies Likely to be Unjust*

If the technologies included in the patent pool are a substitute for one another, the exercise of rights related to such patent pool is likely to be determined as unjust. In addition, if unessential or invalid patents are included in the joint working of patents, there is a high possibility that the exercise of rights related to the relevant patent pool will be determined as unjust as it can increase a licensee's costs and unfairly allow invalid patents to exist.[71]

---

under exclusionary conduct. *See* JAPAN FAIR TRADE COMM'N, THE GUIDELINES FOR THE EXCLUSIONARY PRIVATE MONOPOLIZATION UNDER THE ANTIMONOPOLY ACT 5, 25 (2009) [hereinafter Japanese Exclusion Guidelines], *available at* http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/guidelines_exclusionary.pdf.

69. GU, *supra* note 13, pt. 3(1).

70. Wakui, *supra* note 30, at 92-93.

71. Review Guidelines on Undue Exercise of Intellectual Property Rights 17 (2000) (amended 2010) (S. Kor.), *available at* http://eng.ftc.go.kr/files/static/Legal_Authority/Review%20Guidelines%20on%20Undue%20Exercise%20of%20Intellectual%20Property%20Rights.pdf.

2. *Refusal to License Pooled IPR: Concerned About Fair Trade in the Relevant Market*

Act of unfairly rejecting the grant of license to non-participants in the patent pool or signing a license agreement with such non-participants on discriminatory conditions which threaten to impede fair trade in the relevant market, may be viewed as being outside the bounds of the just exercise of patent rights.[72]

F. *Taiwan*

1. *Much Emphasis on Not Including Substitute Patents in Patent Pool*

The Taiwanese Guidelines do not address the issue of patent pool at all. However, the TFTC has held that patent pools comprising of potentially substitutable patents by competitors, such as that between Philips, Sony and Taiyo Yuden (with a uniform royalty rate and a sole licensing channel), are cartel in disguise. However, the Taipei Administrative High Courts overruled on the following grounds: Local CD-R manufacturers must use all the patents owned by Philips et al in order to make CD-R; Using patents of any one of the three companies would not be sufficient to manufacture CD-R; therefore, patents owned by Philips et al were complementary in nature and every pooled patent was indispensable, which made the patented technology no longer substitutable, therefore no horizontal competitive relationship exited between Philips et al and Article 14 of the FTA that bans cartel could not be applied. The Taipei Administrative High Court's finding of "no substitutability for the patented technology and no competition relationship between Philips et al" was upheld by the Supreme Administrative Court as "ascertaining the facts according to the law."[73]

On 30 March 2011 the TFTC cleared the first patent pool that sought its

72. *Id.* at 16, 18.

73. For more details of the case and some critique, *see* Kung-Chung Liu & Wei-Ke Chien, *CD-R An chih Chiehhsi yu Pingshih—Yi Kungpingfa chi Chuanli Chiangchih Shouchuan wei Chunghsin* [*Analysis of and Comments on CD-R-related Cases: Focusing on Competition Law and Patent Compulsory Licensing Issues*], KUNGPING CHIAOYI CHIKAN [FAIR TRADE Q.], Jan. 2009, at 1-37; Shiow-Ming Wu, *Chuanli Lienmeng yu Kungpingfa chih Lienhe Hsingwei Kuanchih—Yi "Feilipu Kuangtieh An" chung Tiaokuei te Chingcheng Kuanhsi wei Hehsin, Shang* [*Patent Pool and the Regulation of Cartel According to the Fair Trade Act, Part I*], YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.], Nov. 2009, at 120-35; Shiow-Ming Wu, *Chuanli Lienmeng yu Kungpingfa chih Lienhe Hsingwei Kuanchih—Yi "Feilipu Kuangtieh An" chung Tiaokuei te Chingcheng Kuanhsi wei Hehsin, Hsia* [*Patent Pool and the Regulation of Cartel According to the Fair Trade Act, Part II*], YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.], Dec. 2009, at 85-101.

approval. The TFTC decided not to oppose the merger between Hitachi, Panasonic, Philips, Samsung, Sony and CyberLink which takes the form of a new company, One-Blue, with each company controlling one-sixth of its share. One-Blue will act as a licensing agent for the patent pool to license essential blue-ray disc (BD) patents for the manufacturing of back-ward compatible BD products (such as CD, DVD etc.). One-Blue assures that (1) the patent pool will be composed exclusively of patents that will be periodically reviewed by independent patent experts (selected by the Administrative Commission from independent and professional patent experts of different countries. The patent experts will provide their patent evaluation service on an hourly charge basis and the outcome of their evaluations on the patents essentiality have nothing to do with their compensations for the service) to be necessary, complementary and valid; (2) the patent pool will be open to all patent holders; (3) licensors of the patent pool are required to conduct individual licensing activities to any licensee on a FRAND (fair, reasonable, and non-discriminatory terms) basis; (4) licensors of the patent pool are prohibited from disclosing their confidential information, and shall not get access to licensee's information provided in the application of per-batch license before each shipment of product; (5) grant back is limited to essential patents, the royalties will be paid under the same royalty rate as the patent pool, and licensors of such grant back licensing are free to individually license their patents.

In order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraints and to ensure that participating parties will not restrain competition through the patent pool, the TFTC imposes the following conditions on participating parties and One-Blue[74]: (1) Not to engage in any concerted action by entering into any agreement that restricts the quantities or prices of the BD products or by exchanging important transaction information; (2) Not to restrict licensees' use of technology, trading counterparts and product prices; (3) Not to restrict licensees from challenging the essentiality and validity of the licensed patents; (4) Not to restrict licensees from researching and developing, manufacturing, using and selling the competitive products and/or adopting competitive technologies within the license term or after the expiration of the license; (5) Not to refuse to provide licensees with the content, scope and term of the licensed patents; (6) To provide executed copies of the pool agreements for the TFTC's review.[75]

It is evident that the TFTC puts much emphasis on the fact that substitute patents are not included in the patent pool, and strives to avoid

74. Fair Trde Comm'n, Kungchieh No. 100002 (Mar. 31, 2011) (Taiwan), *available at* http://www.ftc.gov.tw/uploadDecision/fc229308-2070-4498-9f4e-a845bcea7c55.pdf.

75. *Id.*

restraint of licensees' freedom to decide prices, use or challenge the pooled patents, and to research and develop competitive products or technologies. In addition, it is noteworthy that the TFTC abandons its prior skepticism about the sole licensing channel through a particular pool member it exhibited against the CD-R patent pool and concludes that "Therefore, licensing the essential BD patents through a patent pool is expected to make it easier for Taiwanese manufactures to obtain the license of essential patents, to lower the transaction cost and to avoid the risk of infringement and litigation, which will make it easier for Taiwanese manufactures to compete with each other for consumer's interest."

2. *Refusal to License Pooled IPR via Refusing Royalty Negotiation: Abuse of Monopolistic Position*

The Taiwanese Guidelines do not deal with the abuse of monopolistic market power derived from patent pools. However, the CD-R cases prompted the TFTC to interpret and apply Article 10 (abuse of monopolistic market power) to the refusal to license the pooled patents. In 2000, Philips et al were accused of abusing their monopoly power in the CD-R market through the JLA by demanding excessive royalties and obscuring information about the patents to be licensed. Philips et al were further accused of engaging in cartels by bundling patents and licensing in packages, tying in patents that had already expired. In January 2001 the TFTC found that Philips et al had a joint monopoly power in the CD-R patent-licensing technology market because they own all the important patents for the manufacture of CD-R. From the drastic price drop and the sixty-fold growth in volume worldwide, the TFTC concluded that the maintenance of the minimum royalty of 10 JPY and the refusal to negotiate on a royalty scheme to match the market situation would give rise to the situation where Philips et al would earn royalties between twenty to sixty times more than the expected amount; hence Philips et al were guilty of abusing their joint monopoly power and violated Article 10(2) of the FTA. The Taipei Administrative High Court and the Supreme Administrative Court concurred with this finding.[76]

76. Fair Trade Comm'n, Kungchu No. 098156 (Oct. 20, 2009) (Taiwan), *available at* http://www.ftc.gov.tw/uploadDecision/faed94a8-34ce-4f8e-b59a-239a9eaece1d.pdf. The TFTC's determination of the relevant product market has not been upheld. But on remand the TFTC reached the same conclusions, which was appealed to and upheld by the Executive Yuan, the Taipei Administrative High Court and the Administrative Supreme Court. However, the Taipei Administrative High Court took into consideration the fact that the TFTC imposed different fines on Philips, Sony and Taiyo Yuden respectively in one administrative decision (not three administrative decisions) and found itself unable to render an "affirmed-in-part, vacated-in-part" decision and instead compelled to rescind the TFTC's decision as a whole. Both the TFTC and Phillips et al. appealed the case to the Supreme Administrative Court which rejected the appeal in 2007 and the retrial appeal by

V. MAJOR DIFFERENCE—HOW TO LOOK UPON AND HARMONIZE IT

The following analysis will identify the area where countries are most divided, arguably the abuse of a dominant position by patent pools, and discuss how we should look upon the major difference and harmonize it via the governance of patent pools.

A. *The Dividing Line: Abuse of a Dominant Position by Patent Pools*

There is a fundamental difference between U.S. and European antitrust law, namely that U.S. antitrust law does not have any specific regulation on the abuse of dominant position while the European antitrust law (mirrored by countries including China, Japan, Korea, and Taiwan) does. According to the latter, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on its merits. However, a dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition in the market. Patent pools often give rise to a dominant position in the licensing (or technology) market which in turns triggers the issue of the abuse of such dominance.[77] The abuse of dominance is commonly embodied in the form of refusal to license and charging prohibitive royalty.

1. *Refusal to License*

The unilateral, unconditional refusal to license patents by individual patentee is a core part of the patent grant. Accordingly, the AE & IPR REPORT states "Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections."[78] However, the unilateral,

---

the TFTC in 2009. So the case was remanded back to the TFTC for further treatment. On 29 October 2009 the TFTC again comes to the same conclusion that Philips et al. had violated Articles 10(2) and (4) of the FTA in the following exploitative abuse of monopoly power: refusing to renegotiate royalty with licensees while there have been significant changes on the market. For more details, *see* Kung-Chung Liu, *The Taiwanese "Philips" CD-R Cases: Abuses of a Monopolistic Position, Cartel and Compulsory Patent Licensing*, *in* LANDMARK INTELLECTUAL PROPERTY CASES AND THEIR LEGACY 83-104 (Christopher Heath & Anselm Kamperman Sanders eds., 2010).

77. For jurisdictions that have special regulation on dominance, there exist also thresholds of sorts. Under the Japanese Exclusion Guidelines, the JFTC will prioritize the case where the share of the product that the said entrepreneur supplies exceeds approximately 50% after the commencement of such conduct and where the conduct is deemed to have a serious impact on the lives of the citizenry, comprehensively considering the relevant factors such as market size, scope of business activities of the said entrepreneur, and characteristics of the product. For the European Commission dominance is not likely if the undertaking's market share is below 40% in the relevant market. *See supra* note 64, ¶ 14.

78. AE & IPR REP., *supra* note 6, at 6. However, AE & IPR Report continues to say on the same page that "conditional refusals to license that cause competitive harm are subject to antitrust liability,"

unconditional refusal to license by patent pools, especially those holding dominant market position cannot be equally harmless, especially in jurisdictions with abuse-of-dominance antitrust law.[79] The AE & IPR REPORT in the context of patent pools is only willing to recall that the DOJ relied on the representations made by pool proponents that the license agreement would be available to all interested licensees.[80]

Under what conditions will a refusal to license by patent pools with dominant market power constitute an abuse of dominance? The German Supreme Court in the "Orange-Book-Standard" has drawn a fine line that can be followed by other countries with European-style antitrust law: dominant patent pools only abuse their dominant market position and act faithlessly when the following two conditions have been satisfied: (1) the license-seeking party must have made an unconditional offer to sign a licensing agreement and abided by the offer, which the patentee if refused to accept would have inequitably excluded the license-seeking party or violated the prohibition of discrimination; (2) the license-seeking party who has already used the patent must abide by the obligations which the to-be-signed licensing agreement attaches to the use of the licensed object, before the patentee accepts the offer. This means in particular that the license-seeking party must pay or guarantee the payment of royalties resulting from the licensing agreement (Paragraph 29 of the Orange-Book-Standard decision).[81]

An issue related to the refusal to license by patent pools is the refusal to grant partial-pool licenses. Its competitive effects are discussed below.

2. *Charging Prohibitive Royalty*

Collective royalty setting is an integral part of pooling agreements for the avoidance of royalty stacking with individual IPR holders charging royalties on top of royalties already charged by other IPR holders (double marginalization),which would make royalties prohibitively high. Collective royalty setting can also send out a clear price signal to on-lookers who are contemplating entering the market but are hesitant due to the uncertainty of royalties.

However, royalty set by patent pools can be excessive. Based on Article 102 TFEU, the European Court of Justice is prepared to find that an excessive royalty is an abuse of dominant position as it pronounced in the 1987 Basset v. SACEM case (Case 402/85) that "it was possible that the

---

without giving any specific example of such conditional refusals.

79. TRITTON, *supra* note 53, at 1075-77.

80. *See* AE & IPR REP., *supra* note 6, at 71-72.

81. Bundesgerichtshof [BGH] [Federal Court of Justice] May 6, 2009, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNG-REPORT ZIVILRECHT [NJW-RR] 1049, 2009 (Ger.).

level of royalty fixed by a copyright society is such that Article 82 may be applied".[82]In contrast, the U.S. DOJ and FTC will not generally assess the reasonableness of royalties set by a pool and their analysis will focus on the pool's formation and whether its structure would likely enable pool participants to impair competition.[83] Nor does the CAFC accept the "assumption that a license to fewer than all the patents in a package would presumably carry a lower fee than the package" because it "ignores the reality that the value of any patent package is largely, if not entirely, based on the patents that are essential to the technology in question."[84] "It is entirely rational for a patentee who has a patent that is essential to particular technology, as well as other patents that are not essential, to charge what the market will bear for the essential patent and to offer the others for free."[85] Following that line of thought, the AE & IPR Report concludes that:

> In general, a refusal to license less than all of a pool's intellectual property will not raise competitive concerns, provided that the licensors retain the ability to license their patents individually and the pool's design is otherwise procompetitive. In this way, licensees are not required to purchase access to more technology than they need.[86]

In setting royalties, there are at least two ways of doing so, that is. percentage-wise or by charging a fixed amount. Royalty by percentage can fluctuate with the price levels on the market and is very popular,[87] but suffers from licensees underreporting the prices they sold the patented products. Conversely, fixed amounts of royalty protect the minimum returns collectable for licensors, but are equally plagued with licensees underreporting product volume sold. However, fixed amounts of royalty by patent pools are likely subject to stricter examination in the event that the prices of the patented product fall significantly such that the fixed amount of royalty results in an abusive use of dominant market power.

In addition, collective royalty setting should not prevent licensees of patent pools from only choosing and paying for patents that they actually need, in order to avoid tie-in, unfairness against technologically more advanced licensees, and the foreclosure of (potentially) competitive

82. TRITTON, *supra* note 53, at 1074-75.
83. AE & IPR REP., *supra* note 6, at 9.
84. U.S. Philips Corp. v. Int'l Trade Comm'n, 424 F.3d 1179, 1191 (Fed. Cir. 2005).
85. *Id.*
86. AE & IPR REP., *supra* note 6, at 84.
87. In Germany, the remuneration of employees for their contribution to the granted patents owned by the companies they work for is commonly calculated according to percentage. *See* ORTWIN HELLEBRAND ET AL., LIZENZSÄTZE FÜR TECHNISCHE ERFINDUNGEN 57-76 (2006).

technology. The EU Guidelines (Paragraph. 229), Japanese Guidelines (Part 4-5-(4)), Korean Guidelines (p. 18), and the Taiwanese Guidelines (Point 6(2)(xii)) are all very mindful of the risk that invalid patents may be included in the package, which would force licensees to pay higher royalties and prevent innovation in the field covered by the invalid patents. Consequently, the practice of package licensing "essential" and "non-essential" patents at one price will seem to be questionable in these jurisdictions.[88]

B. *How to Look Upon Differences*

To some people differences between jurisdictions are a source of legal uncertainty and costs and would see their complete eradication as the most desirable result of comparative legal study. However, differences reflect divergent legal background and social values. Therefore no one law and treatment of patent pools is in itself better than the other and demands deference. A forced unification of differences would not only impair national sovereignty, but also neglects and possibly even negate the potential they might hold for solving the pooling problems in the future.[89] Bearing in mind the major difference identified in the preceding subsection, the following discussion will deal with the issue of patent pool governance and hope to use this as an effective vehicle to bridge the difference.

C. *The Governance of Patent Pools*

Despite the widely acknowledged integrative efficiency-enhancing benefits, patent pools consisting of substitutes held by competitors can facilitate horizontal collusion that would reduce price and inter-technology competition and lead to margin squeeze.[90] Patent pools comprised of complementary and non-essential patents raise the danger of foreclosing third party new R&D and innovation and forcing licensees to pay for technology that they may not need. To offset these perils and maximize the

88. For example, Philips offered four different pools of patents for licensing: (1) a joint CD-R patent pool that included patents owned by Philips and two other companies (Sony and Taiyo Yuden); (2) a joint CD-RW patent pool that included patents owned by Philips and two other companies (Sony and Ricoh); (3) a CD-R patent pool that included only patents owned by Philips; and (4) a CD-RW patent pool that included only patents owned by Philips. After 2001 Philips offered additional package options by grouping its patents into two categories, "essential" and "nonessential" for producing compact discs compliant with the technical standards set forth in the Orange Book. The "essential" and "nonessential" patents are licensed in package; however licensees do not have to pay any additional royalty fee for "nonessential" patents. *See U.S. Philips Corp.*, 424 F.3d at 1182.

89. Hanns Ullrich, *Patent Pools—Policy and Problems*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW 139, 161 (Joseph Drexl ed., 2008).

90. Rudolf Peritz, *Competition Policy and Its Implications for Intellectual Property Rights in the United States*, *in* THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY 214-15 (Steven D. Anderman ed., 2007).

pro-competitive effects of patent pools, first and foremost, patent pools must be subject to good governance. Good governance of patent pools requires at least an independent oversight mechanism with internal and external openness and firewalls.

1. *Independent Patent Controller*

Without exception, the patent pools to whom the U.S. DOJ issued business review letters have all engaged an independent expert to exclude substitute technologies and to admit to the pool only those complementary patents essential to manufacturing products complying with the product standards.[91] The One-Blue patent pool is the latest case in point. It is therefore imperative to have a neutral third party expert, both technically and financially not bound by the patent pools, to conduct technical evaluation, either upon his own initiative or request, with regard to the essentiality and substitutability of the pooled patents and confidential know-how.[92] With an independent patent controller put in place, the related legality elaborations surrounding the no challenge clause would be superfluous.[93]

2. *Openness*

Openness of patent pools can ease the burden of competent agencies in discerning procompetitive ones from the anti-competitive and help prevent patent pools from denaturing into cartels and means to monopolizing the market. To ensure external openness, patent pools should allow licensors to retain the right to license their patents individually and the license agreement should be available to all interested licensees.[94] With respect to internal openness, patent pools should provide a clear understanding of the contents

91. AE & IPR REP., *supra* note 6, at 71.

92. Guidelines on the Application of Art. 81, *supra* note 11, ¶¶ 225, 232. *See also* Wakui, *supra* note 30, at 101.

93. Art. 5 (1)(c) of the EU TTBER states that any direct or indirect obligation on the licensee not to challenge the validity of IPRs held by the licensor shall not be block exempted, provided that without prejudice to the possibility of terminating the technology transfer agreement in the event that the licensee challenges the validity of one or more of the licensed IPR. Point 7 of the Taiwanese Guidelines provides that licensing arrangements that involve restrictions on the licensee's ability to challenge the validity of the licensed technology and are likely to restrain competition or to impede fair competition in relevant markets would probably contravene Article 19(6) of the FTA. In practice, the TFTC found the demand by Philips et al. that the Taiwanese licensees withdraw their invalidity applications against patents held by Philips et al. as a precondition for concluding the licensing contracts an improper exercise of patent rights and amounted to exploitative abuse of monopoly power derived from such patents and therefore violated Art. 10(4) of the FTA. The Taipei Administrative High Court and the Administrative Supreme Court concurred with the TFTC on its ruling. For more details, *see* Fair Trade Comm'n, *supra* note 75.

94. *See* AE & IPR REP., *supra* note 6, at 71-72. *See also* Wakui, *supra* note 30, at 102-03.

of the license,[95] and the scope, terms and number of the patents owned by each licensor.[96]

3. *Firewalls*

An antithesis to internal openness needs to be mentioned, namely the necessity to establish firewalls within patent pools. Often, in the names of overcoming underreporting by the licensee and calculating accurate royalty, competitively sensitive information such as pricing and output data and sales reports are asked to be provided to the pool administrator or licensors.[97] The exchange or provision of such information will lead to collusion among patent pool members who are (potential) competitors. To preempt such attempts, there should be a safeguard mechanism installed in patent pools to prevent the departments other than the one overseeing the execution of licensing agreements from gaining access to the business secrets of others and using them to gain competitive advantages. In the US, the MPEG-2 patent pool hired an independent licensing administrator so that the licensors would not be privy to information gathered from other pool participants; in both DVD patent pools, the parties designed "walls" to sufficiently limit access to each other's sensitive information.[98]

Out of similar concerns for the institutional framework governing pool management, the EU Guidelines state:

---

95. AE & IPR REP., *supra* note 6, at 72.

96. The TFTC has found Philips et al. elusive about important trading information, such as the contents, scope, terms and number of patents they individually owned and constituted a so-called exploitative abuse of monopoly power and therefore violated Article 10(4) of the FTA. The Taipei Administrative High Court and the Administrative Supreme Court concurred with the TFTC's ruling. *See* Zuigao Hsingcheng Fayuan [Sup. Admin. Ct.], 96 Pan No. 553 (2007) (Taiwan).

97. In Taiwan an actual legal case was fought over the legality of the licensor's demanding of the list of manufacturing equipments and the sales reports to be provided by the licensee. The TFTC was of the opinion that such demand was categorically illegal, a violation of the general clause against unfair competition, namely Article 24 of the FTA ("in addition to what is provided for in this Law, no enterprise shall otherwise have any deceptive or obviously unfair conduct sufficient to affect trading order.") and fined Philips NTD 6 million for imposing such demand on its CD-R patents licensees in Taiwan, *see* Taiwan Fair Trade Comm'n, Kungchu No. 095045 (2006) (Taiwan). However, the Taipei Administrative High Court did not see the "list of manufacturing equipments, suppliers, dates of installing and testing" as trade secrets of the licensees because the licensor knew already the manufacturing procedures (the same across all CD-R manufacturers) and equipments, and many other factors (e.g. orders, actual work dispatch and operation, and prices of dyes and PCs) contributed to the price determination of CD-R. At the same time, the Court found a violation of Article 24 of the FTA in Philips' demanding of the information about the identification of CD-R buyers and the trademarks used by the buyers to be contained in the "written sales report." For the Court these were sensitive business information and unrelated to the calculation of royalty, not even after taking into account of the common phenomenon of underreporting by the licensees, which can be dealt with through other lawful means. The Supreme Administrative Court upheld this decision. The Supreme Administrative Court rejected both the appeals filed by the TFTC and Philips for their failing to raise an issue of law, *see* Zuigao Hsingcheng Fayuan [Sup. Admin. Ct.], 99 Tsai No. 2028 (2010) (Taiwan).

98. AE & IPR REP., *supra* note 6, at 82.

> In oligopolistic markets exchanges of sensitive information such as pricing and output data may facilitate collusion. In such cases the Commission will take into account to what extent safeguards have been put in place, which ensures that sensitive information is not exchanged. An independent expert or licensing body may play an important role in this respect by ensuring that output and sales data, which may be necessary for the purposes of calculating and verifying royalties is not disclosed to undertakings that compete on affected markets.[99]

VI. THE IMPACT OF ANTITRUST VIOLATION BY PATENT POOLS ON IPR

A. *On the Cease-and-Decease Request Based on IPR*

As a relevant issue caught in the intersection between IPR and competition law is whether the cease-and-decease request based on IPR is barred by the determination of an antitrust law violation on the part of the IPR-holder In the US, the answer would likely be the affirmative if a patent misuse has been determined under competition law on the ground that the patentee has asserted the patent in an anticompetitive way, akin to an antitrust violation. As long as the patent owner is using his patent in violation of the antitrust laws, he cannot restrain infringement of it by others. This is also otherwise known as the unenforceability of patents. The German Supreme Court answered a similar question (whether the cease-and-decease request based on Article 139(1) of the German Patent Act can be countered by a claim derived from competition law, namely Article 33(1) of the Anti-Cartel Law in combination with Article 82 EC or Articles 19 and 20 of the Anti-Cartel Law) also positively in the "Orange-Book-Standard" case with a rather simple reason: Behavior that is prohibited by competition law cannot be ordered by the courts. It further reasoned that when a dominant undertaking discriminates against the license-seeking undertaking or inequitably excludes it by refusing to accept its offer to signing a licensing agreement, then the enforcement of the cease-and-decease request according to the Patent Act by the dominant undertaking would be an abuse of the dominant market position (Paragraph 27 Orange-Book-Standard).[100]

B. *On IPR Licensing Agreement*

In cases where IPR licensing agreements have been found by the

99. Guidelines on the Application of Art. 81, *supra* note 11, ¶ 234.

100. Bundesgerichtshof [BGH] [Federal Court of Justice] May 6, 2009, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNG-REPORT ZIVILRECHT [NJW-RR], 1049, 2009 (Ger.).

authorities as violating antitrust law, what impact would it have on such agreements? At least the royalty should be adjusted in accordance with equitable estimation to a certain degree that would complement the IPR with competition law. Bewilderingly, the question has first been answered negatively by the Taiwan Intellectual Property Court (IP Court) with very straightforward reasoning: the licensing agreement is valid notwithstanding the fact that abusively high royalty demanded by a dominant patent pool has violated the FTA.[101] Among its flawed reasoning,[102] above all, it contradicts the final decision of the administrative courts which found abuse of collective monopoly power by improperly maintaining high royalties via the continual charge of the same high royalties.

In contrast, the German Supreme Court correctly acknowledges a co-relationship between antitrust law and patent law in the "Orange-Book-Standard" decision and came to a different conclusion in a similar case: damages that the patentee can demand from an unauthorized infringer who has a right to compulsory license according to the competition law are limited to an amount that is uncontroversial according to the German Anti-Cartel Law.[103] So long as the infringer has made an unconditional offer

101. The Hsinchu District Court first suspended the royalty payment suit brought by Philips against its former licensee Princo due to the then pending antitrust cases brought by Princo against Philips. The Hsinchu District Court came to a decision on 15 August 2008 and awarded Philips the full royalty of 2,353,850,000 JPY (calculated by 10 JPY per CD-R produced by Princo, total number of production: 235,385,000), with a monthly interest of 2% as agreed in the licensing agreement for the belated payment. A monthly interest of 2% equals an annual interest of 24%, despite the fact that the Supreme Administrative Court, the Taipei Administrative High Court and the TFTC all found that Philips violated the FTA by refusing to negotiate royalty and hence maintaining improperly high royalty with Princo. The Intellectual Property Court concurred and did not question the unreasonableness of the royalty either, *see* Chihhui Tsaichan Fayuan [Intell. Prop. Ct.], 97 Minchuan Shang No. 14 (Apr. 23, 2009) (Taiwan).

102. The damages rewarded to Philips et al. are too high for several reasons. Firstly, according to Princo, it paid Sony and Taiyo Yuden a royalty of USD 700,000 respectively after the TFTC ordered that Philips, Sony and Taiyo Yuden may not use the JLA anymore and must each license its own patents. Under the JLA, the collected royalty for the pooled patents will be distributed to Philips, Sony and Taiyo Yuden by the ratio of 7:2:1. If this ratio is merit-based, i.e. in line with each company's contribution to the patent pool, then starting from the 1 unit of USD 700,000 royalty due to Taiyo Yuden, royalty for Philips could be calculated by seven times of 1 unit of USD 700,000, namely about USD 4,900,000. But in comparison, the Intellectual Property Court awarded Philips USD 26,358,000—difference of five times. Secondly, compared with the standard rate and reward rate for the Philips-only license agreement that Philips introduced after the JLA was found by the TFTC as illegal cartel on 20 January 2001, the damages are excessive. The standard rate was USD 0.06 per disc and a reward rate of USD 0.045 was set for those who are in full compliance with the licensing agreement. The reward rate was lowered to USD 0.035 from the third quarter of 2004 to the second quarter of 2005. In the beginning of 2006, Philips started to offer the so-called Veeza program with even lower reward rate. *See* TBR REP., ¶ 16. Thirdly, the annual interest of 24% for the belated payment to be paid by the licensees of Philips et al. is far too high by any measure and possibly also the result of the abuse of joint monopoly power.

103. According to the German Supreme Court, even this number is not readily clear for the infringer, it does not constitute an inequitable burden on him, because in principle he is already obliged to bear the burden of explanation and proof in order to satisfy the requirements for claiming a right to a (compulsory) license from the patentee. *See* Bundesgerichtshof [BGH] [Federal Court of

to acquire a license from the patentee and deposited a sufficient amount for the benefit of the patentee at the court,[104] the court in charge of the patent infringement case can make the determination that the patentee is obliged to accept the offer for a licensing agreement and to decide equitably on the payable royalty.[105]

On appeal, the Taiwanese Supreme Court annulled the decision by the Taiwan IP Court on the ground that the applicable law had not been correctly chosen and remanded the case back to it.[106] This time the Taiwan IP Court reasoned that whenever the basic terms of a contract have been regulated or prohibited by public action and if enforced could lead to obviously unfair situations, then courts are entitled to resort to the principles of "change of circumstances (or the discontinuance of the basis of contract)" and "equity" to increase, decrease the amount of payment or to alter the original effects of the contract. It therefore exercised its discretionary and reduced the royalty from 10 to 3 JPY to eradicate the obvious unfairness.[107]

VII. FUTURE PROSPECTS

A. *The Transparency of Patent Pools toward Competition Authorities*

Patent pools involve substantial amount of patents, one would not expect all members and licensees to use all of them. "This makes it harder to distinguish between innocuous pools from those meant to reduce competition. In addition, the number of patents involved multiplies the potential for 'multi-market contact' between pool members, making tacit collusion easier to support. It is therefore paramount to make patent pool

---

Justice] May 6, 2009, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNG-REPORT ZIVILRECHT [NJW-RR] 1051, 2009 (Ger.).

104. The German Supreme Court reasoned, by analogy to Article 11(2) of the German Act on the Exercise of Copyrights and Related Rights (UrhWahrnG), the fact that the to-be-paid amount is not yet clear, which in this case depends on Article 315 of the Civil Code (BGB), does not hinder the deposition of the royalty. *See id*. at 1051. Article 11(2) of UrhWahrnG provides that in case no agreement can be reached with regard to the royalty, it will be deemed that a license has been issued when the user paid the amount he recognized to the collecting society and under reservation paid the amount the collecting society demands, which exceeds the former amount under, to the collecting society or deposit for the benefit of it. Article 315(1) of the Civil Code stipulates that if the performance to be decided by one contracting party, in case of doubt, it will be decided in accordance with equitable estimation. URHEBERRECHTSWAHRNEHMUNGESETZ [URHWAHRNG] [Act on the Exercise of Copyrights and Related Rights], Sept. 9, 1965, BGBL I at 1294, last amended by Gesetz [G], Oct. 26, 2007, BGBL I at 2513, art. 11(2) (Ger.); BÜRGERLICHES GESETZBUCHN [BGB] [Civil Code], Aug. 19, 1896, REICHSGESETZBLATT [RGBL.] 195, as amended, §315, para. 1 (Ger.).

105. Bundesgerichtshof [BGH] [Federal Court of Justice] May 6, 2009, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNG-REPORT ZIVILRECHT [NJW-RR] 1051, 2009 (Ger.).

106. Zuigao Fayuan [Sup. Ct.], Civil Division, 98 Taishang No. 1933 (2009) (Taiwan).

107. Chihhui Tsaichan Fayuan [Intell. Prop. Ct.], 100 Minchuan Shangkeng (1) No. 9 (2011) (Taiwan).

agreements transparent to competition authorities,"[108] which can ex office pass them on to their counterparts in jurisdictions that will also be affected by them.

B. *Comprehensive Guidelines on IPR Licensing Agreements Needed*

Issuing guidelines on IPR licensing agreements is a common practice. But their coverage, degree of clarity and transparency vary across national borders; some of which begs improvement. Almost without exception, many documents have to be pieced together and constantly cross-referenced before a clear understanding of the law in certain jurisdictions can emerge. It is hoped that through studies like this paper national authorities can put forward comprehensive and complete guidelines on IPR licensing agreements. Such guidelines should not shy away from shedding light on widely used local licensing arrangements, which are crucial to the production, uptake and penetration of innovative products, services and competition in their respective markets. After all, the more economic approach does not mean universal uniformity, otherwise the per se rule would reign.

C. *The Effects that the More Economic Approach Should Pursue*

The more economic approach will inevitably require greater economic literacy from IPR specialists.[109] We then need to enquire which kind of effects is relevant for the assessment of the pro and anti-competitiveness of a specific-IPR related conduct, whether it is the "effective competition structure" (the European Courts),[110] "consumer harm" (U.S. courts and European Commission) or the "consumer choice" advocated by Josef Drexl.[111] It is tentatively submitted that the "effective competition structure" approach can be taken as a starting point as it is the least invasive into IPR and minimizes the costs of regulation. Ultimately, it is the consumer welfare, either in form of increase in choices or reduction of harm, which will be the final gauge for balancing competition law and IPR.

---

108. Pierre Régibeau & Katharine Rockett, *The Relationship Between Intellectual Property Law and Competition Law: An Economic Approach*, *in* THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY 505, 532-33 (Steven D. Anderman ed., 2007).

109. Steve D. Anderman, *The New EC Competition Law Framework for Technology Transfer and IP Licensing*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW 107, 138 (Joseph Drexl ed., 2008).

110. Podszun, *supra* note 25, at 75.

111. Josef Drexl, *Real Knowledge is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-related Competition Cases*, Ser. No. 0915, MAX PLANCK PAPERS ON INTELL. PROP., COMPETITION & TAX L. RES. PAPER (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517757.

REFERENCES

The Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299. Retrieved from http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

Anderman, S. (2008). The new EC competition law framework for technology transfer and IP licensing. In J. Drexl (Ed.), *Research handbook on intellectual property and competition law* (pp. 107-138). Munich, Germany: Edward Elgar Publishing.

Anti-Counterfeiting Trade Agreement, art. 27, ¶ 3, Oct. 1, 2011, USTR-2010-0014. Retrieved from http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf

Bellamy, C. (2008). Forward. In P. Roth & V. Rose (Eds.), *Bellamy & Child: European Community Law of Competition* (6th ed.) (pp. ix-x). New York, NY: Oxford University Press.

Bundesgerichtshof [BGH] [Federal Court of Justice] May 6, 2009, Neue Juristische Wochenschrift Rechtsprechung-Report Zivilrecht [NJW-RR] 1047, 2009 (Ger.).

BÜRGERLICHES GESETZBUCHN [BGB] [Civil Code], Aug. 19, 1896, REICHSGESETZBLATT [RGBL.] 195, as amended, §315, para. 1 (Ger.).

Chihhui Tsaichan Fayuan [Intell. Prop. Ct.], 97 Minchuan Shangtzu No. 14 (2009) (Taiwan).

Chihhui Tsaichan Fayuan [Intell. Prop. Ct.], 100 Minchuan Shangkeng No. 9 (2011) (Taiwan).

Commission Regulation 772/2004, On the Application of Article 81(3) of the Treaty to Categories of Technology Transfer Agreements, 2004 O.J. (L 123) 11. Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0772:EN:HTML

D'Erme, R., Geiger, C., Ruse-Khan, H. G., Heinze, C., Jaeger, T., Matulionyte, R., & Metzger, A. (2011, January). Opinion of European Academics on Anti-Counterfeiting Trade Agreement. Retrieved from http://www.statewatch.org/news/2011/jul/acta-academics-opinion.pdf

Dokjeom gyuje mit gongjeong geooraeae gwanhan beobyul [Monopoly Regulation and Fair Trade Act], Act No.6651, Jan. 26, 2002, art. 59 (S. Kor.).

Drexl, J. (2008). Is there a 'more economic approach' to intellectual property and competition law?. In J. Drexl (Ed.), *Research handbook on intellectual property and competition law* (pp. 27-53). Munich,

Germany: Edward Elgar Publishing.

Drexl, J. (2009). *Real knowledge is to know the extent of one's own ignorance: On the consumer harm approach in innovation-related competition cases* (Max Planck for Intellectual Property, Competition & Tax Law Research Paper Series No. 0915). Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517757

Drexl, J., Hilty, R. M., Conde-Gallego, B., Enchelmaier, S., Mackenrodt, M. O., & Feil, M. (2004). Comments on the draft technology transfer block exemption regulation. *International Review of Intellectual Property and Competition Law, 35*, 187-196.

European Commission. (2011, April 27). Comments on the "opinion of European Academics on Anti-Counterfeiting Trade Agreement". Retrieved from http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf

Examination Procedure Concerning an Obstacle to Trade, Within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Measures Adopted by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu Affecting Patent Protection in Respect of Recordable Compact Discs. (Jan. 30, 2008). Retrieved from http://trade.ec.europa.eu/doclib/docs/2008/january/tradoc_137633.pdf

Fair Trade Act (1991) (amended 2011) (Taiwan). Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=J0150002

Fair Trade Comm'n, Kungchu No. 098156 (Oct. 20, 2009) (Taiwan). Retrieved from http://www.ftc.gov.tw/uploadDecision/faed94a8-34ce-4f8e-b59a-239a9eaece1d.pdf

Fair Trade Comm'n, Kungchieh No. 100002 (Mar. 31, 2011) (Taiwan). Retrieved from http://www.ftc.gov.tw/uploadDecision/fc229308-2070-4498-9f4e-a845bcea7c55.pdf

Fair Trade Commssion Disposal Direction (Guidelines) on Technology Licensing Arrangements (2001) (amended 2009) (Taiwan). Retrieved from http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=746&docid=10254

Fanlungtuan Fa [Anti-monopolization Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 55 (China).

FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF

COMPETITION AND PATENT LAW AND POLICY (2003). Retrieved from http://www.ftc.gov/os/2003/10/innovationrpt.pdf

Geiger, C., Hilty M. R., Griffiths, J., & Suthersanen U. (2010). Declaration on a balanced interpretation of the "three-step test" in copyright law. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 1*, 119-122. Retrieved from http://www.jipitec.eu/issues/jipitec-1-2-2010/2621/Declaration-Balanced-Interpretation-Of-The-Three-Step-Test.pdf

Guidelines for the Use of Intellectual Property under the Antimonopoly Act (2008) (Japan). Retrieved from http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/070928_IP_Guideline.pdf

Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements, 2004 O.J. (C 101) 2. Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0002:0042:EN:PDF

Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 2. Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224(01):EN:NOT

Heath, C. (2007). The interface between competition law and intellectual property in Japan. In S. D. Anderman (Ed.), *The interface between intellectual property rights and competition policy* (pp. 250-311). Cambridge, England: Cambridge University Press.

Hellebrand, O., Kaube, G., & von Falckenstein, R. (2006). *Lizenzsätze für technische erfindungen.* Cologne, Germany: Carl Heymanns Verlag.

Hilty, R. (2009). Renaissance der Zwangzlizezen im Urheberrecht? Gedanken zu Ungereimtheiten auf der urheberrechtlichen Wertschöpfungskette. *Gewerblicher Rechtsschutz und Urheberrecht, 111*, 633-644.

Hilty, R. (2011). Patent Enforcement. In K.-C. Liu & R. Hilty (Eds.). *The enforcement of patents*. Alphen aan den Rijn, the Netherlands: Kluwer Law International.

Homiller, D. P. (2006). Patent misuse in patent pool licensing: From national harrow to "the nine no-nos" to not likely. *Duke Law and Technology Review, 2006.* Retrieved from http://www.law.duke.edu/journals/dltr/articles/pdf/2006dltr0007.pdf

JAPAN FAIR TRADE COMM'N, GUIDELINES FOR THE USE OF INTELLECTUAL

PROPERTY UNDER THE ANTIMONOPOLY ACT (2007). Retrieved from http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/070928_IP_Guideline.pdf

JAPAN FAIR TRADE COMM'N, THE GUIDELINES FOR THE EXCLUSIONARY PRIVATE MONOPOLIZATION UNDER THE ANTIMONOPOLY ACT 5, 25 (2009). Retrieved from http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/guidelines_exclusionary.pdf

Kur, A., & Levin, M. (Eds). (2011). *Intellectual property rights in a fair world trade system: Proposals for reform of TRIPS*. Cheltenham, England: Edward Elgar.

Liu, K.-C. (2008). Rationalizing the regime of compulsory patent licensing by the essential facilities doctrine. *International Review of Intellectual Property and Competition Law, 39*, 757-774.

Liu, K.-C. (2010). The Taiwanese "Philips" CD-R cases: Abuses of a monopolistic position, cartel and compulsory patent licensing. In C. Heath C., & A. K. Sanders (Eds.), *Landmark intellectual property cases and their legacy* (pp. 83-104). Alphen aan den Rijn, the Netherlands: Wolters Kluwer.

Liu, K.-C. & Chien, W.-K. (2009). CD-R an chih chiehhsi yu pingshih—Yi kungpingfa chi chuanli chiangchih shouchuan wei chunghsin [Analysis of and comments on CD-R-related cases: Focusing on competition law and patent compulsory licensing issues]. *Kungping Chiaoyi Chikan* [*Fair Trade Quarterly*]*, 17*(1), 1-37.

Ni, K.-J. (2010). WTO huiyuan sheting chiangchih shouchuan shihyu te chuanhsien: Yi Weiyehna Tiaoyuehfa Kungyueh chih chiehshih yuantse fenhsi Feilipu CD-R Chuanli tehsu Shihshih Shihyu yu TRIPS te Hsiangkuanhsing [The Competence of a WTO Member in Determining the Grounds for Compulsory Licensing: The Compatibility of the Ground for Triggering Compulsory Licensing on Philips' CD-R Patents with the TRIPS Agreement in Light of the Vienna Convention on the Law of Treaties]. *Kuoli Taiwan Tahsueh Fahsueh Luntsung* [*NTU Law Journal*]*, 39*(3), 369-434.

Patent Act B.E. 2522, § 39(1) (1979) (amended 1999) (Thai.).

Peritz, R. (2007). Competition policy and its implications for intellectual property rights in the United States. In S. D. Anderman (Ed.), *The interface between intellectual property rights and competition policy* (pp. 125-249). Cambridge, England: Cambridge University Press.

Podszun, R. (2010). Lizenzverweigerung—Ernstfall im Verhältnis von Kartell- und Immaterialgüterrecht. In P. Matousek, E. Müller & T. Thanner (Eds.), *Jahrbuch kartell- und wettbewerbsrecht* (pp. 57-76).

Graz, Australia: Neuer Wissenschaftlicher Verlag.

Princo Corp. v. Int'l Trade Com'n, 563 F.3d 1301 (Fed. Cir. 2009).

Princo Corp. v. Int'l Trade Com'n, 616 F.3d 1318 (Fed. Cir. 2010).

Régibeau, P. & Rockett, K. (2007). The relationship between intellectual property law and competition law: An economic approach. In Anderman, S. D. (Ed.), *The interface between intellectual property rights and competition policy* (pp. 505-552). Cambridge, England: Cambridge University Press.

Review Guidelines on Undue Exercise of Intellectual Property Rights (2000) (amended 2010) (S. Kor.) Retrieved from http://eng.ftc.go.kr/files/static/Legal_Authority/Review%20Guidelines%20on%20Undue%20Exercise%20of%20Intellectual%20Property%20Rights.pdf

Shibata, J. (2008). Patent and know-how licenses under the Japanese antimonopoly act. In J. Drexl (Ed.), *Research handbook on intellectual property and competition law* (pp. 201-214). Cheltenham, England: Edward Elgar Publishing.

Shiteki-dokusen no Kinshi oyobi Kōseitorhiki no Kakuho ni Kansuru Hōritsu [Dokukinhō] [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 54 of 1947, art. 21 (Japan).

Taiwan Fair Trade Comm'n, Kungchu No. 095045 (2006) (Taiwan).

Tritton, G. (2008). *Intellectual property in Europe* (3rd ed.). London, England: Sweet & Maxwell.

U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007). Retrieved from http://www.justice.gov/atr/public/hearings/ip/222655.pdf.

U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 22 n.30 (1995). Retrieved from http://www.justice.gov/atr/public/guidelines/0558.pdf

U.S. Philips Corp. v. Int'l Trade Comm'n, 424 F.3d 1179 (Fed. Cir. 2005).

Ullrich, H. (2008). Patent pools—Policy and problems. In J. Drexl (Ed.), *Research handbook on intellectual property and competition law* (pp. 139-161). Cheltenham, England: Edward Elgar Publishing.

URHEBERRECHTSWAHRNEHMUNGESETZ [URHWAHRNG] [Act on the Exercise of Copyrights and Related Rights], Sept. 9, 1965, BGBL I at 1294, last amended by Gesetz [G], Oct. 26, 2007, BGBL I at 2513, art. 11(2) (Ger.).

Wakui, M. (2004). Standardisation and patent pools in Japan. In R. Taplin (Ed.), *Valuing intellectual property in Japan, Britain, and the United States* (pp. 81-109). London, England: Taylor & Francis.

Wang, R. L.-D. (2008). Biomedical upstream patenting and scientific research: The case for compulsory licenses bearing reach-through royalties. *Yale Journal of Law and Technology, 10*, 251-329.

Wang, R. L.-D. (2012). Deviated, unsound, and self-retreating: A critical assessment of the Princo v. ITC en banc decision. *Marquette Intellectual Property Law Review, 16*, 51-79.

Wu, S. M. (2009). Chuanli lienmeng yu kungpingfa chih lienhe hsingwei kuanchih — Yi "Feilipu Kuangtieh An" chung tiaokuei te chingcheng kuanhsi wei hehsin shang [Patent pool and the regulation of cartel according to the fair trade act, part I]. *Yuehtan Fahsueh Tsachih* [*Taiwan Law Review*]*, 174*, 120-135.

Wu, S. M. (2009). Chuanli lienmeng yu kungpingfa chih lienhe hsingwei kuanchih — Yi "Feilipu Kuangtieh An" chung tiaokuei te chingcheng kuanhsi wei hehsin hsia [Patent pool and the regulation of cartel according to the fair trade act, part II]. *Yuehtan Fahsueh Tsachih* [*Taiwan Law Review*]*, 175*, 85-101.

Yen, T.-T. (2009). Jihpen Tuchan Chinchihfa tuiyu chishu shouchuan hsingwei chih kueifan—Chienlun tui wokuo Kungpingfa kueifan chih chishih [The rules of technology licensing agreements under Japanese antimonopoly law—Reflections on Taiwan's fair trade act]. *Kungping Chiaoyi Chikan* [*Fair Trade Quarterly*]*, 17*(3), 99-141.

Zuigao Fayuan [Sup. Ct.], Civil Division, 98 Taishang No. 1933 (2009) (Taiwan).

Zuigao Hsingcheng Fayuan [Sup. Admin. Ct.], 96 Pan No. 553 (2007) (Taiwan).

Zuigao Hsingcheng Fayuan [Sup. Admin. Ct.], 99 Tsai No. 2028 (2010) (Taiwan).

一個更經濟取向與跨法制的專利庫研究

劉 孔 中

摘 要

本文以美國、歐盟（兼及德國）、日本、韓國及臺灣法制為主，比較研究各國日益以經濟取向看待智慧財產權與競爭法之法律實務，並且歸納出其共同的特徵：認知智慧財產權法的經濟性、設置介入干預的門檻（安全港）以及論理（合理）原則取代當然（合法／非法）原則。本文接著研究上述法制之競爭法如何處遇在專利落實與新技術開發運用上日趨重要的專利庫授權條款，並整理出其彼此間最大差異點之所在（僅美國沒有「具有市場支配地位之專利庫濫用其支配地位」的問題），並探討應如何看待或調和此種差異。專利庫授權條款一旦被認定違反競爭法，將對基於智慧財產權法的禁制令以及專利授權約款之效力有何影響，是本文關心的第三個主題。本文在結論部分提出三點值得進一步研究的議題：專利庫應對競爭法主管機關透明、涵蓋全部智慧財產權的授權約款單一準則有其必要性，以及經濟取向應該以何種效益為依歸。

關鍵詞：智慧財產權法、競爭法、專利庫、專利落實、經濟取向、當然（合法／非法）原則、論理（合理）原則、濫用市場支配地位

Article

Justice Frankfurter as the Pioneer of the Strict Scrutiny Test－Filling in the Blank in the Development of Free Speech Jurisprudence

Toru Mori*

ABSTRACT

This article shows Justice Frankfurter's positive influence on the development of the jurisprudence of free speech, which has been overlooked in the shadow of his judicial passivism. Reading the decisions of that time carefully, this article finds the theoretical relationship between him and Justice Brennan, who played the main role in the progressive Warren Court.

As the Supreme Court began to yield to the hysteria of McCarthyism, Frankfurter's deep concern about the wide discouraging effect of the restraint came to the forefront. It was Frankfurter who began to use the terms "deter" and "chill" to describe the negative effect of restrictions on speech. In Sweezy v. New Hampshire*, Frankfurter demanded that the State interest be "compelling" to justify the intrusion on political liberties. Brennan succeeded in developing the compelling interest test in following decisions. It is true that Frankfurter needed more evidence than Brennan to recognize the deterrent effect enough to make restrictions unconstitutional. However, this article confirms that Frankfurter helped the restart of the Supreme Court with his keen sensitivity to the negative potential of restrictions on political liberties.*

Keywords: *freedom of speech, Justice Frankfurter, Justice Brennan, deterrent effect, compelling interest*

---

* Professor, Graduate School of Law, Kyoto University; LL.D., Graduate School of Law, Kyoto University; LL.B., Faculty of Law, University of Tokyo. E-mail: toru.mori@law.kyoto-u.ac.jp. The author would like to thank two anonymous reviewers for their helpful comments.

CONTENTS

I. INTRODUCTION

Justice Frankfurter is known as an advocate of judicial passivism, especially in the field of free speech. It is true that his "antagonistic" relationship with Justices Black and Douglas came to light most clearly in this realm.[1] However, when the Supreme Court's decisions on free speech in the 1950s are carefully examined, one can discover another story about his role.

Frankfurter had significant influence on the development of judicial precedents at this crucial time. This assertion is in fact not as strange as it sounds at first. Black and Douglas's literal "absolutistic" method of constitutional interpretation never occupied the dominant position in the Supreme Court[2] though they certainly played an important role in forming the consistent liberal majority in the Warren Court. What characterized the Warren Court's decisions was the pragmatic approach promoted mainly by Justice Brennan. He did not revive the preferred position doctrine which the Vinson Court had abandoned, but he raised the level of protection for freedom of expression by focusing on the real effect of the disputed restrictions. He took seriously the negative psychological influence of restrictions on potential speakers who had minority ideas. It was the central concern of the Warren Court to prevent this discouraging, deterrent effect of restrictions on free speech, which was later generally called the "chilling effect."[3] It is however often overlooked that this approach was a kind of balancing of interests. Brennan's method of analyzing cases with a realistic view was derived from Frankfurter's approach. Additionally, the concerns regarding the deterrent effect itself, working in favor of protecting freedom of expression when balancing controversial interests, had its root in Frankfurter's opinions. Frankfurter was pragmatic enough to realize the wide negative influences which the suppression of political activities could arouse during the strained Cold War period. As this article discusses, it was Frankfurter who first demanded a "compelling" interest, the integral part of

---

1. JAMES F. SIMON, THE ANTAGONISTS**:** HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 116 (1989).

2. *See infra* text accompanying note 95. *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 293-97 (1964) (Black, J., concurring).

3. *See* Harry Kalven, Jr., *"Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court,* 67 MICH. L. REV. 289, 297-99 (1968); Robert C. Post, *William J. Brennan and the Warren Court*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 123, 130-35 (Mark Tushnet ed., 1993); Morton J. Horwitz, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 23, 26-28 (1997). For discussion concerning the theoretical grounds of the chilling effect doctrine *see* Toru Mori, *Freedom in the Public Sphere and Democracy*, 2 KYOTO J.L. & POL. 55, 68-69 (2005). As for the term, "chilling effect" became popular after Brennan had resorted to it in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Until this decision, "deterrent effect" had been generally used. Dombrowski v. Pfister, 380 U.S. 479, 487, 494 (1965).

today's strict or most exacting scrutiny test,[4] to justify a restriction on the freedom of speech.[5]

It is known that the Warren Court did not need the "clear and present danger" test to protect the freedom of speech.[6] However, it is not well known how that became possible. The Warren Court's famous decisions on free speech were and still are praised and criticized, but their genesis has not been fully explored. This article provides the missing link in the development of the free speech doctrine.[7] There is a reason that the point has been missed. If, as typical, Brennan is classified as progressive whereas Frankfurter as conservative and the theoretical relationship between them is ignored, the real current of the free speech decisions is lost. It is true that generally speaking, "Frankfurter overestimated the dangers to a democratic society of judicial activism in the protection of freedom of speech, and underestimated the need for, and the effectiveness of, the Supreme Court's moral leadership in such matters."[8] Even in Frankfurter's opinions which negatively impacted liberties, however, he left important clues for future progress. This article will discuss Frankfurter's positive role as the pioneer of the strict scrutiny test.

---

4. *See*, *e.g.*, Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 540 (1980); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). *See also e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010) (a recent decision demanding "compelling" interest to legitimate a restraint on speech).

5. *See infra* text accompanying note 76. This article treats only the emergence of the strict scrutiny test in the field of free speech to which Frankfurter contributed. As for the origin of the strict scrutiny test in general, nevertheless, I find Stephen A. Siegel's view correct that it was born in the decisions on the First Amendment, not on the Equal Protection Clause. Although the Warren Court had already made famous decisions against racial segregation in the 1950s, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), they did not resort to the demand that the interest of the government be compelling in order to legitimate the segregation. Racial segregation was considered there simply unreasonable. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 384, 401-02 (2006). Richard H. Fallon, Jr. asserts, in contrast, that the strict scrutiny test evolved simultaneously in a number of fields of constitutional law in the 1960s. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273-85 (2007). This observation need not necessarily be judged wrong, but it does not show the cause of the formula of the "compelling interest." Fallon's article is still very helpful in realizing the function of the strict scrutiny today, which is also outside of the scope of this article.

6. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 213-14.

7. William T. Coleman, Jr. states correctly, "Justice Black's simple absolutism . . . has never been accepted as constitutional doctrine. . . . Frankfurter's careful efforts to articulate first amendment values assures [*sic*] that future Courts will have adequate guidance in resolving competing social claims." William T. Coleman does not make clear, however, what the concrete contribution of Frankfurter's efforts was to the "future Courts." This will be clarified in this article. William T. Coleman, Jr., *Mr. Justice Felix Frankfurter*, *in* SIX JUSTICES ON CIVIL RIGHTS 85, 102 (Ronald D. Rotunda ed., 1983).

8. Nathaniel L. Nathanson, *Mr. Justice Frankfurter and the Holmes Chair: A Study in Liberalism and Judicial Self-Restraint*, 71 NW. U. L. REV. 135, 157 (1976) (pointing out nevertheless correctly that Frankfurter resisted "the McCarthy hysteria" vigorously. *id*. at 155-56). This article will show that he had a consistent point of view regarding freedom of speech which enabled this resistance.

II. FRANKFURTER'S AMBIGUOUS ATTITUDE TO THE PREFERRED POSITION DOCTRINE OF FREEDOM OF SPEECH

As time passed in the 1940s, it became increasingly clear that Frankfurter was left behind by the liberal majority. However, he did not persist in pursuing judicial passivism in cases about constitutional liberties. Frankfurter did not oppose the basic idea of the famous footnote 4 of *United States v. Carolene Products Co.*[9] which suggested that the liberties necessary to maintain the democratic political process should be protected more carefully than the economic liberties, and became the starting point of the "preferred position" doctrine of freedom of speech. At first Frankfurter even supported the Court's opinions which referred to the clear and present danger test and denied the constitutionality of prohibitions on freedom of expression with the help of this test.[10]

But in *Bridges v. California*,[11] in which the limit of the contempt power of state courts was disputed, Frankfurter criticized the Court's decision written by Black, which allowed punishment only if a verbal offense against courts created a clear and present danger. Frankfurter wrote, "[b]ecause freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined."[12] He stressed that the power of states to keep adjudications fair was broad enough to prohibit publications having a "reasonable tendency" to interfere with them. He found a long history justifying this prohibition and criticized the opinion for replacing it with the new concept of "clear and present danger." However, Frankfurter avoided a frontal attack on this test. He said, "[t]he phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional dimension."[13] Essentially the clear and present danger test should not ignore the "consideration of the circumstances of the particular case" either, which he thought was lacking in the majority opinion.[14] He did not abandon the possibility of reconciling the clear and present danger test with his method of constitutional interpretation.

In *West Virginia State Board of Education v. Barnette*,[15] in which the

9. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

10. Thornhill v. Alabama, 310 U.S. 88 (1940) (referring to *Carolene Products* expressly at 105); Cantwell v. Connecticut, 310 U.S. 296 (1940).

11. Bridges v. California, 314 U.S. 252 (1941).

12. *Id*. at 293 (Frankfurter, J., dissenting).

13. *Id*. at 295-96 (Frankfurter, J., dissenting).

14. *Id*. at 296-97 (Frankfurter, J., dissenting).

15. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Court condemned the Board for requiring pupils to salute the Flag, Frankfurter wrote a harsh dissenting opinion which appeared to barely acknowledge the claim that civil liberties should be protected more carefully by the judiciary than economic liberties. He emphasized the legislature's broad political power and the "very narrow" function of the Court. "The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. . . . Our power does not vary according to the particular provision of the Bill of Rights which is invoked."[16] Nevertheless, he did not deny the clear and present danger test, but restricted the sorts of regulations to which it was applicable. To use this criterion in this case, in which Frankfurter assumed the State had the legitimate power to regulate as an educational measure, is "to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted."[17] He wanted to put this test back in the right place where "mere speech," "mere utterance" which the States had naturally no power to regulate was suppressed.[18] It is apparent that Frankfurter recognized the clear and present danger test as a means to balance controversial interests in specific circumstances where the value of free speech should prevail. In this regard, he admitted that the speech itself should be out of reach of regulation in principle.

The majority of the "Roosevelt Court" went a different way than Frankfurter, however. It drew on the generalized conclusion of the preferred position of the freedom of speech out of the footnote 4 of *Carolene Products*. In *Thomas v. Collins*,[19] Justice Rutledge clearly declared the judicial philosophy at that time. He acknowledged "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."[20] "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. . . . For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."[21] The clear and present danger test thus became the symbolic manifestation of the heightened status of First Amendment liberties.

Frankfurter could not help attacking such a generalization. He unfolded his criticism in detail in his opinion in *Kovacs v. Cooper*,[22] which supported the prohibition of the use of sound trucks on public streets. He took up the catch phrase "the preferred position of freedom of speech" and went on to

16. *Id*. at 648 (Frankfurter, J., dissenting).
17. *Id*. at 662-63 (Frankfurter, J., dissenting).
18. *Id*. at 663 (Frankfurter, J., dissenting).
19. Thomas v. Collins, 323 U.S. 516 (1945).
20. *Id*. at 530.
21. *Id*. at 530.
22. Kovacs v. Cooper, 336 U.S. 77 (1949).

say, "I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity."[23] He stressed, "the *Carolene* footnote did not purport to announce any new doctrine" [24] nor did it assert a presumption of invalidity. Frankfurter acknowledged that former Justice Holmes, whose line of thought he saw had influenced the Court's decisions in the 1940s, had been "far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics" [25] in order to preserve an open society and the progress of civilization. This was evidently his own stance, too. Still, the preferred position doctrine was a "deceptive," "oversimplified" formula ignoring the "complicated process of constitutional adjudication." "Such a formula makes for mechanical jurisprudence,"[26] which Frankfurter thought was by no means suitable for the Court responsible for appropriate consideration of concrete situations.

III. THE GROWING SIGNIFICANCE OF FRANKFURTER'S ATTENTION TO THE DETERRENT EFFECT

A. *The Red Scare and the Changing Jurisprudence of the Supreme Court*

When *Kovacs* was decided, the liberal majority began to disappear, against the background of the hysterical atmosphere of McCarthyism. Freedom of speech had been a truly important legal problem, but previously it had been mostly related to religious minorities or incidental slanderers. Now it became the target of the most crucial social and political dispute in the Nation—how far the political activities of Communists or supposed Communists could be prohibited. The peril of communist penetration was felt as a serious national security concern. The Supreme Court could not resist the social tension and pressure that Congress and the President also helped to elevate. The clear and present danger test collapsed. It was time to restart. Frankfurter played an important role when the Supreme Court

23. *Id*. at 90 (Frankfurter, J., concurring in judgment).
24. *Id*. at 91 (Frankfurter, J., concurring in judgment).
25. *Id*. at 95 (Frankfurter, J., concurring in judgment).
26. *Id*. at 96 (Frankfurter, J., concurring in judgment). Melvin I. Urofsky concludes from this opinion, "Frankfurter did put speech on a higher plane–a preferred position–than other values. Judges would still balance, but perhaps the scales will be tipped." Though that seems a correct observation, he criticizes Frankfurter because he thinks that Frankfurter nevertheless persisted in his judicial philosophy of self-restraint even in the suppressive atmosphere of McCarthyism. He writes that Frankfurter was a courageous person, but "he lacked the vision" to show it in the Court. MELVIN I. UROFSKY, FELIX FRANKFURTER**:** JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 110-11, 127 (1991). I do not agree with this type of generalized negation of Frankfurter's judicial contributions, though he surely often argued against the freedom of speech. This article will show that Frankfurter's liberal attitude also operated in his judicial opinions and helped to shape the jurisprudence of the Supreme Court.

intended to rebuild protection for freedom of expression without the preferred position doctrine.

American Communications Association v. Douds[27] approved the constitutionality of a non-communist affidavit for labor union officers under the National Labor Relations Act. The statute did not forbid persons who did not sign the affidavit from holding positions, but the Act made it a condition for requesting help from the National Labor Relations Board. The Court's decision acknowledged that, in effect, the Act imposed restrictions on non-complying unions. May Congress then exert this pressure to prevent political strikes that the Communist Party could order to disrupt the free flow of commerce? Though the Court recognized the particular danger of this party, it also admitted that the normal political activities of Communists themselves could be legitimate and that beliefs are inviolate. It found a serious constitutional problem in that "Congress has undeniably discouraged the lawful exercise of political freedoms as well" with this statute.[28]

The unions contended, of course, that this broad suppression did not pass the clear and present danger test. The Court responded, however, that the test was not "a mechanical test in every case touching First Amendment freedoms."[29] The majority opinion distinguished this case from the restrictions to which the test had been applied in the past. In this case, there was a danger to the Nation. "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity."[30] Facing a case with such political graveness, the Court chose to balance the interests and to determine which one was worth more protection. Furthermore, it respected the competence of Congress to estimate the need for regulation and supported the constitutionality of this statute.[31]

It is noteworthy that the Court's method of analysis closely resembled Frankfurter's approach. This highlights the fact that in his opinion, Frankfurter did not hail the triumph of his jurisprudence, but cautiously objected in part with the Court. He warned that "the conflict of political ideas now dividing the world"[32] would be the most serious challenge in the history of the Supreme Court.

> No doubt issues like those now before us cannot be completely

27. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950).
28. *Id*. at 387-93.
29. *Id*. at 394.
30. *Id*. at 395-98.
31. *Id*. at 398-401.
32. *Id*. at 415 (Frankfurter, J., concurring in part).

> severed from the political and emotional context out of which they emerge. For that very reason adjudication touching such matters should not go one whit beyond the immediate issues requiring decision, and what is said in support of the adjudication should insulate the Court as far as is rationally possible from the political conflict beneath the legal issues.[33]

It is clear in Frankfurter's opinion that this legal positivism did not let him ignore the real situation of the union members, but led him, on the contrary, to take into account the pressure the broad regulations of the Act would put on them. Though he admitted Congress's interest in securing interstate commerce from disruption by Communists, he thought that Congress had cast its net too indiscriminately by asking for an avowal not to believe in the overthrow of the U.S. Government by any illegal or unconstitutional methods. "It is asking more than rightfully may be asked of ordinary men to take oath that a method is not 'unconstitutional' or 'illegal' when constitutionality or legality is frequently determined by this Court by the chance of a single vote."[34] The danger of prosecution for perjury was too severe to be neutralized by judicial review. Moreover, "fastidiously scrupulous regard for [oaths] should be encouraged. . . . If a man has scruples about taking an oath because of uncertainty as to whether it encompasses some beliefs that are inviolate, the surrender of abstention is invited by the ambiguity of the congressional exaction."[35] An individual's freedom of thought is so important, however, that, "[e]ntry into that citadel can be justified, if at all, only if strictly confined so that the belief that a man is asked to reveal is so defined as to leave no fair room for doubt that he is not asked to disclose what he has a right to withhold."[36]

It is apparent that Frankfurter was very sensitive to the discouraging effect which vague regulations could bring about. He was so concerned about their pressure on the inner and core freedom of thought which would arise inevitably in the "political and emotional context" of the day in America that he considered it a legal problem. When the Supreme Court began to retreat from the generalized preferred position doctrine, Frankfurter's manner of keeping a close watch on the cases would play a role in protecting freedoms by taking a realistic view of the negative effect of restrictions.

---

33. *Id*. at 416 (Frankfurter, J., concurring in part).
34. *Id*. at 420 (Frankfurter, J., concurring in part).
35. *Id*. at 420-21 (Frankfurter, J., concurring in part).
36. *Id*. at 421 (Frankfurter, J., concurring in part).

B. *Frankfurter's Candid Confession in the Dennis Case*

In *Dennis v. United States*,[37] the famous case of the conviction of Communist leaders for violations of the Smith Act,[38] Chief Justice Vinson's opinion stressed the importance of the interest to prevent the overthrow of the Government by force and violence "in the context of world crisis after crisis".[39] He agreed with Judge Learned Hand, who had written the lower court opinion, that the gravity of the evil could justify the regulation even if the probability of its realization was not high.[40]

Frankfurter did not join in the opinion primarily because, as often stated, he did not want to reinterpret the clear and present danger test, but dared to replace it with the "candid and informed weighing of the competing interests."[41] Furthermore, he recognized that the primary responsibility for this balancing should belong to Congress. When Congress had determined that the danger justified a restriction on freedom of speech, the judiciary must respect its decision.[42] One should not overlook, however, the part of his opinion in which Frankfurter confessed that the challenged provisions of the Smith Act also would have serious negative effects on the ability of persons not directly regulated by the law to exercise freedom of speech.

> Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. . . . [I]t is self-delusion to think that we can punish [the defendants] for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas.[43]

Frankfurter reminded us, "[f]or social development of trial and error, the fullest possible opportunity for the free play of the human mind is an indispensable prerequisite. . . . Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes."[44]

---

37. Dennis v. United States, 341 U.S. 494 (1951).
38. The text of the statute applied in that case is found in *Dennis*, 341 U.S. at 496-97. *See* 18 U.S.C. § 2385 (2006).
39. *Dennis*, 341 U.S. at 510 (Vinson, C.J., plurality opinion).
40. *Id*. at 509-10 (Vinson, C.J., plurality opinion).
41. *Id*. at 525 (Frankfurter, J., concurring in judgment).
42. *Id*. at 525-27, 550-52 (Frankfurter, J., concurring in judgment).
43. *Id*. at 549 (Frankfurter, J., concurring in judgment).
44. *Id*. at 550 (Frankfurter, J., concurring in judgment).

Frankfurter had strong concerns about the serious impact which would be inevitable if the activities of the Communists in America were forbidden. Frankfurter's opinion differs from the other opinions supporting the conviction in that he was aware that the challenged restriction had much to do with the freedom of expression of normal citizens. The restriction created an atmosphere in which criticism was silenced. Even the dissenting opinions of Black and Douglas, which denied the risk of Communists to be a sufficient reason for the conviction, did not take this broad influence into consideration. Frankfurter's realistic sense was able to see it as a legally relevant restraint of an important freedom.[45]

However, Frankfurter still respected the power of Congress in this case. His method of generously weighing the legislature's interests was criticized all the more, because after *Dennis* the Supreme Court ceased to apply the clear and present danger test to restrictions on speech and began to judge their constitutionality by using a balancing test.[46] Frankfurter seemed to be responsible for the Supreme Court's retreat in the time of the Red Scare. Black and Douglas also abandoned the test in the end out of despair of its worth for protecting free speech. If Frankfurter had not been sensitive to the silencing effect of prohibitions of speech, however, the Court's revival would have been much more difficult. When balancing the interests in question began to play a decisive role in Court decisions, Frankfurter could regard regulations of expression not simply as prohibitions on Communists or other dangerous groups, but as leading to a general atmosphere hostile to the exercise of freedom of speech.

C. *Frankfurter's Introduction of the Deterrent Effect to the Balancing Test*

Garner v. Board of Public Works of Los Angeles[47] demonstrated that this sensitiveness could work in favor of freedom of speech. In this case, decided on the same day as *Dennis*, Frankfurter dissented in part from the Court's opinion upholding the constitutionality of a city ordinance which required each city employee to take an oath that she had not advocated and would not advocate the overthrow of the Government by violence or had not been and would not be a member of groups aiming to achieve those ends.

---

45. Geoffrey R. Stone finds in Frankfurter's statements in *Dennis* "a powerful and trenchant insight" "[i]n light of the climate of the times." Stone thinks that Frankfurter was nevertheless "captured by the image of the domestic Communist as treacherous, malignant, and powerful" and could not resist the pressures of the Cold War era. This view seems rather persuasive at least about *Dennis*, the criminal case against the leaders of the Communists, although Frankfurter did resist the atmosphere of those days in several decisions. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 404-06, 410-11 (2004).

46. *See* Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting).

47. Garner v. L.A. Bd. of Pub. Works, 341 U.S. 716 (1951).

The Court treated the sanction only as a loss of the privilege to work for the city and considered the requirement within the reach of the city's power when the oath text was so restrictively construed that scienter was implicit in it.[48]

Frankfurter ensured that even conditions on privileges should not be unreasonable. "To describe public employment as a privilege does not meet the problem."[49] Moreover, he did not allow the Court to reinterpret the content of the oath. In his opinion, "[t]he vice in this oath is that it is not limited to affiliation with organizations known at the time to have advocated overthrow of government."[50] Grave problems would arise when such an oath were sustained. "It is bound to operate as a real deterrent to people contemplating even innocent associations."[51] Anyone would be concerned that her organization could be found one day to advocate the overthrow of government. "All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people" "Such curbs are indeed self-defeating. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service."[52]

In *Wieman v. Updegraff*,[53] a similar case about the constitutionality of a loyalty oath required of a state college's teachers, the Court determined the oath was unconstitutional because under the challenged statute, knowledge about the organization was not needed to exclude persons from public employment. In balancing the interests, the Court's opinion stated that exclusion on disloyalty grounds meant "a badge of infamy" in the American community. "Especially is this so in time of cold war and hot emotions."[54] Frankfurter wrote, moreover, how broadly the risk of being so badged would affect current or potential teachers in fact. "[Such unwarranted inhibition] has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."[55] "[Teachers] must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind

48. *Id*. at 721-24.
49. *Id*. at 725 (Frankfurter, J., concurring in part and dissenting in part).
50. *Id*. at 726 (Frankfurter, J., concurring in part and dissenting in part).
51. *Id*. at 727-28 (Frankfurter, J., concurring in part and dissenting in part).
52. *Id*. at 728 (Frankfurter, J., concurring in part and dissenting in part).
53. Wieman v. Updegraff, 344 U.S. 183 (1952).
54. *Id*. at 189-91.
55. *Id*. at 195. (Frankfurter, J., concurring).

are denied to them."[56]

It was Frankfurter who began to use the terms "deter" and "chill" to describe the effect of restrictions on speech which should be prevented in principle in order to keep a vital society open to critical minds. These terms would later grow to be the very means by which Brennan and the Warren Court would enlarge freedom of expression.[57] Of course, Frankfurter did not always regard this broad influence of prohibition as fatal. It was an element in the balancing process. Still, it opened eyes to reality and prevented respecting the legislature's interest one-sidedly, as the following cases also demonstrate.

In *Adler v. Board of Education of City of New York*,[58] the Supreme Court upheld a state law that required public school teachers not to be members of subversive groups like the Communist Party. The Court's decision recognized the State's interest to protect children from the influence of subversive groups on the one hand and, on the other, did not consider the disqualification of teachers as an invasion of freedom of expression. "[H]e is not thereby denied the right of free speech and assembly."[59] Douglas and Black objected to this judgment vehemently. Anyone would be afraid that she could be condemned if she associates with suspected groups. "Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled."[60] "Fear stalks the classroom . . . . [P]ursuit of knowledge is discouraged; discussion often leaves off where it should begin."[61]

Frankfurter also dissented, but with a rather technical reason that the controversy was not yet ripe to be judicially decided. He pointed out as an element of the lack of ripeness that the appellant teachers did not show that they were deterred from activities for fear of the challenged law. He was not satisfied with the general suggestion that the system complained of would have this effect on teachers as a group.[62] Frankfurter did not agree with the Court's majority opinion that this statute's requirement did not deny freedom of speech. He was aware that it could have a deterrent effect on the exercise of free speech which should be protected intrinsically, but was not aware in this case if the statute's requirement would cause such an effect in fact; this set him apart from his liberal brethren.

---

56. *Id*. at 196. (Frankfurter, J., concurring).

57. *See*, *e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); Dombrowski v. Pfister, 380 U.S. 479, 486-87, 494 (1965).

58. Adler v. Bd. of Educ. of City of N.Y., 342 U.S. 485 (1952).

59. *Id*. at 489-93.

60. *Id*. at 509 (Douglas, J., dissenting).

61. *Id*.

62. *Id*. at 504 (Frankfurter, J., dissenting).

In *Beauharnais v. Illinois,*[63] Frankfurter wrote the opinion of the Court supporting the constitutionality of a group libel law, under which the petitioner was convicted for publishing hate speech against African Americans. He acknowledged the State's interest to keep peace between races with this criminal law against the background of high racial tension of that time. He also examined the risk that the law could be abused. "Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled," but Frankfurter recognized that the statute could be interpreted so clearly that he was able to slight this danger.[64] Black dissented because he regarded the statute as a much more serious infringement on freedom of expression. He thought that it would be very difficult for any court to interpret this statute in good conscience in racial controversies which often proceeded emotionally. It would become dangerous to only criticize groups. "No rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press and religion."[65]

Black and Douglas's approach in these cases shared Frankfurter's realistic view about the broad stifling effect of prohibitions. What led them to the absolutist doctrine after the decline of the clear and present danger test was their keen consciousness that restrictions on speech of that day threatened the openness of the society in general. It is true that this firm belief could not be shared by the Supreme Court. Nevertheless, there remained the possibility of dialogue between them and Frankfurter. They shared the concern about the vulnerable conditions of freedom of expression. Frankfurter balanced this concern with the needs of the regulation in the facts of each case. What the Warren Court developed was this very method, as will be discussed in the next section.

IV. FRANKFURTER'S POSITIVE ROLE IN THE WARREN COURT

A. *Examining the "Compelling" Interest of Government to Protect the Fragility of Speech*

When Warren and Brennan joined the Supreme Court, they tended to act as liberals, changing the power relationship in the Court a great deal. It did not return to the preferred position doctrine, however. The Court did not bravely declare that the value of free speech was special, partly because the new liberal bloc of four Justices was not strong enough to rule the Court. They had to gain at least one more vote, for which they looked especially to

63. Beauharnais v. Illinois, 343 U.S. 250 (1952).
64. *Id*. at 258-64 (1952).
65. *Id*. at 273-74 (Black, J., dissenting).

Frankfurter or Justice Harlan, who consciously behaved like "Frankfurter's principal ally."[66] Therefore, the decisions could be only those well reasoned as good solutions for concrete conflicts.[67] Brennan, especially, adopted what was then also Frankfurter's concern about the deterrent effect of regulations into the balancing process, which enabled him to take the loss of freedoms seriously.

In *Watkins v. United States,*[68] the range of Congress's contempt power was challenged by a summoned witness of a Subcommittee of the House of Representatives Committee on Un-American Activities. The witness testified that he had cooperated with the Communist Party in the past, but he refused to tell if he knew whether other persons on a list were members. The Court's decision, written by Chief Justice Warren, emphasized that the contempt power of Congress should clearly be restricted. When the risk of abuse remained, for example about the word "Un-American," grave negative effects would appear.

> [W]hen those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. . . . Nor does the witness alone suffer the consequences. Those who are identified by witnesses, and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time.[69]

In contrast, Justice Clark's dissenting opinion described the logic of the judicial passivism in those days clearly. He stressed the broad authority of Congress to investigate about national security on the one hand, and on the other hand slighted the negative influence of its inquiry on the freedom of speech. "Remote and indirect disadvantages such as 'public stigma, scorn and obloquy' may be related to the First Amendment, but they are not enough to block investigation."[70] It is therefore interesting that Frankfurter joined Warren and added a short opinion which showed off his talent for

---

66. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 466-67 (1983). *See also* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 130 (1992).

67. See CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 131, 149 (1974); MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK AND THE PROCESS OF JUDICIAL DECISION MAKING 203-04 (1984).

68. Watkins v. United States, 354 U.S. 178 (1957).

69. *Id*. at 197-98.

70. *Id*. at 232 (Clark, J., dissenting).

applying the balancing test. He also showed his respect for Congress's traditional power to punish for contempt, but at the same time required that the scope of inquiry should be clearly defined to allow witnesses to be aware of the relevance of the questions.[71] Frankfurter admitted the judicial relevance of the deterrent effect emerging from vague sanctions against political activities, which distinguished him from the other conservatives in the Court.

Sweezy v. New Hampshire,[72] decided on the same day, was a similar case about a witness's refusal to testify regarding certain questions at a committee of State legislature. Chief Justice Warren's opinion was joined by only three liberal Justices, but the case was decided with the help of Frankfurter's opinion concurring in judgment. In this case, an inquiry was held about "subversive organizations" and "subversive persons." A summoned university teacher had refused to answer some questions about the Progressive Party and his own beliefs. Warren criticized that, according to the law, people could be treated as "subversive persons" without knowing it. He cited a paragraph from *Wieman* and added, "[t]he sanction emanating from legislative investigations is of a different kind than loss of employment. But the stain of the stamp of disloyalty is just as deep. The inhibiting effect in the flow of democratic expression and controversy upon those directly affected and those touched more subtly is equally grave."[73]

Frankfurter dared not depend on the vagueness of the state law to decide the case, but tried to weigh the competing claims squarely. He emphasized the value of intellectual freedom in universities and the grave harm resulting from governmental intrusion into it. Inquiries and speculations must be left as unfettered as possible. "Political power must abstain from intrusion into this activity of freedom . . . except for reasons that are exigent and obviously compelling. . . . It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."[74] Therefore, "in these matters of the spirit inroads on legitimacy must be resisted at their incipiency."[75] Furthermore, Frankfurter's explanation went beyond the importance of academic freedom and reached that of the right to privacy in citizens' political thoughts and associations in general. He doubted the State's belief that the Progressive Party was infiltrated by Communists and repeated, "[f]or a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating

71. *Id*. at 216-17 (Frankfurter, J., concurring).
72. Sweezy v. New Hampshire, 354 U.S. 234 (1957).
73. *Id*. at 246-51 (Warren, C.J., plurality opinion).
74. *Id*. at 262 (Frankfurter, J., concurring in judgment).
75. *Id*. at 263 (Frankfurter, J., concurring in judgment).

interest of the State must be compelling."[76] The State's evidence was not therefore sufficient to require the defendant to disclose his political loyalties.

This opinion reflected Frankfurter's deep concern about the situation in universities. Professors were indeed some of the main targets of the investigations into suspicions for disloyalty in the McCarthy era. Once they were suspected as un-American, professors' lectures and talks with colleagues would be searched, disclosed, and condemned. Under this tremendous pressure, they were eager to avoid any risks of being suspected, which seemed to Frankfurter, as a former professor, to mean the death of academic inquiries.[77] He was therefore confident that academic freedom was "at once so fragile and so indispensable"[78] that it should be protected most carefully. This view inevitably reminds us of the famous phrase out of *NAACP v. Button*, a typical free speech decision of the Warren Court written by Brennan; "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[79] Frankfurter also agreed that citizens' political beliefs in general must be primarily protected against forced disclosure. He shared the sense of the vulnerability of free speech with Brennan.

Frankfurter took the lead in the development of free speech jurisprudence in the early Warren court. The Court had already left the clear and present danger doctrine and decided the cases then by a balancing of interests. Unfortunately, this method included the danger that its results

---

76. *Id*. at 264-66 (Frankfurter, J., concurring in judgment). Frankfurter's opinion in *Sweezy* has drawn much attention because of his passionate defense of freedom, which looks unusual for him. I find that H. N. Hirsch's assertion that in this case Frankfurter arbitrarily left the judicial passivism because of his personal inclination is not persuasive at all, when it is read in the stream of opinions at that time. H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 193-96 (1981). On the contrary, the most impressive commentary has been made by Clyde E. Jacobs. He describes *Sweezy* in connection with Frankfurter's "candid" concession of broad silencing effect of the conviction in *Dennis*. He finds Frankfurter's consistent concern about the fragile character of freedom of expression in these opinions which are apparently opposed to each other. However, he does not mention the meaning of *Sweezy* in the development of freedom of speech jurisprudence. JACOBS, *supra* note 67, at 120-27. *See also* Joseph L. Rauh, Jr., *Felix Frankfurter: Civil Libertarian*, 11 HARV. C.R.-C.L. L. REV. 496, 508, 519 (1976); SILVERSTEIN, *supra* note 67, at 204-06.

77. According to Ellen W. Schrecker, "it may well be that almost 20 percent of the witnesses called before congressional and state investigating committees were college teachers or graduate students. Most of those academic witnesses who did not clear themselves with the committees lost their jobs." ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 10 (1986). *See*, *e.g.,* RALF S. BROWN, JR., LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES 120-34 (1958). *See also* ZECHARIAH CHAFEE, JR., THE BLESSINGS OF LIBERTY 179-252 (1956) (depicting the critical situation of universities at that time). Chafee himself was condemned by Senator McCarthy as having "bad loyalty," and being "dangerous to America." DONALD L. SMITH, ZECHARIAH CHAFEE, JR., DEFENDER OF LIBERTY AND LAW 261-62 (1986).

78. *Sweezy*, 354 U.S. at 262.

79. NAACP v. Button, 371 U.S. 415, 433 (1963).

would depend on arbitrary choices by judges. To avoid this danger, criteria to measure interests needed to be determined before the courts faced concrete cases. With his recognition of the fragility of freedom of expression, Frankfurter was able to find the measure to determine the interest needed to restrict First Amendment freedoms. The interest must be "compelling." It was then that this representative word of the later called "strict scrutiny" test first appeared in Supreme Court opinions. Though the requirement of having a compelling interest for restricting speech played a decisive role in decisions thereafter, its origin is almost forgotten. Perhaps the reason lies in the fact that it did not come from Black or Douglas, nor from Brennan or Warren, but came from Frankfurter, of all people an acknowledged advocate of judicial passivism. That seems almost unbelievable and indeed has not been researched.[80] It was because Frankfurter was realistic about the extreme difficulties of freedoms of those times, however, that the Court could begin to protect them carefully once again with his vote.

In *NAACP v. Alabama ex rel. Patterson*,[81] Harlan introduced the "compelling" interest standard from Frankfurter's opinion into the opinion of the Court. The question there was whether Alabama could compel the NAACP to reveal its members' names and addresses. The Court stressed that such a disclosure forced on unpopular groups was not a direct prohibition on the freedom of association, but had a "discouraging," "deterrent effect" on it, which by itself required the State to show that it had an interest sufficient to justify this inhibition. "Such a '. . . subordinating interest of the State must be compelling,' *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (concurring opinion)."[82] The State's need to know the group's members was not so important, and therefore forcing disclosure was unconstitutional. This was the first use of the "compelling" interest test in an opinion of the Court.[83] It is noteworthy that sensitivity to the fragility of First Amendment freedoms played an important role in recognizing the real degree of restriction on

80. Although Stephen A. Siegel mentions Frankfurter's opinion in *Sweezy* in his article on the origin of the strict scrutiny, he does not admit that it implied substantial significance in the development of the test. He recognizes it only in the decisions after Frankfurter's retirement and the formation of the solid liberal majority. Siegel, *supra* note 5, at 361-80. This evaluation underestimates Frankfurter's role there. Siegel does not doubt that Frankfurter and Harlan were "low-protectionists" and does not anticipate that they and Brennan had common concern about the situation of the freedom in the hysteria of anti-communism. Of course, they and Brennan had often different opinions about what interest legitimated the restriction on the freedom of expression, as this article will show. However, Frankfurter's reference to "compelling" in *Sweezy* had the theoretical background which Brennan shared. Therefore, it helped Brennan substantially to build his own jurisprudence. *See also* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 97-98 (2000).

81. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958).

82. *Id*. at 463.

83. *See* Barenblatt v. United States, 360 U.S. 109, 127 (1959) (written also by Harlan, who cited the same sentence from Frankfurter's opinion in *Sweezy*).

freedoms and to require the State to show not just some legitimate interest, but a compelling interest.

B. *Frankfurter and Brennan's Shared Concern*

On the same day, the *Speiser v. Randall*[84] opinion was written by a Court newcomer, Justice Brennan. This case was about denying a tax exemption to veterans who refused to subscribe to an oath that they would not advocate the overthrow of the Government by force. The California Constitution denied people advocating such a policy any tax exemptions. The State demanded the oath from the claimants in order to reduce the State's burden to ascertain whether or not they had such beliefs. The veterans could request judicial review if they refused the oaths and were denied the tax exemption. Brennan recognized immediately that this was not only a case about denial of privileges. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."[85] He emphasized that to regulate the freedom of speech the State must provide adequate procedures. Brennan stated that the State fell short of this requirement because the claimants who had refused to subscribe to the oath needed to bring a suit against the State in order to prove that they were entitled to the tax exemption and, furthermore, the burden of proof was allocated to them.

> The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding–inherent in all litigation–will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free.[86]

In this opinion, Brennan found a serious constitutional problem in the deterrent effect of regulation, even if it did not prohibit speech directly. He

84. Speiser v. Randall, 357 U.S. 513 (1958).
85. *Id*. at 518.
86. *Id*. at 526.

cited, to confirm this viewpoint, *Douds* and *Wieman*,[87] which had acknowledged that exclusion from some privileges or offices might mean "a badge of infamy" and bring about a "discouraging" effect broadly. In each of those cases, Frankfurter had written opinions more sensitive to the fragility of free speech under social pressure. He had also confirmed in *Garner* that even conditioning privileges was unconstitutional if it operated "as a real deterrent."[88] In *Speiser*, Brennan made this realistic approach his own and also introduced the term "deterrent effect" as an important checkpoint in the scrutiny of the constitutionality of restrictions on free speech.[89] He tried to enlarge the protection of free speech thereafter with this approach. This decision was the starting point of his jurisprudence on free speech. It is also notable that Brennan shared concerns about the issues concerning freedom of speech with Frankfurter, who joined *Speiser* as well as *Alabama*.

I do not insist that in the face of concrete cases these two justices always had the same perception about the vulnerability of freedom of expression and the necessity of its protection. Frankfurter tended to trust in the sincerity of legislatures more. In *Beilan v. Board of Education*,[90] decided on the same day as *Alabama* and *Speiser*, the two Justices took different positions. *Beilan* was about the constitutionality of discharging a teacher on the grounds of his refusal to answer a loyalty test. The Court's decision stated that the questions about his relationship with Communists were relevant to his fitness as a teacher and that the Board might consider his refusal as proof of his incompetence as a teacher. The Court confirmed carefully that the reason for the teacher's discharge had not been a finding of disloyalty.[91] Frankfurter wrote a concurring opinion to emphasize this point—the teacher had not been labeled as "disloyal". He warned that it would curb the State power on the school system too much to treat the teacher, on the contrary to its explanation, as a sufferer of this fatal finding and negate the legitimacy of

87. *Id*. at 519.

88. *See supra* text accompanying note 51.

89. Lawrence H. Tribe emphasizes the significance of *Speiser*, "[f]or the first time in the context of individual rights and liberties, the Court made clear that calling something a 'privilege' did not immunize its allocation from judicial review." He treats it as the starting point of the doctrine of unconstitutional conditions. Lawrence H. Tribe, *Sticks and Carrots*, *in* REASON AND PASSION 123, 127 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997). *See also* Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech*, 139 U. PA. L. REV. 1333, 1337-39 (1991). This decision had much precedential influence on the following cases, but I do not regard it, as Tribe does, as Brennan's surprising great contribution in the Supreme Court where the formalistic attitude had ruled. Brennan's opinion in that case can and should be understood in the context of the continuing struggle of the Court to rebuild the jurisprudence of free speech. The attention to the deterrent effect was not Brennan's discovery, but he adopted it and developed it with his excellent talent as a Justice. Lucas A. Powe, Jr.'s observation that "*Speiser* itself would be the precedent for what would become known as the chilling effect" is fully persuasive, although the decision should be read in the context said above. POWE, *supra* note 80, at 135-36.

90. Beilan v. Bd. of Educ., 357 U.S. 399 (1958).

91. *Id*. at 405-06.

the discharge.[92]

The four liberal Justices dissented, but it was Brennan who refuted Frankfurter precisely on how to understand the meaning of the discharge. According to Brennan, this case could not be looked upon as a conflict only about the teacher's competence. "It is obvious that more is at stake here. . . . Rather, it is the simultaneous public labeling of the employees as disloyal that gives rise to our concern."[93] The serious negative effect of the challenged discharge was the same as that in *Wieman*. The State placed such grave blame on the teacher without due process, and that should be forbidden as unconstitutional.[94]

What was important for Brennan was not what the State itself explained as the reason for the discharge, but what its action publicly announced. This was just the source of the "badge of infamy" that the Court had been concerned about in earlier cases. Frankfurter certainly acknowledged the negative effect of this label on the freedom of speech, too. All the more, he had to specify that the teacher had not been so labeled. It seems that he also recognized the possibility that the teacher could be deemed disloyal publicly, because he did not deny such an inference. It did not seem certain enough, however, to restrict the State's power on education. Frankfurter and Brennan truly disagreed, but they both used a similar approach to estimate the real effect of restrictions on speech.

The similar thinking of these two Justices is also demonstrated in *Smith v. California*,[95] a case about the conviction of a bookstore proprietor under a city ordinance which made it unlawful to have any obscene books for sale even if the possessor had no knowledge of their obscenity. This decision is well-known as the stage for the theoretical confrontation between Black and Frankfurter, though they agreed with Brennan's opinion for the Court that the ordinance was unconstitutional.[96] Black criticized Brennan's interpretation because it allowed for a balancing of interests. He declared in this obscenity case his famous absolutism about the First Amendment clearly—that freedom of speech and press is "beyond the reach" of federal and state power.[97] Frankfurter retorted that this attitude was "doctrinaire absolutism."[98] Black's inflexible method does not seem very persuasive, to be sure, but he did not lose the realistic view. On the contrary, his doctrinaire position was caused by his concern about the real danger for free speech. He

92. *Id*. at 410-11 (Frankfurter, J., concurring).
93. *Id*. at 418 (Brennan, J., dissenting).
94. *Id*. at 418-19 (Brennan, J., dissenting).
95. Smith v. California, 361 U.S. 147 (1959).
96. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 491 (1994); JAMES J. MAGEE, MR. JUSTICE BLACK 133-34 (1980).
97. *Smith*, 361 U.S. at 157-59 (Black, J., concurring).
98. *Id*. at 163 (Frankfurter, J., concurring).

felt, "we are on the way to national censorship."[99] Therefore, the Court must be watchful against "any stealthy encroachments" on freedom of speech.[100] His absolutism seemed necessary to fulfill this duty. It was not a simple literalistic interpretation, but reflected Black's deepening worry about the conditions of American society.

Whereas Black, with his general suspicion against the Government, tended nevertheless to depart from the concrete consideration of the cases, Brennan and Frankfurter attached importance to the real effects of the challenged regulations. In this case, Brennan's opinion for the Court condemned the ordinance because it would bring about "the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it."[101] Obscene writings were not protected, indeed, but the ordinance would restrict the dissemination of books which were not obscene, because it penalized the booksellers even if they did not know the contents. "The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."[102] The bookseller's tendency to "self-censorship" which would thus necessarily occur as the result of this ordinance was too extensive to be justified by the State's interest to regulate obscene books.[103] Frankfurter accepted this reasoning, but added a concurring opinion to make it clear that the State could prohibit obscene books in a balanced way. He was more conscious of the legitimate State interest than Brennan. He agreed nevertheless with Brennan, because he also realized the peril which the ordinance would cause for "the vital role of free speech."[104]

C. *The Demand for More Evidence Made Frankfurter More Passive*

Frankfurter disagreed with the majority in *Shelton v. Tucker*,[105] a case about the constitutionality of an Arkansas statute which compelled every teacher to annually file an affidavit listing all organizations to which she belonged or regularly contributed. The Court's decision, written by Justice Stewart, found the statute unconstitutional on its face. Although the State had the right to investigate the competence of teachers, the requirement of the statute was too intrusive upon the freedom of association to be balanced

99. *Id*. at 159-60 (Black, J., concurring).
100. *Id*. at 159-60 (Black, J., concurring).
101. *Id*. at 150-51.
102. *Id*. at 153-54.
103. *Id*. at 154-55.
104. *Id*. at 162-64 (Frankfurter, J., concurring).
105. Shelton v. Tucker, 364 U.S. 479 (1960).

with—the scope of inquiry was completely unlimited. The fear of public exposure and of the danger of the resulting discharge would seriously widen the impairment of liberty. The Court cited here Frankfurter's opinion in *Wieman* which had referred to the "tendency to chill" of the forced oath there. Then Stewart wrote, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"[106].

Frankfurter began his dissenting opinion with a renewed declaration of his judicial passivism.

> As one who has strong views against crude intrusions by the state into the atmosphere of creative freedom in which alone the spirit and mind of a teacher can fruitfully function, I may find displeasure with the Arkansas legislation now under review. But in maintaining the distinction between private views and constitutional restrictions, I am constrained to find that it does not exceed the permissible range of state action limited by the Fourteenth Amendment.[107]

This passage is not a denial of the judicial relevance of the "atmosphere of creative freedom." Frankfurter had acknowledged the value of this atmosphere and therefore was aware of the rather large restraints on freedom of expression even in the deterrents to the ability to exercise those freedoms. He cited his own opinions in *Wieman* and *Sweezy* to clearly demonstrate his consistency.[108] It seemed to him, however, that in *Shelton,* the "vice of deterring the exercise of constitutional freedoms" was not as grave as in the other cases. "The statute challenged in the present cases involves neither administrative discretion to censor nor vague, overreaching tests of criminal responsibility."[109] As such, the Court could not demand the State to take the narrowest means. However, at the end of his opinion, Frankfurter carefully noted that if the gathered information were used to discharge teachers because of their memberships, that use would violate the Fourteenth Amendment. [110] Frankfurter needed more evidence of restrictions on freedom to override the State's interest. That is the reason he thought that the intrusion here looked displeasing, but was not vicious enough to be declared unconstitutional.

This decision once again demonstrates the attention given to the

106. *Id*. at 485-88.
107. *Id*. at 490 (Frankfurter, J., dissenting).
108. *Id*. at 495 (Frankfurter, J., dissenting).
109. *Id*. at 492 (Frankfurter, J., dissenting).
110. *Id*. at 496 (Frankfurter, J., dissenting).

deterrent, broadly stifling effect of regulating speech. The Warren Court decided cases, differing from the Court in the 1940s, by using the balancing test. Even with this method, the Court was able to protect freedom of expression against government interests because it was ready to recognize the fragility of the freedom of expression, and accordingly to seriously estimate the damage caused by regulation. Frankfurter himself balanced the same concern with his respect for the power of legislatures in each case, which often led to different results from the liberal Justices. Even in those cases, however, their opinions were somewhat influenced by Frankfurter's worthwhile ideas.

Frankfurter's last lengthy Court opinion in this field, *Communist Party of United States v. Subversive Activities Control Board*,[111] which strengthened his notorious image as an advocate of the cold passivism, should be reread from this viewpoint. Frankfurter approved the constitutionality of the registration of the Communist Party as a Communist-action organization pursuant to the so-called McCarran Act. This registration brought the group a lot of grave disadvantages, including requiring it to bear the writing "a Communist organization" on its publications, and banning its members from employment in the U.S. Government or any defense facility or from applying for a passport. It was characteristic of Frankfurter's opinion that he excluded an examination about the constitutionality of those concrete measures from the focus of judicial review because the conflicts were not ripe. "It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport, or seek government or defense-facility or labor-union employment . . . "[112] Because he limited himself to the constitutional problem about the registration itself, he recognized as a result "only potential deterrence of association," but no real threat.[113] On the contrary, he respected the findings of Congress and admitted the vital importance of the interest of the United States to fight against the Communism. "[T]he magnitude of the public interests which the registration and disclosure provisions are designed to protect" was great enough to justify the potential disadvantages resulting from the registration.[114]

Black and Douglas criticized the Court's decision because they observed that just the registration itself caused enormous suppressive effects on the group. It branded the registered groups as disloyal to the United States. "The plan of the Act is to make it impossible for an organization to continue to

111. Communist Party of U. S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961).
112. *Id*. at 70-72, 78-79.
113. *Id*. at 79-81.
114. *Id*. at 93.

function once a registration order is issued against it."[115]

These Justices believed that Frankfurter ignored the reality of this case. Their criticism was rather persuasive. Nevertheless, it should not be forgotten that Frankfurter did not deny the possibility that the concrete measures of the challenged statute could cause serious harm and make it unconstitutional. He required, as in *Shelton*, more evidence of a deterrent effect to override such a vital interest of the United States and therefore postponed crucial judgments. Brennan, dissenting in part, was clever enough to realize the meaning of Frankfurter's judicial self-restraint here. He stated in his opinion that the constitutionality of each concrete duty and sanction was not decided yet.[116] He knew that Frankfurter's view would permit the denial of the statute's constitutionality if the Court could find the real deterrent effect caused by it. After Frankfurter's retirement in 1962, the Supreme Court declared in fact that some measures were unconstitutional.[117]

D. *Development of the Jurisprudence*

The sensitivity to the deterrent or chilling effect of regulations on freedom of expression characterized the decisions of the Warren Court. This very concern required the government to show "compelling" interests in order to justify the regulations. In *Bates v. Little Rock*,[118] a case about forced disclosure from the NAACP as in *Alabama,* the Court said, "[f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference"[119]. The Court recognized "fear of community hostility and economic reprisals that would follow public disclosure of the membership lists,"[120] and continued, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *NAACP v. Alabama*, 357 U.S. 449."[121] As a result, "[w]e conclude that the municipalities have failed to demonstrate a controlling justification for the deterrence of free association."[122]

This 1960 decision already showed the typical logic of the Warren Court when it intended to protect First Amendment freedoms. In 1963, *NAACP v.*

---

115. *Id*. at 141 (Black, J., dissenting).

116. *Id*. at 191 (Brennan, J., dissenting in part).

117. *See*, *e.g.*, Aptheker v. Sec'y of State, 378 U.S. 500 (1964) (concerning nullification of passports); United States v. Robel, 389 U.S. 258 (1967) (concerning prohibition of employment in defense-facility).

118. Bates v. Little Rock, 361 U.S. 516 (1960).

119. *Id*. at 523.

120. *Id*. at 524.

121. *Id*.

122. *Id*. at 527. *See* POWE, *supra* note 80, at 167.

Button,[123] written by Brennan, declared unconstitutional a statute regulating the solicitation of legal business, which aimed in fact to inhibit the activities of the NAACP. The Supreme Court emphasized there, as previously discussed,[124] the vulnerability of freedom of speech and at the same time the vice of "a vague and broad statute" especially for "unpopular causes." "Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens."[125] Then the Court showed how to weigh the interests in conflict against this background. "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[126] Brennan concluded that the State had failed to advance such reasoning. Originating from Frankfurter's opinion in *Sweezy*, the requirement of a compelling interest was thus established in the Court's jurisprudence.[127]

In this manner, the Supreme Court in the 1960s reestablished its strict attitude against the regulation of freedom of speech. The approach was not the same as in the 1940s, however. After *Dennis*, the Supreme Court did not return to the clear and present danger test. Under the tremendous pressure of the Red Scare, the balancing of interests approach, supported mainly by Frankfurter, won the majority. That did not mean, however, that the Court always remained passive. It was also Frankfurter who was realistic about the deterrent effect caused by restrictions on speech[128] and demanded a compelling interest from the government in order to justify it. What is now known as the strict or most exacting scrutiny was developed from this standpoint. This relationship was nonetheless almost forgotten, because the compelling interest test later became a symbol of the positive attitude of the Court, which seemed just the opposite to Frankfurter.

V. CONCLUSION

In the 1950s, Frankfurter explained his motives in his early book about the *Sacco-Vanzetti* case, in which he had critically examined the evidence

123. NAACP v. Button, 371 U.S. 415 (1963).

124. *See supra* text accompanying note 79.

125. *Button*, 371 U.S. at 435-36.

126. *Id*. at 438.

127. The Supreme Court could already say in 1963, "[s]ignificantly, the parties are in substantial agreement as to the proper test to be applied to reconcile the competing claims of government and individual." That was, of course, the compelling interest test. Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963) (forced disclosure of membership of a branch of NAACP was declared unconstitutional).

128. *See* BROWN, *supra* note 77, at 183-93 (analyzing the broad impact of the loyalty tests on the attitude of citizens).

which had led to the convictions of Sacco and Vanzetti.[129] "Few questions bother me more from time to time than what is it that makes people cowardly, makes people timid and afraid to say publicly what they say privately."[130] The result of this timidity is that "those who have no scruples, who are ruthless, who don't give a damn, influence gradually wider and wider circles, and you get Hitler movements in Germany, . . . McCarthyism cowing most of the Senators of the United States at least to the extent that they didn't speak out, etcetera, etcetera."[131] "So the affair like Sacco-Vanzetti for me was a manifestation of what one might call the human situation. The upshot is that I didn't think that it should be minimized to the trivialities of a few individuals."[132] He had tried to defy that weakness in most people. This reminiscence seems to reveal the origin of his keen concern about the deterrent effect.[133] He was consistent in his awareness of the "human situation" after he joined the Supreme Court. Although he respected the political judgments of legislatures in general, he was too sensitive to the fragile character of freedom of expression to trivialize it in balancing interests.

Brennan's pragmatic sense of the fragility of First Amendment freedoms was often praised. Morton J. Horwitz reveals the roots of Brennan's deep concern about the chilling effect during the experience of McCarthyism. "The chilling effects doctrine was more than an important legal formula; it also reflected a deep understanding of the stagnation of political, cultural, and intellectual life in American society during the McCarthy era, and the dangers that such stagnation posed to democracy."[134] I agree. However, his retrospect emphasizing Brennan's role, which claims that until Brennan joined the Court, "[u]nder Justice Frankfurter's influence, the Court had rubber-stamped a wide variety of repressive McCarthyite laws, triggering an unprecedented climate of political fear and suspicion"[135] is an

129. FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 11-34 (1927).

130. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 242 (1962).

131. *Id*. at 243.

132. *Id*.

133. Frankfurter chose as one of the best "advice" he had ever had a remark of Justice Brandeis, his great mentor; "[p]erhaps the greatest weakness of man is his inability to say 'No.'" Frankfurter believed that this weakness was deep-rooted in "the nature of man." FELIX FRANKFURTER, *The Best Advice I Ever Had*, *in* OF LAW AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956-1963, at 37, 38 (Philip B. Kurland ed., 1965). Perhaps this consciousness also helped him recognize psychological effects of regulations realistically. More fundamentally, I suppose, his Jewish origin had something to do with his sensitivity to the fragility of freedoms.

134. Horwitz, *supra* note 3, at 28. *See also* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 68-73 (1998); Stone, *supra* note 89, at 1337.

135. Horwitz, *supra* note 3, at 26. Horwitz says that Brennan built his jurisprudence of free speech on the footnote 4 of *Carolene Products*. Horwitz, *supra* note 3, at 27. However widespread this view is, it has no textual grounds. *See* POWE, *supra* note 80, at 489. Moreover, it remains unclear how this view relates to Brennan's attention to the chilling effect. I believe that his opinions can be

oversimplified observation. If one examines the Court's decisions carefully, it can be seen that Frankfurter's opinions functioned as Brennan's trailblazer. Even if they often took different positions, the Supreme Court was able to prepare in the 1950s for the development of the jurisprudence thereafter because Frankfurter's concern about the dangerous situation of free speech had already moved the Court in that direction.

understood better from the viewpoint this article shows.

REFERENCES

18 U.S.C. § 2385 (2006).

Adler v. Bd. of Educ. of City of N.Y., 342 U.S. 485 (1952).

Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950).

Aptheker v. Sec'y of State, 378 U.S. 500 (1964).

Barenblatt v. United States, 360 U.S. 109 (1959).

Bates v. Little Rock, 361 U.S. 516 (1960).

Beauharnais v. Illinois, 343 U.S. 250 (1952).

Beilan v. Bd. of Educ., 357 U.S. 399 (1958).

Bridges v. California, 314 U.S. 252 (1941).

Brown, R. S., Jr. (1958). *Loyalty and security: Employment tests in the United States*. New Haven, CT: Yale University Press.

Cantwell v. Connecticut, 310 U.S. 296 (1940).

Chafee, Z., Jr. (1956). *The blessings of liberty*. Philadelphia, PA: J.B. Lippincott.

Citizens United v. Fed. Election Comm'n., 130 S. Ct. 876 (2010).

Coleman, W. T., Jr. (1983). Mr. Justice Felix Frankfurter. In R. D. Rotunda (Ed.), *Six Justices on civil rights* (pp. 85-105). London, UK: Oceana.

Communist Party of the U. S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980).

Dennis v. United States, 341 U.S. 494 (1951).

Dombrowski v. Pfister, 380 U.S. 479 (1965).

Fallon, R. H., Jr. (2007). Strict judicial scrutiny. *UCLA Law Review, 54*, 1267-1337.

Frankfurter, F. (1927). *The case of Sacco and Vanzetti*. Boston, MA: Little, Brown.

Frankfurter, F. (1965). The best advice I ever had. In P. B. Kurland (Ed.), *Of law and life & other things that matter: Papers and addresses of Felix Frankfurter, 1956-1963* (pp. 37-41). Cambridge, MA: Belknap Press.

Garner v. L.A. Bd. of Pub. Works, 341 U.S. 716 (1951).

Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963).

Hirsch, H. N. (1981). *The enigma of Felix Frankfurter*. New York, NY: Basic Books.

Horwitz, M. J. (1997). In Memoriam: William J. Brennan, Jr.. *Harvard Law*

Review, 111, 23-28.

Horwitz, M. J. (1998). *The Warren Court and the pursuit of justice*. New York, NY: Hill and Wang.

Jacobs, C. E. (1974). *Justice Frankfurter and civil liberties*. Berkeley, CA: University of California Press.

Kalven, H., Jr. (1964). The New York Times case: A note on "the central meaning of the First Amendment". *Supreme Court Review, 1964*, 191-221.

Kalven, H., Jr. (1968). "Uninhibited, robust, and wide-open"—A note on free speech and the Warren Court. *Michigan Law Review, 67*, 289-302.

Kovacs v. Cooper, 336 U.S. 77 (1949).

Magee, J. J. (1980). *Mr. Justice Black*. Charlottesville, VA: University Press of Virginia.

Mori, T. (2005). Freedom in the public sphere and democracy. *Kyoto Journal of Law and Politics, 2*(1), 55-69.

NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958).

NAACP v. Button, 371 U.S. 415 (1963).

Nathanson, N. L. (1976). Mr. Justice Frankfurter and the Holmes Chair: A study in liberalism and judicial self-restraint. *Northwestern University Law Review, 71*, 135-160.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Newman, R. K. (1994). *Hugo Black: A biography*. New York, NY: Pantheon.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

Phillips, H. B. (1960). *Felix Frankfurter reminisces*. New York, NY: Anchor.

Post, R. C. (1993). William J. Brennan and the Warren Court. In M. Tushnet (Ed.), *The Warren Court in historical and political perspective* (pp. 123-136). Charlottesville, VA: University Press of Virginia.

Powe, L. A., Jr. (2000). *The Warren Court and American politics*. Cambridge, MA: Belknap Press.

Rauh, J. L., Jr. (1976). Felix Frankfurter: Civil libertarian. *Harvard Civil Rights-Civil Liberties Law Review, 11*, 496-520.

Schrecker, E. W. (1986). *No ivory tower: McCarthyism and the universities*. New York, NY: Oxford University Press.

Schwartz, B. (1983). *Super chief: Earl Warren and his Supreme Court: A judicial biography*. New York, NY: New York University Press.

Shelton v. Tucker, 364 U.S. 479 (1960).

Siegel, S. A. (2006). The origin of the compelling state interest test and strict

scrutiny. *American Journal of Legal History, 48*, 355-407.

Silverstein, M. (1984). *Constitutional faiths: Felix Frankfurter, Hugo Black and the process of judicial decision making*. Ithaca, NY: Cornell University Press.

Simon, J. F. (1989). *The antagonists: Hugo Black, Felix Frankfurter and civil liberties in modern America*. New York, NY: Simon and Schuster.

Smith, D. L. (1986). *Zechariah Chafee, Jr.: Defender of liberty and law*. Cambridge, MA: Harvard University Press.

Smith v. California, 361 U.S. 147 (1959).

Speiser v. Randall, 357 U.S. 513 (1958).

Stone, G. R. (1991). Justice Brennan and the freedom of speech. *University of Pennsylvania Law Review, 139*, 1333-1355.

Stone, G. R. (2004). *Perilous times: Free speech in wartime from the Sedition Act of 1798 to the war on terrorism*. New York, NY: W.W. Norton.

Sweezy v. New Hampshire, 354 U.S. 234 (1957).

Thomas v. Collins, 323 U.S. 516 (1945).

Thornhill v. Alabama, 310 U.S. 88 (1940).

Tribe, L. H. (1997). Sticks and carrots. In E. J. Rosenkranz & B. Schwartz (Eds.), *Reason and passion* (pp. 123-132). New York, NY: W. W. Norton.

United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

United States v. Robel, 389 U.S. 258 (1967).

Urofsky, M. I. (1991). *Felix Frankfurter: Judicial restraint and individual liberties*. Boston, MA: Twayne.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Watkins v. United States, 354 U.S. 178 (1957).

Wieman v. Updegraff, 344 U.S. 183 (1952).

Yarbrough, T. E. (1992). *John Marshall Harlan: Great dissenter of the Warren Court*. New York, NY: Oxford University Press.

Frankfurter大法官作為嚴格審查的先驅——填補言論自由審查標準的缺口

毛 利 透

摘 要

本文以案例分析為研究方法，主張Frankfurter大法官對於言論自由嚴格審查基準的發展有正面影響，上述貢獻因其著名的「司法消極主義」主張而受到世人忽略；同時，本文也發現Frankfurter大法官影響了在進步的華倫法院扮演主要角色的Brennan大法官的法學理論。

當聯邦最高法院向麥卡錫主義退讓時，Frankfurter大法官對於限制疑似共產黨人活動所生的影響深表關切，並率先使用「威懾」與「寒蟬效應」描述限制言論自由對一個開放社會的負面影響。在*Sweezy v. New Hampshire*一案中，Frankfurter大法官主張，只有重大迫切的國家利益始可正當化對政治自由之限制。Brennan大法官延續Frankfurter大法官的理論，在言論自由領域發展出重大迫切利益的審查標準。儘管Frankfurter大法官相較於Brennan大法官，在認定寒蟬效應以宣告言論自由限制違憲時，需要更堅實的證據。然而，本文依然確認了Frankfurter大法官以其敏感度，使美國聯邦最高法院注意到限制政治自由的負面效應，對言論自由違憲審查基準的建立產生正面影響。

關鍵詞：言論自由、Frankfurter大法官、Brennan大法官、寒蟬效應、重大迫切利益

Article

Judicial Ideal Points in New Democracies: The Case of Taiwan

Lucia Dalla Pellegrina,[*] Nuno Garoupa[**] & Shirley Ching-ping Lin[***]

ABSTRACT

This paper extends the empirical analysis of the determinants of judicial behavior by estimating the ideal points for the Justices of the Taiwanese Constitutional Court from 1988-2009. Taiwan presents a particularly interesting case because the establishment and development of constitutional review corresponds to the country's political transition from an authoritarian regime to an emerging democracy. The estimated ideal points allow us to focus on political coalitions in the Judicial Yuan based on presidential appointments. We did not find any strong evidence of such coalitions. Our empirical results indicated that, with the exception of a handful of Justices, most of them have moderate estimated ideal points. In the context of the Taiwanese Constitutional Court, our results also confirm the previous econometric analysis that largely rejected the attitudinal hypothesis, which predicted that Justices would respond to their appointers' party interests.

Keywords: *Constitutional Court, Constitutional Review, Empirical Analysis, Grand Justice, Ideal Point, Judicial Yuan, Taiwan*

---

[*] Assistant Professor, Department of Statistics, Università Bocconi and Milano-Bicocca. E-mail: lucia.dallapellegrina@unibocconi.it.

[**] Professor, College of Law, University of Illinois at Urbana-Champaign. E-mail: ngaroupa@illinois.edu. Address correspondence to Nuno Garoupa at the University of Illinois College of Law, 504 E. Pennsylvania Avenue, Champaign, Illinois 61820, United States of America.

[***] S.J.D. Candidate, School of Law, Northwestern University. E-mail: c-lin@nlaw.northwestern.edu. The authors are grateful to two anonymous referees, Yun-chien Chang, Cheng-Yi Huang, Jimmy Chia-shin Hsu, Gianna Monti and participants at the Academia Sinica workshop for their useful comments and suggestions. Nuno Garoupa acknowledges financial support by FCT, PPCDT/JUR/55752/2006. We are also grateful to Rachel Jo-yu Chen, Tzu-Te Wen and Jessie Chien-yu Hsu for superb research assistantship. And we are grateful to Caroline Belloff, Melissa Marrero and Roya H. Samarghandi for reviewing the paper. The usual disclaimers apply.

CONTENTS

I. INTRODUCTION

In the field of comparative judicial politics, Taiwan is a particularly interesting case because the establishment and development of its constitutional review, to a large extent, corresponds to its transition from an authoritarian regime to an emerging democracy.[1] Further, scholars have identified Taiwan as a success story—Taiwanese constitutional judges have increasingly established themselves as a relevant role, while simultaneously avoiding excessive backlash from other political actors.[2]

The Taiwanese Constitution ("Constitution" or "ROC Constitution") is one of the oldest active constitutions remaining in the world. Similarly, the Taiwanese Constitutional Court (a.k.a. "Council of Grand Justices" or "Council") predates almost all other specialized constitutional courts on the globe. Although its composition and competence have been reformed in the last fifty years, the Taiwanese Constitutional Court is by no means a new product, as are the constitutional courts in many other third-wave democracies,[3] but it is instead an institution that has prevailed throughout the authoritarian period and the more recent emerging democracy. The age and role of the Council of Grand Justices substantially distinguish the court from other, seemingly similar, constitutional courts around the world.

The Council was founded in China in 1948 and retreated with the ROC government to Taiwan in 1949.[4] Prior to 2003, the Council was composed of seventeen Grand Justices who were appointed by the President and approved by the Control Yuan (1948-1992) or the National Assembly (1992-2000). The Grand Justices served renewable terms of nine years.[5] The Presidents of the Judicial Yuan presided over the Council meetings, despite the fact that they were not Grand Justices at the time.[6] Today, the

---

1. On other transitions, *see generally* GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2004); LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007); REBECCA BILL CHÁVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA (2004).

2. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 42, 106 (2003).

3. For example, Spain, Portugal, Eastern European countries, or Chile (to some extent).

4. Yueh-sheng Weng, *Wokuo Shihhsien chihtu chih Techen yu Chanwang* [*The Features and Prospects of the Republic of China (ROC) Constitutional Review System*], *in* SSUFAYUAN DAFAKUAN SHIHHSIEN 50 CHOUNIEN CHINIEN LUNWENCHI [ESSAYS IN MEMORY OF THE FIFTIETH ANNIVERSARY OF CONSTITUTIONAL INTERPRETATIONS BY THE GRAND JUSTICES OF THE JUDICIAL YUAN] 297 (Dep't of Clerks for the Justices of the Constitutional Court ed., 2000).

5. Ssufayuan Tsuchihfa [The Organic Act of the Judicial Yuan], art. 3 (1947) (amended 2009) (Taiwan) [hereinafter OAJY], *available at* http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0010051; *see also* Constitution, (1947) (Taiwan); J.Y. Interpretation No. 541 (2002) (Taiwan), *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=541.

6. *See* OAJY, *supra* note 5, arts. 3(1), 3(2), 5(2); *see also* Thomas Weishing Huang, *Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan*, 19 TEMP. INT'L & COMP.

number of Grand Justices has been reduced to fifteen, and both the President and Vice President of the Judicial Yuan simultaneously hold a position as Grand Justice. With the exception of the eight Justices appointed in 2003 to serve four-year terms, today's Justices are appointed by the President with the majority consent of the Legislative Yuan and serve non-renewable eight-year terms.[7] About half of the Justices are renewed every four years, meaning, in theory, each President could potentially appoint seven or eight Justices during his or her four-year presidential term.

The Council of Grand Justices follows the centralized German model of constitutional review rather than the decentralized review system practiced in the United States or Japan.[8] The importance of the Council and the significant role that it plays in Taiwan provide an interesting framework to evaluate and analyze the judicial behavior therein.

In a previous paper we tested the attitudinal model in the Council of Grand Justices during the period 1988–2008.[9] We hypothesized that the Taiwanese constitutional judges responded to party interests, either because their preferences coincided with the appointer(s) or they wanted to exhibit loyalty to them. Given the disproportional influence of the Chinese Nationalist Party ("KMT" or "Kuomintang") in the appointment process throughout most of this period, we expected the Grand Justices appointed by KMT Presidents (in 1985, 1994, and 1999) to favor KMT interests. We also expected that the Grand Justices appointed by the President—who was supported by the Democratic Progressive Party ("DPP"), the major KMT opponent—in 2003 and 2007 would disfavor KMT interests.[10] Under this

---

L.J. 1, 3 (2005).

7. *See* Constitution, Additional Articles (1991) (amended 2000) (Taiwan); *see also* Constitution, Additional Articles, art. 5 (1991) (amended 2005) (Taiwan). Moreover, it is noteworthy that the Justices who serve as President and Vice President of the Judicial Yuan are not guaranteed an eight-year term in office. Constitution, Additional Articles, art. 5(2) (1991) (amended 2005) (Taiwan).

8. *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 465-66 (2d ed. 2006). The Council portrays itself as a "model similar to the German and Austrian system." *See also* J.Y. Interpretation No. 419 (1996) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=419.

9. *See* Nuno Garoupa, Veronica Grembi & Shirley Ching-ping Lin, *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20 PAC. RIM L. & POL'Y J. 1 (2011). For a general view of the attitudinal model, *see* Saul Brenner & Harold J. Spaeth, *Ideological Position as a Variable in the Authoring of Dissenting Opinions on the Warren and Burger Courts*, 16 AM. POL. RES. 317, 317-28 (1988); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557-65 (1989); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1997); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2008).

10. However, because the opposition never actually dominated the relevant confirming body (i.e., the Control Yuan, National Assembly, or Legislative Yuan), we expected the second effect (alignment between the interests of the opposition and the voting patterns of Justices appointed by the DPP President) to be less significant than the first (alignment between the interests of the KMT and the voting patterns of Justices appointed by the KMT Presidents).

hypothesis, the affiliation of the Grand Justices, as measured by the President who appointed them, should be a good predictor of their voting patterns in the Court.[11]

As mentioned earlier, the appointment mechanism is heavily dominated by the President and the political parties of the relevant confirming body (under the influence of the KMT and its allies). In this study, we assumed that the choice of Grand Justices would correspond to the preferences of the appointing President given the position of the Control Yuan, National Assembly, or Legislative Yuan.[12] Thus, we expected these preferences to largely align. Moreover, the Grand Justices have limited tenure and, prior to 2003, also faced the possibility of reappointment. Thus, we also expected that these two factors would influence the likelihood that the Grand Justices would seriously consider the interests of their appointers.

Our research proved to be quite convincing—although political variables partly explained how members of the Council made their decisions, the role of political variables was significantly limited and did not evidence notable party alignment. (Specifically, we tested how the Council members aligned with the KMT, the traditional ruling party). Our empirical analysis provides evidence that, in general, the Taiwanese Constitutional Court remains fairly insulated from the main party interests. Also, our empirical research did not find any strong systematic interference of any other political variables or ideologies.

In addition, our results indicated that other explanations, such as judicial concern over advancing the reputation of the Court, exist to describe the Council's behavior. Moreover, since dissenting opinions had become more likely as the KMT gradually lost its political influence, while the likelihood of the opposition gaining the presidency increased (i.e., during the political transition), our results showed that the alignment of interests between the Council and political parties weakened during the transition (mid-1990s to early 2000s) but was noticeably stronger prior to the transition period.

In this paper, we address judicial behavior in the Council with a different empirical methodology. We estimate individual ideal points for each constitutional judge during the period 1988–2009. The American empirical literature on the behavior of the Supreme Court Justices developed a sophisticated empirical method for estimating individual judges' ideal points based on how judges manifest their views in dissenting and

11. The following names are the elected Presidents of Taiwan since 1950: Chiang Kai-shek (1950-1975, KMT), Yen Chia-kan (1975-1978, KMT), Chiang Ching-kuo (1978-1988, KMT), Lee Teng-hui (1988-2000, KMT), Chen Shui-bian (2000-2008, DPP), and Ma Ying-jeou (since 2008, KMT).

12. While these bodies of government should not pose problems for KMT Presidents, they could potentially influence in the case of DPP President Chen (who never controlled a legislative majority).

concurring opinions.[13] Technically, the empirical method of estimation revealed those points in some n–dimensional space of politically relevant choices, which judges prefer over all other points in that space. Utilizing this particular approach allows us to estimate judicial ideal points by ranking them in one dimension. Essentially, we treated the period between 1988–2009 as a single large court, which based on how the Justices have voted, we estimated their individual ideal points.

In the context of the U.S. Supreme Court, it has been shown that the ideal points of individual Justices can be consistently estimated in a one-dimension space that reflects the traditional conservative-liberal dichotomy. Although results suggest that U.S. Supreme Court Justices do not have temporally constant ideal points, they seem to correlate quite significantly with the general perception of which Justices are conservative or liberal. Therefore, ideal point estimations are still viewed as a rightful measurement to predict judicial behavior.

Our paper develops a similar exercise for the Taiwanese Judicial Yuan. The unique dataset is collected by the authors and includes 101 decisions ("interpretations") issued by the Taiwanese Constitutional Court during the time period between 1988 and 2009. We chose July 15, 1987 (the date of the lifting of martial law in Taiwan) to serve as the initial period because this date corresponds with the start of the transition from the traditional authoritarian period to an emerging democracy. Additionally, we chose those interpretations in which petitioners with certain political interests can be easily identifiable (particularly, when they are affiliated with the KMT and its allies or with the opposition).[14] However, unlike the American model, the Taiwanese Constitutional Court does not entertain concrete review, but instead employs abstract review when it delivers a constitutional interpretation. Therefore, all of the cases we have selected are abstract in nature and can be easily associated with political interests. If there are significant differences among judicial ideal points, these cases will present

13. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court*, 1953-1999, 10 POL. ANALYSIS 134 (2002). Other relevant references *see* Simon Jackman, *Multidimensional Analysis of Roll Call Data via Bayesian Simulation: Identification, Estimation, Inference, and Model Checking*, 9 POL. ANALYSIS 227 (2001); Joseph Bafumi et al., *Practical Issues in Implementing and Understanding Bayesian Ideal Point Estimation*, 13 POL. ANALYSIS 171 (2005); Michael Peress, *Small Chamber Ideal Point Estimation*, 17 POL. ANALYSIS 276 (2009). From a comparative perspective, *see also* Matthew E. Wetstein et al., *Ideological Consistency and Attitudinal Conflict: A Comparison of the U.S. and Canadian Supreme Courts*, 42 COMP. POL. STUD. 763 (2009); Chris Hanretty, *Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals*, EUR. J. POL. RES. (forthcoming 2012).

14. By no means are these the only cases with possible political consequences. However, in order to avoid subjectivity, we have only considered those cases that are obviously and remarkably political in nature. The argument should be that these are salient cases for which we should be able to detect politicization, if any exists.

the best evidence to reveal these points.

Unlike the standard results from research on the U.S. Supreme Court , the evidence from our Taiwan Constitutional Court study do not show significantly different estimated ideal points. In fact, the Taiwanese constitutional judges do not appear to be excessively polarized. Our results indicate that the ranking of estimated ideal points is fairly unrelated to presidential appointments. In addition, because part of our estimated results reflects a prevailing low rate of separate opinions, Justices who tend to author dissenting opinions more often are more likely polarized in terms of estimated ideal points.

Our results generally support our previous findings. The Council is largely non-polarized and seems to follow the pattern of civil law jurisdictions by pursuing a certain apolitical façade.[15] While some political influence can be detected empirically, it is generally insignificant once compared with the U.S. Supreme Court.

Our paper makes four main contributions to the growing comparative empirical studies on constitutional courts. First, it estimates judicial ideal points outside the U.S. court system. Second, it compares the Council of Grand Justices with other constitutional courts to confirm the Council's distinct elements. Third, it supports the view that, under certain conditions, constitutional judges in a particular setting might be willing to restrain their potential ideological biases and pursue other, more collective, interests. Fourth, it provides an empirically oriented framework for future research on Taiwanese judicial politics. In Part II we address the case of Taiwan. In Part III, we present our empirical results. And, finally, in Part IV we conclude this paper.

II. THE CASE OF TAIWAN[16]

Prior to Taiwan's transformation to a democratic system in the 1990s, the country experienced over 100 years of colonial and authoritarian rule.[17] In 1895, as a result of the First Sino-Japanese War, Taiwan was ceded by Imperial China (the Ching Dynasty) to Japan and became a Japanese colony

15. *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION (3d ed. 2007) (discussing the pressure for consensus in the civil law tradition).

16. This section largely follows Garoupa, Grembi & Lin, *supra* note 9.

17. *See* Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 531-39 (2002); *see also* Xiaohong Xiao-Planes, *Of Constitutions and Constitutionalism: Trying to Build a New Political Order in China, 1908-1949*, *in* BUILDING CONSTITUTIONALISM IN CHINA (Stéphanie Balme & Michael W. Dowdle eds., 2009) (discussing the Constitution as a political compromise and the later enactment of the Temporary Provisions during the period of the Communist Rebellion). The Temporary Provisions removed constitutional constraints imposed on the President and effectively allowed for a one-party state with no independent constitutional structures.

for fifty years until Japan was defeated during World War II in 1945.[18] That same year, the troops of Chiang Kai-shek, then-President of the Republic of China and Director-General of the KMT as well as the Supreme Allied Commander in Asia, took control of Taiwan on behalf of the Allied Forces. Followed by Chiang's defeat in the Chinese Civil War, the KMT-led government of the Republic of China declared martial law in Taiwan in May 1949. They also retreated from the Chinese mainland to Taiwan that year. The KMT continuously ruled Taiwan, Penghu, and several outlying Fujianese islands for fifty-five years[19] until the DPP won the presidential election in 2000.[20] The KMT imposed authoritarian rule on the Taiwanese people from 1949 until martial law was lifted in 1987.[21] This crucial political reform opened up a new era of liberalization and democratization for Taiwan.[22] Opposition parties were legalized in 1989, and many restrictions on public discourse were eliminated.[23] Beginning in 1991, various general elections have been held regularly.[24] Taiwan has been a liberal democratic state ever since.[25]

The complex political transition from colonial rule to authoritarian reign to democracy has inevitably affected Taiwan's laws and its overall legal system. The Constitution of Taiwan, which is also the Constitution of the

18. *See* GOV'T INFO. OFF., REPUBLIC OF CHINA YEAR BOOK 53-54 (2010) [hereinafter 2010 Y.B.], *available at* http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/2010/03History.pdf.

19. *See* Cheng-jung Lin, *The San Francisco Peace Treaty and the Lack of Conclusions on Taiwan's International Status*, TAIWAN HIST. ASS'N (Sept. 10, 2001), http://www.twhistory.org.tw/20010910.htm; *see also* Nigel Nien-Tsu Li, *Nishuihsingchou de Hsiancheng—Taiwan Chiehyen Erhshih Nien Huiku Hsianfa Laishihlu* [*The Constitution: March Forward or Be Swept Away—The Post-Martial-Law Path 20 Years On*], 46 SSU YU YEN: JENWEN YU SHEHUIKEHSUEH TSACHIH [THOUGHT AND WORDS: J. HUMAN. & SOC. SCI.] 2008, at 1, 3.

20. *See* 2010 Y.B., *supra* note 18, at 56. The DPP candidate, Chen Shui-bian, was elected in 2000 and re-elected in 2004. However, the KMT returned to power after its candidate, Ma Ying-jeou, won the presidential election in 2008 and re-elected in 2012.

21. *See* Wang, *supra* note 17, at 537-38. Parenthetically, Chiang Ching-Kuo, Chiang Kai-shek's son, was the President at the time; *see also* Jane Kaufman Winn & Tang-chi Yeh, *Advocating Democracy: The Role of Lawyers in Taiwan's Political Transformation*, 20 LAW & SOC. INQUIRY 561 (1995) (discussing the role of lawyers in promoting democracy in Taiwan both in increasing the autonomy of Judicial Yuan and in forming and shaping the DPP and pro-democracy social movements).

22. Wang, *supra* note 17, at 538; *see also* Sean Cooney, *Why Taiwan Is Not Hong Kong: A Review of the PRC's "One Country Two Systems" Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL'Y J. 497, 518 (1997); Lin, *supra* note 19, at 2-3.

23. However, the DPP was already founded in 1986. *See* Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 LAW & SOC. INQUIRY 763, 770 (2002).

24. For example, the first election for all Representatives of the National Assembly was held in 1991; the first election for all Legislators was held in 1992; and the first direct elections for President and Vice President occurred in 1996, when KMT candidates Lee Teng-hui and Lien Chan were elected respectively. *See* 2010 Y.B., *supra* note 18.

25. *See* Wang, *supra* note 17, at 539; *see also* Cooney, *supra* note 22, at 518.

Republic of China,[26] is an excellent example of these changes. As originally drafted, the central government, according to Sun Yat-sen's political doctrines,[27] is separated into five branches ("Yuan")—the Executive, Legislative, Judicial, Examination, and Control Yuans,[28] with the President[29] and the National Assembly[30] separated outside of the five-power scheme. Among them, the Executive, Legislative, and Judicial Yuans reflect the conventional Montesquieuan framework.[31] The Examination Yuan is in charge of entry into the civil service and the Control Yuan is responsible for auditing as well as impeachment of public officials.[32] Furthermore, the Taiwanese government is divided into central, provincial or municipal, and district levels.[33]

In addition to Taiwan's relatively complicated political structure, the legitimacy of its Constitution was challenged during the authoritarian regime. First, the Constitution was imposed from the outside without the consent or approval of the Taiwanese people. Secondly, the Taiwanese government was dominated by the so-called "Mainlanders," who comprised approximately 13% of the population,[34] despite the fact that the native Taiwanese people comprised the overwhelming majority (approximately 87%) of the population.[35]

Setting aside the controversial, but valid, claims made by the Taiwanese people against their government, it is important to note that the Constitution has never been completely enforced in the country for several reasons. To begin with, the National Assembly enacted the "Temporary Provisions

---

26. The Constitution was enacted in 1946 and went into effect in 1947 in China. *See* GINSBURG, *supra* note 2, at 111; Constitution (1947) (Taiwan).

27. *See* DENNY ROY, TAIWAN: A POLITICAL HISTORY 84 (2003).

28. Constitution, arts. 53-106 (1947) (Taiwan).

29. The President is the head of the state and serves a six-year term with a two-term limit. Constitution, arts. 35, 47 (1947) (Taiwan). The President's promulgation of laws and orders requires the countersignature of the head of the Executive Yuan (the Premier). Constitution, art. 37 (1947) (Taiwan). Meanwhile, his or her appointment to the Premier requires the consent of the Legislative Yuan. Constitution, art. 55(1) (1947) (Taiwan); *see also* Wang, *supra* note 17, at 541.

30. The National Assembly is a popularly elected body that is empowered to elect or recall the President or Vice President and to amend the Constitution. Constitution, art. 27 (1947) (Taiwan); *see also* Wang, *supra* note 17, at 541.

31. These three branches represent the state's highest administrative, legislative, and judicial organs respectively. Constitution, arts. 53, 62, 77 (1947) (Taiwan); *see also* Ginsburg, *supra* note 23, at 768 n.8.

32. Constitution, arts. 83, 90 (1947) (Taiwan); *see also* Ginsburg, *supra* note 23, at 768.

33. Constitution, arts. 107-111, 112-128. Because the Constitution establishes an extremely complex political structure, some have argued that the structure is more suitable for governing a huge country, such as China, than a small island like Taiwan. *See* Cooney, *supra* note 22, at 514.

34. "Mainlanders" (Waishengjen, literally "people from other provinces") refers to people who were born in China and emigrated from the Chinese mainland to Taiwan after 1945. *See* Wang, *supra* note 17, at 535, 537; *see also* GINSBURG, *supra* note 2, at 108.

35. "Native Taiwanese" (Penshengren, literally "people of this province") refers to the people, and their descendents, who inhabited Taiwan before 1945. *See* Wang, *supra* note 17, at 535.

Effective during the Period of Communist Rebellion" ("Temporary Provisions") in China in 1948.[36] The Temporary Provisions suspended many provisions of the Constitution while strengthening presidential powers[37] until their abolishment in 1991.[38] Additionally, the Constitution has been amended seven times since 1991.[39] Although these amendments, which are known collectively as the "Additional Articles," preserve the original text of the Constitution, they have significantly reshaped the structure of the government and its political practices.[40] The central government provides a noteworthy example of how the Additional Articles have affected the Constitution and its uniform implementation throughout Taiwan.

For example, the position of the President has been substantially reorganized by the 1994 and 1997 Additional Articles, which allow for the President's direct election by the Taiwanese people for a four-year term (that may only be renewed once). Under the Additional Articles, the President is no longer required to seek the Premier's countersignature to promulgate personnel orders and is also permitted to appoint the Premier without the consent of the Legislative Yuan. Moreover, the President, upon passing a vote of "no confidence" against the Premier, has been granted the authority to dissolve the Legislative Yuan.[41] These changes to the Taiwanese central government indicate that the country has adopted a semi-presidential system since 1997.[42]

---

36. Tungyuan Kanluan Shihchi Linshih Tiaokuan [The Temporary Provisions Effective During the Period of Communist Rebellion] (1948) (repealed 1991) (Taiwan) [hereinafter Temporary Provisions], *available at* http://en.wikisource.org/wiki/Temporary_Provisions_Effective_During_the_Period_of_Communist_Rebellion (non-official translation).

37. For example, the Temporary Provisions facilitated the President's ability to issue emergency orders and empowered the President to create extra-constitutional agencies as well as suspended the two-term limit on the presidency. *See* Temporary Provisions, arts. 1, 3, 4; *see also* Wang, *supra* note 17; Cooney, *supra* note 22, at 515; GINSBURG, *supra* note 2, at 113-15.

38. *See* Wang, *supra* note 17, at 542. Parenthetically, Lee Teng-hui, Chiang Ching-kuo's successor, was President at the time.

39. The Constitution was revised in 1991, 1992, 1994, 1997, 1999, 2000, and 2005. However, the Council of Grand Justices declared the 1999 Additional Articles unconstitutional and void because the Amendments permitted Representatives of the National Assembly to extend their own terms for almost three years. *See* Constitution, Additional Articles, (1991) (amended 2005) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=98.
For a more detailed discussion, *see* Jiunn-rong Yeh, *Constitutional Reform and Democratization in Taiwan: 1945-2000*, *in* Taiwan's Modernization in Global Perspective 47-77 (Peter Chow ed., 2002). *see also* J.Y. Interpretation No. 499 (2000), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499.

40. *See* Cooney, *supra* note 22, at 520; *see also* Wang, *supra* note 17, at 542.

41. *See* Constitution, Additional Articles (1991) (amended 1994) (Taiwan), Constitution Additional Articles (1991) (amended 1997) (Taiwan); *see also* Constitution, Additional Articles, arts. 2(1), 2(2), 2(6), 3(1), 3(2) (1991) (amended 2005) (Taiwan).

42. For a detailed discussion, *see* Thomas Weishing Huang, *The President Refuses to Cohabit: Semi-presidentialism in Taiwan*, 15 PAC. RIM L. & POL'Y J. 375, 375-402 (2006).

However, unlike other semi-presidential countries, Taiwan has neither a constitutional mechanism nor a provision that requires the President to take into account the results of parliamentary elections when appointing a prime minister.[43] The country also lacks a political culture of a legislature with a strong sense of political identity, such as the French tradition,[44] that would urge the President to accept "cohabitation."[45] As a result, Taiwan experienced a chronic political deadlock between the executive and legislative branches when DPP President Chen Shui-bian refused to cohabitate with the opposition coalition (referred to as the "Pan-Blue" Alliance[46]), which dominated the Legislative Yuan throughout his terms (2000–2008).[47]

Moreover, the 1992 and 2000 Additional Articles have considerably altered the status of the Control Yuan by allowing the President, with the consent of the Legislative Yuan, to elect its members. These Additional Articles also allow the President to appoint the Grand Justices of the Judicial Yuan and the Members of the Examination Yuan in the same manner.[48] Even more dramatically, the 2005 Additional Articles abolished the National Assembly[49] and set a very high threshold for constitutional amendments.[50] As a result, the Constitution has since become extremely difficult to change.

Further, it is important to understand how the Additional Articles have transformed the judicial branch of the Taiwanese government. Prior to the Articles, the Constitution granted the Judicial Yuan, the highest judicial organ, the authority to: (1) adjudicate civil, criminal, and administrative cases, as well as cases concerning disciplinary measures against public officials;[51] and (2) interpret the Constitution as well as unify the

43. *Id.* at 387.

44. The tradition of a strong legislature existed at least between the Third and Fourth Republics. *See id*. at 386.

45. *Id.* at 385, 387.

46. This alliance was formed by the KMT and the People First Party ("PFP"). *See Background Note: Taiwan*, U.S. DEP'T OF STATE, BUREAU OF EAST ASIA AND PAC. AFF., http://www.state.gov/r/pa/ei/bgn/35855.htm (last updated Feb. 7, 2012).

47. *See* Huang, *supra* note 42, at 386.

48. *See* Constitution, Additional Articles, arts. 5(1), 6(2), 7(1), 7(2) (1991) (amended 2005) (Taiwan).

49. *Id.* art. 1.

50. *Id.* art. 12 ("Amendment of the Constitution shall be . . . passed by at least three-fourths of the [legislators] present at a meeting attended by at least three-fourths of the total members of the Legislative Yuan, and sanctioned by electors . . . at a referendum . . . wherein the number of valid votes in favor exceeds one-half of the total number of electors. . . .").

51. Constitution, art. 77 (1947) (Taiwan). However, in practice, these cases are adjudicated by the ordinary court system, Administrative Courts, and Commission on the Disciplinary Sanction of Functionaries, which are outside the Judicial Yuan but under its supervision. Because these practices have made the Judicial Yuan "the highest judicial administrative organ," rather than the highest judicial (adjudicative) organ, the related laws were declared unconstitutional in 2001. *See* J.Y. Interpretation No. 530 (2001), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=530.

interpretations of laws and ordinances.[52] However, the 1997 and 2005 Additional Articles have further expanded the power of the Judicial Yuan[53] by empowering the Grand Justices to adjudicate cases that related to the impeachment of the President or Vice President as well as cases concerning the dissolution of unconstitutional political parties.[54] In order to safeguard judicial independence, the 1997 Additional Articles have also prohibited the Executive Yuan from eliminating or reducing the annual budget proposal of the Judicial Yuan.[55]

The Council of Grand Justices has the potential to play a significant role in the governmental system. For example, the Council has the authority to take action in the following scenarios by: (1) dealing with the "most contentious moral and political issues," as its counterparts do in other democracies;[56] (2) acting as an arbiter when a political deadlock occurs between the executive and the legislature under the present semi-presidential system;[57] (3) interpreting the Constitution authoritatively, especially now that it is immensely difficult to amend; and (4) deciding some of the most politically controversial cases (e.g., impeaching the President or dissolving an "unconstitutional" political party). Unsurprisingly, this authority has become more of a coveted object for various political, economic, and judicial actors than ever before.[58] Regardless of the heightened desirability of the Council's Grand Justices positions, we cannot ignore that the Council once operated as an instrument of the KMT regime, rather than a guardian of the Constitution, during the authoritarian era.[59] The most infamous example was *Interpretation No. 31* of 1954, when the Council allowed the Members of the Legislative Yuan, Control Yuan, and National Assembly, who were elected in China in 1948, to remain in power for more than forty years.[60]

---

52. Constitution, art. 78 (1947) (Taiwan). The power of judicial review lies with the Council of Grand Justices, a component of the Judicial Yuan. *See* Wang, *supra* note 17, at 545; *see also* Ginsburg, *supra* note 23, at 768.

53. *See* Huang, *supra* note 6, at 4.

54. *See* Constitution, Additional Articles, art. 5(4) (1991) (amended 2005) (Taiwan).

55. *See* Constitution, Additional Articles, art. 5(6) (1991) (amended 1997) (Taiwan).

56. *See* Ran Hirschl, *Reviews (2002-2005), December 2003, Ginsburg, Tom, Book Review: Judicial Review in New Democracies: Constitutional Courts in Asian Cases by Tom Ginsburg*, LAW & POL. BOOK REV. (Dec., 2003) [hereinafter Hirschl, *Book Review*], *available at* http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Ginsburg1203.htm (last visited Feb. 10, 2012).

57. A good example is *Interpretation No. 632*, which was filed by the DPP legislators because the Pan-Blue-dominated Legislative Yuan had refused to exercise its consent power over President Chen's nominees of the Members of the Control Yuan for more than two and a half years. The Council finally ruled the action of the legislature unconstitutional. J.Y. Interpretation No. 632 (2007), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=632.

58. *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 11-12 (2004).

59. *See* Wang, *supra* note 17, at 545; *see also* GINSBURG, *supra* note 2, at 130-34.

60. *See* Wang, *supra* note 17, at 543-44; *see also* J.Y. Interpretation No. 31 (1954) (Taiwan) *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=31. However, the Council eventually overturned *Interpretation No. 31*. *See* J.Y. Interpretation No. 261 (1990) (Taiwan),

Since the martial law was lifted in 1987, fifty-two Grand Justices have served on the bench. Our research covers forty-nine of these Justices,[61] all of whom were respectively appointed by President Chiang Ching-Kuo in 1985 (i.e., the fifth term), President Lee Teng-hui in 1994 and 1999 (i.e., the sixth term), President Chen Shui-bian in 2003 and 2007, and President Ma Ying-Jeou in 2008.[62] Twenty-three of the forty-nine Justices were former Supreme Court judges in the ordinary court system (OAJY art. 4(1)(1)); twenty-three were formerly law professors (OAJY art. 4(1)(3)); two were senior prosecutors; and only one was a legislator (OAJY art. 4(1)(2)).[63] In addition, 80% and 40% of Chiang and Ma's appointees are Mainlanders or their second generation. In contrast, 79% and 74% of Lee and Chen's appointees are native Taiwanese. Evidently, Mainlander Presidents (i.e., mainly Chiang) exhibited a tendency to appoint Mainlanders, despite the fact that Mainlanders only represented 13–15% of the Taiwanese population. To the contrary, Taiwan's native-born Presidents (i.e., Lee and Chen) had a tendency of appointing a greater number of native Taiwanese to the bench, even though these appointments did not accurately reflect the population ratio.

As mentioned above, the Grand Justices presently enjoy the following powers to: (1) interpret the Constitution; (2) unify the interpretations of laws and ordinances; (3) adjudicate cases relating to the impeachment of the

---

available at
http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=261.

61. We only have forty-nine Justices in our dataset for the following reasons: First, Fan Shin-Shiang, a Chiang's appointee, had taken a sick leave beginning in July 1987 and eventually died of liver cancer in November 1987. Considering that she did not attend any Council meetings while in office, we decided not to include her in our dataset. *See* Hua-yuan Hsueh, *Taiwan Lishih Tzutien—Chiuhua—Fan Hsin-Hsiang* [*Dictionary of the Taiwan History—Nine Strokes—Fan Hsin-Hsiang*], TAIWAN LISHIH TZUTIEN [DICTIONARY OF THE TAIWAN HIST.], http://nrch.cca.gov.tw/ccahome/website/site20/contents/009/cca220003-li-wpkbhisdict002006-0612-u.xml (last visited Apr. 4, 2011). Second, Rai Hau-Min (the current president of the Judicial Yuan) and Su Yeong-Chin (the current vice president of the Judicial Yuan), Ma's appointees, did not take up their posts until October 2010. These two Justices rendered none of the decisions that we collected for our dataset so we decided to exclude them as well. *See Rai Promises to Win Back Public's Trust in Judiciary*, TAIPEI TIMES, Oct. 14, 2010, at 3, *available at* http://www.taipeitimes.com/News/taiwan/archives/2010/10/14/2003485347.

62. *See Former Justices*, JUSTICES OF THE CONST. COURT—JUD. YUAN, http://www.judicial.gov.tw/constitutionalcourt/en/p01_04.asp (last visited Feb. 10, 2012); *see also*, *Justices*, JUSTICES OF THE CONST. COURT—JUD. YUAN, *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p01_03.asp (last visited Feb. 10, 2012).

63. OAJY, art. 4. "To be eligible for appointment as a Justice of the Constitutional Court, a candidate must: (1) have served as a Justice of the Supreme Court for more than ten years . . . ; or (2) have served as a Member of the Legislative Yuan for more than nine years . . . ; or (3) have been a [law] professor . . . for more than ten years . . . ; or (4) have served as a Justice of the International Court, or have had authoritative works published in the fields of public or comparative law; or (5) be a person highly reputed in the field of legal research and have political experience. The number of Justices qualifying under any single qualification listed above shall not exceed one third of the total number of Justices."

President or the Vice President; and (4) declare the dissolution of unconstitutional political parties.[64] The Constitutional Interpretation Procedure Act of 1993 ("CIPA") applies different procedures to each set of powers.[65] In short, the Council conducts an abstract review in the first two categories of jurisdiction and forms a Constitutional Court to hear the other two types of "cases or controversies" (i.e., to exercise concrete review).[66] Although the Council has not yet dealt with any cases to impeach the President or Vice President or been required to dissolve an unconstitutional party (and taking into consideration that interpreting the Constitution is the core of constitutional review), our research thus concentrates on the Justices' rulings under Article 5 of the CIPA,[67] especially cases filed under Articles 5(1)(1) and 5(1)(3) (the petitioners in these cases are comprised of either the central government, local governments, or at least one–third of legislators). We also focused our research on a few other important cases that are related to party politics and were filed under Articles 5(1)(2) and 5(2) (the petitioners in these cases are comprised of individuals, legal persons, political parties, or judges of the other courts[68]).[69]

The CIPA grants an individual or a judge of the other courts standing to

---

64. *See* Constitution, arts. 78-79 (1947) (Taiwan); Constitution, Additional Articles, art. 5 (1991) (amended 2005) (Taiwan).

65. *See* Constitutional Interpretation Procedure Act (1948) (amended 1993) (Taiwan) [hereinafter CIPA], *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73.

66. *See* JACKSON & TUSHNET, *supra* note 8, at 468.

67. Article 5(1) of CIPA provides

> A petition for an interpretation of the Constitution may be filed under one of the following circumstances: (1) Where a central or local government agency is uncertain regarding the application of the Constitution in exercising its powers, or, where the agency, while exercising its powers, is in dispute with another agency regarding the application of the Constitution, or where the agency is uncertain of the constitutionality of a particular law or order when applying it; (2) Where an individual, a legal person, or a political party, having exhausted all judicial remedies provided by law, alleges that her/his/its constitutional rights have been infringed upon and thereby questions the constitutionality of the law or order applied by the court of last resort in its final decision; (3) Where the members of the Legislative Yuan, in exercising their powers, are uncertain regarding the application of the Constitution or regarding the constitutionality of a particular law when applying the same, and at least one-third of the members of the Legislative Yuan have filed a petition.

Besides, since Interpretation No. 371 expanded the application of art. 5(2), now when any judge sincerely believes the statute or regulation at issue before the court is in conflict with the Constitution, the court has the authority to adjourn the proceedings and petition the Constitutional Court to interpret the constitutionality of the statute or regulation at issue. J.Y. Interpretation No. 371 (1995) (Taiwan) *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371. Additionally, unlike the Justices of the U.S. Supreme Court, the Grand Justices have no discretion when determining which cases they would like to hear. In other words, the Grand Justices have to deal with all of the petitions unless a petition does not meet the requirements of CIPA and, in that case, the Council should dismiss the case without issuing any interpretation.

68. They include the ordinary court system, Administrative Courts, and Commission on the Disciplinary Sanction of Functionaries. *See supra* notes 51 & 66 and accompanying text.

69. Out of 101 decisions in our dataset, 10 were filed under Article 5(1)(2) and 1 under Article 5(2); hence, the remaining ninety decisions were filed under Articles 5(1)(1) and 5(1)(3).

file a petition for a constitutional interpretation under Articles 5(1)(2) or 5(2). However, the Council's constitutional interpretations are not equivalent to the concrete review used by the American and Japanese Supreme Court Systems because the Council does not have the authority to directly declare another court's final decision unconstitutional.[70] Instead, the Council is permitted only to interpret the constitutionality of the laws, regulations, or legal precedents on which another court's decision was based.[71] Furthermore, although our research mainly focuses on those cases filed under Articles 5(1)(1) and 5(1)(3) of the CIPA on account of their political nature and significance, the cases filed by individuals (i.e., the cases of Article 5(1)(2) comprise a large portion of the Council's docket.[72]

The Council must obtain an absolute majority of votes in order to declare a constitutional interpretation. Prior to 1993, the Council had the authority to adopt an interpretation with a three-fourths majority of the attending Justices as long as it had a quorum consisting of three-fourths of all the Justices.[73] However, in 1993, the CIPA was amended to require the Counsel to obtain a two-thirds majority of attending Justices with a quorum consisting of two-thirds of all Justices in order to adopt an interpretation.[74] Additionally, prior to the changes imposed in 1993, any Justices with separate opinions were only permitted to issue "dissenting opinions," even if

70. In addition to this difference, there are other distinctions between the Council and the Supreme Courts of the United States and Japan. For example, the President, the other four Yuans, or even one-third of legislators have the right to challenge, on an "abstract" basis, the constitutionality of laws enacted by the Legislative Yuan. In this case, many of the "cases or controversies" doctrines that form an important part of the U.S. constitutional jurisprudence cannot be applied naturally. However, the role and profile of the Council seems to be consistent with general trends in East Asia. *See* Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805 (2011).

71. *See* CIPA, art. 4; *see also* J.Y. Interpretation, No. 154 (1978) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=154; J.Y. Interpretation, No. 271 (1990) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=271; J.Y. Interpretation, No. 374 (1995) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=374; J.Y. Interpretation, No. 569 (2003) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=569; J.Y. Interpretation, No. 582, (2004) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=582 .

72. For example, in the fifth and sixth terms, 97% and 92% of petitions respectively were filed by individuals. In addition, 72% and 75% of interpretations, based on the cases filed by individuals, received judicial rulings. *See* Judicial Yuan, *Tiyichieh chih Tiliuchieh Tafakuan Chiu Chikuanshengchingche yu Jenminshengchingche Tsocheng Chiehshih chih Tungchishuchupiao* [*The Proportion of the Cases Filed by Individuals and by Institutions from the First Term to the Sixth term of the Grand Justices*], TUNGCHI TZULIAO [STAT.], http://www.judicial.gov.tw/constitutionalcourt/uploadfile/E100/第一屆至第六屆大法官作成解釋之統計數據表.htm (last visited Feb. 10, 2012).

73. *See* Ssufayuan Tafakuan Huiyi Fa [The Act of the Council of Grand Justices of the Judicial Yuan], art. 13(1) (1948) (amended 1958) *available at* http://www.judicial.gov.tw/constitutionalcourt/p07_2_one.asp?lawno=61&types=all.

74. *See* CIPA, art. 14(1).

their opinions differed only in the reasoning, but not the final ruling, from the majority opinion.[75] Thus, the changes implemented under the 1993 CIPA have allowed any Justices with separate opinions to issue either concurring or dissenting opinions, which are proclaimed along with the interpretations of the Council.[76]

Under the Constitution, the Council has the power to declare laws and ordinances unconstitutional and void.[77] However, like other German-style constitutional courts, the Council does not always act to explicitly declare a law or governmental action unconstitutional or immediately invalid even when it is not in conformity with the Constitution.[78] For example, in *Interpretation No. 419* of 1996, although the Council did not proclaim that the status of the Vice President concurrently serving as Premier of the Executive Yuan unconstitutional, it instead concluded that this situation was "constitutionally inappropriate."[79] In addition, in *Interpretation No. 530* of 2001, the Council struck down the related laws, which included the OAJY, the Organic Act of Court, and the Organic Act of the Administrative Court, but rather than immediately voiding them, the Council granted the Legislative Yuan two years to revise the laws.[80]

These two examples prove the Council's tendency to adopt a cautious and self-restricted role when making decisions that directly affect other branches of the government or important political actors. In return, the government and political parties in Taiwan generally respect the Council's decisions. A successful example of the Council's cautious decision-making tactics occurred with *Interpretation No. 419*. After this interpretation was released, Vice President Lien Chan resigned from his post as the Premier even though the Council did not explicitly prohibit the Vice President from simultaneously serving as the Premier. On the other hand, the Council's rulings are not respected absolutely. For instance, although the Council issued *Interpretation No. 530*, which demanded the Legislative Yuan to amend the unconstitutional laws within a two-year time frame, ten years

75. *See* ACGJ, art. 17.

76. *See* CIPA, art. 17. However, it is important to note that the Justices vote in secret. Therefore, if a Justice votes with the minority, but he or she refuses to write a separate (especially dissenting) opinion, then, according to the public record, that vote will be counted toward the majority. When this occurs, it is possible to assume that the Justice voting with the minority opinion may have later changed his or her opinion to align with that of the majority. However, it is more likely that, prior to voting, the lobbyists of different political parties or interest groups have targeted the Justice, and, as a result of these lobbying efforts, the Justices do not want to publish an individual opinion.

77. *See* Constitution, arts. 171-172 (1947) (Taiwan).

78. *See* J.Y. Interpretation No. 419 (1996) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=419. *See also* J.Y. Interpretation No. 530 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=530.

79. *See id.*

80. *See id*.

have passed without legislative action.

III. THE DATA AND RESULTS

We have analyzed and coded 101 decisions issued by the Grand Justices of the Taiwanese Constitutional Court from 1988 to 2009.[81] As discussed earlier, we included all cases that are political in nature. These decisions have obvious political content and, therefore, do not require second-guessing concerning the political interests involved. These decisions include all cases of abstract interpretations (filed under articles 5(1)(1) and 5(1)(3) of the CIPA) and some cases of concrete interpretations (filed under articles 5(1)(2) and 5(2) of the CIPA) issued during the relevant time period.[82]

When coding the decisions, we focused on the peculiarities of the Taiwanese system of concurring and dissenting opinions (also known as separate opinions). We also ensured that the different political interests were accurately identified.[83] Furthermore, we studied a total of 49 Grand Justices.[84] Table I provides the general descriptive statistics concerning gender, first-time appointment/reappointment, career backgrounds, and origins (meaning Mainlander or Native Taiwanese) of these forty-nine Justices.

We began our study by conducting a descriptive analysis of dissent rates (which we defined as the number of decisions with dissents over the total number of decision) in the Council for each term in order to get a sense of any judicial polarization that was employed. While almost two-thirds of the decisions selected for our sample were decided unanimously (including separate opinions that do not disagree with the Council's decision), slightly more than one-third of the decisions included dissenting votes, which are separate opinions that disagree with the outcome derived from the majority opinion.[85] During the early period of Taiwan's transition to democracy (1988–1994) the dissent rate was less than 30%, but the rate increased to 50% in the following decade (1995–2003). However, once democracy began to root itself (2004–2009), the dissent rate declined to approximately 28%. Table II provides additional details and explanations for dissent rate

81. Our previous work included ninety-seven decisions issued by the Grand Justices. *See* Garoupa, Grembi & Lin, *supra* note 9. The list of cases is detailed in Appendix B.

82. *See supra* text accompanying note 69.

83. Appendix C provides a detailed explanation of the coding of controversial cases, which we defined as those that required a more comprehensive explanation concerning the identification of "concurring" and "dissenting" opinions. *See supra* text accompanying note 76. Our sample likely underestimates actual dissent so, in this sense, we have only studied the reported dissent.

84. *See supra* text accompanying note 61. A list with their names in English and in Chinese is reported on Appendix A.

85. Notice our functionalist definition of "dissent": an opinion that proposes a different outcome in terms of pro-petitioner or against-petitioner.

fluctuations.

After completing our dissent rate analysis, we focused on the next step in our study—estimating judicial ideal points in the context of our sample. We followed the methodological approach of previous scholarship, which is based on item response modeling (IRT).[86] We let x_{ij} represent the vote of each justice j (j = 1, . . . , J) for decision i (i = 1, . . . , N). Further, we assigned a vote in favor of the constitutionality of a particular law, ordinance, or government behavior a value of one (x_{ij} = 1), while the votes against constitutionality received a value of zero (x_{ij} = 0). In our study, J=49 represents the number of respondents and N=101 represents the number of items.

Each Justice's vote responds to the personal attributes of the judge as well as the characteristics of the decision. In particular, we focused on the judge's ideal point (θ_j), which is a latent variable that can be measured indirectly by observing the judge's manifest opinions on several decisions of the Constitutional Court. We also considered a possible case characteristic that adjusts the particular preference of an individual judge to the relevant dimension when faced with a particular decision (β_i). In other words, β_i, which is parallel to the discrimination parameter in IRT models, provides information on how effectively a decision on a given issue can discriminate between judges on the recovered dimension. We also accounted for a particular location of the decision in the relevant space (α_i). Again, α_i is parallel to the difficulty parameter in Two-Parameter IRT models.
Suppose that the excess utility to a given justice, j, voting for constitutionality in a particular decision, i, is the following:

$$z_{ij} = \alpha_i + \beta_i\theta_j + e_{ij}$$

where the error term e_{ij} is distributed according to a standard normal distribution. Since z_{ij} is a latent variable, we assumed that x_{ij} = 1 if $z_{ij}>0$ and x_{ij} = 0 if $z_{ij}\leq 0$.

Moreover, the model is not identified unless additional restrictions are imposed. In the event that additional restrictions are imposed, it is possible to either normalize the ideal points or constrain the position of two of the Justices in the one-dimensional latent space in such a way that all of the other Justices' ideal points are estimated in relation to the two fixed positions.[87] We chose to employ the latter empirical strategy and assumed

86. Martin & Quinn, *supra* note 13; Hanretty, *supra* note 13. Other papers that use non-dynamic simulations include: Joshua Clinton, Simon Jackman & Douglas Rivers, *The Statistical Analysis of Roll Call Data*, 98 AM. POL. SCI. REV. 355 (2004); Jackman, *supra* note 13.

87. Normalized estimates typically show better convergence properties compared to non-normalized ones. *See* Bafumi et al., *supra* note 13. However, here we use the standard procedure

standard normal priors for the item parameters.

The estimated judicial ideal points are presented in one relevant dimension. These estimations typically follow the left-right or liberal-conservative dimension. But, in the context of Taiwan, such traditional dimension seems inapplicable considering the political culture of the Council. The obvious approach may be favorable-unfavorable to the KMT, given the political context and the transition period included in our dataset. However, considering the potential complications caused by the internal problems of the KMT during President Lee's terms, we decided to loop together non-KMT's interests and suggested the relevant dimension to be the KMT's political interests versus the political interests of non-KMT groups.[88]

Through a careful analysis of the dissenting opinions, we began utilizing this method by setting Yang Chien-hua and Li Chih-peng, both appointed by President Chiang, to -2 (opinions favorable to non-KMT groups) and +2 (opinions favorable to KMT party), respectively. If the relevant dimension is correctly identified, we expect these Justices to be at the extremes, while the values corresponding to the other Justices should fall between -2 and +2. If, however, we incorrectly identified the relevant dimension, the estimated model should experience convergence problems or Justices are situated in less likely positions.[89] In order to address these shortcomings, in addition to the complications in framing Taiwanese judicial politics in the recovered dimension, we have estimated ideal points with multiple combinations of Justices in -2 and +2, using those that the algorithm systematically locates in the extreme positions. As a result, we therefore produced nine estimations of ideal points to guarantee robustness and avoid the standard methodological shortcomings of misidentifying the relevant dimension.

Given our dataset, we have a matrix of 49 Justices by 101 decisions with a total of 1,415 observations. Since we estimated judicial ideal points over a time period of more than twenty years, many individual votes in these decisions are missing (because not all 49 Justices voted in all of the decisions we used) and many pairs of Justices were never matched (because they did not decide any cases together). Equivalently, we estimated ideal points for a Council composed of 49 Justices where many were absent for a significant number of decisions.[90] Since President Ma's appointees were

followed in the literature since convergence does not appear to be a relevant problem in our estimates.

88. *See* Garoupa, Grembi & Lin, *supra* note 9, at 34-35.

89. In our case standard diagnostic tests suggest that convergence is achieved in all simulations except in the few cases when Justices appointed by President Ma are involved. This occurred because of the relatively low number of decisions involving these Justices.

90. Missing data due to nonresponse threatens statistical inferences if the target of inference and the tendency to omit responses are not independent, such as for instance when measuring students' proficiency scores. In our case, instead, missing votes can be ignored in a statistical sense, and are due

only included for a handful of decisions (four), we produced separate estimations of judicial ideal points that include and exclude these Justices.

We used the MCMC pack for R to estimate the model.[91] This approach is advantageous because it uses Bayesian Markov Chain Monte Carlo to provide for robust intervals for the estimated parameters. Each model was run for 1,200,000 iterations, discarding the first 2,000 as burn-in. The thinning interval that we used in the simulations is 10. Gibbs sampling was adopted.

The results of our nine estimations are presented in Tables III and IV as average estimated ideal points conditioned on presidential appointments, including and excluding President Ma's appointees, respectively.[92] Evidently, there is no correlation between the average estimated ideal points and presidential appointments.[93] Examples of individual simulations in terms of estimated ideal points and corresponding confidence intervals are presented in Figures I and II.

Tables V and VI present the individual average ideal estimate points for 44 Justices (excluding President Ma's appointees) and all 49 Justices (including President Ma's appointees). The appropriate graphs are presented in Figures III and IV. By ranking Justices from -2 to +2, the results clearly confirm no relationship between the opinions of the Grand Justices and presidential appointments. In addition, with the exception of six Justices, the large majority seemingly favor a moderate ideal point. Furthermore, the direct comparison of scores, including and excluding priors from the computation, show that the six Justices in the extremes are robust to different alternatives. JusticesShih Wen-sen, Dong Shiang-fei, and Yang Chien-hua are close to -2 (favorable to non-KMT groups in the recovered dimension)

---

to playing no role in the assessing judges' alignment. *See* NORMAN ROSE, MATTHIAS VON DAVIER & XUELI XU, MODELING NONIGNORABLE MISSING DATA WITH ITEM RESPONSE THEORY (IRT), 10-11 (2010), *available at* http://www.ets.org/Media/Research/pdf/RR-10-11.pdf.

91. *See* MCMCPACK: MARKOV CHAIN MONTE CARLO (MCMC) PACKAGE (2005), http://mcmcpack.wustl.edu/ (last visited Feb. 10, 2012).

92. The detailed results of the nine estimations in terms of individual estimated ideal points and standard deviations are available upon request.

93. Correlation coefficients between estimated ideal points and the President who appointed the judge are not statistically significant. We also computed correlation coefficients between estimated ideal points and other potentially relevant variables (gender, whether justice is a mainlander, a second-generation mainlander, a career judge, a law professor, and has been reappointed) in order to check whether there may be other elements interfering with our interpretation of the recovered dimension. We obtained one significant negative coefficient (-0.25) between average ideal points and the professional origin of judges being a law professor (i.e. law professors are more likely to be associated to negative ideal points). However, the coefficient turns to be non-significant once judges appointed by President Ma are included in the computation of average points. Furthermore, considering the absolute value of ideal points helps understanding whether there are other characteristics pushing judges towards a greater degree of polarization, regardless the recovered dimension. We find that more polarized justices are mainlanders, and have been appointed by President Chiang, while less polarized ones have been appointed by President Chen.

and Sun Sen-yan, Li Chung-sheng, and Li Chih-peng are close to +2 (favorable to KMT in the recovered dimension).

Table VII summarizes relevant information concerning the six Justices we have identified in the extremes. There are no strong common attributes or traits, except that they dissent more than the average Justices that we studied. Unlike the results gathered from the U.S. Supreme Court Justices studies, the judicial opinions of the Taiwanese Grand Justices do not lend themselves to an easily detectable pattern that serves as an explanation for polarization.

Our results highlight the importance of dissenting opinions. Apart from the six more polarized Justices, the next three Justices who have dissented most often tended to have "off-center" opinions that were not statistically significant. The three "off-center" Justices are: Liu Tieh-cheng (wrote five, which was the highest number, of the dissenting opinions in our dataset), Su Chun-shiung (wrote three dissenting opinions) and Shu Yu-shiu (wrote three dissenting opinions) even though Justice Shu's ideal point is surprisingly closer to center than those of the other two. Since not all of the dissenters are on the margins, this reinforces the importance of our analysis and emphasizes that these six polarized Justices are statistically different.

Our results also indicate that the Justices appointed after 2000, the year of the first democratic alternation of ruling parties in Taiwan, seem to issue more moderate opinions than the Justices before them. This conclusion is evidenced by the incidence of dissent rates in the period 1995–2003, as documented by Table II. Moreover, although our dataset shows that three of the four new decisions in 2009 include dissenting votes, we believe this to minimally affect the overall results for reasons already explained. Therefore, we concluded that, unlike some of their predecessors, Justices appointed after the first democratic alternation of ruling parties tended to issue seemingly more politically moderate, or less polarized, opinions. This observation is potentially in contradiction with the perceived reduction of the individual cost of dissenting after 2000 (given the more democratic nature of the political regime), but fully explained by our account elsewhere.[94]

There are three potential objections to using the recovered dimension for our analysis that we would like to address. The first argument against our analysis is that a political dimension is irrelevant for judicial decision-making in Taiwan. However, we found that the robustness and convergence of results seem to indicate otherwise, even in the case that in some specifications convergence is difficult to achieve given the limitations of the dataset where the number of dissenting opinions only constitutes one-third of the sample. We do not find this surprising since our dataset reflects the politically salient cases rather than the entire workload of the

94. *See* Garoupa, Grembi & Lin, *supra* note 9.

Council.

A related objection could be that our estimations are fundamentally driven by dissent in these politically salient cases whereas in the more general workload of the Council dissent patterns are significantly different. However, there has been no systematic work on explaining general dissent patterns at the Council, making it difficult to assess the extent to which politically salient cases are exceptional in this respect. Moreover, the direction of such alleged differences is simply unclear. That is, one could argue that there will be more dissents in politically salient cases since the appointers and their administration's interests are highly implicated. Nonetheless, we could equally argue that there will be less dissents in politically salient cases because, under these circumstances, Justices are more likely to compromise or even consent in order to face less additional pressure from outsiders. At the same time, in other less politically visible and controversial cases (such as human rights), Justices could more freely express their divisions within the Council. Compared with these seemingly plausible, but contradictory, arguments, using politically relevant cases is advantageous in order to nail down the interpretation of the recovered dimension, which is not convoluted with potentially inconsistent explanations.[95]

The second argument against our analysis is that the Council of Grand Justices is characterized by *n*-relevant dimension and the recovered dimension does not fully reflect ideal points in this Court. Although the dataset cannot completely exclude the existence of other relevant (unrecovered) dimensions, we believe that the robustness of our results—absolutely clear evidence of no relationship between presidential appointments and the systematic empirical identification of the same few polarized Justices' points—evidences otherwise. Finally, we recognize that it is certainly possible that the estimation of the moderate ideal points may not be statistically strong, especially considering that some Justices are subject to significantly larger standard deviations. However, our results indicate that the six polarized Justices survive the difference in specifications.

The third argument is that our results do not reflect conventional wisdom concerning some particular Justices. For example, Justice Shu Yu-shiu emerges in our analysis as a moderate judge while many local legal experts have recognized her work at the Court as promoting a particularly outspoken line. Without questioning these general perceptions, our results are driven by the dataset and therefore limited to politically salient cases. It goes without saying that the area of human rights is of fundamental political

95. On the general discussion about political relevant cases, *see* Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8 INT'L. J. CONST. L. 885 (2011).

importance, but it is not politically salient in our sense unless there is a clear implication for the interests of the KMT (favorable or unfavorable). The Justices are ranked in this light rather than by their general tendency to dissent or to promote a particular unconventional approach to a particular area of law. While recognizing the limitations of our dataset, the serious advantage is a clean and transparent interpretation of the results.

IV. CONCLUSION

This paper presents an application of ideal point estimation to the Taiwanese Constitutional Court. Unlike the published literature discussing the Justices of the U.S. Supreme Court, we did not find a strong indication of any relationship between judicial ideal points and presidential appointments. Our results did not confirm any indication of political allegiance by Council members.

Our estimated model is consistent with an interpretation we have offered and defended in a previous article.[96] While politics certainly influence the Taiwanese Constitutional Court, it is not in the conventional government-opposition or left-right dimensions. First, during Taiwan's political transition from an authoritarian regime to a democracy, the Council of Grand Justices had to liberate itself from the KMT tutelage and establish a solid reputation for judicial independence. As a result, Grand Justices appointed by KMT Presidents were willing to disregard, and even disfavor, KMT interests when necessary. Second, the appointment process and other features of the Taiwanese Constitutional Court do not generate the kind of party quotas or majority-versus-minority coalitions seen in similar courts of other countries. Third, the rate of dissenting opinions is low as compared with those published by the U.S. Supreme Court.[97] Thus, we conclude from our studies that the Council has been primarily concerned with actively asserting its independence from the other branches of government by establishing consensus and sound legal doctrines.

The absence of polarization is not necessarily synonymous with a consensual model. It could merely reflect lack of judicial independence. However, the fluctuation of dissent rates and the consistency of our results seem to make such explanation less plausible.

---

96. *See* Garoupa, Grembi & Lin, *supra* note 9.

97. It is important to note that, unlike the manner in which the U.S. Supreme Court disposes of cases, an absolute majority (two-thirds or even three-fourths of the votes) is required for the Taiwanese Constitutional Court to render a decision.

TABLE I Characteristics of Taiwanese Constitutional Court Judges, 1985-2008

	Appointed by Chiang Ching-kuo (1985)	Appointed by Lee Teng-hui (1994; 1999)	Appointed by Chen Shui-bian (2003; 2007)	Appointed by Ma Ying-jeou (2008)
Number	15	19	19	5
Mainlander	12	4	3	1
Second generation Mainlander	0	0	2	1
Native Taiwanese	3	15	14	3
Career Magistrate	9	7	8	1
Law Professor	5	11	9	4
First Time Appointment	12	16	13	5
Reappointment by a Different President	3(*)	3	6	0
Female	0	1	3	0
Male	15	18	16	5

Source: Taiwanese Constitutional Court, 1985-2009

Note: Some judges are counted more than once because they were appointed and reappointed by different Presidents.

(*) Two were originally appointed by Yen Chia-kan (1976) and one by Chiang Kai-shek (1972).

TABLE II Dissent in the Court By Years

	Number of Decisions Without Dissent	Number of Decisions With Dissent	Percentage of Dissent
1988-1994	22	9	29.0%
1995-2003	19	19	50.0%
2004-2009	23	9	28.1%
Total	64	37	36.6%

Source: Taiwanese Constitutional Court, 1985-2009; own calculations.

TABLE III Average Scores Excluding President Ma' appointees

-2	+2	Average score appointed by President Chen	Average score appointed by President Lee	Average score appointed by President Chiang
Shih, Wen-sen (Lee)	Sun, Sen-yan (Lee)	0.036	-0.074	-0.009
Shih, Wen-sen (Lee)	Li, Chung-sheng (Chiang)	0.032	-0.155	-0.019
Shih, Wen-sen (Lee)	Li Chih-Peng (Chiang)	0.026	-0.177	-0.117
Dong, Shiang-fei (Lee)	Sun, Sen-yan (Lee)	0.042	-0.095	0.013
Dong, Shiang-fei (Lee)	Li, Chung-sheng (Chiang)	0.028	0.061	0.005
Dong, Shiang-fei (Lee)	Li Chih-Peng (Chiang)	0.030	0.053	-0.094
Yang, Chien-hua (Chiang)	Sun, Sen-yan (Lee)	0.050	-0.025	0.140
Yang, Chien-hua (Chiang)	Li, Chung-sheng (Chiang)	0.046	0.015	0.129
Yang, Chien-hua (Chiang)	Li Chih-Peng (Chiang)	0.031	0.010	0.029

Note: Average scores exclude priors

TABLE IV Average Scores Including President Ma' appointees

-2	+2	Average score appointed by President Ma	Average score appointed by President Chen	Average score appointed by President Lee	Average score appointed by President Chiang
Shih, Wen-sen (Lee)	Sun, Sen-yan (Lee)	0.158	-0.007	-0.087	-0.007
Shih, Wen-sen (Lee)	Li, Chung-sheng (Chiang)	0.091	0.000	-0.059	-0.009
Shih, Wen-sen (Lee)	Li Chih-Peng (Chiang)	0.083	-0.001	-0.066	-0.110
Dong, Shiang-fei (Lee)	Sun, Sen-yan (Lee)	0.082	0.024	0.003	0.015
Dong, Shiang-fei (Lee)	Li, Chung-sheng (Chiang)	0.074	0.018	0.050	0.002
Dong, Shiang-fei (Lee)	Li Chih-Peng (Chiang)	0.093	0.003	0.0039	-0.094
Yang, Chien-hua (Chiang)	Sun, Sen-yan (Lee)	0.100	0.026	-0.047	0.139
Yang, Chien-hua (Chiang)	Li, Chung-sheng (Chiang)	-0.011	-0.024	-0.067	0.162
Yang, Chien-hua (Chiang)	Li Chih-Peng (Chiang)	0.009	0.037	-0.018	0.030

Note: Average scores exclude priors

TABLE V Individual Average Scoring Excluding Appointees of President Ma

Justices	Averages with priors	Averages without priors
Yang, Chien-hua[(c)]	**-1.743**	**-1.614**
Dong, Shiang-fei[(b)]	**-1.720**	**-1.580**
Shih, Wen-sen[(b)]	**-1.391**	**-1.086**
Liu, Tieh-cheng[(c)]	-0.932	-0.932
Tseng, Hua-sung[(b)]	-0.539	-0.539
Shu, Yu-shiu[(a)]	-0.426	-0.426
Tseng, Yu-tien[(a)]	-0.395	-0.395
Huang, Yui-chin[(b)]	-0.306	-0.306
Shu, Tsung-li[(a)]	-0.253	-0.253
Li, Chen-shan[(a)]	-0.243	-0.243
Chen, Jui-tang[(c)]	-0.223	-0.223
Chen, Chi-nan[(b)]	-0.217	-0.217
Cheng, Chung-mou[(b)]	-0.196	-0.196
Chang, Cheng-tao[(c)]	-0.144	-0.144
Lin, Tze-yi[(a)]	-0.128	-0.128
Wung, Yueh-sheng[(c)]	-0.109	-0.109
Zhai, Shao-shien[(c)]	-0.108	-0.108
Yang, Jih-jan[(c)]	-0.107	-0.107
Ma, Han-bau[(c)]	-0.106	-0.106
Liao, Yi-nan[(a)]	-0.060	-0.060
Shih, His-en[(c)]	-0.059	-0.059
Cheng, Chien-tsai[(c)]	-0.059	-0.059
Lin, Guo-shien[(b)]	-0.056	-0.056
Wu, Geng[(c)]	-0.031	-0.031
Wang, Tse-chien[(b)]	-0.022	-0.022
Yang, Hui-ying[(b)]	-0.021	-0.021
Wang, He-shiung[(b)]	0.055	0.055
Shu, Bi-hu[(a)]	0.153	0.153
Lai, Ying-jao[(b)]	0.219	0.219
Peng, Feng-chih[(a)]	0.234	0.234
Chih, Chi-ming[(a)]	0.262	0.262
Tsai, Ching-yu[(a)]	0.262	0.262
Li, His-yao[(a)]	0.266	0.266
Lin, Yung-mou[(b)]	0.274	0.274
Dai, Tung-shiung[(b)]	0.369	0.369
Yu, Shueh-ming[(a)]	0.393	0.393
Yang, Jen-shou[(a)]	0.396	0.396
Shieh, Tsai-chuan[(b)]	0.450	0.450
Yang, Yu-ling[(c)]	0.547	0.547
Chang, Te-sheng[(c)]	0.547	0.547
Su, Chun-shiung[(b)]	0.896	0.896
Li, Chung-sheng[(c)]	**1.464**	**1.196**
Sun, Sen-yan[(b)]	**1.531**	**1.297**
Li, Chih-peng[(c)]	**1.834**	**1.751**

[(a)]President Chen; [(b)]President Lee; [(c)]President Chiang

TABLE VI Individual Average Scoring Including Appointees of President Ma

Justices	Averages with priors	Averages without priors
Yang, Chien-hua[(c)]	**-1.739**	**-1.609**
Dong, Shiang-fei[(b)]	**-1.548**	**-1.323**
Shih, Wen-sen[(b)]	**-1.267**	**-0.900**
Liu, Tieh-cheng[(c)]	-0.877	-0.877
Tseng, Hua-sung[(b)]	-0.497	-0.497
Huang, Yui-chin[(b)]	-0.263	-0.263
Chen, Jui-tang[(c)]	-0.220	-0.220
Chen, Chi-nan[(b)]	-0.209	-0.209
Cheng, Chung-mou[(b)]	-0.193	-0.193
Tseng, Yu-tien[(a)]	-0.155	-0.155
Shu, Yu-shiu[(a)]	-0.146	-0.146
Chang, Cheng-tao[(c)]	-0.143	-0.143
Shu, Tsung-li[(a)]	-0.120	-0.120
Li, Chen-shan[(a)]	-0.119	-0.119
Yang, Jih-jan[(c)]	-0.106	-0.106
Ma, Han-bau[(c)]	-0.106	-0.106
Zhai, Shao-shien[(c)]	-0.104	-0.104
Wung, Yueh-sheng[(c)]	-0.100	-0.100
Lin, Guo-shien[(b)]	-0.067	-0.067
Lin, Tze-yi[(a)]	-0.060	-0.060
Shih, His-en[(c)]	-0.058	-0.058
Cheng, Chien-tsai[(c)]	-0.058	-0.058
Wu, Geng[(c)]	-0.044	-0.044
Yang, Hui-ying[(b)]	-0.040	-0.040
Wang, Tse-chien[(b)]	-0.040	-0.040
Liao, Yi-nan[(a)]	-0.017	-0.017
Wang, He-shiung[(b)]	0.021	0.021
Chen, Xin-min[(d)]	0.022	0.022
Shu, Bi-hu[(a)]	0.047	0.047
Peng, Feng-chih[(a)]	0.074	0.074
Huang, Mao-rong[(d)]	0.081	0.081
Ye, Bai-xiu[(d)]	0.089	0.089
Li, His-yao[(a)]	0.090	0.090
Chen, Chun-sheng[(d)]	0.092	0.092
Chih, Chi-ming[(a)]	0.092	0.092
Chen, Min[(d)]	0.093	0.093
Tsai, Ching-yu[(a)]	0.096	0.096
Lai, Ying-jao[(b)]	0.114	0.114
Yu, Shueh-ming[(a)]	0.159	0.159
Yang, Jen-shou[(a)]	0.168	0.168
Lin, Yung-mou[(b)]	0.239	0.239
Shieh, Tsai-chuan[(b)]	0.239	0.239
Dai, Tung-shiung[(b)]	0.307	0.307
Yang, Yu-ling[(c)]	0.551	0.551
Chang, Te-sheng[(c)]	0.551	0.551
Su, Chun-shiung[(b)]	0.767	0.767
Sun, Sen-yan[(b)]	**1.350**	**1.025**
Li, Chung-sheng[(c)]	**1.465**	**1.198**
Li, Chih-peng[(c)]	**1.836**	**1.753**

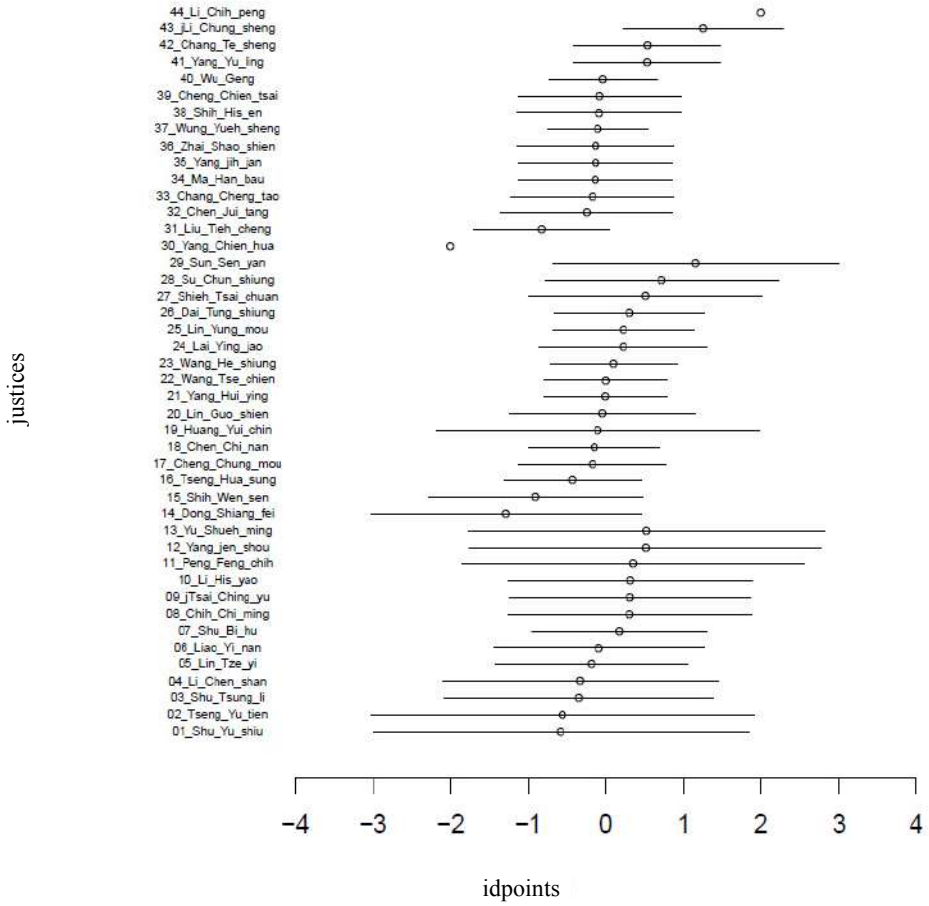
[(a)]President Chen; [(b)]President Lee; [(c)]President Chiang; [(d)]President Ma

TABLE VII Details About the Six Polarized Justices

	Close to +2			Close to -2		
	Li Chih-Peng	Li Chung-Sheng	Sun Sen-Yan	Yang Chien-Hua	Dong Shiang-Fei	Shih Wen-Sen
Appointer	Chiang	Chiang	Lee	Chiang	Lee	Lee
Career Background	Legislator (KMT)	Judge	Judge	Judge	Professor	Professor
Origins	Main-lander	Main-lander	Native Taiwanese	Main-Lander	Main-lander	Main-lander
First Appointed/ Reappointed	First Appointed	Re-appointed (by Chiang)	First Appointed	Re-appointed (by Chiang)	First Appointed	First Appointed
Dissent Ranking in his term	1st (4 cases) (5th term)	2nd (3 cases) (5th term)	2nd (4 cases) (6th term)	2nd (3 cases) (5th term)	1st (5 cases) (6th term)	2nd (4 cases) (6th term)

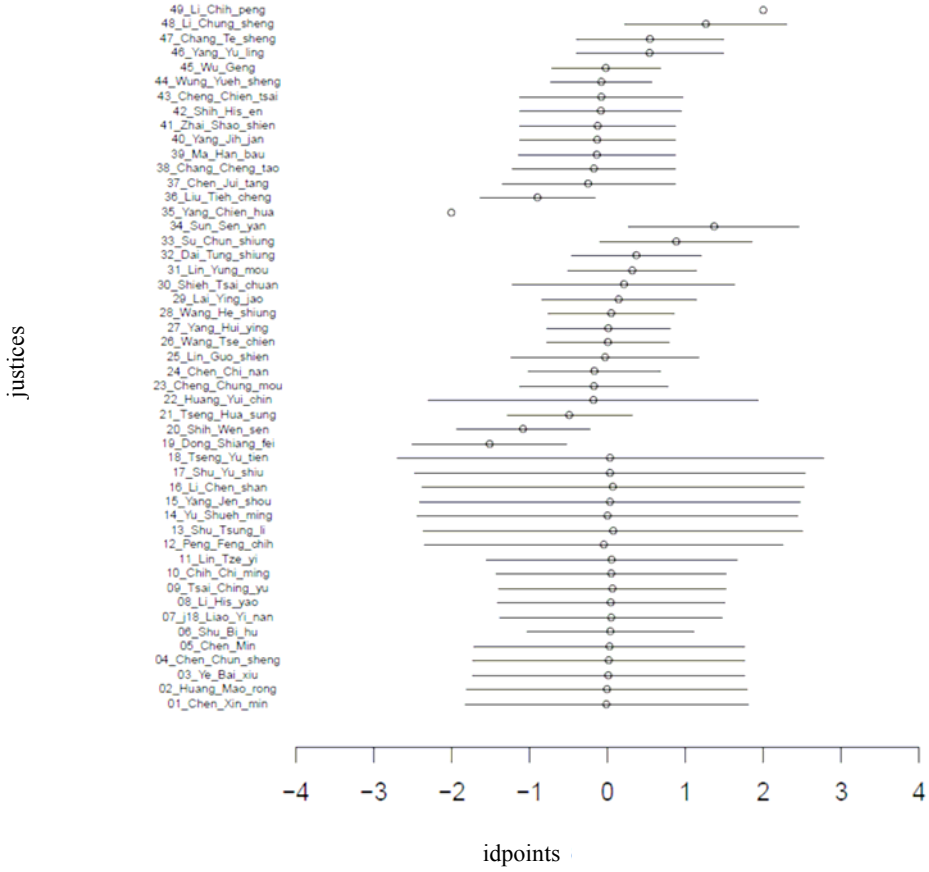
* In our dataset, there were 9 decisions with dissent in 1988-1994, part of the 5th term.
** In our dataset, there were 19 decisions with dissent in the 6th term (1994-2003).

Figure I Example of Estimated Ideal Points (Excluding appointees of President Ma): Justice Li Chih-peng as +2 and Justice Yang Chien-hua as -2.



Positions 1 to 13 refer to judges Appointed by President Chen Shui-bian (DPP)
Positions 14 to 29 refer to judges Appointed by President Lee Teng-hui (KMT)
Positions 30 to 44 refer to judges Appointed by President Chiang Ching-Kuo (KMT)

Figure II Example of Estimated Ideal Points (Including appointees of President Ma): Justice Li Chih-peng as +2 and Justice Yang Chien-hua as -2.



Positions 1 to 5 refer to judges Appointed by President Ma Ying-jeou (KMT)
Positions 6 to 18 refer to judges Appointed by President Chen Shui-bian (DPP)
Positions 19 to 34 refer to judges Appointed by President Lee Teng-hui (KMT)
Positions 35 to 49 refer to judges Appointed by President Chiang Ching-Kuo (KMT)

Figure III Individual Average Scoring Excluding Appointees of President Ma

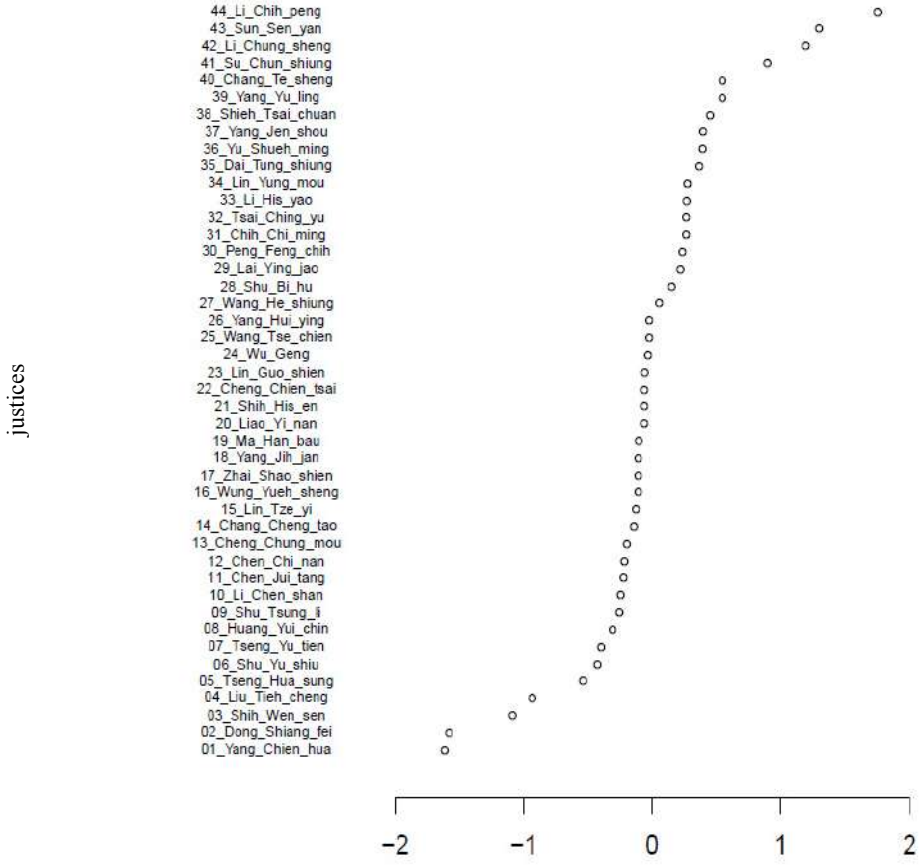
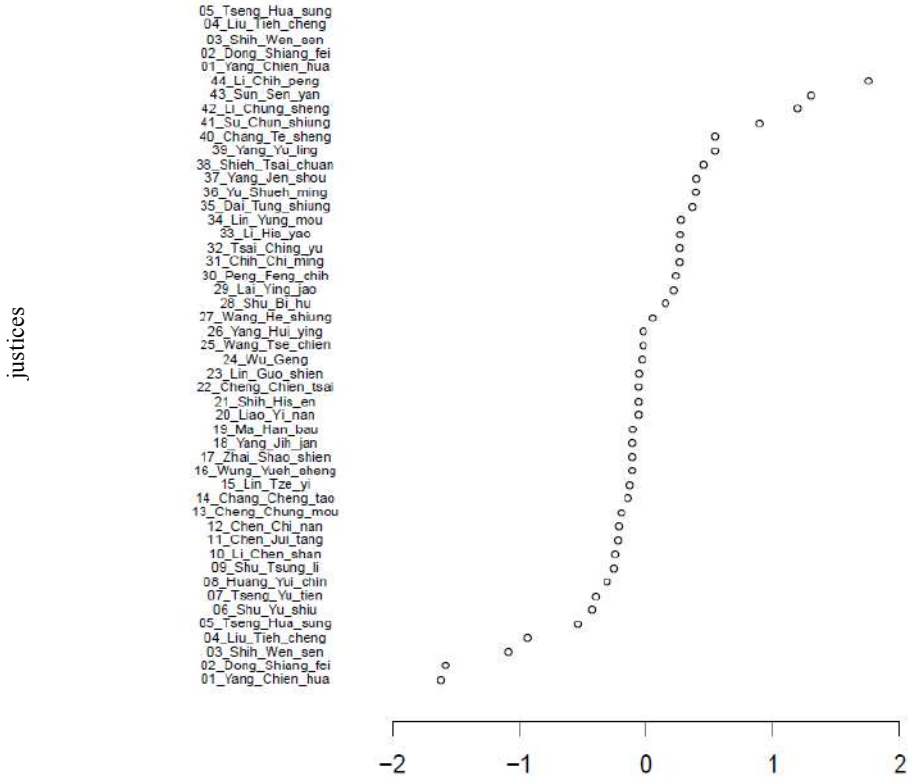


Figure IV Individual Average Scoring Including Appointees of President Ma



APPENDIX A: LIST OF GRAND JUSTICES' CHINESE & ENGLISH NAMES

As mentioned in the text, our research covers forty-nine of Grand Justices. The following is the contrast list of their Chinese names and according English spellings.

黃茂榮 Huang Mao-rong	陳　敏 Chen Min	葉百修 Yeh Bai-xiu
陳春生 Chen Chun-sheng	陳新民 Chen Xin-min	賴英照 Lai Ying-jao
謝在全 Shieh Tsai-chuan	徐璧湖 Shu Bi-hu	林子儀 Lin Tze-yi
許宗力 Shu Tsung-li	許玉秀 Shu Yu-shiu	林錫堯 Li His-yao
池啓明 Chih Chi-ming	李震山 Li Chen-shan	蔡清遊 Tsai Ching-yu
翁岳生 Wung Yueh-sheng	林永謀 Lin Yung-mou	余雪明 Yu Shueh-ming
曾有田 Tseng Yu-tien	彭鳳至 Peng Feng-chih	城仲模 Cheng Chung-mou
王和雄 Wang He-shiung	廖義男 Liao Yi-nan	楊仁壽 Yang Jen-shou
劉鐵錚 Liu Tieh-cheng	吳　庚 Wu Geng	王澤鑑 Wang Tse-chien
林國賢 Lin Guo-shien	施文森 Shih Wen-sen	孫森焱 Sun Sen-yan
陳計男 Chen Chi-nan	曾華松 Tseng Hua-sung	董翔飛 Dong Shiang-fei
楊慧英 Yang Hui-ying	戴東雄 Dai Tung-shiung	蘇俊雄 Su Chun-shiung
黃越欽 Huang Yui-chin	馬漢寶 Ma Han-bau	張特生 Chang Te-sheng
楊建華 Yang Chien-hua	李鐘聲 Li Chung-sheng	鄭健才 Cheng Chien-tsai
翟紹先 Zhai Shao-shien	楊與齡 Yang Yu-ling	楊日然 Yang Jih-jan
史錫恩 Shih His-en	陳瑞堂 Chen Jui-tang	李志鵬 Li Chih-peng
張承韜 Chang Cheng-tao		

APPENDIX B: THE LIST OF THE CASES

Our paper has analyzed and coded 101 decisions issued by the Grand Justices of the Taiwanese Constitutional Court from 1988 to 2009. The following is the list of the cases:

Interpretation No. (Year)	Interpretation No. (Year)	Interpretation No. (Year)
665 (2009)	655 (2009)	645 (2008)
644 (2008)	633 (2007)	632 (2007)
627 (2007)	613 (2006)	603 (2005)
601 (2005)	599 (2005)	592 (2005)
589 (2005)	585 (2004)	553 (2002)
550 (2002)	546 (2002)	543 (2002)
541 (2002)	530 (2001)	520 (2001)
499 (2000)	498 (1999)	485 (1999)
481 (1999)	472 (1999)	470 (1998)
468 (1998)	467 (1998)	463 (1998)
461 (1998)	453 (1998)	450 (1998)
436 (1997)	435 (1997)	426 (1997)
421 (1997)	419 (1996)	405 (1996)
401 (1996)	392 (1995)	391 (1995)
388 (1995)	387 (1995)	381 (1995)
380 (1995)	371 (1995)	365 (1994)
364 (1994)	357 (1994)	342 (1994)
340 (1994)	331 (1993)	329 (1993)
328 (1993)	325 (1993)	314 (1993)
307 (1992)	299 (1992)	298 (1992)
294 (1992)	290 (1992)	283 (1991)
282 (1991)	278 (1991)	277 (1991)
264 (1990)	262 (1990)	261 (1990)
260 (1990)	259 (1990)	258 (1990)
254 (1990)	250 (1990)	235 (1989)
234 (1989)	231 (1988)	

The actual case number is less than 101 because some interpretations include more than one issue, and, under these circumstances, a Justice may make plural decisions in one case.

APPENDIX C: CODING CONTROVERSIAL CASES

All of the coded controversial cases are listed as follows. We have also included an explanation of why some Justices' dissenting opinions have been coded as the majority opinions in those Interpretations of the Judicial Yuan.

1) *Interpretation No. 592*: In this case the majority opinion favors the petitioner, so their votes have been coded as zero (*i.e.* unconstitutional). As for Shieh Tsai-chuan's dissenting, he is also favorable to the petitioner, so his vote has been coded as zero as well. However, Tseng Yu-tien argues that this case should be dismissed (unfavorable to the petitioner) and we have therefore coded his vote as one.

2) *Interpretation No. 585*: Although it is not a unanimous decision, we have not coded Shu Tsung-li and Shu Yu-shiu's votes as dissents after reviewing their partial dissenting opinions.

3) *Interpretation No. 553*: The majority and concurring opinions have both been coded as one. However, because Shieh Tsai-chuan's dissenting opinion expresses that this case should be dismissed (also unfavorable to the petitioner), we have also coded his vote as one.

4) *Interpretation No. 543*: In this Interpretation the majority opinions declare that the regulations at issue do not absolutely fit in with the Constitution and should have been reviewed by the legislators (favorable to the petitioner), so their votes have been coded as zero. As for Dong Shiang-fei's dissenting opinion, we coded his vote as zero as well because the Justice clearly and strongly argues that the regulations are unconstitutional (also favorable to the petitioner).

5) *Interpretation No. 520*: In this Interpretation the majority and concurring opinions have been coded as one (unfavorable to the petitioner, Executive Yuan). Because Chen Chi-nan presented a partially concurring opinion, we decided to code his vote as if it were part of the majority (*i.e.* one). As for the dissenting opinions of Liu Tieh-cheng, Shih Wen-sen and Dong Shiang-fei, we also coded their votes as one because they all argue strongly against the petitioner.

6) *Interpretation No. 485*: The majority opinion declares the law at issue to be constitutional (unfavorable to the petitioners). However, Chen Chi-nan's dissenting opinion is also unfavorable to the petitioners (he argues that the case should be dismissed), so we have also coded his vote as one.

7) *Interpretation No. 450*: We have coded the majority opinion as zero because it favors the petitioners. As for Chen Chi-nan's dissenting opinion, since he only disagrees with the reasoning of the majority but not their conclusion (*i.e.* the holding), we have coded his vote as zero.

8) *Interpretation No. 419*: On issue (1)—whether the Vice President may concurrently hold the position of the Premier of the Executive Yuan while serving his term as Vice President—the votes of the majority have been coded as zero (*i.e.* unconstitutional) for two reasons. First, unlike Liu Tieh-cheng and Dong Shiang-fei's dissenting opinions (coded as zero), the majority does not argue that this status is obviously unconstitutional, but instead declares that it is constitutionally inappropriate in the end. We also coded the majority opinion as zero because then Vice President Lien Chan resigned his post as Premier of the Executive Yuan after this Interpretation was released.

9) *Interpretation No. 290*: We have coded the majority's votes as one. The Cheng Chien-tsai and Yang Jih-jan's alleged "dissenting" opinions were also coded as one, since, upon a careful reading of each opinion, it becomes evident that they are actually concurring opinions (they only disagree with the majority's reasoning, but not the holding).

REFERENCES

Bafumi, J., Gelman, A., Park, D. K., & Kaplan, N. (2005). Practical issues in implementing and understanding Bayesian ideal point estimation. *Political Analysis, 13*, 171-187.

Brenner, S., & Spaeth, H. J. (1988). Ideological position as a variable in the authoring of dissenting opinions on the Warren and Burger Courts. *American Politics Research, 16*, 317-328.

Bureau of East Asia and Pacific Affairs. (February 7, 2012). Background Note: Taiwan. Retrieved from http://www.state.gov/r/pa/ei/bgn/35855.htm

Chang, W.-C. (2011). Strategic judicial responses in politically charged cases: East Asian experiences. *International Journal of Constitutional Law, 8*, 885-910.

Chávez, R. B. (2004). *The rule of law in nascent democracies: Judicial politics in Argentina.* Palo Alto, CA: Stanford University Press.

Clinton, J., Jackman, S., & Rivers, D. (2004). The statistical analysis of roll call data. *American Political Science Review, 98*, 355-370.

Constitution, (1947) (Taiwan).

Constitution, Addtional Articles, (1991) (amended 1994) (Taiwan).

Constitution, Addtional Articles, (1991) (amended 1997) (Taiwan).

Constitution, Addtional Articles, (1991) (amended 2000) (Taiwan).

Constitution, Addtional Articles, (1991) (amended 2005) (Taiwan).

Constitutional Interpretation Procedure Act (1948) (amended 1993). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73

Cooney, S. (1997). Why Taiwan is not Hong Kong: A review of the PRC's "one country two systems" model for reunification with Taiwan. *Pacific Rim Law & Policy Journal, 6*, 497-548.

Epstein, L., & Knight, J. (1997). *The choices Justices make*. Washington, DC: CQ Press.

Garoupa, N., Grembi, V., & Lin, S. C.-p. (2011). Explaining constitutional review in new democracies: The case of Taiwan. *Pacific Rim Law & Policy Journal, 20*, 1-40.

Ginsburg, T. (2002). Confucian constitutionalism? The emergence of constitutional review in Korea and Taiwan. *Law and Social Inquiry, 27*, 763-799.

Ginsburg, T. (2003). *Judicial review in new democracies: Constitutional*

courts in Asian cases. Cambridge, England: Cambridge University Press.

Government Information Office. (2010). *Republic of China yearbook 2010*. Taipei, Taiwan: Kwang Hwa.

Hanretty, C. (in press). Dissent in Iberia: The ideal points of justices of the Spanish and Portuguese constitutional tribunals. *European Journal of Political Research*.

Hansford, T. G., & Spriggs, J. F, II. (2008). *The politics of precedent on the U.S. Supreme Court.* Princeton, NJ: Princeton University Press.

Helmke, G. (2004). *Courts under constraints: Judges, generals, and Presidents in Argentina.* Cambridge, England: Cambridge University Press.

Hilbink, L. (2007). *Judges beyond politics in democracy and dictatorship: lessons from Chile.* Cambridge, England: Cambridge University Press.

Hirschl, R. (2003). *Book review: Judicial review in new democracies: Constitutional courts in Asian cases by Tom Ginsburg*. Retrieved from http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Ginsburg1203.htm

Hirschl, R. (2004). *Towards juristocracy: The origins and consequences of the new constitutionalism*. Cambridge, MA: Harvard University Press.

Hsueh, H.-y. Taiwan lishih tzutien—Chiuhua—Fan Hsin-Hsiang [Dictionary of the Taiwan history—Nine strokes—Fan Hsin-Hsiang]. Retrieved from http://nrch.cca.gov.tw/ccahome/website/site20/contents/009/cca220003-li-wpkbhisdict002006-0612-u.xml

Huang, T. W. (2005). Judicial activism in the transitional polity: The council of Grand Justices in Taiwan. *Temple International and Comparative Law Journal, 19*, 1-26.

Huang, T. W. (2006). The President refuses to cohabit: Semi-presidentialism in Taiwan. *Pacific Rim Law & Policy Journal, 15*, 375–402.

J.Y. Interpretation No. 31 (1954) (Taiwan). Retrieved from http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=31

J.Y. Interpretation No. 154 (1978) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=154

J.Y. Interpretation No. 261 (1990) (Taiwan). Retrieved from http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=261

J.Y. Interpretation No. 271 (1990) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=271

J.Y. Interpretation No. 371 (1995) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371

J.Y. Interpretation No. 374 (1995) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=374

J.Y. Interpretation No. 419 (1996) (Taiwan). Retrieved from http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=419

J.Y. Interpretation No. 499 (2000) (Taiwan). Retrieved from http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=499

J.Y. Interpretation No. 530 (2001) (Taiwan). Retrieved from http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=530

J.Y. Interpretation No. 541 (2002) (Taiwan). Retrieved from http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=541

J.Y. Interpretation No. 569 (2003) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=569

J.Y. Interpretation No. 582 (2004) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=582

J.Y. Interpretation No. 632 (2007) (Taiwan). Retrieved from http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=632

Jackman, S. (2001). Multidimensional analysis of roll call data via Bayesian simulation: Identification, estimation, inference, and model checking. *Political Analysis, 9*, 227-241.

Jackson, V. C., & Tushnet, M. (2006). *Comparative constitutional law.* (2nd ed.) Eagan, MN: Foundation Press.

Judicial Yuan. Tiyichieh chih Tiliuchieh Tafakuan Chiu Chikuanshengchingche yu Jenminshengchingche Tsocheng Chiehshih chih Tungchishuchupiao [The Proportion of the Cases Filed by Individuals and by Institutions from the First Term to the Sixth term of

the Grand Justices]. Retrieved from http://www.judicial.gov.tw/constitutionalcourt/uploadfile/E100/第一屆至第六屆大法官作成解釋之統計數據表.htm

Justices of the Constitutional Court—Judicial Yuan, Former Justices. Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p01_04.asp

Justices of the Constitutional Court—Judicial Yuan, Justices. Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p01_03.asp

Li, N. N.-T. (2008). Nishuihsingchou de hsiancheng—Taiwan chiehyen erhshih nien huiku hsianfa laishihlu [The constitution: March forward or be swept away—the post-martial-law path 20 years on]. *Ssu yu Yen: Jenwen yu Shehuikehsueh Tsachih* [*Thought and Words: Journal of the Humanities and Social Science*]*, 46*(3)*,* 1-92.

Lin, C.-j. (2001, September 10). The San Francisco Peace Treaty and the lack of conclusions on Taiwan's international status. Retrieved from http://www.twhistory.org.tw/20010910.htm

Martin, A. D., & Quinn, K. M. (2002). Dynamic ideal point estimation via Markov chain Monte Carlo for the U.S. Supreme Court, 1953-1999. *Political Analysis, 10*, 134-153.

MCMCpack: Markov chain Monte Carlo (MCMC) package. Retrieved from http://mcmcpack.wustl.edu/

Merryman, J. H., & Pérez-Perdomo, R. (2007) *The civil law tradition.* (3rd ed.) Palo Alto, CA: Stanford University Press.

Rai promises to win back public's trust in judiciary [Editorial]. (2010, October 14). *Taipei Times*. Retrieved from http://www.taipeitimes.com/News/taiwan/archives/2010/10/14/2003485347

Peress, M. (2009). Small chamber ideal point estimation. *Political Analysis, 17,* 276-290.

Rose, N., von Davier, M., & Xu, X. (2010, April). *Modeling nonignorable missing data with item response theory (IRT)*. Retrieved from http://www.ets.org/Media/Research/pdf/RR-10-11.pdf

Roy, D. (2003). *Taiwan: A political history.* Ithaca, NY: Cornell University Press.

Segal, J. A., & Cover, A. D. (1989). Ideological values and the votes of U.S. Supreme Court Justices. *The American Political Science Review, 83*, 557-565.

Segal, J. A., & Spaeth, H. J. (2002). *The Supreme Court and the attitudinal model revisited.* Cambridge. England: Cambridge University Press.

Ssufayuan Tafakuan Huiyi Fa [The Act of the Council of Grand Justices of the Judicial Yuan], art. 13(1) (1948) (amended 1958). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/p07_2_one.asp?lawno=61&types=all

Ssufayuan Tsuchihfa [The Organic Act of the Judicial Yuan], arts. 3, 4, 5(2) (1947) (amended 2001) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/p07_2.asp?lawno=81

Tungyuan Kanluan Shihchi Linshih Tiaokuan [The Temporary Provisions Effective During the Period of Communist Rebellion] (1948) (repealed 1991). Retrieved from http://en.wikisource.org/wiki/Temporary_Provisions_Effective_During_the_Period_of_Communist_Rebellion

Wang, T.-s. (2002). The legal development of Taiwan in the 20th century: toward a liberal and democratic country. *Pacific Rim Law & Policy Journal, 11*, 531-560.

Weng, Y.-s. (2000). Wokuo shihhsianchihtu chih techeng yu chanwang [The features and prospects of the Republic of China (ROC) constitutional review system]. In Department of Clerks for the Justices of the Constitutional Court (Ed.), *Ssufayuan Dafakuan Shihhsian wushihchounien Chinian Lunwenchi* [*Essays in Memory of the Fiftieth Anniversary of Constitutional Interpretations by the Grand Justices of the Judicial Yuan*] (pp 285-323). Taipei, Taiwan: Judicial Yuan.

Wetstein, M. E., Ostberg, C. L., Songer, D. R., & Johnson. S. W. (2009). Ideological consistency and attitudinal conflict: A comparison of the U.S. and Canadian Supreme Courts. *Comparative Political Studies, 42*, 763-792.

Winn, J. K., & Yeh, T.-c. (1995). Advocating democracy: The role of lawyers in Taiwan's political transformation. *Law & Social Inquiry, 20*, 561-600.

Xiao-Planes, X. (2009). Of constitutions and constitutionalism: Trying to build a new political order in China, 1908-1949. In S. Balme & M. W. Dowdle (Eds.), *Building Constitutionalism in China* (pp. 37-58). Hants, England: Palgrave Macmillan.

Yeh, J.-r. & Chang, W.-C. (2011). The emergence of East Asian constitutionalism: features in comparison. *American Journal of Comparative Law, 59*, 805-840.

Yeh, J.-r. (2002). *Constitutional reform and democratization in Taiwan: 1945-2000.* In P. C. Y. Chow (Ed.), *Taiwan's modernization in global perspective* (pp. 47-77). Westport, CT; Praeger.

新興民主的司法理想點
——以臺灣為例

Lucia Dalla Pellegrina、Nuno Garoupa、林靜萍

摘　要

本文以1998年至2009年任職臺灣司法院的大法官為研究對象，估計其理想點，以實證分析方法研究影響其司法行為的決定因素。又，臺灣違憲審查制度的建立與發展，與該國由一黨專政的威權體制轉型為新興民主政體息息相關，故其在個案研究上更具價值。根據本文研究結果，亦即估計出來的理想點顯示，首先，無法證明總統與其提名、任用之大法官具有政治結盟的關係。其次，除少數例外，絕大多數大法官的理想點均分佈在中庸地帶。最後，對於作者群先前運用計量經濟分析，否定態度性假設的研究成果，本文也再度確認司法院大法官並不傾向響應其提名人的政黨利益。

關鍵詞：大法官、司法院、理想點、臺灣、實證分析、違憲審查、憲法法院

Article

The Birth and Rebirth of the Judicial Review in Taiwan－Its Establishment, Empowerment, and Evolvement

Chien-Chih Lin*

ABSTRACT

This paper first briefly introduces several major models that explain the emergence of judicial review in an attempt to find one that best elucidates the situation in Taiwan. Yet, owing to its particular political history, no single model can fully explain the development of judicial review in Taiwan. Rather, different models may be used to account for different stages. During the foundational stage, the Court was subservient to the authoritarian regime. During its transition stage, the Court regained authority and began to function like a court that insurance theory presupposes. Owing to the changeable political environment and the lack of an unchallengeable authority, the need for a fair and apolitical arbitrator increased, a fact which explains the increase in judicial power. Besides, political manipulation, the Court also expanded its power actively and cautiously, even when society was highly divided after 2000. In new democracies, the tendency of judicialization has provided the Court with more opportunities to intervene in political decision-making processes. Nonetheless, this may spawn unintended political conflict that threatens to damage the integrity and authority of the judiciary.

Keywords: *Taiwanese Constitutional Court, Judicial Review, Constitutional Interpretation, Insurance Theory, Hegemonic Preservation*

---

* Ph.D. student, College of Law, National Taiwan University. E-mail: d98a21009@ntu.edu.tw.
The author would like to thank two anonymous reviewers for their constructive suggestions. This paper was first presented in Professor Yueh-shen Weng and Professor Wen-Chen Chang's class, and the author would like to express my deepest gratitude for their instruction. In addition, I would like to thank Professor Tom Ginsburg for his valuable comments.

CONTENTS

I. FOREWORD

Why do we have the judiciary, a branch that has "no influence over either the sword or the purse"?[1] A simple answer may be that we want to solve disputes in a civilized way and these calls for the involvement of a third party. This answer explains the biggest part of the daily work that courts undertake. But the power of a judiciary is evidently broader and stronger than that. In most countries, democratic or authoritarian,[2] the judiciary also plays a role as a guardian of human rights that may invalidate the collective decisions of the administrative or legislative branches. This has always been regarded as the most controversial power wielded by the judiciary.[3] Why do we invest this ostensibly least dangerous branch with the most dangerous power of judicial review that seems to be counter-majoritarian at first glance?[4]

The emergence of judicial review and its rapid spread along with democratization around the globe in the last century are puzzling. Generally speaking, there have been three waves of judicial proliferation, each of which occurred in a different period and place.[5] Taiwan, the Republic of China, embarked on its inexorable journey towards democratization in 1987, the year that the longest period of martial law in world history was terminated. However, the Constitution of the Republic of China[6] (the Constitution) was enacted early in 1947 and its main text was never revised during the martial law period, a fact worthy of note given that there are now twelve constitutional amendments. The Taiwanese Constitutional Court (the Court), one of the oldest constitutional courts in Asia, was established at the same time the constitution was promulgated. In fact, not long after its founding, the Republic of China was embroiled in a civil war, and it was

---

1. THE FEDERALIST NO. 78 (Alexander Hamilton).

2. *See generally* GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2004); Martin Shapiro, *Courts in Authoritarian Regimes*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 326, 329-30 (Tom Ginsburg & Tamir Moustafa eds., 2008); *but see* Lisa Hilbink, *Agents of Anti-Politics: Courts in Pinochet's Chile*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 102, 104-11 (Tom Ginsburg & Tamir Moustafa eds., 2008).

3. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 142 (2002).

4. *But see* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283-86, 291, 294 (1957); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 13 (2d ed. 2008); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 745-78 (2009) (arguing that judicial review is not counter-majoritarian because of its monitoring and coordinating functions).

5. *See* Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 82-88 (Keith E. Whittington et al. eds., 2008); MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 119-20 (2010).

6. Constitution (1947) (Taiwan).

then that the Constitution was promulgated. The power of the Constitution was soon partly and indefinitely suspended by The Temporary Provisions. Needless to say, the function of judicial review, inter alia, was seriously constrained. Not until the lift of the martial law decree in 1987 did the Constitutional Court gradually regain its authority.

Due to the political cataclysm of 1949, the reasons why the Taiwanese people adopted and recognized judicial review ordained in the Constitution were not properly articulated. This leads to many puzzles that survived long beyond the founding era, including but not limited to the status of the Judicial Yuan, the issue of the legitimacy of judicial review in Taiwan, and the role of the Constitutional Court after democratization. Finally in 2001 with *Interpretation No. 530*, the Justices of the Constitutional Court, Judicial Yuan clearly characterized themselves as "the highest judicial organ in charge of civil, criminal, administrative cases, and in cases concerning disciplinary measures against public officials."[7]

Besides, much scholarly literature has analyzed these issues and generated illuminating discussion.[8] For example, Hwang has argued that the Judicial Yuan should be the final court of all lawsuits, and that a concrete and decentralized judicial review is "the very essence of judicial duty."[9] Furthermore, concrete review can effectively alleviate the counter-majoritarian concern of judicial review and enhance its legitimacy.[10] On the other hand, Lee has pointed out that although the model of the Supreme Court of the United States was indeed taken into consideration during the founding era, it was rejected by the Constituent National

---

7 J.Y. Interpretation No. 530 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=530.

8. *See*, *e.g.*, Jau-Yuan Hwang, *Ssufa Weihsien Shencha te Chihtu Hsuantse yu Ssufayuan Tingwei* [*Choosing a New System of Judicial Review for Taiwan: Some Reflections on the Status of Judicial Yuan*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Sept. 2003, at 55; Chien-Liang Lee, *Tafakuan te Chihtu Pienke yu Ssufayuan te Hsienfa Tingwei* [*Reform of the Institution of the Grand Justices and Constitutional Status of the Judicial Yuan: An Analysis Based on the 1997 Constitutional Reform*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Jan. 1998, at 217; Jiunn-rong Yeh, *Hsienkai yu Taiwan Hsienfa Pienchien te Moshih* [*Towards a model-building on Taiwan's Constitutional Change after 1997 Constitutional Reform*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Jan. 1998, at 7; Jau-Yuan Hwang, *Ssufa Weihsien Shencha te Chengtanghsing Chengi* [*Legitimacy of Judicial Review: A Preliminary Analysis of Theories and Approaches*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Nov. 2003 at 103; Jiunn-rong Yeh, *Chuanhsing Fayuan te Tzuwo Tingwei—Lun Hsienfachehshih tui Hsiuhsienchichih te Yinghsiang* [*The Role of Transitional Court: On the Interactions between Constitutional Interpretations and Constitutional Revisions*], TAITA FAHSUEH LUNTSENG [NTU L.J.], Nov. 2003, at 29; DENNIS TE-CHUNG TANG, *Chuanli Fenli yu Weihsien Shencha* [*Judicial Review and Separation of Powers*], *in* CHUANLI FENLI HSIN LUN (2): WEIHSIEN SHENCHA YU TUNGTAI PINGHENG [A NEW PERSPECTIVE ON SEPARATION OF POWERS (2): JUDICAIL REVIEW AND DYNAMIC BALANCE] 75, 75-123 (2005).

9. *See* Hwang, *Ssufa Weihsien Shencha te Chihtu Hsuantse yu Ssufayuan Tingwei, supra* note 8, at 24-31, 34-35.

10. *Id.* at 37-38.

Assembly and is no longer applicable to the Judicial Yuan.[11] In addition to these disputes over the courts proper institutional role, Yeh has contended that functionally the role of the Constitutional Court changed from the transitional-court model to the ordinary-court model during the past few decades.[12] These arguments focused on various facets of judicial review and provide us with insightful viewpoints. However, most of them have concentrated on more recent developments of the Constitutional Court, and have not put much emphasis on the origin of judicial review itself. In this paper, I address the theories of the establishment of judicial review, and the applications of these theories to the Taiwanese context.

This paper is not intended as a complete, panoramic overview of the Constitutional Court or judicial review. Rather, my central arguments are as follows. First, an examination of political concerns provides the best, though by no means only, explanations of the birth and rebirth of judicial review in Taiwan. Secondly, justices are politicians in robes, and they exercise the power of judicial review to aggrandize themselves. From the era of its establishment, judicial review was a product of the negotiation among various political parties. During the Temporary Provision era, the justices and their interpretations functioned mostly as decorations for an authoritarian regime. This is not to say that the judiciary was totally toothless at that time. Some interpretations did pave a road for future changes, but generally speaking, most interpretations were quite obedient to the executive branch. After democratization, things were different. A functioning judicial review is indispensible not only for ensuring a system of checks and balances among branches, but also for protecting the interests of different parties. During the authoritarian period, the dominant rulers needed a submissive court so that they could monopolize political power without the risk of condemnation. Ironically, after democratization, it is a functional court that may protect them from retaliation and maintain their past interests. Justices know this, and they have skillfully exercised their interpretive authority in a way that has been welcomed both by the ruling and opposition parties. This resulted in an expansion of their power during and after the transitional period. This sort of development is especially evident when a society is divided by ideology. In these cases constitutional courts are especially apt to strategically exercise their power of judicial review to maintain the stability of society and the authority of its interpretations.

This paper suggests that the establishment of judicial review in 1947 in mainland China and its reinvigoration after 1987 in Taiwan were predicated

11. *See* Lee, *supra* note 8, at 233-45.

12. *See* Yeh, *Chuanhsing Fayuan te Tzuwo Tingwei —Lun Hsienfachehshih tui Hsiuhsienchichih te Yinghsiang*, *supra* note 8, at 49-54.

on different reasons. Although the main text has never been revised, the Constitution has in essence undergone substantial modification through the enactment of the amendments. Under two sets of different international, social and political conditions, politicians during the post-constitutional stage after 1947 and after period of democratization after 1987 separately sought to maximize their interests through the establishment of judicial review. These intricate calculations and behaviors must be discussed carefully in various contexts. In a sense, we may say that judicial review was established twice separately in 1947 and after 1987.

This paper will be divided into five parts. The first is the introductory part which lays out a general framework for the rest of the paper. In the second part, I will briefly introduce some leading theories in an attempt to elucidate the establishment of judicial review and the expansion of judicial power. The third part will discuss the reasons why judicial review was founded, constrained, and rejuvenated in Taiwan. During the forty years spanning 1947 to 1987, the Kuomintang (KMT) had always been the ruling party in the Republic of China. But, cries for democratization grew stronger and stronger over time. The reasons why judicial review was "reestablished" after democratization cannot be properly understood without understanding the attitude of the KMT. The fourth part describes the interaction of the Constitution Court with other political branches after democratization. At this fully-fledged functioning stage, the role of the Constitutional Court in political arena still merits discussion. The Court has strategically expanded its power, but also faced much backlash in the process of expansion. The fifth part is the conclusion.

II. DIFFERENT MODELS OF JUDICIAL REVIEW

Much ink has been spilled over this issue of why systems of judicial review that constrain popularly-elected legislatives are established. Much debate has revolved around the perceived proclivity of this institutional design to create a so-called counter-majoritarian dilemma. Some scholars have compared this arrangement with the part of the Odyssey in which Ulysses is firmly bound to the mast of his ship so as to prevent him from being enchanted by the song of the Sirens. Others believe that the establishment of judicial review can only be explained from both legal and political perspectives.[13] Traditional legal theories tend to approach this problem either by distinguishing the procedures of law-making, [14]

13. Mark A. Garber, *The Problematic Establishment of Judicial Review*, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST APPROACHES 28, 29 (Cornell Clayton & Howard Gillman eds., 1999).

14. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266-94 (1991).

advocating judicial minimalism,[15] or reinforcing democratic representation.[16] These approaches, however, still imply the existence of self-contradictory decisions made by the people. Indeed, whose interests is it that are truly protected through the establishment of judicial review? Is it those of political elites or lay people? If we revisit the landmark *Marbury*,[17] the answer seems to be clearer. Arguably, it was Chief Justice John Marshall, rather than Madison, who substantively "won" the case (to say nothing of the poor Marbury).[18] Throughout the process of building a judicial review system,[19] the entrenchment of personal interests of political elites is usually masqueraded as the protection of fundamental rights. If so, what is the rationale behind the establishment of judicial review in Taiwan? The following paragraphs will provide some possible explanations for the origin of judicial review.

A. *Demand-Side Models*

There are at least two kinds of, in Tom Ginsburg's words,[20] demand-side models of judicial review. I will call them the "right-based theory" and the "need-based theory." Proponents of the right-based theory regard a constitution as a contract between the people and the sovereign. People collectively hand over some basic rights to the state and entrust it with the duty to protect these fundamental rights.[21] Therefore, drafters of constitutions usually want to enshrine some fundamental rights in basic documents that may serve as the supreme law of the land in case the government should infringe their rights after its establishment. However, the people are also concerned that these fundamental rights may be sacrificed by future generations for short-term interests. Hence, they usually try to "lock in commitments over indefinite time periods,"[22] and choose to adopt a constitutional review system as a guarantee. When fundamental rights are infringed by the legislative or administrative branch as a consequence of

---

15. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 16-19, 25-36, 61-72 (1999).

16. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 77-88, 101-04 (1980).

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

18. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 25-28 (4th ed. 2010); ROBERT LANGRAN, THE SUPREME COURT: A CONCISE HISTORY 14-16 (2004).

19. *But see* Garber, *supra* note 13, at 31-34 (arguing that *Marbury* "did not establish the judicial power to declare laws unconstitutional in this legal sense"); Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. POL'Y HIST. 6, 7-25 (2008) ("Marshall did not invent judicial review. Judicial review developed from a long-standing English practice of reviewing the bylaws of corporations for repugnancy to the laws of England.").

20. Ginsburg, *supra* note 5, at 90.

21. *But see* RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 85-90 (1999) (emphasizing the differences between a constitution and a contract).

22. SHAPIRO & SWEET, *supra* note 3, at 142.

some short-term temptation, a court may serve as a watchman to remind the people of their violations. This is presumed possible because courts are supposed to be less influenced by political interests and motivations.[23] In addition, after the horrible experience of World War II, constitutional review has increasingly been regarded as an indispensible checking mechanism to safeguard human rights since the notion of democracy as majority rule is no longer as reassuring. Since courts wield the power to protect minority rights, the empowerment of a court is justified and strengthened as time goes by.

Need-based theorists, on the other hand, focus on the need for an independent and active judiciary. In a political system that is "weak, decentralized, or chronically deadlocked," the role of judges becomes pivotal and their power expands.[24] This argument differs from the previous one because it is the state, and not the people, that needs a functioning judiciary. Hence, some scholars point out that a court is "the only institutional mechanism to monitor distrusted politicians and decision-makers."[25]

These demand-side arguments face several incisive criticisms. First of all, the contractarian line of thought is more imagination than reality. In other words, it is normative rather than positive.[26] The most troublesome criticism is the aforementioned counter-majoritarian difficulty. Since a court obviously has less democratic support than a congress, it is assumed that the will and interests of the people are best represented by the legislature, which undergoes normal and repeated elections, and not by expert judges. Moreover, these models fail to account for the variation in institutional design.[27] To be more specific, for example, why do politicians choose to invest this power to courts but not other institutions? Some countries, such as the People's Republic of China and France, indeed intentionally choose to invest the power of constitutional review to other parts of the administrative or legislative branches. Finally, these models have difficulty accounting for the timing of the development of judicial review. That is, for why judicial review is established at a certain time and not during another period.[28]

B. *The Institutional Economics Model*

As mentioned above, demand-side theories do not explain why most

23. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 32-34 (2004).

24. *Id.* at 34-35.

25. *Id.* at 35.

26. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 23 (2003).

27. Ginsburg, *supra* note 5.

28. *See* Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 99-100 (2000).

drafters would invest a court, rather than other branches, with the power of constitutional review. The institutional economics model elucidates the origin of judicial review and the expansion of judicial power from a utilitarian perspective. Thus, the reason judicial review develops may be quite simple: courts are inexpensive compared to other alternatives.[29] For example, some scholars hold that judicial review functions as a fire alarm system.[30] Vis-a-vis creating and maintaining an expensive police patrol system, providing for an information-conveying judiciary is a much more efficient means of supervising bureaucratic agencies and preventing unfavorable behavior.

Moreover, an independent judiciary equipped with constitutional review also increases a regime's credibility and secures foreign investment since laws and adjudications are more predictable.[31] Therefore, it may serve as proof that a government's resolve to uphold and implement its constitution. A court under this line of thought performs the function of signaling, that is, telling others that the regime is credible and provides a suitable environment for investment.[32] According to this model, the judiciary and the judicial review stem from an economic calculation of cost and benefit.[33] Setting up a court not only efficiently reduces the domestic cost of bureaucracy, but also effectively improves a country's reputation for economic security.

C. *The Insurance Model*

The Insurance model of judicial review emphasizes the diffusion of political power. When a political environment is unstable, judicial review functions as an insurance mechanism for potential political losers.[34] Since no one knows for sure which party will become the dominant one after the post-constitution stage, politicians tend to prefer a political framework with judicial review to protect them should they become the political minority

29. HIRSCHL, *supra* note 23, at 37-38; GINSBURG, *supra* note 26, at 26.

30. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984); Tom Ginsburg, *Administrative Law and the Judicial Control of Agents in Authoritarian Regimes*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 58, 63 (Tom Ginsburg & Tamir Moustafa eds., 2008).

31. HIRSCHL, *supra* note 23, at 37.

32. Hilton L. Root & Karen May, *Judicial Systems and Economic Development*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 304, 304-09 (Tom Ginsburg & Tamir Moustafa eds., 2008).

33. Gordon Silverstein, *Singapore*: *The Exception that Proves Rules Matter*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 73, 77 (Tom Ginsburg & Tamir Moustafa eds., 2008).

34. GINSBURG, *supra* note 26, at 25; Rebecca Bill Chavez, *The Rule of Law and Courts in Democratizing Regimes*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 63, 67-69 (Keith E. Whittington et al. eds., 2008); Francisco Ramos Romeu, *The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions*, 2 REV. L. & ECON. 103, 107-09 (2006).

themselves after elections. Thus, winners cannot take all, and losers still retain the possibility to challenge the majority.[35] With this model, a capricious political situation and the diffusion of power are prerequisites for the building up of a strong judicial review.[36] The principle difference between commitment theory[37] and insurance theory is that insurance theory focuses on the losing parties, while commitment theory underscores the willingness of the dominant party.[38] The way these models conceive of the role of judges and the way they interpret laws varies as well.[39]

The design of judicial review built on the insurance model has several characteristics. In general, people tend to have more access to the constitutional court since it is designed with the interest of political losers in mind from the very beginning.[40] Also, the effect of the court's decisions tends to be stronger. Courts may nullify unconstitutional statutes and exercise quasi-legislative power from time to time.[41] In regard to the mechanism by which judges are appointed, Ginsburg distinguishes four appointing types: single-bodied appointments, professional appointments, cooperative appointments, and representative appointments.[42] Among them, courts preferred by the insurance theory are not likely to be composed of judges appointed by a single-body appointing mechanism. Besides, the term of the judges tend to be longer as this is a cardinal factor determining judicial independence,[43] and an independent judiciary is especially important for the prospective losers. Finally, the court size tends to be larger since it would be harder for a dominant party to control a larger and

35. *See* Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1439-40 (2009).

36. In a similar vein, Ramseyer argues that an independent court is possible only when the ruling party is likely to lose and the election will continue in foreseeable future. J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach,* 23 J. LEGAL STUD. 721, 722 (1994); *see also* Matthew C. Stephenson, *"When The Devil Turns. . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 72-73 (2003); Ran Hirschl, *The New Constitutionalism and The Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 747 (2006) (discussing the "Party Alternation Model" which predicts that the more dominant a political party is, the less independent courts will be); David S. Law, *The Anatomy of A Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009) (arguing that the conservative political environment and the dominance of LDP lead to the most conservative constitutional court in the world); REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA 14-17 (2004) (arguing that competitive political environment is a necessary condition for the rule of law).

37. For example, the commitment theory argues that a dominant political party still has the incentive to build up a strong judicial review since the latter is an evidence to prove the dominant party's commitment to eternalize the constitution and protect human rights.

38. GINSBURG, *supra* note 26, at 29.

39. *See* Shannon Roesler, *Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority*, 32 LAW & SOC. INQUIRY 545, 557 (2007).

40. GINSBURG, *supra* note 26, at 36-40.

41. *See id*. at 40-42.

42. *See id*. at 40-46.

43. *See id*. at 46-47.

diversified court.[44]

D. *The Hegemonic Model*

Some scholars argue that the interaction among political elites is not the only reason behind the emergence of judicial review. The judiciary itself and entrepreneurs also contribute to the germination of the expansion of judicial power. In other words, judicial review and judicial empowerment are strategic interplays between political elites, economic elites, and judicial elites.[45] This is quite different from previous theories in terms of the people who participate in judicial empowerment since other theories focus only on the behavior of political actors. The hegemonic model of judicial review, in contrast, offers a panoramic view that shows the conflux of different dynamics.

It is not difficult to realize why a judiciary would contribute to the establishment of judicial review. Despite concerns over the presumed anti-democratic character of judiciaries, judicial review undoubtedly enhances their power, giving the least dangerous branch more checking power against other branches.

As for economic elites, the rationale here is similar to that of the institutional economic model mentioned above. The constitutionalization of economic rights, such as property rights, is essential to the development of a robust market.[46] It is also a means of securing an "open market, economic deregulation, anti-statism, and anti-collectivism."[47] The design and practice of judicial review by independent courts further ensure these protections, providing guarantees for economic elites against any instability of economic liberties.[48]

From the viewpoint of political elites, judicial review maintains the validity and reliability of status quo political framework. Anyone who wants to challenge their power must first recognize and obey the rules set up by current authorities. It is thus a way to preserve or enhance their political hegemony "by insulating policy-making processes from the vicissitudes of democratic politics."[49]

---

44. *See id*. at 47-48.
45. HIRSCHL, *supra* note 23, at 11-12.
46. CHAVEZ, *supra* note 36, at 17-20.
47. GINSBURG, *supra* note 26, at 43.
48. *See generally* TAMIR MOUSTAFA, *The Politics of Domination: Law and Resistance in Authoritarian States*, *in* THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 19, 21-24 (2007).
49. HIRSCHL, *supra* note 23, at 43.

III. THE CASE OF THE CONSTITUTIONAL COURT, JUDICIAL YUAN

The Constitution of the Republic of China was enacted in 1946 and its main text had never been directly revised. Unlike its American counterpart, the power of judicial review was clearly prescribed in the main text from the first day it was enacted. At that time, the KMT firmly controlled both mainland China and a majority of representatives of the Constituent National Assembly. According to some historical evidence, there were two versions of draft constitution—the Double Five Draft and the Political-Consultative Draft—discussed in the assembly. The KMT preferred the former, since it was modeled exclusively in accordance with the political theory of Sun Yat-sen, the founding father of the Republic of China.[50] It might seem as though the former draft, which was preferred by a dominant party, would have been adopted. Surprisingly, however, the KMT finally comprised and passed the latter version.

After that, because of the civil war between the KMT and the Chinese Communist Party (CCP), the National Assembly passed the Temporary Provisions Effective During the Period of Communist Rebellion (Temporary Provisions) on April 18, 1948. Not long after its promulgation, many of the substantive provisions of the Constitution were suspended by the Temporary Provisions. After the civil war, the KMT lost control of mainland China and retreated to Taiwan. They did not forget to bring the Constitution——a symbol of legitimacy—with them, but after this point, the extent to which the Constitution was applied further deteriorated. In addition to the Temporary Provisions, the Nationalist Government issued the Martial Law Decree, which was not lifted until July 14, 1987 in Taiwan. This was issued in accordance with the mandates of martial law rule, which extensively aggrandized the power of the executive branch, or to be more specific, the president Chiang Kai-shek. Hence, the judiciary became at best nothing but a rubber stamp, which was quite deferential to the dictatorship until 1987.[51] Not surprisingly, the justices all but ceased to fulfill the obligation of judicial review. Not until the lift of the Martial Law Decree in 1987 and the repeal of the Temporary Provisions in 1991 did the judiciary regain its vitality. After that, Taiwan began its transition to democracy, and the judiciary, being a political actor, played a cardinal role at that time. The judiciary assumed more functions than merely being the champion of human rights, and the interaction between the judiciary and the other two branches should also be

50. *See* Wen-Chen Chang, Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective 87 (June, 2001) (unpublished J.S.D. dissertation, Yale Law School) (on file with the author).

51. GRAHAM HASSALL & CHERYL SAUNDERS, ASIA-PACIFIC CONSTITUTIONAL SYSTEMS 47-48 (2002).

noted. I will distinguish between three different constitutional moments: the stage of foundation, the stage of transition, and the stage of division[52]. Then, I will analyze how the Constitution was separately created and reinvigorated after the forty-year suspension. Each stage had its own factors that contributed to the recognition of the constitution and judicial review in diverse political contexts.

A. *Foundation: Before 1947*

1. Background

The Constitution of the Republic of China, enacted on December 25, 1946, was formally promulgated on January 1, 1947, and took effect on December 25 of the same year. The Constitutional Court, Judicial Yuan, which was then known as the Council of Grand Justices,[53] is the court that is responsible for the interpretation of the Constitution in accordance with the Articles 78,[54] 171,[55] and 173[56] of the Constitution. However, the term "Constitutional Court" never appears in the text of the Constitution, and the Additional Articles of the Constitution of the Republic of China. Yet, according to the original intent of the drafters of the Constitution, the Judicial Yuan was to play the same role as the Supreme Court of the United States.[57] Chang Chun Mai, the person who is regarded as most influential in enacting the Constitution, elaborated this point in his speeches as well.[58]

---

52. The Author borrows the idea of a constitutional moment from Bruce Ackerman, who proposes a "dualist" approach to constitutional interpretation—an approach that claims that America has witnessed two types of decisions: foundational ones made by the American people and more ordinary ones made by their representatives. A constitutional moment is a period of popular development of principles that results in revolutionary reform. ACKERMAN, *supra* note 14, at 6.

53. The official name changed in 1993 when Constitutional Interpretation Procedure Act was enacted. Constitutional Interpretation Procedure Act (1948) (amended 1993) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73.

54. Constitution, art. 78 (1947) (Taiwan) ("The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders.").

55. *Id.* art. 171 ("Laws that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan.").

56. *Id.* art. 173 (stipulating that "The Constitution shall be interpreted by the Judicial Yuan").

57. Lawrence Shao-Liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 AM. J. COMP. L. 509, 515 (1991); HUA-YUAN HSUEH, MINCHU HSIENCHENG YU MINTSUCHUI TE PIENCHENG FACHAN—CHANG CHUNMAI SSUHSIANG YENCHIU [THE DEVELOPMENT OF DEMOCRATIC CONSTITUTIONALISM AND NATIONALISM—A RESEARCH ON CHANG CHUN MAI'S THINKING] 195-96 (1993); TAFAKUAN SHIHHSIEN SHIHLIAO [HISTORY DOCUMENTS OF JUDICIAL YUAN INTERPRETATIONS] 27 (Secretariat of Judicial Yuan ed. 1998) [hereinafter History Documents of Judicial Yuan Interpretation]; Symposium, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, NTU L. REV., Sept. 2008, at 165-66 (2008); Lee, *supra* note 8, at 235.

58. It is interesting to note that in the prologue of this book, Chang compared this collection of his speeches to The Federalist Papers. CHUN-MAI CHANG, CHUNGHUAMINKUO MINCHU HSIENFA

As mentioned above, the Constitution was enacted during a turbulent era. In 1932, the KMT made a resolution to draft the Constitution, and convened the Constituent National Assembly. In 1933, the Legislative Yuan established a Constitution Draft Committee, and the Nationalist Government promulgated the Double-Five Draft on May 5, 1936.[59] However, with the eruption of the armed conflict between Japan and China, this draft, although amended later in 1940, was never to be put into effect. The progress of constitutionalization in China was forced to a halt.

In 1945, the year that Japan formally surrendered and World War II finally ended, the KMT and the CCP, accompanied by U.S. ambassador Patrick Hurley, held negotiations in Chongqing. They decided to hold the Political Consultative Conference to discuss the termination of the Tutelage Era and the practice of constitutionalism in mainland China. On January 10, 1946, thirty-eight representatives, affiliated with the KMT, the CCP, and other small parties, such as the Democratic League and the Young China Party, participated in the Political Consultative Conference held in Chongqing. Chang Chun Mai, a representative of the Democratic League, participated in the Conference on January 16. One of the main issues at hand was to revise the aforementioned Double-Five Draft.[60] At the Conference, the representatives agreed upon twelve principles aimed at revising the Double-Five Draft, and decided to establish the Constitution Drafting Committee. By the end of April, the committee had roughly completed the so-called Political Consultative Draft according to these twelve principles.

However, the domestic armed conflict between the KMT and CCP intensified, and the KMT decided to convene the Constituent National Assembly by itself, a decision that violated the consensus that had been reached during the Political Consultative Conference.[61] Consequently, the CCP decided to boycott the Constituent National Assembly and refused to recognize the Constitution later.[62] An intense civil war broke out thereafter. Chang Chun Mai, the leader of Social Democratic Party, still attended the Constituent National Assembly after making a bargain with Chiang Kai-Shek. Finally, the KMT and other two parties, the Social Democratic

---

SHIHCHIANG [TEN SPEECHES CONCERNING THE CONSTITUTION OF REPUBLIC OF CHINA] 97-98 (1971).

59. RECORDS OF THE NATIONAL ASSEMBLY 317 (Secretariat of the National Assembly ed. 1946); Jyh-pin Fa, *Constitutional Developments in Taiwan: The Role of the Council of Grand Justices*, 40 INT'L & COMP. L. Q. 198, 199 (1991).

60. CHUAN-CHI MIAO, CHUNGKUO CHIHHSIENSHIH TZULIAO HUIPIEN [THE COMPILATION OF INFORMATION CONCERNING THE CHINESE CONSTITUTIONAL MAKING HISTORY] 590-91 (1989).

61. HSUEH, *supra* note 57, at 186.

62. *Id.* at 186-87; MIAO, *supra* note 60, at 595; Yueh-sheng Weng, *Ssufayuan Tafakuan Chiehshih yu Taiwan Minchuchengchih chi Fachihchui chih Fachan* [*Interpretations of the Constitutional Court and the Developments of Rule of Law and Democratic Constitutionalism in Taiwan*], 178 TAIWAN FAHSUEH TSACHIH [TAIWAN L. J.] 1, 2 (2011).

Party and the anti-communist Young China Party, joined the Constituent National Assembly. The Assembly was composed of representatives that came from different occupational groups, political parties, and provinces, including Taiwan. Needless to say, the KMT was the dominant party. In spite of Chiang's open support for Chang's Political-Consultative Draft, representatives of the KMT still preferred the Double-Five Draft.[63] Chang was angry and threatened to quit the Constituent National Assembly.[64] Due to the pressure of the united boycott that came from the other two parties in the Assembly, the KMT gave way to Chang's proposal. Chiang, leader of KMT, and Sun Ke, son of Sun Yat-sen, publicly supported Chang's version of the draft constitution and criticized the Double-Five Draft.[65] Eventually, the Political-Consultative Draft was adopted by the Constituent National Assembly. Since Chang played a pivotal role in the creation of the twelve principles and drafting of the Constitution, some scholars have thus contended that he was substantively the founding father of the Constitution.[66]

2. *Analysis*

Certainly, there is a difference between the enactment of a constitution and the adoption of judicial review. There are many alternatives institutional designs that may effectively and efficiently ensure that a constitution will be faithfully obeyed, and judicial review is only one of them. What then, lead to the inclusion of judicial review in the Constitution enacted in 1947? Working from the insurance model, Ginsburg argues that two factors may account for the adoption of judicial review at the time. The first is domestic. Politicians passed the Constitution out of the desire to buy insurance through establishing a fair and impartial judicial review to make sure that all constitutional rights would be guaranteed since they might have lost their power afterwards in that tumultuous era.[67] The second factor is international. That is, "the ideology of modernization that underpinned the desire to rule through a constitution in the first place."[68]

This may be true. I would like to suggest, however, that other factors, both historical and theoretical, may better account for the birth of the judicial review in the Republic of China. On the one hand, from a historical perspective, judicial review was not mentioned in the twelve principles.[69]

63. *See* Chang, *supra* note 50, at 87-90.
64. HSUEH, *supra* note 57, at 188.
65. *Id.* at 189.
66. *Id.*
67. GINSBURG, *supra* note 26, at 109.
68. *Id.* at 116.
69. HSUEH, *supra* note 57, at 174-76.

The only principle regarding the judiciary focused on the status of Judicial Yuan, the nomination and approval of justices, and the independence of judges. For this reason, Jau-Yuan Hwang has argued that "the power of judicial review might not even [have been] an issue at all for the major political parties in China at the time."[70] He has expressed doubt that "either the KMT or CCP would even think of using the judicial power as leverage on the political branches."[71] The fact that Chang, chairman of a small party, had so much leeway to draft the Constitution indicated precisely the indifference the KMT felt toward the Constitution itself, let alone the power of judicial review.

Beside the twelve principles, the KMT did have other alternatives, and they were able to adopt their preferred one. The Double-Fifth Draft, drafted in accordance with Sun Yat-sen's political theory, was discussed in the Constituent National Assembly, a convention over which the KMT enjoyed majority control. Nevertheless, the KMT compromised with the Social Democratic Party and Young China Party in the hope of accelerating the process of the constitution-making. They did so simply because Chiang, leader of KMT, wanted to accumulate more external military support and internal legitimacy in order to fight the CCP.[72] By democratically enacting a constitution and, most importantly, recognizing the power of judicial review which was drafted largely by opposition parties to supervise himself, Chiang might be able to claim that the KMT he led was tolerant and willing to negotiate, factors which significantly differentiated it from Fascist or Leninist parties, such as the CCP. Also, he might have stood to gain foreign economic aid that came from anti-communist allies. In a nutshell, the adoption of judicial review did not stem from the fear that he would lose power in the future, but from his will to consolidate his already strong political influence. This account deviates from the standard assumptions of insurance theory.[73]

Neither from a theoretical perspective, did the system of judicial review set out in 1947 fit into the framework of the insurance model. For instance, people had limited access to the Constitutional Court. During the first term, only national and local government agencies were entitled to petition the Constitutional Court due to the Regulations Governing the Adjudication of the Council of the Grand Justices. The Constitutional Court was at best the legal counsel of the Nationalist Government, and certainly a far cry from the

70. Symposium, *supra* note 57, at 166.

71. *Id.*

72. *See* Chang, *supra* note 50, at 89.

73. *See*, *e.g.*, Michael C. Davis, *Constitutionalism and New Democracies*, 36 GEO. WASH. INT'L L. REV. 681, 686 (2004) (reviewing TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003)).

guardian of constitutional rights.[74] From judicial statistics, we may easily see that during the first three terms of the justices, only one decision was petitioned by individuals.[75] And, during the first term, the start of judicial review in mainland China, of 226 petitions that sought for constitutional protection, not a single was put forth by individuals. This too runs contrary to the insurance model because no insurance may be secured unless there is an unimpeded path to the Court.

Moreover, the mechanism of appointment may indicate the intent of politicians as well. Ginsburg writes:

> An example that is close to [single-body appointment mechanisms] is the Council of Grand Justices in Taiwan, whose members are appointed by the president from a list of nominees prepared by a committee he picks. Approval is required by the legislature, but because the president was historically the head of the largest political party, this was not an effective check, and the mechanism was a de facto single-body appointment mechanism.[76]

With single-body appointment mechanisms, there is little chance, if any, that the judiciary will independently shoulder the responsibility maintaining checks and balances, a function that is the precondition for the insurance model to work. The results of the early interpretations proved that the justices were quite obedient to the executive branch. Additionally, the possibility of reappointment was also detrimental to the independence of the justices. And, size of the court is another factor that sheds light on the KMT's attitude at the time of the establishment judicial review. Since court size was not provided for in the Constitution itself,[77] the Nationalist Government promulgated the Organic Act of Judicial Yuan on March 31, 1947 which stipulated in article 3 that the Judicial Yuan should have nine grand justices.[78] Although the number of justices was increased to seventeen in later revisions, only ten really served as the first-term justices starting on July 14, 1948. Subsequently the mainland soon became embroiled in the civil war and only five justices retreated to Taiwan with the KMT. Since the quorum for passing interpretation had not been reached, the president

74. Weng, *supra* note 62, at 4.

75. Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracies*, 2 ASIA L. REV. 73, 79 tbl.2, 82 tbl.3 (2005); History Documents of Judicial Yuan Interpretation, *supra* note 57, at 486 fig.8.

76. GINSBURG, *supra* note 26, at 42-43.

77. Article 79, section 2 of the Constitution only prescribed that "The Judicial Yuan shall have **a number of** Grand Justices to take charge of matters specified in Article 78 of this Constitution, who shall be nominated and, with the consent of the Control Yuan, appointed by the President of the Republic." (emphasis added by author).

78. Liu, *supra* note 57, at 516.

nominated new candidates in 1952. At that time, there were only nine justices.[79] That is, it was comparatively a small court that was easily influenced by the dominant political party.

The numbers of constitutional interpretations and their results reflected the shaky status of justices and the impotence of judicial review as well. Generally speaking, justices of the Judicial Yuan may exercise two kinds of interpretative power: uniform interpretation and constitutional interpretation.[80] We may observe that justices made fewer constitutional interpretations than uniform interpretations, which means that justices emphasized the uniform application of statues and regulations rather than the protection of constitutional rights.[81] Furthermore, even when they did exercise their constitutional interpretation power, they rendered few unconstitutional findings.[82] Almost all constitutional interpretations recognized the statutes or regulations in question as consistent with the Constitution. The justices did not dare to challenge the Nationalist Government, and consequently people gradually lost their confidence in the judiciary, a situation that has been called "low equilibrium of judicial review."[83]

The international factor also played a role at the time. The decision to include judicial review was indeed an imitation of the Supreme Court of the United States.[84] Sun Ke, then-President of the Legislative Yuan, clarified that the jurisdiction of the Judicial Yuan in the draft Constitution was to extend to all cases arising under the Constitution, including civil, criminal, and administrative cases as well as uniform and constitutional interpretations. This was distinctly different from the role of the Judicial Yuan before the draft.[85] Nevertheless, since judges in normal and administrative courts did not exercise the power of judicial review, the jurisdiction of the Judicial Yuan was intentionally limited due to concern that the functions of uniform and constitutional interpretations might be paralyzed with the caseload burden that came from civil, criminal, and administrative controversies.[86]

After the promulgation of the Constitution on January 1, 1947, the Organic Act of Judicial Yuan was promulgated on March 31 of the same year. It is worthy of note that the Organic Act still stipulated that the Judicial

79. History Documents of Judicial Yuan Interpretation, *supra* note 57, 55-56.
80. Chang, *supra* note 75, at 76-78; Liu, *supra* note 57, at 518.
81. Chang, *supra* note 75, at 77 tbl.1; Fa, *supra* note 59, at 207; History Documents of Judicial Yuan Interpretation, *supra* note 57, 490 tbl.4, 491 fig.12.
82. Chang, *supra* note 75, at 84-85 & tbl.5.
83. GINSBURG, *supra* note 26, at 73-74.
84. *See supra* note 57.
85. Lee, *supra* note 8, at 235.
86. *Id.* at 237.

Yuan was responsible for all cases, regardless of the original intent mentioned above. Not surprisingly, this law faced adamant opposition from the Supreme Court. The Nationalist Government compromised and revised the Organic Act in accordance with the original intent of the framers on December 25, 1947, the exact day that the Constitution was put into effect.[87] From that point, the Court only took charges of matters "specified in Article 78 of this Constitution"–that is, interpreting the Constitution and unifying the interpretation of laws and orders. And, judges of normal and administrative courts were prohibited from exercising the power of judicial review. This centralized model of judicial review was consonant with the interests of KMT because "the small number of justices [made] political control easier."[88]

In sum, the judicial review established in 1947 did not aim to protect human rights at that time. In light of historical records and related literature, the argument for a contract theory-based explanation for judicial review in Taiwan seems flimsy here. Moreover, from the historical and normative perspectives, judicial review did not stem from politicians' desire to buy political insurance either. For the ruling KMT members, the international factor did contribute to the inclusion of the judicial review. It was a kind of propaganda that showed international society that they stood under the banner of democratic alliance, siding with other liberal and progressive countries rather than with authoritarian regimes. Most important of all, they could draw an ideologically distinct line between themselves and the CCP. This was especially true when the Nationalist Government retreated to Taiwan and foreign aid was much needed. Domestically, the Constitution was also "made for national inclusion against the backdrops of warlordism and localism after war."[89] It was not enacted out of the fear that KMT would lose the election. Therefore, it seems fair to say that the establishment of judicial review in 1947 cannot be explained by the insurance model.[90] On the contrary, it was enacted out of the KMT's political commitment, a commitment not only to the opposition parties, but also to foreign and domestic society. Furthermore, little evidence, if any, shows that economic or judicial elites played a substantial role in the progress of constitutional law-making. Therefore, this paper holds that it was international pressure and domestic need, rather than the protection of people's fundamental rights, which resulted in the establishment of judicial review in 1947. This need did

87. *Id.* at 237-38.

88. GINSBURG, *supra* note 26, at 117.

89. Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, NTU L. REV., Sept. 2008, at 111, 132-33.

90. *See* Thilo Tetzlaff, *Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan*, NTU L. REV., Sept. 2006, at 75, 102.

not come from politicians' heightened willingness to buy insurance during a chaotic period, but rather came from the desire to prolong and guarantee their monopoly on political power. Given the aforementioned compromises in the Constituent National Assembly, it was still the willingness of the dominant political party that actively contributed to the birth of judicial review, and not the unpredictability of future elections or the cooperation with elites in other domains.

B. *Transition: After 1987*

1. *Background*

During the party-state era, the Taiwanese economy developed at an amazing rate, which had a direct and dynamic impact upon social change.[91] Similar to other developing countries, these changes finally resulted in an escalating appeal for political reform, which eventually led to the abolishment of the Martial Law Decree and Temporary Provisions.[92] After the abolishment of the Martial Law Decree on July 15, 1987 and the annulment of the Temporary Provisions on May 1, 1991, the pace of democratization gathered speed and the role of the judiciary changed rapidly. The strongman died, so to speak, and his past authority to which everyone had submitted suddenly disappeared. The succeeding KMT chairman Lee could not claim similar authority due to a power struggle inside the KMT itself. Facing external challenges from the growing Democratic Progressive Party (DPP) and internal strife, after 1987 the KMT in Taiwan was not as commanding as the KMT had been in mainland China had been forty years prior. This lame giant had to negotiate and even yield to opposition parties to maintain its clout. Taiwan gradually transformed itself from an authoritarian regime to a liberal democracy. Many radical changes happened continuously, be they political, economic, or social.

At that time, political power diffused and the foundation of the KMT regime grew shaky.[93] The national executive power, and to be more specific, presidential power, shifted twice.[94] As mentioned above, the KMT won the

---

91. *See generally* Murray A. Rubinstein, *Taiwan's Socioeconomic Modernization, 1971-1996*, *in* TAIWAN: A NEW HISTORY 366, 377-95 (Murray A. Rubinstein ed., 1999).

92. *See* Murray A. Rubinstein, *Political Taiwanization and Pragmatic Diplomacy: The eras of Chiang Ching-Kuo and Lee Teng-Hui, 1971-1994*, *in* TAIWAN: A NEW HISTORY 436, 439-47 (Murray A. Rubinstein ed., 1999).

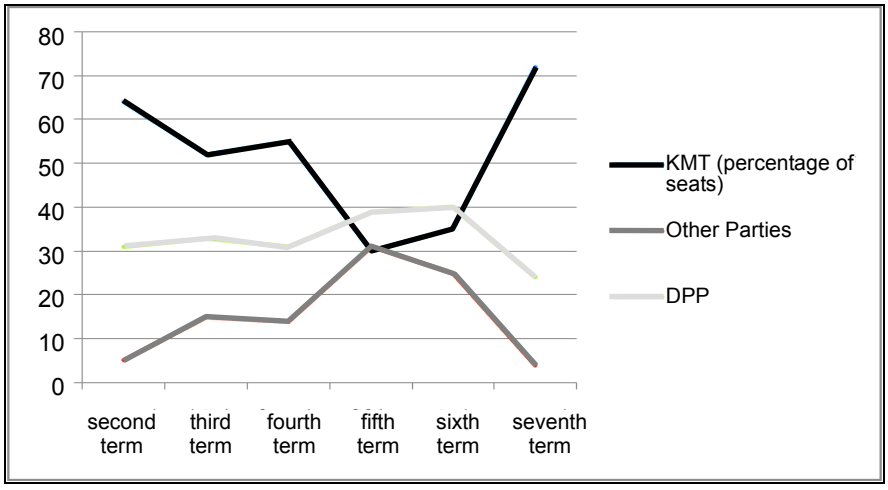
93. *See generally* SIMON LONG, TAIWAN: CHINA'S LAST FRONTIER 180-202 (1991) (sketching the political reform in Taiwan after 1986).

94. From the text of the Constitution and the Additional Articles, Taiwan is regarded mostly as embracing a French semi-presidential system. Roughly speaking, the president controls the decision-making power over external issues, such as national security and foreign affairs, while the president of the Executive Yuan controls decision-making power over domestic affairs. However, the

first direct presidential election in 1996. Four years later in 2000, the DPP won the next presidential election, the first time the KMT was defeated in a national election. In addition, the DPP also won several seats in local elections for county magistrates.[95] The KMT resumed its control over the executive power in 2008. On the whole, however, these electoral results conveyed a significant signal that the KMT was no longer as dominant as it was before.

The KMT was no longer the biggest political party in Congress. We may say that legislative power diffused after the democratization as well. In 1992, the election for the second-term of legislators was held, and the DPP came to control one-third of the seats. It is obvious that political power started to diffuse, and more and more non-KMT political actors began to share decision-making power. In 1995, the third-term election of legislators was even more competitive. The DPP took control of more seats than it had three years before, and the New Party also won about 13% of seats in its first election.[96] From the following graph, it is clear that no single political party is sure to win the next election. This is precisely the scenario described by the insurance model.

Figure I: Percentage of Seats in Legislative Yuan after the First Term



Source: Central Election Commission, Executive Yuan, Taiwan

president of the Executive Yuan is in reality a staff member of the president's team since the latter controls the nomination power of the former. Although Article 53 of the Constitution stipulates that "[t]he Executive Yuan shall be the highest administrative organ of the State", in fact the substantive highest administrative officer in Taiwan is the President, rather than the president of the Executive Yuan. From past experience, the president of the Executive Yuan, formally the highest executive officer, has made few, if any, decisions contradictory to the president's will.

95. *See* Rubinstein, *supra* note 92, at 449.

96. ,*The List of Party Proportion in the 1995 Legislative Election*, CENTRAL ELECTION COMM'N, http://db.cec.gov.tw/pdf/B1995005.pdf (last visited Mar. 24, 2012).

In spite of the emergence of the DPP, this cataclysmic diffusion of political power was also partly the result of a chaos within the KMT. Simply put, the KMT, which is a political party composed of mainlanders and local elites, encountered cleavage. During the later stage of President Chiang Ching-Kuo's (the son of Chiang Kai-Shek) rule, the KMT intentionally promoted local Taiwanese elites of all fields in order to localize and legitimize the KMT to counter the longstanding perception of some Taiwanese that it was a foreign political party. Former President Lee Teng-Hui is precisely the best example.[97] At the beginning, he was promoted because of his province of origin as well as his expertise in agriculture, but climbed his way to the top of the KMT step by step. After Chiang Ching-Kuo passed away, he became the chairman of the KMT and the president of Taiwan. Some mainlanders in the KMT were worried about their fading power and clout inside the KMT, and thus decided to challenge Lee. This fractionalization appeared inside the KMT in late 1989.[98] This scenario is further evidenced by the apostasy of some KMT members. In 1993, some members of the KMT defected and established the New Party, which was regarded as a pro-reunification political party. What's more, in the first presidential election in 1996, in addition to the KMT's and DPP's presidential candidates, two other candidates, Lin and Chen, were former KMT members as well.[99] Due to this power struggle within the KMT, Lee chose to negotiate with opposition parties in order to consolidate his political power.

On June 21, 1990, the landmark *Interpretation No. 261* was promulgated. It held that "[t]he Central Government is further mandated to hold, in due course, a nationwide second-term election of the national representatives, in accordance with the spirit of the Constitution, the essence of this Interpretation and the relevant regulations, so that the constitutional system will function properly."[100] In 1991, the Additional Articles of the Constitution of The Republic of China were enacted, the first time that the Constitution was amended. After that, the Constitution was amended six times within fifteen years.

In general, the framework of the Constitution changed radically as a whole. An examination of the remodeling of judiciary may provide us more hints as to how this occurred. For example, the reappointment of justices was no longer possible after the 1997 amendments. This was intended to

97. ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 174 (2009).

98. *Id*. at 450.

99. Lin was former president of Judicial Yuan and Chen was the former president of Control Yuan. In fact, Lin himself is a local Taiwanese but his vice-president candidate, Hao, is a mainlander who serves as the minister of National Defense and former president of Executive Yuan.

100. J.Y. Interpretation No. 261 (1990) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=261.

"insulate the justices somewhat and enhance the policy space for independent decision making."[101] Moreover, the Amendments granted the justices the power to impeach the president and dissolve unconstitutional parties, a power that allows the judiciary to keep in check the executive and legislative power.[102] In addition, the proposed budget submitted annually by the Judicial Yuan may not be eliminated or reduced by the Executive Yuan.[103] Nor could the Legislative Yuan constitutionally delete the budget appropriated as a specialty premium for the Justices.[104] Access to the Constitutional Court was expanded considerably.[105] In the past, only the Supreme Court and Administrative Court had the right to petition the Grand Justices Council for the interpretation of statutes.

2. *Analysis*

How did the expansion of judicial power happen? From the thumbnail histories, we might say that the political environment after democratization has been uncertain and amorphous. It was this precarious environment that gave birth to the constitutional amendments and the expansion of judicial power discussed above. Facing the threat of an emerging opposition party and needing to claim internal legitimacy at the juncture of democratic transition, the KMT chose to revise the Constitution. The Constitutional Court was thus vested with a wide array of powers, such as the power to impeach the president and dissolve unconstitutional parties.[106] It was indeed a clever choice for both the KMT and former president Lee Teng-Hui. By doing so, the KMT properly alleviated political strife and peacefully responded to the bottom-up pressure for democratization and constitutionalization. In sum, the constitutional amendments were adopted not only as insurance, but also as propaganda to bolster its legitimacy even after democratization. As Wen-Chen Chang aptly described, "[f]aced 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 . . . [C]onstitutional courts are unexpectedly empowered to enter into political centers."[107]

---

101. GINSBURG, *supra* note 26, at 73-74.

102. Constitution, Additional Articles, art. 5(4) (1991) (amended 2005) (Taiwan).

103. *Id.* art. 5(6).

104. J.Y. Interpretation No. 601 (2005) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=601.

105. *See* Nuno Garoupa, Veronica Grembi & Shirley Ching-ping Lin., *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20 PAC. RIM L. & POL'Y J. 1, 8-13 (2011).

106. For further discussion, *see* Tom Ginsburg, *Beyond Judicial Review: Ancillary Power of Constitutional Courts*, *in* INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 225, 233-34 (Tom Ginsburg & Robert A. Kagan eds., 2005).

107. Symposium, *supra* note 57, at 170.

Moreover, since the political environment had become chaotic and unpredictable, an impartial third party was required to intervene. No one with whom everyone has agreed in the past can ever play the role of authoritative arbiter.[108] It is under these political circumstances that the judiciary gains its authority as an institution with the final say. Through constitutional revision and constitutional petition, courts are delegated, sometimes even asked, to deal with politically polarizing issues.[109] This tendency of judicialization is especially evident when there is a political gridlock.[110] The controversy over nuclear power plant in *Interpretation No. 520* is one of the best examples of this dynamic in the context of Taiwan.[111]

Together with political manipulation, judicial activism also plays a role in the expansion of judicial power. Given the maintenance of an abstract review system, judges in lower courts at present are permitted by the Constitutional Court to petition for interpretation when they suspect with reasonable assurance that the constitutionality of a statute is not clear after democratization.[112] In regard to the justices themselves, the scope and validity of their decisions has expanded considerably. The justices have even challenged the constitutionality of statutes with constitutional status, such as the Temporary Provisions in *Interpretation No. 261*, and the 1999 constitutional amendments in *Interpretation No. 499*. This attitude would have been unimaginable in earlier decades when even statutes and regulation were rarely declared unconstitutional. We might say that with the expansion of judicial power, the justices become more active when facing thorny issues and more cases were petitioned to them. This reciprocal-causal situation has been called a "high equilibrium" of judicial review.[113]

Nonetheless, without enough popular support, a constitutional court cannot place its activism on solid ground. Based on insurance theory explanations, politicians may still attack the judiciary from time to time when they are ruled against. If the legitimacy of the Court had relied solely

---

108. Ran Hirschl, *The "Design Sciences" and Constitutional "Success"*, 87 TEX. L. REV. 1339, 1351-52 (2009).

109. Jiunn-rong Yeh has pointed out that democratization would empower the judiciary and facilitate judicialization in at least three ways – empowerment, trust, and spillover. *See* Jiunn-rong Yeh, *Democracy-driven Transformation to Regulatory State: The Case of Taiwan*, NTU L. REV., Sept. 2008, at 31, 48-49 (2008).

110. *See* C. Neal Tate, *Why the Expansion of Judicial Power? in* THE GLOBAL EXPANSION OF JUDICIAL POWER 27, 28-33 (C. Neal Tate & Torbjörn Vallinder eds., 1995); CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 182-83 (2002).

111. *See* Tom Ginsburg, *Constitutional Choices in Taiwan: Implications of Global Trends* 35-36 (Ill. Pub. Law and Legal Theory Research Papers Series, Research Paper No. 06-01, Jan. 18, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=877154.

112. J.Y. Interpretation No. 371 (1995) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371

113. GINSBURG, *supra* note 26, at 74, 128-34; Fa, *supra* note 59, at 207-08.

on the politicians' subjective will—that is, politicians cooperating with the judiciary only when it is beneficial to their interests—then the Court could not have been as potent as it was during this time. The concept of tolerances interval may provide some theoretical elucidation from another angle.[114] Generally speaking, every political actor is assumed to have his or her own preferred positions, that is, policy preferences.[115] All actors in the political arena vote for policies that are close to their ideals and disagree with those that do not fit their preferences. However, these actors are not unfettered in their ability to challenge those policies that displease them, and their challenges are usually not costless.[116] According to the logic of cost-benefit analysis, therefore, political actors will only challenge those that deviate too much from their preferences. Thus, the term tolerances interval refers to the interval around which "each of [political actors'] ideal points such that they would be unwilling to challenge a Court decision placed within that interval."[117] This may partly explain why the Court during this transitional period encountered relatively small resistance from the other two branches. On the one hand, by opening the gate of the Constitutional Court and rendering a series of Interpretations that protected fundamental rights during this period,[118] the Court gradually entrenched its position as the guardian of citizens' constitutional rights. On the other hand, by issuing some Interpretations that were consistent with popular eagerness for democratization, such as the aforementioned *Interpretation Nos. 261* and *499*, the Court also became the most trusted branch among the three. Both of these developments tended to increase the cost and risk at which the executive and the legislative branches could challenge the Court's decisions.

After the 1991 amendments, the Constitution was amended another six times. The enactment of these amendments represented both a political tool for an uncertain society to reestablish stability and consensus, and evidence of politicians' desire to retain their power. Some scholars have characterized this as the emergence of transitional constitutionalism.[119] The frequency reflects the unstable balance among political parties and implies that the political arena has moved from regular elections to the conventions of constitutional law-making. At this stage, I believe that the insurance theory and the hegemonic model both properly account in part for why politicians

114. I would like to thank one anonymous reviewer for pointing this out to me.

115. *See* Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 127-28 (2001).

116. The costs here may include, according to Epstein et al., case salience, case authoritativeness, public policy preferences, and public support for the court. *See id.* at 129-30.

117. *Id*. at 128-29.

118. *See infra* IV, A-B.

119. For more discussion about transitional constitutionalism, *see* Jiunn-rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, NTU L. REV., Mar. 2009, at 145.

actively empowered the development of judicial review. Tolerances interval explains why politicians tolerated the rebirth of judicial review during the democratic transition period in Taiwan.

C. *Division: 2000-2008*

1. *Background*

In 2000, the DPP candidate Chen Shui-bian won the presidential election and became the first non-KMT president in history. For the first time, the KMT lost its control of the executive in a national election and became the opposition party in Taiwan. Despite its defeat in the presidential election, the KMT, or at least the "pan-blue" alliance maintained firm control of the legislature during the eight years of Chen's presidency,[120] Because of this, the executive and legislative were separately controlled by two adversarial parties, which both claimed to represent the popular will. It is hardly surprising that a political stalemate formed and society was soon divided ideologically. This antagonism was further aggravated by the so-called 319 Shooting during the 2004 presidential election. During Chen's presidency, many major constitutional disputes arose,[121] including but not limited to those over the nuclear power plant case, the investigation power of the Legislative Yuan, the nomination power of the Premier, the scope of presidential immunity and secret privilege, the consent power of Legislative Yuan, and the referendum controversy. It is fair to say that all of these cases resulted in serious social cleavages at that time. Facing this unprecedented deadlock between the two branches, it is intriguing to analyze how the judiciary, the third branch, chose to exercise its power.

In addition to these constitutional cases, the Constitution was once again amended in 2005. Many provisions therein were constitutionally important, but if we concentrate on the interaction among the three branches, the only change that directly impacted the balance of the three powers was that the Constitutional Court gained the power to adjudicate motions initiated by the Legislative Yuan to impeach the president or vice president. From this Amendment we may see that after two decades of democratization, the judicial branch, especially the Constitutional Court, had garnered substantial

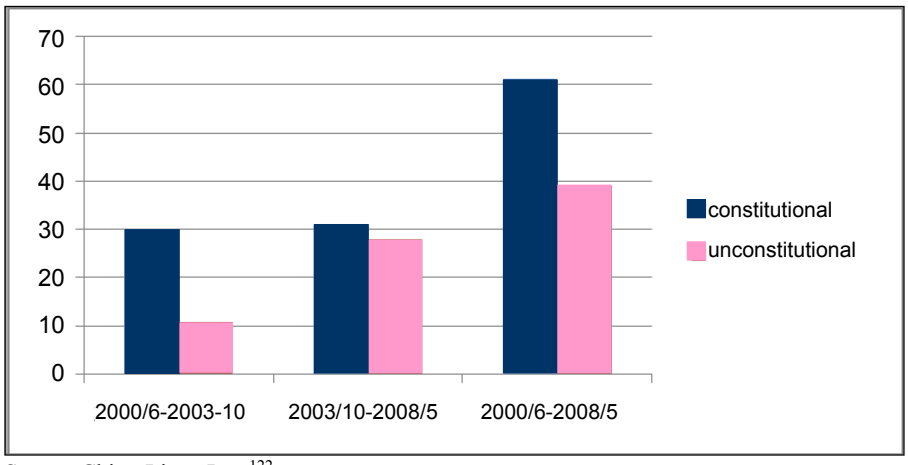
120. The pan-blue alliance is a political coalition that consists of the KMT, the New Party, and the People First Party. Almost all members in the New Party and People First Party are former KMT members.

121. *See* Jiunn-rong Yeh, *Tsungtungchih yu Fenlieh Shehui:Taiwan yu Nanhan Hsiehfa Fayuan te Pichiao Yenchiu* [*Presidentialism and Divided Society: Comparing Constitutional Court Decisions in Taiwan and South Korea*], 40 NTU L.J. 459, 480-84 (2011) (pointing out that more constitutional controversies, especially those concerning governmental system and separation of powers, emerged during this time than they did during other periods).

support both from citizens and the political parties. It was no longer a politically biased rubber stamp of the autocracy; rather, it had become a trustworthy institution that could fulfill its duty to check the other branches even with neither purse nor sword.

Furthermore, during the eight years of divided government, the Constitutional Court rendered 143 interpretations (from *Interpretation No. 508*, decided on June 9, 2000, through *Interpretation No. 642*, decided on May 7, 2008). Among them, 100 were in response to petitions by citizens. It is also worth noting that among these 100, sixty-one were declared constitutional, which means that the Constitutional Court ruled against the petitioners, that is, the citizens. At first glance, it may seem that the Constitutional Court during this time made little progress in striking down laws that encroach upon human rights. But upon further notice, we see that as of October 1, 2003, the Interpretations were no longer decided by the Justices of the sixth term. Instead, starting with *Interpretation No. 567*, interpretations were decided by Justices nominated by the new executive power, that is, by DPP President Chen. The timing is important for this is the first time Justices were not nominated by a KMT president. From Figure II below, we may see that in the time the new Justices assumed office through the end of President Chen's second term, fifty-nine Interpretations appealed by citizens were made. Among those fifty-nine decisions, twenty-eight were declared unconstitutional, which means that almost fifty percent of the decisions ruled in favor of citizens.

Figure II: Cases Appealed by Citizens (May 20, 2000–May 19, 2008)



Source: Chien-Liang Lee.[122]

122. Chien-Liang Lee, *Jenchuan Weihuche te Liushih Huiku yu Shihtai Tiaochan: Shihtan Tafakuan Jenchuan Chiehshih te Fantoshu Kunchu* [*60 Years Retrospect and the New Challenge as Human Rights Guardian: Exploring the Counter-Majoritarian Difficulty of Grand Justices'*

2. *Analysis*

After a cursory examination of political and constitutional change during the right years, we find that many major controversies occurred during those eight years. This background provided a perfect opportunity for the Constitutional Court to exercise its power of judicial review and thus further entrench its position in the governmental system. As mentioned above, on October 1, 2003, President Chen nominated new Justices. In addition to the influence of these nominations on human rights decisions, it is also intriguing to analyze whether this change in personnel invested with judicial power lead to different understandings of the separation of powers and checks and balances.

Before discussing specific cases, it should be noted that during these eight years, forty-three Interpretations concerning appeals from central and local governments were rendered, which means that about thirty percent of those cases were appealed by governments. Compared to the fifth term and the first six years of the sixth term, this ratio is indeed higher because only about twenty-five percent of Interpretations were based on appeals by governmental officials at that time.[123] This corroborates the observation that in a highly ideologically divided society, the trust between political parties is weak, if not nonexistent, and a detached, politically-neutral arbitrator is very much required to prevent an otherwise functional government from being paralyzed by clashes between the executive and legislative branches. More cases are brought to the courthouse by politicians, and correspondingly the Court is expected to shoulder more responsibilities and still respond in a timely manner. These factors caused the increase of Interpretations related to separation of powers.

With respect to some of the most controversial Interpretations during this period, it seems that although the Constitutional Court cautiously prevented itself from being dragged into the political conflict between the other two branches, this was not successful every time. The nuclear power plant case is the first cardinal case that related to separation of powers the Court encountered in this period. During the 2000 presidential campaign, the issue of nuclear power plants was harshly debated. The then-DPP presidential candidate Chen promised to halt construction of the fourth nuclear power plant if elected. After winning the presidential election, he

Interpretations of Human Rights], *in* 6(2) HSIENFACHIEHSHIH CHIH LILUN YU SHIHWU TILIUCHI HSIATSE [CONSTITUTIONAL INTERPRETATION: THEORY AND PRACTICE] 467, 545-49 (2009).

123. *Judicial Yuan*, Statistics of Interpretations from the First Term to the Sixth Term, http://www.judicial.gov.tw/constitutionalcourt/uploadfile/E100/%E7%AC%AC%E4%B8%80%E5%B1%86%E8%87%B3%E7%AC%AC%E5%85%AD%E5%B1%86%E5%A4%A7%E6%B3%95%E5%AE%98%E4%BD%9C%E6%88%90%E8%A7%A3%E9%87%8B%E4%B9%8B%E7%B5%B1%E8%A8%88%E6%95%B8%E6%93%9A%E8%A1%A8.htm (last visited Dec. 22, 2011).

ordered the Executive Yuan to withhold implementation of the statutory bill that had already been passed and reconsidered by the Legislative Yuan. In this case, the Court arguably rendered an ambiguous decision that did not declare unequivocally whether the decision not to implement the budget was constitutional. Instead, the Court emphasized that many constitutional approaches, such as a no-confidence vote or legislation for an isolated case, could be chosen to resolve major political conflicts in the system of democratic representation, and that "all related agencies should then negotiate a solution based upon the meanings and purpose of this Interpretation, or to select a proper channel within the current constitutional mechanism to end the stalemate."[124] Mindful that an assertive decision might embarrass both branches and escalate the political confrontation, the Court adopted a process-centric approach which prevented itself not only from engaging in direct confrontation with other two branches, but also from being embroiled in political conflict.[125] In addition, although the Court claimed that the judiciary had no authority to decide which approach might best solve the controversy in question, both branches were obligated to act in accordance with the Constitutional Court's exposition of the Constitution. Judicial supremacy was thus implicitly entrenched even in the context of politically divided society.

Another example is the Special Commission case. In *Interpretation Nos. 585* and *633*, cases that relate to the constitutionality of Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting, the Constitutional Court twice struck down that law on substantial grounds. It found that most of the investigative powers vested by the provisions went beyond the ambit of legislative power.[126] The Special Commission indeed was supposed to be a Special Prosecutor or Independent Counselor that may exercise the power to prosecute because the Legislative Yuan did not trust the Minister of Justice in a case in which the incumbent President was involved. The Legislative Yuan did not deny this. However, facing this politically sensitive case, the Constitutional Court cunningly

---

124. J.Y. Interpretation No. 520 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=520.

125. *See* Yeh, *supra* note 109, at 52; Yeh, *Chuanhsing Fayuan te Tzuwo Tingwei — Lun Hsienfachehshih tui Hsiuhsienchichih te Yinghsiang*, *supra* note 8, at 52; Yeh, *supra* note 121, at 493-94.

126. For related discussions, see Yeong-Chin Su, *Chiao Taishou Shih te Fenchuan, Sa Kouhsieh Pan te Jenchuan* [*Prefecture Chiao's Idea of Separation of Powers; Excessively Emphasized Human Rights*], 70 TAIWAN FAHSUEH TSACHIH [TAIWAN L.J.] 38 (2005); Bruce Yuan-Hao Liao, *Lun Lifa Yuan Tiaochachuan te Chiehhsien yu Fanwei* [*On the Limitation and Spectrum of the Investigative Power of Legislative Yuan*], 78 TAIWAN FAHSUEH TSACHIH [TAIWAN L.J.] 83 (2006); Tsi-Yang Chen, *Lun "319 Chiangchi Shihchien Chenhsiang Tiaocha Tepieh Weiyuanhui Tiaoli" chih Weihsienhsing* [*On the Constitutionality of the "Act to Form a Special Investigative Committee in Search of the Truth of 319 Gun Shot"*], 125 YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.] 48 (2005).

distorted the original intent of the Legislative Yuan,[127] trying to maintain the constitutionality of the Act at issue as much as possible by arguing "[t]he SCIT should be categorized as a special commission designed to assist the Legislative Yuan in exercising investigation power. Therefore, it is not an organization that does not belong to any constitutional organ, nor is it a hybrid organ that exercises the legislative, executive, judicial and control powers simultaneously."[128] Thus, the Special Commission was defined by the Court as a subordinate commission of the Legislative Yuan that may constitutionally assist the Legislative Yuan exercising the investigation power with minor revision of the Act. By undercutting the power of the commission on the one hand and retaining the possibility of its constitutionality in the future, the Court spared no effort in striking a balance between executive and legislative power, such as not to unnecessarily rile either. Nevertheless, these two Interpretations still provoked the Legislative Yuan and resulted in backlash.[129] Still, it is obvious that the Court, aware of the political impasse, strategically exercised its interpretive power to maintain its integrity and avoid an unbearable constitutional disaster at the same time.

Given concerns over possible retaliation from the legislative and executive branches, the Court consistently reminded the two branches of its most effective weapon for checks and balances – its interpretive authority that "shall be binding upon every institution and person in the country."[130] *Interpretation No. 627* was exactly the Taiwanese analog of *United State v. Nixon.*[131] The petitioner, that is, then-President Chen, argued in his petition that, inter alia, Article 52[132] of the Constitution should be interpreted most broadly, vesting him with absolute immunity from criminal procedures, including those that may directly and indirectly distract him from his public duties. In other words, due to the status and duties of the President, the criminal procedure's interests in the determent and punishment of crime should yield to the President's claim of privilege. Secondly, the evidence in this case fell into the category of absolute state secretes privilege, which

127. Justice Tzong-Li Hsu articulated and disagreed with the majority opinion's intentional distortion in his dissenting in part opinion in J.Y. Interpretation No. 585. J.Y. Interpretation No. 585 (2004) (Hsu, Tzong-Li J., partly dissenting) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/%E6%8A%84%E6%9C%AC585.pdf.

128. J.Y. Interpretation No. 585 (2004) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=585.

129. *See infra* Part IV C.

130. J.Y. Interpretation No. 185 (1984) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=185.

131. United States v. Nixon, 418 U.S. 683 (1974).

132. Article 52 of the Constitution stipulates that "The President shall not, without having been recalled, or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason." Constitution, art. 52 (1947) (Taiwan).

means that either the Taipei district court or the Constitutional Court should be deferential to the President's judgments not to publicize them. Thirdly, the President had no obligation to testify either in his own criminal case or in that involving another person.[133] By rejecting these broad interpretations of Article 52 of the Constitution of the President, the Court, like its American counterpart, implicitly reaffirmed "that it is the province and duty of this Court to say what the law is with respect to the claim of privilege presented in this case."[134]

Also, *Interpretation No. 601* is another example of the Court's reiteration of its interpretive supremacy in explicating laws. In this case, the Court, faced with the prospect of reprisal from the legislative branch, maintained that it should have the final say over whether Justices themselves fall under the category of "judges" prescribed in Article 81 of the Constitution and thus should be entitled to guaranteed salaries.

In addition to the aforementioned cases, there were many other controversial cases in respect of separation of powers, including but not limited to *Interpretation Nos. 613, 632,* and *645*. These decisions that occurred during the eight years of Chen's term showed that the Court did not interpret the Constitution mechanically regardless of the fact that society was politically divided. The Justices had to be politically neutral, which would prevent them from becoming embroiled in head-to-head conflicts between the two branches. This could protect the Court from being attacked by either the sword or the purse to some extent. What was more important was that by doing so, they could claim the position of the only and final arbitrator that everyone else must to succumb to even in the context of political controversies in which the Court usually lacks judicable standards. After all, as observed by McClosky, "the Court's position would ultimately depend on preserving its difference from the other branches of government. The Congress and the presidency would always have roots in the power structure of [the] society, while the Court must find its support in the popular belief that the judiciary stands apart and defends the fundamental law."[135] At the same time, the Justices had to be fully conscious of political developments as well, which prevented them from interpreting the Constitution mechanically. This awareness may have prompted the Court to conciliate various viewpoints from different branches and maintain the stability of the whole country and along with it the legitimacy to intervene the policy-making process in the future.[136]

---

133. J.Y. Interpretation No. 627 (2007) (petiton) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/%E6%8A%84%E6%9C%AC627.pdf

134. *Nixon*, 418 U.S. at 705.

135. MCCLOSKEY, *supra* note 18, at 20.

136. *See* Epstein et al., *supra* note 115, at 130; Dahl, *supra* note 4, at 293.

Generally speaking, the Court during this politically divided period did demonstrate the Justices' shrewdness, as they asserted their supremacy in some cases while exhibiting the judicial restraint in others. By exercising its interpretive power strategically, the Court led the purview of judicial power to be expanded. Just as McCloskey has remarked, a Court "often gains rather than loses power by adopting a policy of forbearance."[137] The power to adjudicate the impeachment of the president initiated by the Legislative Yuan, which presents a classical conflict between the executive and the legislative power, is a good example of this.

IV. STRATEGIC WAYS THE COURT EXPANDED ITSELF

This paper has suggested that the establishment and empowerment of judicial review at different stages was for different reasons. However, whether we regard judicial review as a byproduct of political conflict, a symbol of national legitimacy, or an indispensible mechanism to protect human rights, the judiciary itself, being one actor in the political arena, functions dynamically and strategically.[138] Courts in nascent democracies are all the more so since political, economic, and social conditions are in rapid transition. If taken to the extreme, they may even totally deviate from the track presupposed by the politicians. Therefore, judicial development after democratization is particularly worth of notice.

In the face of this rapid transition, a court not only has to respond, but must also accustom itself to these changes, which can be regarded as a double-edged sword for a court. On the one hand, these changes are tough challenges to an old court since it may no longer be trusted unless it duly responds to the needs of politicians and citizens in a timely manner.[139] On the other hand, these changes are also opportunities for a court to expand its power and claim its supremacy. Namely, a court must be brave enough to nullify unconstitutional laws enacted in the past to build its authority in new era while still careful enough not to invite backlash or destructive reprisal from other branches. The Constitutional Court faced these challenges in Taiwan as well. After democratization, it did gradually establish its authority as an independent and competent institution that has the final say over

137. MCCLOSKEY, *supra* note 18, at 30.

138. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 139-77 (1998) (arguing that before rendering any decision, justices must take the reactions of the President, the Congress, as well as the people into account); Micheal McCann, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives*, *in* THE SUPREME COURT IN AMERICAN POLITICS 63, 69-76 (Howard Gillman & Cornell Clayton eds., 1999) (articulating five general ways how the Supreme Court of U.S. shapes the terms of strategic interaction).

139. *See* Romeu, *supra* note 34, at 107.

constitutional issues.[140] However, it also faced backlash from Congress, the executive branch, and even the Supreme Court. In the following paragraphs, I will discuss how the Constitutional Court evolved from a rubber stamp into a guardian of fundamental rights, and how it faced backlash as a result of the expansion of judicial power. From a political science perspective, the Court strategically and successfully, expanded its power through various approaches.

A. *Guardian of Constitutional Rights*

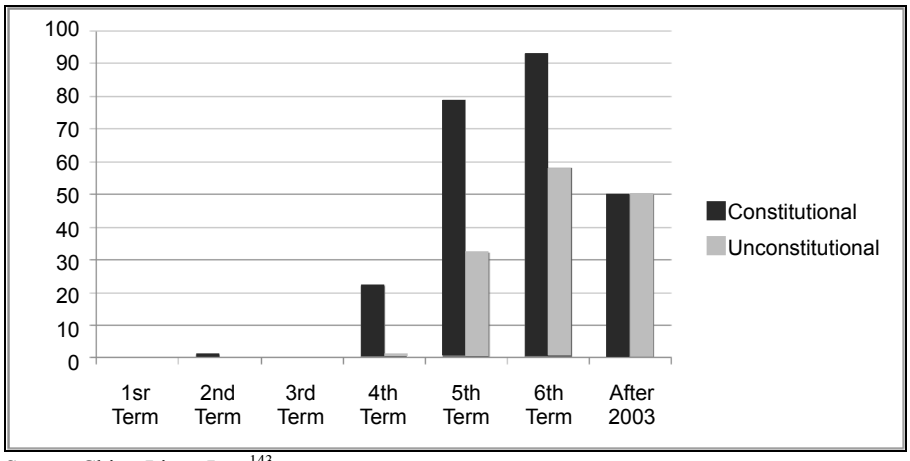
The best and fastest way for a court in a nascent democracy to establish its reputation and reinforce the people's confidence is for it to make itself more accessible and more dedicated to rights review. Multiple reasons may account for this. Generally speaking, cases regarding constitutional rights are less politically sensitive in the usual scenarios. Compared to issues related to the separation of powers that directly challenge the allocation of power, a court takes a lower risk when it adjudicates cases concerning fundamental rights. In addition, it is natural that the more opportunities citizens have to appeal to a court, the more likely they will depend on a court as arbitrator. When people are accustomed to choosing a court as their arbitrator, they implicitly recognize its authority and judgment and will return to the court when they are engaged in a dispute the next time around. Through repetition of this behavior, a path-dependent psychology is formed, and a court thus gains its reputation. This is especially the case when petitioners do win occasionally when they appeal. Therefore, it is predictable that a court established after political struggle will choose to hear more cases about human rights. Constitutional courts are no exception.

During the Constitutional Court's first three terms, only one Interpretation came from citizens, and the Court ruled against the appellant. Access to the Court during authoritarian era was quite restricted, to say nothing of the protection of human rights. From the fourth term, however, there were twenty-three cases appealed by citizens—a significant growth compared to the previous term.[141] Among them, one ruled in the appellant's favor, which was also a break through at that time. After democratization, decisions appealed by citizens increased enormously, and now these cases constitute the bulk of the Court's docket. In the fifth term, the Court made 110 decisions appealed by citizens, five times more than the fourth term. In the sixth term, there was again steady growth: 151 decisions appealed by citizens were made.[142]

---

140. *See* Ginsburg, *supra* note 111, at 30.
141. Lee, *supra* note 122, at 535-49; Fa, *supra* note 59, at 207.
142. After 2003, there is no "seventh term" since justices serve for a non-renewable, staggered

Figure III: Cases Appealed by Citizens



Source: Chien-Liang Lee.[143]

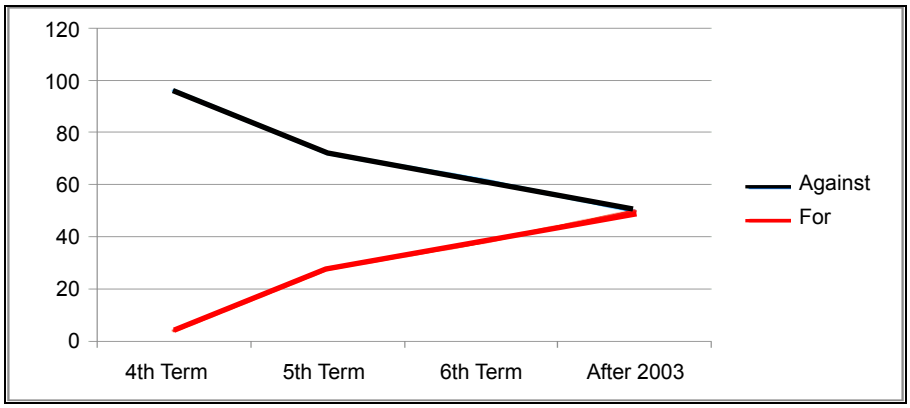
In spite of the increase in decisions appealed by citizens, the percentage of decisions ruled in favor of citizens, rather than the for government, also grew steadily. That is, the Constitution Court denounced more and more laws as unconstitutional that infringed fundamental rights after the lift of the Martial Law Decree. From the beginning of the fifth term, it is apparent that Justices have ruled against the government increasingly frequently as time goes by.[144] Or conversely, more and more citizens successfully had their rights entrenched by the Constitutional Court. In the fourth term, ninety-six percent of decisions appealed by citizens were ruled in the government's favor. After that, the rate decreased to seventy-two in the fifth term, and to sixty-two in the sixth term. After 2003, it became almost fifty-fifty. From Figure II, it is clear that the tendency is quite manifest.

term of eight years independent of the order by which each Justice is appointed to office.

143. The Interpretations made after the publication of Lee's article are also calculated and incorporated in the figure by this paper. Lee, *supra* note 122, at 535-49.

144. Since there was only one decision appealed by citizens in the first three terms, it might not be helpful to count it in if we want to see the tendency of decisions from the perspective of percentage.

Figure IV: Ratio of Decisions For – Against the Appellants (Citizens)



Source: Chien-Liang Lee.[145]

In addition, the Court has also actively opened the gate for judges in lower courts to petition the Court. In the past, only judges of the Supreme Court and Supreme Administrative Court could petition the Constitutional Court, as stipulated in article 5, section 2 of the Constitutional Interpretation Procedure Act to limit the qualification of appellants. If citizens wanted to petition the Constitutional Court, they had first to exhaust all available remedies, which was always time-consuming and meaningless. In *Interpretation No. 137*, the Court firstly encountered this problem. In that Interpretation, the Court did not dare to directly challenge the applicability of administrative orders of statutory interpretation handed down by government agencies, even if judges believe that the administrative orders in question were not authoritative. The Court vaguely, and with cowardice, contended that judges should "give a lawful and legitimate legal opinion on a controversy which requires an accurate judicial interpretation."[146]

However, this stance changed after democratization. In *Interpretation No. 216*, which was made in the same year as the lifting of the Martial Law Decree, the Court substantively changed the meaning of Interpretation No. 137, arguing that "Administrative rules . . . [and] [o]rdinances issued by a judicial administration involving legal issues in the business of adjudication are merely references for judges, who again, are not bound thereby in the course of adjudication."[147] From the perspective of checks and balances, the Court announced in this case that administrative rules are not binding to judges. Whether these orders are issued by executive agencies or judicial

145. Lee, *supra* note 122, at 535-49.

146. J.Y. Interpretation No. 137 (1973) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=137.

147. J.Y. Interpretation No. 216 (1987) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=216.

administration, every judge can refuse to apply them if he or she believes they contravene the law. In *Interpretation No. 371*, the Court further specified that article 5, section 2 of the Constitutional Interpretation Procedure Act enacted by the legislative branch was unconstitutional. Every judge, asserted the Court, should have the power to challenge statutes when he or she "with reasonable assurance, has suspected that the statute applicable to the case is unconstitutional . . ."[148]

We might regard this development as the steady progress of human rights protections since people need not exhaust all available remedies to petition the Court so long as they can convince judges of lower courts that laws at issue are unconstitutional. Alternatively, this could also be seen as a tool for the judiciary to recapture its power in interpreting laws. In summary, in order to reestablish its legitimacy and bolster confidence among citizens, the Court started to review more cases appealed by citizens than it had in past decades, and ruled for the citizens much more frequently. The more cases it ruled for the citizens, the more likely citizens would be to believe that injustices imposed upon them can be redressed in the Court. This consensus is exactly the foundation from which the authority of the Court stems.

Still, we must nevertheless appreciate that in the process of increasing access to the Court, conflicts among government branches will inevitably occur. This is because the opportunity for citizens to challenge the government is also the opportunity for the judiciary to examine the legality and constitutionality of legislative and executive behaviors. By declaring these behaviors unconstitutional, be it statutes or administrative regulations, the Court not only wins popular support, but also announces its supremacy over other government agencies in the name of rule of law. After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is . . . This is of the very essence of judicial duty."[149]

B. *Expansion through Interpretations*

After democratization, one strategy the Court adopted to expand its power was through interpretation. This can be further divided into two parts: the scope of Interpretations and the validity of Interpretations.

1. *Scope of Interpretations*

The scope of interpretation directly influences the domain of judicial

148. J.Y. Interpretation No. 371 (1995) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371.

149. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

review, indicating the limit of judicial power. In this regard, there were two cardinal expansions of the scope of judicial review after democratization. The first, the vertical one, is the reviewability of the Constitution and the Amendments themselves. In *Interpretation No. 261*, the Court declared the Temporary Provisions, a statue with quasi-constitutional status, unconstitutional. That was the first case in which the Court declared a quasi-constitutional statute unconstitutional.

In *Interpretation No. 499*, the Court went further and declared the 1999 Constitutional Amendments unconstitutional. In that case, the Court maintained that some principles were "of the most critical and fundamental tenets of the Constitution as a whole."[150] Because the constitutional amendments conflicted with these basic tenets, they were found unconstitutional. This interpretation spawned much controversy at that time since the Constitutional Court was supposed to interpret the Constitution, not enact or revise it—a traditional way of thinking that believes there is a distinct line between interpreting and legislating. In addition, there was another issue as to whether there is an inner limit for constitutional amendments and, if there is, why we should be bound to a limit put in place by people of earlier generations. I will not recap all the related debates in this paper. Rather, what I hope to highlight here is the expansion of judicial power in terms of the scope of judicial review. These two Interpretations controversially expanded the scope of judicial review to the Constitution, which would have been inconceivable during the authoritarian period.

In addition, the Court also expanded the scope of judicial review horizontally in at level of statutes. There is no doubt that the Court may review the constitutionality of all statutes and regulations in the abstract. However, whether the Court may review statutes that had not been challenged in any specific case was once an issue that was not properly answered. Some scholars argued that to maintain a passive and minimal judiciary, the Court should only review the constitutionality of statutes challenged by appellants. If not, the Court might function as a super legislative branch that has the power to actively and intensively review all statutes enacted by the Legislative Yuan. In *Interpretation No. 445*, however, the Court clearly maintained that "[t]he foregoing are merely some examples of the interpretations made by this Court, which should be sufficient to explain that the scope of constitutional interpretation is not always limited to the purport of a petition."[151] In this Interpretation, the Court also cited *Interpretation Nos. 216, 289, 324, 339, 396*, and *436* as precedents, in an

150. J.Y. Interpretation No. 499 (2000) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499.

151. J.Y. Interpretation No. 445 (1998) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=445.

attempt to portray its decision as a mere exercise in *stare decisis*. It seems that the earliest precedent cited by the Court was made in 1987, the year that the Martial Law Decree was abolished.

2. *Validity of Interpretations*

In the authoritarian era, the Court seldom plainly declare a statute at issue to be unconstitutional, and the validity of interpretations was usually challenged. Roughly speaking, two reasons may account for this. The first came from the threat of the dictatorship while the second came from the tension between the Constitutional Court and the Supreme Court[152]—that is, which institution was to be more authoritative in interpreting civil and criminal laws. Therefore, for those cases that were on the verge of being unconstitutional in the future, they might issue *admonitory decisions*.[153] For those unconstitutional findings, they might issue a *simple declaration* without nullifying directly the unconstitutional laws for fear of provoking the executive and legislative branches.[154]

In 1988, the first year after the Martial Law Decree was lifted, the Court issued *Interpretation No. 224*, in which it clearly nullified a statute enacted by the Legislative Yuan on constitutional grounds for the first time in history.[155] After that, the number of simple-declaration findings decreased sharply after democratization. Contrarily, the number of void decisions and void-with-deadline decisions increased over time.[156] By rendering void-with-deadline decisions, which may serve as a kind of safety buffer, the Court expanded its power prudently.[157]

Regarding tension between the Constitutional Court and the Supreme Court, the situation changed during the late stage of the authoritarian era. In *Interpretation No. 177*, the Constitutional Court declared a precedent inconsistent with the Constitution and should no longer be upheld. In *Interpretation Nos. 185 and 188*, the Constitutional Court maintained that the Interpretations, be they constitutional interpretations or unified

152. It seems to be a commonplace feature of centralized judicial review, especially in new democracies. *See* Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 INT'L J. CONST. L. 44, 63-65 (2007). Another parallel example is Korea. *See* Tom Ginsburg, *The Constitutional Court and the Judicialization of Korean politics*, *in* NEW COURTS IN ASIA 145, 153-55 (Andrew Harding & Penelope Nicholson eds., 2010).

153. Chang, *supra* note 75, at 84.

154. *Id.* (identifying the differences between the simple declaration, void decisions, and void-with-deadline decisions).

155. J.Y. Interpretation No. 224 (1988) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=224.

156. Jiunn-rong Yeh, The Politics of Unconstitutionality: An Empirical Analysis of Judicial Deadlines and Political Compliance in Taiwan 7 (June 24, 2011) (unpublished manuscript). *available at* http://www.iias.sinica.edu.tw/upload/conferences/20110624/p20110624-1a.pdf.

157. *Id*. at 12-17.

interpretations, should be "binding upon every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters . . . precedents which are contrary to these interpretations shall automatically be nullified."[158] After these three Interpretations, we may fairly say that the authority of the Court as well as its Interpretations had become entrenched.[159]

After its authority had been established, the Court even clearly instructed institutions how to redress the constitutional defects in concrete cases. To name a few, in *Interpretation No. 624*, the Court instructed that "[i]n order to serve the constitutional purpose first above mentioned, . . . a claim for state compensation may be filed according to the Act of Compensation for Wrongful Detentions and Executions within two years as of the date of this Interpretation if the requirements set forth in Article 1 of said Act are satisfied prior to the amendment to said Article 1 or the enactment and enforcement of any law regulating the compensation for wrongful detentions and executions resulting from military trials."[160] In this case, the Court not only declared the statute in question offensive to the Constitution, but also designated an alternative for the appellants to file suits.

In *Interpretation No. 627*, the Court contended that "[p]rior to the issuance of any ruling by the special tribunal, the enforcement of the original disposition or ruling should stay. The applicable provisions of the Code of Criminal Procedure should apply to the rest of the objection or interim appeal proceedings."[161] In this case, the Court expanded the scope of application of the Code of Criminal Procedure.

In *Interpretation No. 641*, the Court maintained that "[t]he competent authority shall consider the sales price, sales quantity, actual profits earned from selling rice wine at a higher price, negative impact on the market stability and other relevant factors in these individual cases for the purpose of deciding the adequate amount of fine that should be imposed in each case."[162] In this case, the Court asked the relevant agency to consider certain factors before enacting new regulation.

In *Interpretation No. 677*, the Court mentioned that "[t]he related governmental agencies shall promptly implement appropriate regulations on the release of prisoners in accordance with this Interpretation. Before the

158. J.Y. Interpretation No. 185 (1984) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=185.

159. Interview with Yueh-sheng Weng, former President of Judicial Yuan (July 6, 2011).

160. J.Y. Interpretation No. 624 (2007) (Taiwan), *available at*. http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=624.

161. J.Y. Interpretation No. 627 (2007) (Taiwan), *available at*. http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=627.

162. J.Y. Interpretation No. 641 (2008) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=641.

statute is amended, prisoners shall be released before noon on the day their prison terms are ended."[163] In this case, the Court itself enacted a new rule that prescribed when prisoners should be released.

These decisions indicate that the expansion of judicial power has increased over time through various approaches in the name of human rights protection and rule of law. Not only did the Court repeatedly use its judgments to amend the loopholes, which is regarded as quasi-legislation; it also expanded the scope and enhanced the validity of judicial review through its Interpretations. This sort of judicial involvement and law-making mechanism never took place before democratization. Frankly, the development of judicial power did protect human rights against governmental encroachment, which is hard to deny. But it also led to unexpected results.

C. *Backlash*

As discussed above, the Court intentionally expanded its power through various approaches. Gradually, the Court stopped being a rubber stamp or pawn of the ruler, and instead became a functioning and progressive institution. Despite its cautiousness,[164] nevertheless, some interpretations incited considerable backlash from other government agencies.[165] This backlash did not stem from the intense power struggle between political parties, which is common in new democracies, inasmuch as the justices seem "to be fairly insulated from main party interests" after democratization.[166] Instead, it resulted from interactions with other branches during the process of judicialization and democratic transition. The backlash came not only from the legislative and executive branches, but also from the Supreme Court, a court that used to have the final say over civil and criminal issues.

1. *Legislative Reprisal*

Over the history of judicial review, the Court has encountered retaliation

163. J.Y. Interpretation No. 677 (2010) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=677.

164. *See* Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 823-31 (2011) (arguing that the Constitutional Court of Taiwan is cautious and reactive, rather than being active or aggressive).

165. This is by no means peculiar to Taiwan Constitutional Court. Similar situations happened in the American context as well. The Supreme Court of the United States faced congressional and executive attack after its landmark desegregation case—*Brown v. Board of Educcation.*, 349 U.S. 294 (1955); *See* ROSENBERG, *supra* note 4, at 74-82; Gerald Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376-77 (1992) (identifying ten types of proposals to attack the judicial branch).

166. Garoupa et al., *supra* note 105, at 33-34.

from the legislative branch three times. These instances of backlash were reactions to three different decisions made in different terms. To be more specific, the three decisions were *Interpretation Nos. 76*, *499*, and *585*.

In *Interpretation No. 76*, the Court ruled that "[a]lthough some of their approaches to the exercise of power, such as a regular annual assembly, quorum and resolution by the majority are not the same as those of parliaments of democratic nations, the National Assembly, the Legislative Yuan and the Control Yuan, from the perspective of the nature of their statuses and functions in the Constitution, should be considered as equivalent to the parliaments of democratic nations."[167] In other words, legislative power and privilege that had been monopolized by the Legislative Yuan before this decision was thereafter shared by the National Assembly and the Control Yuan. The Legislative Yuan was vexed and revised the Constitutional Interpretation Procedure Act, raising the quorum for passing interpretations.[168] Thus, it would substantively become more difficult for the Court to issue any decisions in the future.

In *Interpretation No. 499*, the Court declared the 1999 constitutional amendments enacted by the National Assembly unconstitutional.[169] This time the National Assembly, not the Legislative Yuan, was the organ to be displeased. Hence, the National Assembly amended the Constitution in 2000, prescribing "[t]he provisions of Article 81 of the Constitution and pertinent regulations on the lifetime holding of office and payment of salary do not apply to grand justices who did not transfer from the post of a judge."[170] This provision not only deprived the Justices of related protection but also left a constitutional controversy—whether or not Justices are to be regarded as judges as referred to in Chapter Seven of the Constitution.

In *Interpretation No. 585*, another politically contentious case, the Court ruled that the Legislative Yuan, by enacting the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting, went beyond the scope of its legislative authority.[171] In this case, most critical articles of the Act were declared unconstitutional because of a variety of constitutional defects. In response, the Legislative Yuan curtailed the budget appropriated as a specialty premium for the Justices. This time, the Justices fought back. In *Interpretation No. 601*, they argued that "[t]he Justices are nominated by the President of the Republic and appointed by the

167. J.Y. Interpretation No. 76 (1957) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=76.

168. *See* Liu, *supra* note 57, at 525; Fa, *supra* note 59, at 202-03.

169. J.Y. Interpretation No. 499 (2000) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499.

170. Constitution, Additional Articles, art. 5(1) (1991) (amended 2005) (Taiwan).

171. J.Y. Interpretation No. 585 (2004) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=585.

same upon confirmation by the Legislative Yuan, and are judges under Article 80 of the Constitution."[172] Therefore, "no constitutional organ may diminish the salary of a judge for grounds other than those subject to disciplinary action."[173]

2. *Executive Disobedience*

During the authoritarian era, the judiciary had little leverage over the executive branches. Decisions were usually passively ignored. For instance, both the prosecutors and judges of the lower courts—that is, the district courts and high courts—were subordinate to the Ministry of Justice, Executive Yuan, rather than Judicial Yuan in the past. In *Interpretation No. 86*, which was rendered in 1960, the Court asked that "[i]n view of the fact that different levels of courts and subsidiary courts below the High Court inclusively hold the judicial power over trials of civil and criminal litigation, these courts shall be subordinate to the Judicial Yuan."[174] Nevertheless, the *simple declaration* was not complied with until 1980.[175]

Furthermore, in *Interpretation No. 166*, the Court argued that "[t]he police sanctions of administrative detention and forced labor stipulated by the Act Governing the Punishment of Police Offences are sanctions on physical freedom. In order to comply with the requirements of Article 8, Paragraph 1, of the Constitution, these sanctions shall be promptly administered by courts based on legal process."[176] However, the executive branch refused to revise the provision in question.[177] After democratization, the Court declared the law inconsistent with the Constitution again in *Interpretation No. 251* after ten years.[178] This time, the Court issued a *void-with-deadline decision* instead of a *simple declaration* as it had done previously. The executive branch complied this time, revising the law that same year.

The percentage of full compliance with void-with-deadline decisions is amazingly high. Politicians indeed are obedient to the deadlines in most cases.[179] However, there are still some cases in which the executive

172. J.Y. Interpretation No. 601 (2005) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=601.

173. *Id.*

174. J.Y. Interpretation No. 86 (1960) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=86.

175. *See* Liu, *supra* note 57, at 526-27; Fa, *supra* note 59, at 206.

176. J.Y. Interpretation No. 166 (1980) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=166.

177. *See* Fa, *supra* note 59, at 206.

178. J.Y. Interpretation No. 251 (1990) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=251.

179. Yeh, *supra* note 156, at 18.

branches as resisted passively in additional to the *Interpretation No. 251*. For example, in *Interpretation No. 366*, the Court asserted that Article 51 of the Criminal Code "create unnecessary restrictions on the people's freedoms and rights . . . should therefore be reviewed and revised accordingly"[180] Nevertheless, the Ministry of Justice refused to revise it until the promulgation of *Interpretation No. 662*. In that Interpretation, the Court reiterated the holding of Interpretation No. 366, and this time the Court nullified the related provisions directly without setting another deadline.

The revision of the Act for the Prevention of Gangsters is another good example that vividly portrays the reluctance of the executive branch to obey the decision. This time, it was Ministry of the Interior that resisted revising the Act comprehensively until it was declared unconstitutional three times by the Court in *Interpretation Nos. 384*,[181] *523*[182] and *636*.[183]

3. *Judicial Resistance*

In the past, whether the supremacy of the Constitutional Court was limited to constitutional issues was once a contentious question. Similar to Interpretations rendered by the Constitutional Court, the Supreme Court also issued its own precedents articulating the meaning and application of civil and criminal laws.[184] Not until *Interpretation Nos. 177*,[185] *185* and *188* did the Constitutional Court solidify its supremacy in interpreting laws, including but not limited to the Constitution.[186] In fact, *Interpretation No. 177* is the first case in which the Constitutional Court manifestly nullified a precedent made by the Supreme Court. The Supreme Court was dissatisfied with the aforementioned interpretations and petitioned the Constitutional Court, giving birth to the *Interpretation No. 209*.[187] In that case, the

180. J.Y. Interpretation No. 366 (1994) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=366.

181. J.Y. Interpretation No. 384 (1995) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=384.

182. J.Y. Interpretation No. 523 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=523.

183. J.Y. Interpretation No. 636 (2008) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=636.

184. The precedent here is not a former adjudication made by the Supreme Court in the literal sense. It is an abstract regulation irrelevant to any concrete cases that prescribes the application and interpretation of laws. It is binding and decisions contradict to Precedents would be reversed by High Courts or the Supreme Court.

185. J.Y. Interpretation No. 177 (1982) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=177.

186. *See* Liu, *supra* note 57, at 532-33 (arguing that this interpretation "removed any doubt whether the Council had the features of a de facto 'supreme court' . . . and 'is a significant step in consolidating the power of the Council within the judicial system'").

187. J.Y. Interpretation No. 209 (1986) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=209.

Constitutional Court reiterated and complemented its position in *Interpretation No. 188*.

In *Interpretation No. 530*, a case related to the original design of the Judicial Yuan, the Court emphasized that "[i]n order to be consistent with the intent of the framers of the Constitution that considered the Judicial Yuan as the highest judicial adjudicative organ, the Organic Act of Judicial Yuan, the Court Organic Act, the Organic Act of Commission on the Disciplinary Sanction of Functionaries must be reviewed and revised in accordance with the designated constitutional structure within two years after the date of this Interpretation."[188] Ten years have passed, but judicial reform has not yet been put into practice partly due to the vehement objection of some judges in the Supreme Court.

It was *Interpretation No. 582* that resulted in the most momentous clash between the Constitutional Court and the Supreme Court.[189] In this Interpretation, the Court declared two precedents issued by the Supreme Court unconstitutional. After the promulgation of this Interpretation, the Supreme Court held a conference and openly expressed their disagreement and disappointment. The Supreme Court voiced its opinion that this Interpretation distorted the meaning of the two void precedents and encroached upon their jurisdiction, in what amounted to public criticism of the Court and this Interpretation. Judges of the Supreme Court even claimed that they would refuse to adjudicate all related cases concerning the two Precedents. This was the first time the Supreme Court expressed an attitude of open confrontation toward the Constitutional Court. Eventually, they petitioned the Constitutional Court for further clarification of the scope and effect of the said Interpretation and the Court issued *Interpretation No. 592* in response.[190]

V. CONCLUSION

Why do Taiwanese people recognize judicial review? What has accounted for the establishment, empowerment, and evolvement of judicial review over the past seventy years? In this paper, I briefly introduced several major models that explain the emergence of judicial review and tried to find the most persuasive one. Among them, I focused on the insurance theory since it is the only one that clearly includes Taiwan Constitutional Court as

188. J.Y. Interpretation No. 530 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=530.

189. J.Y. Interpretation No. 582 (2004) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=582.

190. J.Y. Interpretation No. 592 (2005) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=592.

one of the examples in its gloss. Due to the political cataclysm after the enactment of the Constitution, the constitutional subject was radically changed.[191] For this reason, I think two phases must be discussed separately.

During the foundation stage, the KMT held absolute power in the Constituent National Assembly, and they did have their favored draft of the constitution that was written in accordance with Sun's political thinking. Eventually, they compromised and gave way to opposition parties in the hope of expediting the process of constitutional law-making and winning more domestic as well as international support. Instead of being an example of the insurance model, the Constitution stemmed from politicians' political calculation to eliminate their main adversary—the CCP. That is, the KMT collaborated with other non-influential opposition parties to eliminate their strongest enemy. This is an account that underscores the political calculation of the dominant parties, rather than that of weaker parties. In this regard, it departs from the assumptions of the insurance theory. After the promulgation of the Temporary Provisions and the KMT's retreat in 1949, much of the substantive content of the Constitution was suspended and judicial review did not shoulder the responsibilities it was supposed to.

During the transition stage, the Court regained its power and began to function like a constitutional court that the insurance theory envisions. This situation might have resulted from many political and social conditions. To name a few, the dominant KMT was at the time host to an internal power struggle, and, in fact, it did split into three parties – the so-called pan-blue Coalition. The opposition party, the DPP, won an increasing number of seats in local as well as national elections. The constitutional amendments thus provided a chance for all political parties to negotiate and reallocate political power. Owing to a variable and unpredictable political environment and the lack of an unchallengeable authority, such as the strongman in old authoritarian regime, the need for a fair and apolitical arbitrator increased. The Court was thus empowered. I think, then, that the insurance theory is applicable here.

In addition to political manipulation, the Court also expanded its power actively. Throughout the process of increased judicial involvement, however, courts in new democracies need to be more prudent than usual when exercising the power of judicial review.[192] The Court, while careful, still faced much backlash from other branches. This was especially manifest after democratization in Taiwan since the Court faced more highly contested

191. Here I borrow the term "constitutional subject" from Michel Rosenfeld's book. For a detailed definition and further discussion, *see* Rosenfeld, *supra* note 5, at 41-45 (2010).

192. *See* Martin Shapiro, *Judicial Review in Developed Democracies, in* DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 7, 18 (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004).

issues than before. On the one hand, the tendency of judicialization provided the Court with more opportunities to intervene in political decision-making processes that had been monopolized by the executive and legislative branches. On the other hand, it at times tended to invite unintended political disaster that damages the integrity and authority of the judiciary. The judicial review in Taiwan has been full-fledged, but there are still more challenges for the Court to overcome. I hope this paper may shed some light on future discussion of judicial review and its practice before and after democratization in Taiwan.

REFERENCES

Ackerman, B. (1991). *We the people: Foundations.* London, England: Belknap Press.

Bilder, M. S. (2008). Idea or practice: A brief historiography of judicial review. *Journal of Policy History, 20*, 6-25.

Brown v. Bd. of Educ., 349 U.S. 294 (1955).

Central Election Commission. The list of party proportion in the 1995 legislative election. Retrieved from http://db.cec.gov.tw/pdf/B1995005.pdf

Chang, C.-M. (1971). Chunghuaminkuo Minchu Hsienfa shihchiang [Ten speeches concerning the Constitution of Republic of China]. Taipei, Taiwan: The Commercial Press.

Chang, W.-C. (2001). *Transition to democracy, constitutionalism and judicial activism: Taiwan in comparative constitutional perspective.* (Unpublished J.S.D. dissertation). Yale Law School, New Haven, CT.

Chang, W.-C. (2005). The role of judicial review in consolidating democracies. *Asia Law Review, 2*, 79-82.

Chang, W.-C. (2008). East Asian foundations for constitutionalism: Three models reconstructed. *National Taiwan University Law Review, 3*(2), 111-141.

Chavez, R. B. (2004). *The rule of law in nascent democracies: Judicial politics in Argentina.* Stanford, CA: Stanford University Press.

Chavez, R. B. (2008). The rule of law and courts in democratizing regimes. In K. E. Whittington, R. D. Kelemen & G. A. Caldeira. (Eds.), *The Oxford handbook of law and politics* (pp. 63-80). New York, NY: Oxford University Press.

Chen, T.-Y. (2005). Lun "319 chiangchi shihchien chenhsiang tiaocha tepieh weiyuanhui tiaoli" chih weihsienhsing [On the constitutionality of the "Act to Form a Special Investigative Committee in Search of the Truth of 319 Gun Shot"]. *Taiwan Law Review, 125*, 48-62.

Constitution (1947) (Taiwan).

Constitution, Additional Articles, arts. 5(1), 5(4), 5(6) (1991) (amended 2005) (Taiwan).

Constitutional Interpretation Procedure Act (1948) (amended 1993) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73

Dahl, R. A. (1957). Decision-making in a democracy: The Supreme Court as

a national policy-maker. *Journal of Public Law, 6*, 279-295.

Davis, M. C. (2004). Constitutionalism and new democracies. *George Washington International Law Review, 36,* 681-694.

Elkins, Z., Ginsburg, T., & Melton, J. (2009). *The endurance of national constitutions*. New York, NY: Cambridge University Press.

Ely, J. H. (1980). *Democracy and distrust*. Cambridge, England: Harvard University Press.

Epstein, L., & Knight, J. (1998). *The choices justices make*. Washington, DC: CQ Press.

Epstein, L., Knight J., & Shvetsova, O. (2001). The role of constitutional courts in the establishment and maintenance of democratic systems of government. *Law and Society Review, 35*, 117-163.

Fa, J.-p. (1991). Constitutional developments in Taiwan: The role of the Council of Grand Justices. *International and Comparative Law Quarterly, 40*, 198-209.

Garber, M. A. (1999). The problematic establishment of judicial review. In C. Clayton & H. Gillman (Eds.), *The Supreme Court in American politics: New institutionalist approaches* (pp. 28-42). Lawrance, KS: University Press of Kansas.

Garlicki, L. (2007). Constitutional courts versus supreme courts. *International Journal Constitutional Law, 5*, 44-68.

Garoupa, N., Grembi, V., & Lin, S. C.-p. (2011). Explaining constitutional review in new democracies: The case of Taiwan. *Pacific Rim Law and Policy Journal*, *20*, 1-40.

Ginsburg, T. (2003). *Judicial review in new democracies: Constitutional courts in Asian cases*. New York, NY: Cambridge University Press.

Ginsburg, T. (2005). Beyond judicial review: Ancillary power of constitutional courts. In T. Ginsburg & R. A. Kagan (Eds.), *Institutions and public Law: Comparative approaches* (pp. 225-244). New York, NY: Peter Lang.

Ginsburg, T. (2006). Constitutional choices in Taiwan: Implications of global trends. *Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 06-01*. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=877154

Ginsburg, T. (2008). Administrative law and the judicial control of agents in authoritarian regimes. In T. Ginsburg & T. Moustafa (Eds.), *Rule by law: The politics of courts in authoritarian regimes* (pp 58-72). New York, NY: Cambridge University Press.

Ginsburg, T. (2008). The global spread of constitutional review. In K. E.

Whittington, R. D. Kelemen, & G. A. Caldeira (Eds.), *The Oxford handbook of law and politics* (pp. 81-98). New York, NY: Oxford University Press.

Ginsburg, T. (2008, June). Judicial review in new democracies: constitutional courts in Asian cases. In J.-r. Yeh (Chair), *Roundtable series of rule of law and protection of human rights in East Asia.* Symposium conducted at the meeting of College of Law, National Taiwan University, Taipei, Taiwan.

Ginsburg, T. (2010). The Constitutional Court and the judicialization of Korean politics. In A. Harding & P. Nicholson (Eds.), *New courts in Asia* (pp. 145-168). London, England: Routledge University Press.

Ginsburg, T. & Elkins, Z. (2009). Ancillary powers of constitutional courts. *Texas Law Review, 87*, 1439-40.

Guarnieri, C. & Pederzoli, P. (2002). *The power of judges: A comparative study of courts and democracy*. New York, NY: Oxford University Press.

Hamilton, A., Madison J. & Jay, J. (1982). *The Federalist papers*. New York, NY: Bantem Dell.

Hardin, R. (1999). *Liberalism, constitutionalism, and democracy*. New York, NY: Oxford University Press.

Hassall, G. & Saunders, C. (2002). *Asia-pacific constitutional systems*. New York, NY: Cambridge University Press.

Helmke, G. (2004). *Courts under constraints: Judges, generals, and presidents in Argentina*. New York, NY: Cambridge University Press.

Hilbink, L. (2008). Agents of anti-politics: Courts in Pinochet's Chile. In T. Ginsburg & T. Moustafa (Eds.), *Rule by law: The politics of courts in authoritarian regimes* (pp. 102-131). New York, NY: Cambridge University Press.

Hirschl, R. (2000). The political origins of judicial empowerment through constitutionalization: Lessons from four constitutional revolutions. *Law & Social Inquiry, 25*, 91-149.

Hirschl, R. (2004). *Towards juristocracy: The origins and consequences of the new constitutionalism*. Cambridge, MA: Harvard University Press.

Hirschl, R. (2006). The new constitutionalism and the judicialization of pure politics worldwide. *Fordham Law Review, 75*, 721-753.

Hirschl, R. (2009). The "Design Sciences" and Constitutional "Success". *Texas Law Review, 87*, 1339-1374.

Hsueh, H.-Y. (1993). *Minchu hsiencheng yu mintsuchui te piencheng fachan—Chang Chun Mai ssuhsiang yenchiu* [*The development of*

democratic constitutionalism and nationalism—A research on Chang Chun Mai's thinking]. Taipei, Taiwan: Tao He.

Hwang, J. Y. (2003). Ssufa weihsien shencha te chengtanghsing chengi [Legitimacy of judicial review: A preliminary analysis of theories and approaches]. *Taiwan Tahsueh Fahsueh Luntseng* [*National Taiwan University Law Journal*]*, 32*(6), 103-152.

Hwang, J. Y. (2003). Ssufa weihsien shencha te chihtu hsuantse yu Ssufayuan tingwei [Choosing a new system of judicial review for Taiwan: Some reflections on the status of Judicial Yuan]. *Taiwan Tahsueh Fahsueh Luntseng* [*National Taiwan University Law Journal*]*, 32*(5), 55-118.

J.Y. Interpretation No. 76 (1957) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=76

J.Y. Interpretation No. 86 (1960) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=86

J.Y. Interpretation No. 137 (1973) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=137

J.Y. Interpretation No. 166 (1980) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=166

J.Y. Interpretation No. 177 (1982) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=177

J.Y. Interpretation No. 185 (1984) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=185

J.Y. Interpretation No. 209 (1986) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=209

J.Y. Interpretation No. 216 (1987) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=216

J.Y. Interpretation No. 224 (1988) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=224

J.Y. Interpretation No. 251 (1990) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=251

J.Y. Interpretation No. 261 (1990) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=261

J.Y. Interpretation No. 366 (1994) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=366

J.Y. Interpretation No. 371 (1995) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371

J.Y. Interpretation No. 384 (1995) (Taiwan). Retrieved from

http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=384

J.Y. Interpretation No. 445 (1998) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=445

J.Y. Interpretation No. 499 (2000) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499

J.Y. Interpretation No. 520 (2001) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=520

J.Y. Interpretation No. 523 (2001) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=523

J.Y. Interpretation No. 530 (2001) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=530

J.Y. Interpretation No. 582 (2004) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=582

J.Y. Interpretation No. 585 (2004) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=585

J.Y. Interpretation No. 585 (2001) (Hsu, Tzong-Li J., partly dissenting) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/%E6%8A%84%E6%9C%AC585.pdf

J.Y. Interpretation No. 592 (2005) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=592

J.Y. Interpretation No. 601 (2005) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=601

J.Y. Interpretation No. 624 (2007) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=624

J.Y. Interpretation No. 627 (2007) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=627

J.Y. Interpretation No. 627 (2007) (petiton) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/%E6%8A%84%E6%9C%AC627.pdf

J.Y. Interpretation No. 636 (2008) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=636

J.Y. Interpretation No. 641 (2008) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=641

J.Y. Interpretation No. 677 (2010) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=677

Judicial Yuan. (2011). *Statistics of Interpretations from the First term to the Sixth term.* Retrieved from

http://www.judicial.gov.tw/constitutionalcourt/uploadfile/E100...htm.

Langran, R. (2004). *The supreme court: A concise history*. New York, NY: Peter Lang.

Law, D. S. (2009). The anatomy of a conservative court: Judicial review in Japan. *Texas Law Review, 87*, 1545-1593.

Law, D. S. (2009). A theory of judicial power and judicial review. *Georgetown Law Journal, 97*, 723-801.

Lee, C.-L. (1998). Tafakuan te chihtu pienke yu Ssufayuan te Hsienfa tingwei [Reform of the institution of the Grand Justices and constitutional status of the Judicial Yuan: An analysis based on the 1997 Constitutional Reform]. *Taiwan Tahsueh Fahsueh Luntseng* [*National Taiwan University Law Journal*], *27*(2), 217-262.

Lee, C.-L. (2009). Jenchuan weihuche te liushih huiku yu shihtai tiaochan: shihtan Tafakuan jenchuan chiehshih te fantoshu kunchu [60 Years retrospect and the new challenge as human rights guardian: Exploring the counter-majoritarian difficulty of Grand Justices' interpretations of human rights.] In F. F.-T. Liao (Ed.), *Hsienfachiehshih chih lilun yu shihwu* [*Constitutional interpretation: Theory and practice*] (Vol. 6(2), pp. 467-550).

Liao, Y.-H. (2006). Lun Lifa Yuan tiaochachuan te chiehhsien yu fanwei [On the limitation and spectrum of the investigative power of Legislative Yuan]. *Taiwan Fahsueh Tsachih* [*Taiwan Law Journal*]*, 78*, 83-91.

Liu, L. S.-L. (1991). Judicial review and emerging constitutionalism: The uneasy case for the Republic of China on Taiwan. *American Journal of Comparative Law, 39*, 509-558.

Long, S. (1991). *Taiwan: China's last frontier*. London, England: Macmillan Press.

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

McCann, M. (1999). How the Supreme Court matters in American politics: New Institutionalist perspectives. In H. Gillman & C. Clayton (Eds.), *The Supreme Court in American politics* (pp. 69-97). Lawrence, KS: University Press of Kansas.

McCloskey, R. G. (2010) *The American Supreme Court* (4th ed.). Chicago, IL: University of Chicago Press.

McCubbins, M. D., & Schwartz, T. (1984). Congressional oversight overlooked: Police patrols versus fire alarms. *American Journal of Political Science, 28*, 165-179.

Miao, C.-C. (1989). *Chungkuo chihhsienshih tzuliao huipien* [*The compilation of information concerning the Chinese constitutional*

making history]. Taipei, Taiwan: Academia Historica.

Moustafa, T. (2007). The politics of domination: Law and resistance in authoritarian states. In T. Moustafa (Ed.), *The struggle for constitutional power: Law, politics, and economic development in Eygpt* (pp. 19-56). New York, NY: Cambridge University Press.

Ramseyer, J. M. (2003). The puzzling (in)dependence of courts: A comparative approach. *Journal of Legal Study, 23*, 721-748.

Roesler, S. (2007). Permutations of judicial power: The new constitutionalism and the expansion of judicial authority. *Law and Social Inquiry, 32*, 545-580.

Romeu, F. R. (2006). The establishment of constitutional courts: A study of 128 democratic constitutions. *Review of Law and Economics, 2*, 103-135.

Root, H. L., & May, K. (2008). Judicial systems and economic development. In T. Ginsburg & T. Moustafa (Eds.), *Rule by law: The politics of courts in authoritarian regimes* (pp. 304-325). New York, NY: Cambridge University Press.

Rosenberg, G. (1992). Judicial independence and the reality of political power. *Review of Politics , 54*, 369-398.

Rosenberg, G. (2008). *The hollow hope: Can courts bring about social change?* (2nd ed.). Chicago, IL: University of Chicago Press.

Rosenfeld, M. (2010). *The identity of the constitutional subject: Selfhood, citizenship, culture, and community.* London, England: Routledge University Press.

Rubinstein, M. A. (1999). Political Taiwanization and pragmatic diplomacy: The eras of Chiang Ching-Kuo and Lee Teng-Hui, 1971-1994. In M. A. Rubinstein (Ed.), *Taiwan: A New History* (pp. 436-495). New York, NY: M.E. Sharpe.

Rubinstein, M. A. (1999). Taiwan's socioeconomic modernization, 1971-1996. In M. A. Rubinstein (Ed.), *Taiwan: A New History* (pp. 366-402). New York, NY: M.E. Sharpe.

Secretariat of Judicial Yuan. (Ed.) (1998). *Tafakuan shihhsien shihliao* [*History documents of Judicial Yuan Interpretations*]. Taipei, Taiwan: Author.

Secretariat of the National Assembly. (Ed.) (1946). Koumin Tahui shihlu [Records of the National Assembly]. Taipei, Taiwan: Author.

Shapiro, M. (2004). Judicial review in developed democracies. In S. Gloppen, R. Gargarella & E. Skaar (Eds.), *Democratization and the judiciary: The accountability function of courts in new democracies*

(pp. 5-18). London, England: Frank Cass Publishers.

Shapiro, M. (2008). Courts in authoritarian regimes. In T. Ginsburg & T. Moustafa (Eds.), *Rule by law: The politics of courts in authoritarian regimes* (pp. 326-336). New York, NY: Cambridge University Press.

Shapiro, M., & Sweet A. S. (2002). *On law, politics, and judicialization*. New York, NY: Oxford University Press.

Silverstein, G. (2008). Singapore: The exception that proves rules matter. In T. Ginsburg & T. Moustafa (Eds.), *Rule by law: The politics of courts in authoritarian regimes* (pp. 73-101). New York, NY: Cambridge University Press.

Stephenson, M. C. (2003). "When the devil turns. . .": The political foundations of independent judicial review. *Journal of Legal Study, 32*, 59-89.

Su, Y. C. (2005). Chiao taishou shih te fenchuan, sa kouhsieh pan te jenchuan [Prefecture Chiao's idea of separation of powers; excessively emphasized human rights]. *Taiwan Fahsueh Tsachih* [*Taiwan Law Journal*]*, 70*, 38-57.

Sunstein, C. R. (1999). *One case at a time: Judicial minimalism on the Supreme Court.* Cambridge, MA: Harvard University Press.

Tang, D. T. C. (2005). Chuanli funli yu weihsien shencha [Judicial review and separation of powers]. In D. T.-C. Tang (Ed.), *Chuanli fenli hsin lun (2): Weihsien shencha yu tungtai pingheng* [*A new perspective on separation of powers (2): Judicial review and Dynamic Balance*] (pp. 75-123). Taipei, Taiwan: Angle.

Tate, C. N. (1995). Why the expansion of judicial power? In Tate, C. N. & T. Vallinder (Eds.), *The global expansion of judicial power* (pp. 28-33). New York, NY: New York University Press.

Tezlaff, T. (2006). Kelsen's concept of constitutional review accord in Europe and Asia: The Grand Justices in Taiwan. *National Taiwan University Law Review, 1*(2), 75-107.

United States v. Nixon, 418 U.S. 683 (1974).

Weng, Y.-s. (2011). Ssufayuan Tafakuan Chiehshih yu Taiwan minchuchengchih chi fachihchui chih fachan [Interpretations of the Constitutional Court and the developments of rule of law and democratic constitutionalism in Taiwan]. *Taiwan Fahsueh Tsachih* [*Taiwan Law Journal*]*, 178*, 1-22.

Weng Y.-s. (2011 July 6). *An oral interview with the fromer President of Judicial Yuan Yueh-Shen Weng/Interviewer: Chien-Chih Lin*. On file with the author.

Yeh, J.-r. (1998). Hsienkai yu Taiwan Hsienfa pienchien te moshih [Towards a model-building on Taiwan's constitutional change after 1997 constitutional reform]. *Taiwan Tahsueh Fahsueh Luntseng* [*National Taiwan University Law Journal*]*, 27*(2), 7-48.

Yeh, J.-r. (2003). Chuanhsing Fayuan te tzuwo tingwei—Lun Hsienfa chehshih tui hsiuhsienchichih te yinghsiang [The role of transitional court: On the interactions between constitutional interpretations and constitutional revisions]. *Taiwan Tahsueh Fahsueh Luntseng* [*National Taiwan University Law Journal*]*, 32*(6), 29-59.

Yeh, J.-r. (2008). Democracy-driven transformation to regulatory State: The case of Taiwan. *National Taiwan University Law Review, 3*(2), 31-59.

Yeh, J.-r. (2009). Tsungtungchih yu fenlieh shehui: Taiwan yu Nanhan Hsiehfa Fayuan te pichiao yenchiu [Presidentialism and divided society: Comparing constitutional court decisions in Taiwan and South Korea]. *Taiwan Tahsueh Fahsueh Luntseng* [*National Taiwan University Law Journal*]*, 40*, 459-504.

Yeh, J.-r. (2011, June). The politics of unconstitutionality: An empirical analysis of judicial deadlines and political compliance in Taiwan. In Syue-Ming Yu (Chair), The Second International Conference on Empirical Studies of Judicial Systems. Symposium conducted at the meeting of the Institutum Iurisprudentiae, Academia Sinica, Taipei, Taiwan.

Yeh, J.-r., & Chang, W.-C. (2009). The changing landscape of modern constitutionalism: Transitional perspective. *National Taiwan University Law Review, 4*(1), 145-183.

Yeh, J.-r., & Chang, W.-C. (2011). The emergence of East Asian constitutionalism: Features in comparison. *American Journal of Comparative Law, 59*, 823-31.

臺灣司法違憲審查的誕生與再生
——創設、賦權與發展

林 建 志

摘 要

為什麼臺灣人會認同司法違憲審查？在過去七十年間，什麼因素促成臺灣司法違憲審查的創建、賦權與發展？這是本文所要討論的主要問題。本文一開始簡要介紹幾個解釋司法違憲審查的理論模型，並試圖尋找最吻合臺灣司法違憲審查的理論。然而由於過去臺灣的政治劇變，沒有一個理論可以完整地解釋臺灣的司法違憲審查發展，不同的理論模型只能說明不同階段的臺灣司法違憲審查。在創建時期，憲法法院非常順從，但在轉型時期，如同保險模型所預測的，憲法法院逐漸取回應有的權力與權威。政治環境的不穩定以及缺少過去不容質疑的威權，人們渴望有一個公平且中立的裁決者，而憲法法院正好順勢而起。除了政治操作外，即便是在社會高度分裂的2000年之後，憲法法院也積極、並謹慎的擴張其權力。然而在新興民主國家的脈絡下，司法違憲審查的運作必須特別小心。在一方面來說，司法化的傾向提供憲法法院絕佳的機會參與政治決策的過程，但在另一方面，這也可能造成損及憲法法院威信的政治危機。

關鍵詞：臺灣憲法法院、司法違憲審查、憲法解釋、保險理論、權威留存

Roundtable

Access to Lawyers: A Comparative Analysis of the Supply of Lawyers in China and the United States

ETHAN MICHELSON*

Moderator: PROFESSOR JIUNN-RONG YEH
(College of Law, National Taiwan University, Taiwan)

Speaker: PROFESSOR ETHAN MICHELSON
(Department of Sociology and Department of East Asian Languages & Cultures, Indiana University-Bloomington, the United States; Maurer School of Law; Indiana University-Bloomington, the United States)

Discussants (in order of appearance):

PROFESSOR WEN-CHEN CHANG
(College of Law, National Taiwan University, Taiwan)

PROFESSOR YUN-CHIEN CHANG
(Institutum Iurisprudentiae, Academia Sinica, Taiwan)

PROFESSOR CHI CHUNG
(Institutum Iurisprudentiae, Academia Sinica, Taiwan)

PROFESSOR CHIA-SHIN HSU
(Institutum Iurisprudentiae, Academia Sinica, Taiwan)

PROFESSOR TZE-SHIOU CHIEN
(College of Law, National Taiwan University, Taiwan; Institutum Iurisprudentiae, Academia Sinica, Taiwan)

---

* Associate Professor, Department of Sociology and Department of East Asian Languages & Cultures, Indiana University-Bloomington; Associate Professor, Maurer School of Law, Indiana University-Bloomington; Co-Director, Center for Law, Society, and Culture, Maurer School of Law, Indiana University-Bloomington. Ph.D., Sociology, University of Chicago (2003).
E-mail: emichels@indiana.edu.

INTRODUCTION

Growth in the legal profession has had different implications on access to lawyers worldwide. National Taiwan University College of Law is honored to have Professor Ethan Michelson in this roundtable discussion to compare and contrast the trend in supply and access to lawyers in the U.S. and China. Based on his survey, Professor Michelson highlights the expansion of the legal profession in the U.S. and China, and explains the migration of lawyers. Professor Wen-Chen Chang presents a brief comparison of the developments in the legal profession of China and Taiwan. In answering to comments and questions raised by Professor Yun-Chien Chang and other participants, Professor Michelson compares the type of cases practiced by lawyers that make the bulk of work in legal practice in the U.S. and China. He further explains registration of lawyers in China, and their potential roles in public policy and human rights.

I. OPENING REMARKS

PROFESSOR JIUNN-RONG YEH

Professor Michelson is with us today. He holds his doctorate in sociology from University of Chicago that has a great reputation in interdisciplinary researches, and has looked into many issues related to law and society, particularly the legal profession. His topic today, comparing the legal profession in China with that in the United States, is a very important topic not only for Taiwan, but also for the world to have a better understanding of what is happening in China.

Before Professor Michelson proceeds with his speech, I would like to share my personal experience that may be relevant with this topic. Back in the mid-1980s, I was very fortunate to pass the bar exam, and stood as the only two of my class who passed it. Then I paid some fee to join the bar association and went to Yale Law School for the pursuit of my doctorate. This was in the heyday of the democratic transition in Taiwan. One day, I received a call from one of my classmate, who was also a lawyer. He asked me to fly back from the United States to vote in the bar association in the hope to fight against the Kuomintang (KMT) affiliated domination in the association. At the time, the bar association was controlled by the lawyers from the military, rather than those graduated from law schools. Not until in the late 1980s have the Taipei Bar Association and the National Bar Association been placed at the hand of the lawyers who were graduated from law schools. This story shows the complexities underlying the legal profession and its relationship with society. With this, I would like to invite

Professor Michelson now for his speech.

II. SPEECH

ACCESS TO LAWYERS: A COMPARATIVE ANALYSIS OF THE SUPPLY OF LAWYERS IN CHINA AND THE UNITED STATES

PROFESSOR ETHAN MICHELSON

1. *Introduction*

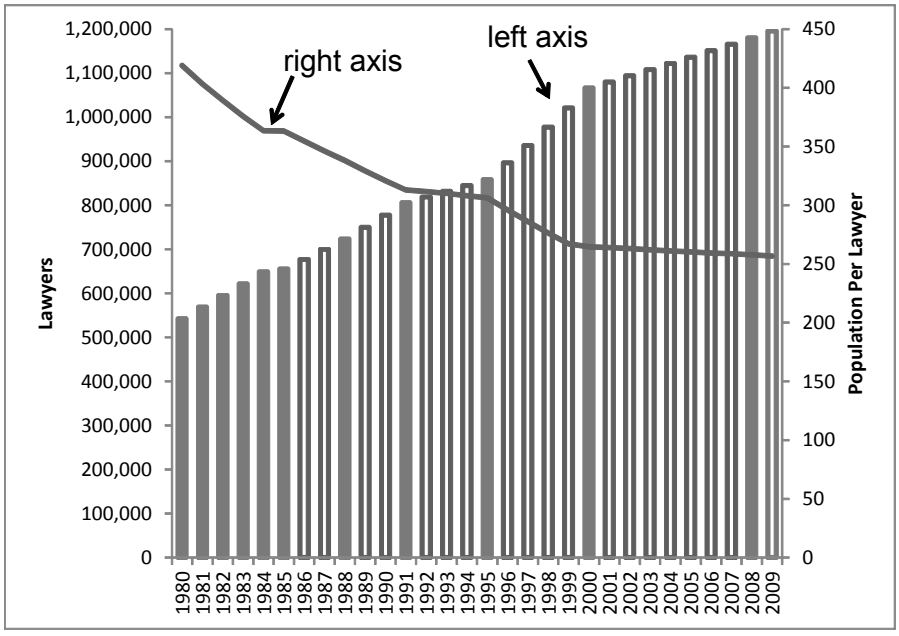
Thank you, Professor Yeh, for the introduction, which sets the stage for me and provides some background on the situation in Taiwan. It is really a privilege and an honor for me to be with you today. Today I want to talk about the evolution of the Chinese and American legal professions over the past few decades. In some respects the dramatic growth of the Chinese bar since the 1980s mirrors that of its American counterpart. However, similarities in aggregate growth obscure important and puzzling differences in the geographical distribution of lawyer populations. In the process of revealing these differences, I will introduce sources of data with the aim of encouraging you to pursue comparative empirical research on legal professions.

2. *Empirical Research on American Lawyers*

(a) The Growth of the American Legal Profession

The following figure indicates the expansion of the American bar (Figure I). The hollow bars are simply imputed and the solid bars are the years for which we actually have information. I basically used the average figure to fill in years in between. The American bar has more than doubled in the past thirty years, and the annual growth rate is 2.8%. This trend is well-known and has caused considerable distress, anxiety, and embarrassment among many Americans. Many scholars have tried to explain why there are so many lawyers in the U.S.

Figure I Population per Lawyer and the Number of Lawyers in the U.S.



Source: Richard L. Abel;[1] Clara N. Carson;[2] American Bar Association Market Research Department.[3]

There are more lawyers in the U.S. than anywhere else in the world. Scholars have offered various explanations. One explanation for this really dramatic growth in the legal profession comes from John P. Heinz and Edward Laumann. First a little background on their study. Their survey of Chicago lawyers in 1975, which culminated in a classic book published in 1982, was one of the first empirical studies of legal professions.[4] They did a follow-up survey twenty years later in 1995, and published a new book in 2005.[5] In the second book they devoted a lot of attention to the issue of change over time.

Beyond the issue of numbers, the most dramatic change was growth in the size of law firms. The emergence of large law firms was a phenomenon

1. RICHARD L. ABEL, AMERICAN LAWYERS (1989).

2. CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 (2004).

3. *Lawyer Demographics*, AM. BAR ASS'N MARKET RESEARCH DEP'T[0] (2009), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/Lawyer_Demographics.authcheckdam.pdf.

4. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

5. JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005).

of the late 1980s and 1990s. This is partly due to the shift of the American economy as a whole and a concomitant shift in legal practice towards torts, commercial litigation, and business law. This is one of the big trends between 1975 and 1995 in the American legal profession as a whole. In America as a whole there was a transformation from an industrial economy to a post-industrial economy, to a service economy based on the financial sector and the service industry more generally. The transformation of the American legal profession mirrors this larger transformation. The legal profession changed along with its clients.

Another reason why the American legal profession has continued to grow has been identified by my colleague Bill Henderson,[6] a faculty member in the Indiana University Maurer School of Law. He was profiled in a *New York Times* article published on January 1, 2011,[7] which received a lot of attention and publicity. His argument is that law schools are responsible at least in part for the continual growth in the legal profession by luring and misleading students into applying to law school with the false promise of a lucrative career when they graduate. American law schools publish statistics on alumni employment rates, salaries, and so on. His argument is that this is a sham. There are many trickeries behind the numbers, including outright falsification. He exposed some of these trickeries and their consequences, including widespread "buyers' remorse" among students who typically end up with over one hundred thousands of dollars of debt to finance their expensive legal education, and then have trouble finding a job.

(b) Sources of Data on American Lawyers

Many sources of survey data on American lawyers are publicly available. Data from the 1975 Chicago lawyers survey can be accessed through the University of Michigan ICPSR website,[8] which is one of the biggest data archives in the U.S. The 1995 survey data and codebooks are also available for download.[9]

Another source of data is the Michigan Alumni Data Set, which contains longitudinal data, or panel data, on Michigan law school graduates over a period of several decades. These data can be used to track their careers over time. Another colleague in the Indiana University Maurer School of Law, Ken Dau-Schmidt, has extensively analyzed the Michigan data with

6. William D. Henderson, Professor of Law and Val Nolan Faculty Fellow in the Indiana University Maurer School of Law. He is also the Director of the Center on the Global Legal Profession in Indiana University.

7. Catherine Pampell, *At well-paying law firms, a low-paid corner,* N.Y. TIMES, May 24, 2011, at A1.

8. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS SURVEY, 1975, *available at* http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/08218 (last visited March 10, 2012).

9. JOHN P. HEINZ et al., CHICAGO LAWYERS SURVEY, 1994-1995, *available at* http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/04100 (last visited March 10, 2012).

particular interested in gender inequality.[10] The careers of lawyers can be tracked, and gender differences can be observed. In one of his recent articles, he reports that there is a real penalty for having children. Women's careers suffer for their leaves of absence to have and care for children. This is one of the biggest obstacles women face as they try to develop careers in law.

Another source of data is the *Martindale-Hubbell Law Directory*, which contains population data on lawyers every year for over a hundred years. Only recently has there been an effort to create an electronic database from the volumes of printed books.

Bill Henderson is also working with these and other data, including the National Law Journal Top 250, which are large law firms that provide data on all their lawyers, when and where they get hired, when they leave, to where they move, and so on. One of the primary missions of our law school's new Center for the Global Legal Profession is to apply empirical social science methods to the analysis of data to understand what is going on in legal professions, not just in the U.S. but around the world.[11] Jayanth Krishnan,[12] another colleague in law school, and a leading expert on India's legal profession, is a core part of this effort.

The Law School Admissions Council National Longitudinal Bar Passage Study is basically a huge database of information on law school admissions. This is a very rich source of data on the demographics of those that entered and graduated from law schools, who took the bar exams, who passed them, and so on. People have been using these data to understand the disparities between blacks and whites, men and women, and other demographic groups on who gets into law school, who actually passes the bar, and who gets good jobs. Of course the U.S. Census Bureau and U.S. Department of Labor's Bureau of Labor Statistics have very detailed occupational data.

John Hagen[13] and his colleague Fiona Kay published a book called *Gender in Practice* using survey data on lawyers in Toronto. The "After the JD Survey" is a longitudinal study of American lawyers.[14] The first "After the JD Survey" was done in 2002 of over 4,000 lawyers across the country.

---

10. Kenneth Glenn Dau-Schmidt, Professor of Willard and Margaret Carr Professor of Labor and Employment Law of Indiana University Bloomington; Maurer School of Law.

11. Kenneth Glenn Dau-Schmidt, Marc Galanter, Kaushik Mukhopadhaya & Kathleen E. Hull, *Men and Women of the Bar: An Empirical Study of the Impact of Gender on Legal Careers*, 16 MICH. J. GENDER & L. 49 (2009).

12. Jayanth Krishnan, Professor of law and Charles L. Whistler faculty fellow; Director of India Initiative, Center on the Global Legal Profession; Co-director, Center for Law, Society, and Culture, Maurer School of Law, Indiana University Bloomington.

13. John Hagan, W. Grant Dalstrom Professor of Sociology and Adjunct Professor of Law at the University of North Carolina at Chapel Hill; Professor of Law & Sociology, University of Toronto.

14. Bryant G. Garth et al., *After the JD*, AM. BAR FOUND., http://www.americanbarfoundation.org/publications/afterthejd.html (last visited Mar. 10, 2012).

The most exciting feature of the data was the respondents were recent law school graduates, people who had graduated from law school within the past three years. They show kinds of jobs they got, what their experience were, how they liked their jobs, and so on. They answered many questions about satisfaction and interaction with partners. They were only in the very early stages of their legal careers. If they practice in private law firms, they were associates; nobody was a partner yet. They then re-interviewed the same people in 2007. The data show us who dropped out of a legal career, who became or failed to become a partner, the lawyers moving between firms, what kinds of firms they were moving to, and geographical relocation. Requests for access to both waves of data can be made on the American Bar Foundation's website.

3. *Empirical Research on Asian Lawyers*

(a) Empirical Research on Chinese Lawyers

It was very exciting for me to have my research profiled on the front page of the *Legal Daily* in China.[15] In 2000, I did a survey of almost a thousand lawyers across twenty-five cities in China. The survey was about the difficulties, challenges, frustrations, and problems they encountered in everyday practice. The conclusion of the research was that it is really hard to be a lawyer in China. All one has to do is ask a lawyer in China, and he will explain how hard it is, particularly in criminal defense, but also in other areas of law. I then wanted to assess the extent of change in terms of whether the legal environment has remained difficult and hostile to lawyers, or whether there have been improvements. So in 2009, I did a new survey, a bigger survey of lawyers across more cities all over China.[16] I did the survey with Sida Liu,[17] who is from the University of Wisconsin-Madison, and, like me, a graduate of the University of Chicago. We have been working on the data together, so some of the analyses presented today come from my work with Sida Liu.

We are not the only ones doing empirical research on Chinese lawyers. In 2007, Professor Ji Wei Dong,[18] Dean of the Shanghai Jiao Tong

15. Yu-Chen Chu, *Yike Laowai Tui Chungkuo Lushih Yeh te Liangtzu Tiaocha he Shihnien Kuancha* [*Two Surveys and A Ten-year Observation of Chinese Lawyers Carried Out by A Foreigne*r], FACHIH JIHPAO [LEGAL DAILY], Nov. 19, 2009, at 2, *available at* http://www.legaldaily.com.cn/zmbm/content/2009-11/19/content_1183784.htm.

16. Ethan Michelson & Sida Liu, *Chinese Lawyers and their Challenges: Findings from Two Surveys* (2009), http://www.indiana.edu/~emsoc/LawyerSurvey/Report1_ENG.pdf.

17. Sida Liu, Assistant Professor of Sociology and Law, Department of Sociology, University of Wisconsin-Madison.

18. Wei-Dong Ji, Dean and Presiding Chair Professor, Director of Law and Society Center of KoGuan Law School, Shanghai Jiao Tong University.

University KoGuan School of Law, did a large survey of lawyers. He is a prominent figure in law and society, and has been trained in social science research methods. He spent a lot of time in Japan before he returned to China only a few years ago. He was thoroughly steeped in Japan's rich law and society research tradition.

(b) Empirical Research on Other Asian Lawyers

One of the leaders of law and society in Japan is Setsuo Miyazawa.[19] He did a survey a few years ago[20] modeled after the Chicago Lawyers Project. He is very closely associated with scholars at the American Bar Foundation, UC Berkeley, and elsewhere in the United States. His goal was to replicate the Chicago survey in Japan: the social structure of the Japanese bar. He presented his findings at the Law and Society Association a couple of years ago, and described how difficult it was to study Japanese lawyers. The refusal rate was amazingly high and the response rate extremely low. I think the response rate was about ten percent. No one could understand why it was so hard to get Japanese lawyers to participate.

A new survey was recently undertaken of lawyers in Vietnam just. This is a very exciting survey because, as I understand it, it is not just a survey, but is really a census of every lawyer in Vietnam. The National Bar Association of Vietnam helped ensure the participation of every lawyer in the country.

(c) Empirical Research on Taiwan Lawyers

Now what kind of research has been done in Taiwan? What has been done, and what needs to be done, would be great discussion topics. If we tried to do a survey like the Chicago Lawyer survey or like the surveys I have been doing in China, would we get reasonable response rates? How would a similar survey actually be done? I am not aware of any survey that has been done. Maybe someone has done the survey and I just don't know about it. I know there has been some high quality research on lawyers in Taiwan published in English. Some research have been published in 1994 in Jane Kaufman Winn's article on "Guanxi", which is about the rule of "Guanxi", not the rule of law, and the Taiwanese legal profession.[21] And she wrote another article which resonates very nicely with the introductory comments of Professor Yeh about Taiwanese lawyers that led the democratic revolution. I think her piece is called "Advocating Democracy".[22] Professor

19. Setsuo Miyazawa, Professor of Law, Aoyama Gakuin University Law School.

20. Setsuo Miyazawa, *Education and Training of Lawyers in Japan—A Critical Analysis*, 43 S. TEX. L. REV. 491 (2002).

21. Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 LAW & SOC'Y REV. 193 (1994). *See also* Shu-chin Grace Kuo, *Seniority, Confucianism, and the Training Programs for Judges and Prosecutors in Taiwan*, 33 KOREAN J.L. & SOC'Y 87 (2007).

22. Jane Kaufman Winn & Tang-Chi Yeh, *Advocating Democracy: The Role of Lawyers in*

Kuo in Taiwan has been writing really terrific primarily qualitative research on gender and other elements.[23]

4. *Access to Lawyers*

The scholarship I have reviewed concerns the careers of the lawyers. The scholars I introduced are interested not only in what causes the growth of the American legal profession but also in the implications of the growth of the American legal profession for lawyers' careers. How has this affected gender inequality? For example,. has the expansion of the bar been good for women? Has it created more opportunities for women? Or has it been bad for women in other ways? I think it is a double-edged sword in most research. It has been good for women because it helped more women enter the bar and created more opportunities for women. However, it has created some difficulties and challenges for women, too.

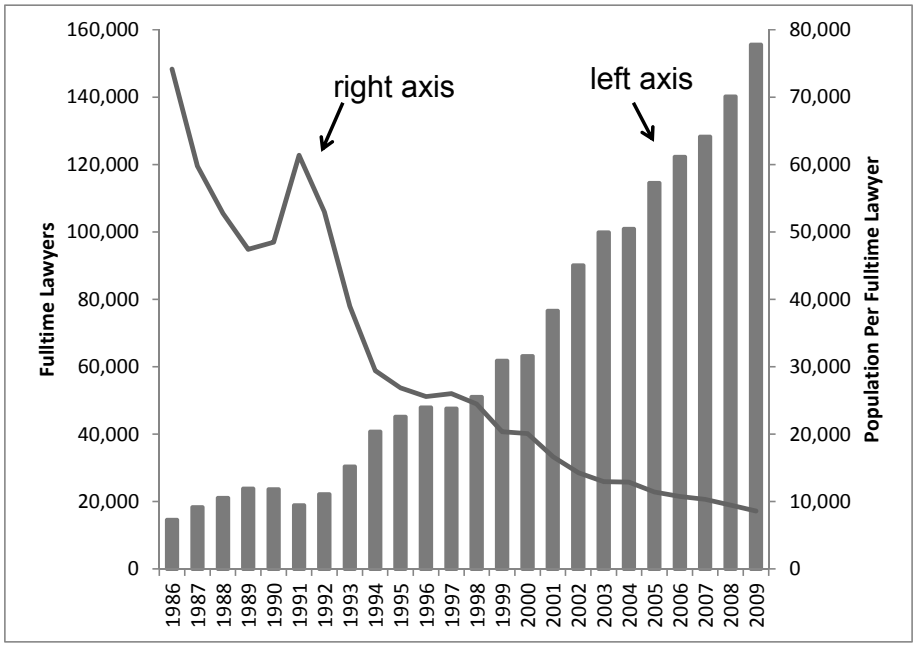
Another issue for lawyers' careers is the promotion to partner. As the bar expanded with the growth of large law firms and the legal system, the associate to partner system has been reinforced. Legal scholars are for the most part interested in what this means career wise for lawyers.

I am not interested in those questions today. I am not interested in the left axis which represents the numbers of full time lawyers, but rather in the right axis which shows the population per lawyer (Figure I). What does the growth of the legal profession mean for access to lawyers? Is the overall trend of growth in lawyers, meaning there is more lawyers available to people, a good thing? There are complaints about the growth of lawyers from politicians and the American medical association, doctors who are worried about suits for medical practice, the U.S. Chamber of Commerce which is worried about the liability of its members, and the insurance industry which is worried about tort litigation. Law and society scholars, on the other hand, for the most part think it is a good phenomenon. Lawyers are good for society. They help people get justice. So enhancing access to lawyers is a good thing. Access to lawyers means access to justice. I am interested in this question.

Taiwan's Political Transformation, 20 LAW & SOC. INQUIRY 561(1995).

23. *E.g.*, Shu-chin Grace Kuo, *Rethinking the Masculine Character of the Legal Profession: A Case Study of Female Legal Professionals and Their Gendered Life in Taiwan*, 13 J. AM. U. GENDER SOC. POL'Y & L. 25 (2005).

Figure II The Number of Full Time Lawyers and the Population per Full Time Lawyers in China



Source: China Lawyer Yearbook; China Law Yearbook; China Statistical Yearbook.

(a) Increasing Lawyer Density in China

So while the general trend in the United States is that there are more lawyers available to people, what happened in China? This is the same graphic looking at the case in China (Figure II). Expansion in the number of lawyers in China has been even more rapid than the U.S. Between 1986 and 2009, the population of full time lawyers increased from about fifteen thousand lawyers in 1986 to over one hundred fifty thousand. The tenfold increase over this period of time was far more dramatic than in the U.S. This growth was not only driven by economic forces and the kind of forces seen in the U.S., market forces and the economic transformation in China, but also by political forces. We have to remember that before this, there were basically no lawyers until the late 1970s in China. Rebuilding the legal system in China and the legal profession was a political project.

Looking at the right axis, access to lawyers has improved dramatically (Figure II). From the graph, in 1986 there was only one lawyer for about 75,000 people in China. Now that has dropped to one lawyer for less than ten thousand people. While this looks quite impressive, we need to bear in mind that there is one lawyer for every 250 people in the U.S. Nonetheless, things have clearly improved a lot in China.

(b) The Geographical Distribution of Lawyers in China

It is important to look at the geographical distribution of lawyers, and whether these lawyers are concentrated in particular places. The national average is one lawyer to every ten thousand people in China, but there must be some regional variation. What does this regional variation look like?

I am interested in this question because the geographical movement of lawyers is disturbing Volumes of the China Lawyer Yearbook[24] are the only source of the data I know of with provincial population data on lawyers. A very simple and quick measure of geographical concentration is the Gini coefficient. The Gini coefficient is essentially a measure of inequality. It is typically used to measure income inequality. It ranges from zero to one. So you can see the Y-axis ranges from 0.33 to 0.43 (Figure III). Zero indicates perfect equality. In this case, the distribution of full-time lawyers would be perfectly equal across all of China's provinces. A Gini coefficient of one would mean that all lawyers in China are concentrated in one province. So the dramatic increase in the Gini coefficient means that full time lawyers have become increasingly concentrated geographically.

Another way to look at this is to look at the percentage of full-time lawyers in Beijing and Shanghai, which follows exactly the same trend. Between 2000 and 2009, the proportion of all full-time lawyers in Beijing and Shanghai more than doubled. It is very alarming and disturbing to see this dramatically growing concentration of lawyers in Beijing and Shanghai. So the next question to ask is whether this is because the population of China as a whole became more concentrated in Beijing and Shanghai.

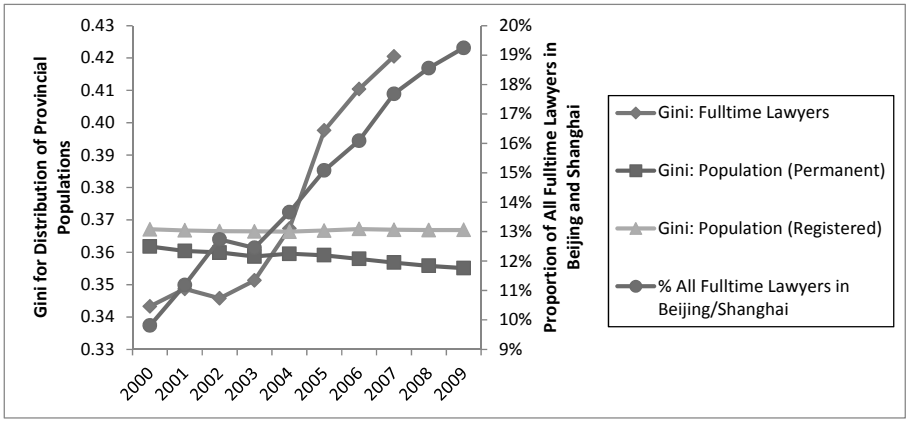
The trend of concentration in Beijing and Shanghai started in 2004. From 2000 to 2003, the trend of this graph was really flat and then took off after 2003 (Figure III). This corresponds precisely with the Administrative License of Law in China. The Administrative License of Law took away licensing authority from the provinces and put it under national jurisdiction so that the central government then became in charge of the licensing. That made it much easier for lawyers to move. The Gini coefficient for the total population is totally flat, so it does not explain the concentration of lawyers in terms of the overall population trend.

What does this mean for access to justice? This means that access to lawyers in Beijing and Shanghai has improved amazingly. Read the line at the bottom (Figure IV) for Beijing and Shanghai. The availability of lawyers in the year 2000 was one lawyer for every 3,600 people, and that dropped to one lawyer for every 885 people in 2009. That decline of 76% is much greater than the decline for places outside of Beijing and Shanghai. Access to

24. *E.g.*, Chungkuo Lushih Nienchien 2009 [China Lawyer Yearbook 2009] (Chungkuo Lushih Nienchien Pienchi Weiyuanhui [China Lawyer Yearbook Editorial Comm'n] ed., 2011).

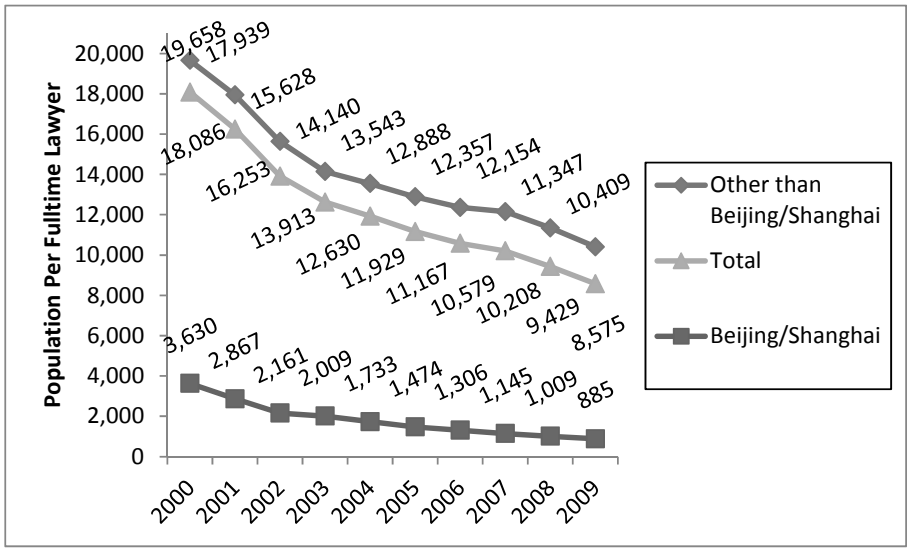
lawyers has improved much faster in Beijing and Shanghai than outside of Beijing and Shanghai. Now the density of lawyers in Beijing and Shanghai is similar that in some European countries. Between Beijing and Shanghai, most of the growth has happened in Beijing. By 2009, in Beijing alone, there was one lawyer for every 631 people. There are even more lawyers available in Beijing than for Germany as a whole; in Germany the rate is about eight hundred people per lawyer. I don't have the most recent data and I don't know about trends in other European countries. This is still fewer lawyers than in the U.S. where there is one lawyer for 250 people, but we are approaching the ballpark. It is getting close, but what about ordinary people outside Beijing and Shanghai? It is much harder to find lawyers outside of Beijing and Shanghai because lawyers are just not available. The supply of lawyers is very limited outside of Beijing and Shanghai. In my opinion, this is alarming and disturbing. So questions I am interested in are: Is this a unique Chinese phenomenon? Has this happened in the U.S. as well? This is the reason why I spend a lot of time analyzing numbers.

Figure III The Gini Coefficient for Distribution of Provincial Population and Proportion of All Full Time Lawyers in Beijing and Shanghai



Source: China Lawyer Yearbook; China Law Yearbook; China Statistical Yearbook; Beijing Statistical Yearbook; Shanghai Statistical Yearbook.

Figure IV Population per Full Time Lawyer in China



Source: China Lawyer Yearbook; China Law Yearbook; China Statistical Yearbook.

(c) The Geographical Distribution of Lawyers in the U.S.

I got data from the U.S. Census Bureau's 5% population Public-Use Microdata Samples (PUMS).[25] The data sets for each state have two hundred or more Megabytes. You have to download gigabytes and gigabytes of data for three census years, 1980, 1990 and 2000. There was a new census in 2010, but the data are not available yet. We can get state-level data from the American Bar Association surveys on lawyer discipline systems,[26] and also from the U.S. Bureau of Labor Statistics.[27] These three sources of data allow me to see if something similar has happened in the U.S. in the past thirty years. The answer is "no." The Gini coefficient of inequality has been basically pretty flat between 1980 and 2009 (Figure V). The degree of geographical concentration of the American lawyer population is essentially constant. Let's pick some places that are really popular to be a lawyer: New York, California and Washington, D.C. Let's look at the proportion of lawyers in these three states over time. It is also pretty flat. In 1980 it was about 27%, and by 2009 it was still in the 27% region. There is some variation using different sources of data because the ways lawyers are defined and counted vary across the three sources of data. But you can see it

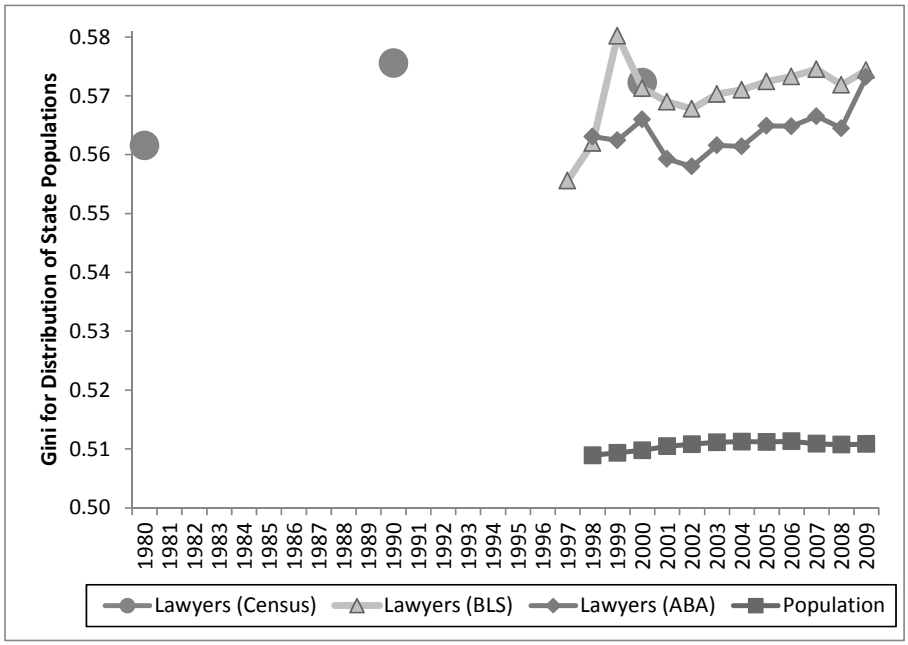
25. *Public-Use Microdata Samples (PUMS)*, U.S. CENSUS BUREAU, http://www.census.gov/main/www/pums.html (last updated May 28, 2010, 9:22 AM).

26. *2009 ABA Survey on Lawyer Discipline Systems (S.O.L.D.)*, AM. BAR ASS'N http://www.americanbar.org/groups/professional_responsibility/resources/survey_lawyer_discipline_systems_2009.html (last visited Mar. 10, 2012)

27. U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/ (last visited Aug. 17, 2011).

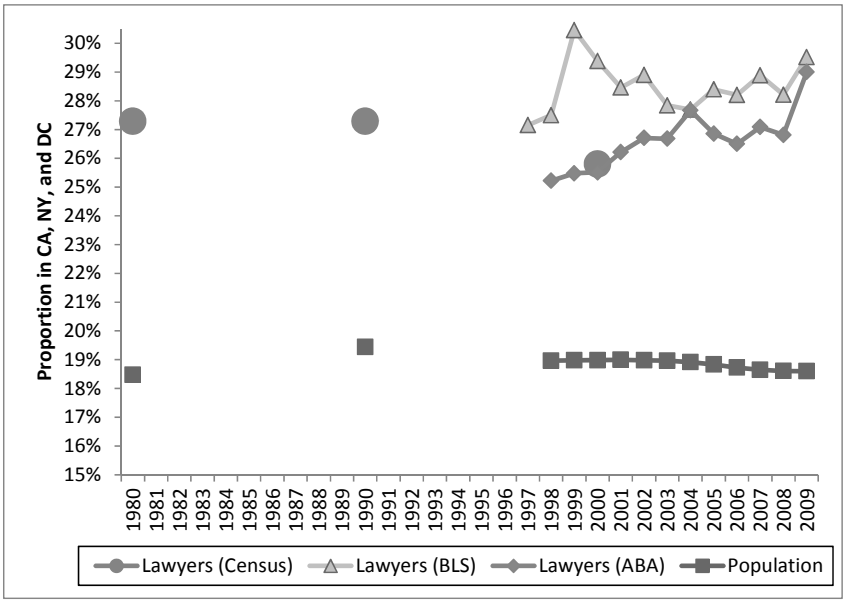
is pretty flat by all measures (Figure VI). The percentage of lawyers in these three places is the same more or less over the thirty year period. What about ten major cities: Boston, Chicago, Dallas, Detroit, Houston, Los Angeles, Miami, New York, Philadelphia, and Washington, D.C.? Ten really big cities were selected and the percentage of lawyers in these big cities is over the thirty year period were studied. There is no real trend over time. It is pretty flat overall (Figure VII).

Figure V The Gini Coefficient for Distribution of State Population in the U.S.



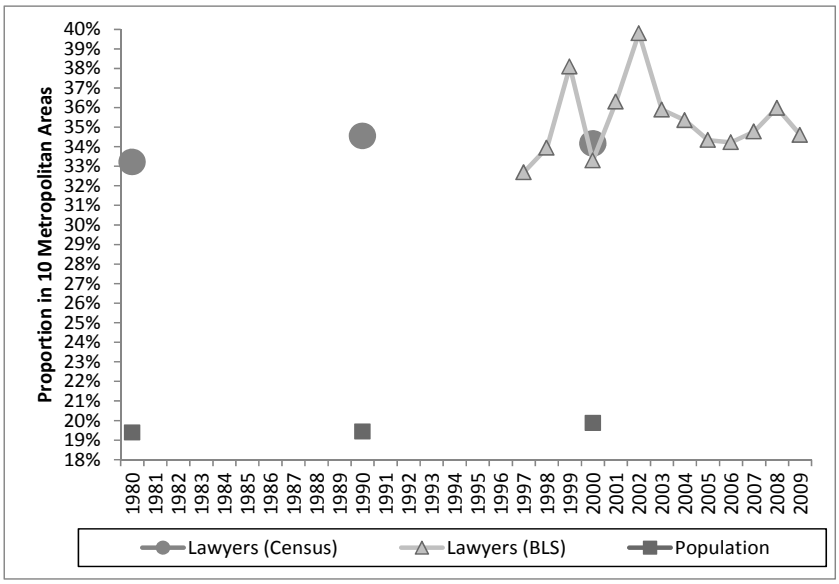
Source: U.S. Bureau of Labor Statistics; 1-Percent Public Use Microdata Sample Files, U.S. Census Bureau; 2009 Survey on Lawyer Discipline Systems, American Bar Association.

Figure VI Proportion of lawyers in California, New York and Washington, D.C.



Source: U.S. Bureau of Labor Statistics; 1-Percent Public Use Microdata Sample Files, U.S. Census Bureau; 2009 Survey on Lawyer Discipline Systems, American Bar Association.

Figure VII Proportion of lawyers in 10 Metropolitan Areas in the U.S.



Source: U.S. Bureau of Labor Statistics; 1-Percent Public Use Microdata Sample Files, U.S. Census Bureau; 2009 Survey on Lawyer Discipline Systems, American Bar Association.

(d) Explaining Why the Geographical Distribution of Lawyers in the U.S. and China is so different?

So, this trend we have seen in China appears to be unique. This has not happened in the U.S. The Y-axis here is the proportion of all American lawyers in these ten major cities. Basically in 1980, 33% of all the lawyers in the U.S. were in these ten cities. And this percentage has not really changed over time. So there has not been the same trend in the U.S. The Chinese trend of increasing concentration in Beijing and Shanghai seems to be unique. This is not like the American trend at all. What is going on? Why has it not happened in the U.S.? And why is it happening in China?

I think the clear answer is "migration," the movement of lawyers. There is very limited movement in the U.S. because the American legal profession is really fragmented by states. Licenses are state licenses. Bar exams are state bar exams. And this very fundamentally limits and constrains movement across jurisdictions, across states.

In China, especially after the passage of the Administrative License Law of the People's Republic of China in 2003, which became effective in 2004 the Administrative License Law simplified and facilitated the migration of lawyers from one place to another. It is seen very clearly in the data. I now want to add another comparative dimension to see if Chinese lawyer migration is different from general Chinese migration.

(e) Empirical Research on the Migration of Lawyers in China

What I want to focus on is the 2009 survey that I did with Sida Liu.[28] Adding questions on migration was his idea. He had the wisdom and foresight to ask the question: "Did you ever work in a different place in the past?" Remarkably, 958 full-time lawyers answered the question, and 33% said they had worked somewhere else. This is a remarkable movement of the legal profession. It is almost unbelievable. Almost half of the lawyers in Shanghai previously worked somewhere else as a lawyer before they went to Shanghai. 44% percent of lawyers in Beijing worked somewhere else as a lawyer before they went to Beijing. 43% of lawyers in Guangdong worked somewhere else as a lawyer before they moved to Guangdong. This could simply mean they moved from Guangdong to Shenzhen. So they may have stayed in Guangdong.

Let's look into inter-provincial movement, the movement from one province to another. We also had this question in the survey: "Please indicate all the places [province-level units] in which you practiced as a licensed lawyer prior to your current place [province-level unit]." We can look at movements from one province to current province. We can see who

28. Ethan Michelson, *Survey on China's Legal Services Work Environment*, http://www.indiana.edu/~emsoc/lawyer_survey.htm (last visited Feb. 24, 2012).

previously worked outside of their current province. Overall almost one in five lawyers moved between provinces. And where is the concentration of movement of lawyers? 38% of lawyers in Shanghai, 35% in Guangdong, and 34% in Beijing respectively worked in different provinces previously. In my opinion, this is truly dramatic.[29]

I analyzed data on the overall migration of the general population in China. I found that the concentration of movement into Beijing and Shanghai is much more pronounced among lawyers than in the general population. In the general population, between 7% and 8% of inter-provincial moves are into Beijing, and among lawyers 21% of inter-provincial moves are into Beijing.

We not only gathered information about where lawyers are coming from, where they were in the past, where they worked before, but also about their future plans to move. We asked the question: "Do you plan to move to another city within the next five years to practice law?" 22% said yes, which was incredible! More than one in five of lawyers were planning to move to different cities! And here we can look at where they are moving to. I divided cities to Tier 1 cities: Beijing, Shanghai, Guangzhou, Shenzhen; Tier 2 cities, and Tier 3 cities. Generally speaking, lawyers move in a tiered process of migration: from Tier 3 to Tier 2 and from Tier 2 to Tier 1. If you are a lawyer, you want to move to Beijing, Shanghai, Guangzhou, or Shenzhen. This is the dream destination. Everybody wants to move to these places and make it and get rich. It is dominated by Beijing. 30% of all intended moves are to Beijing. People want to go to Beijing.

5. *Conclusions*

(a) Chinese Lawyer Migration Patterns

In conclusion, survey findings and official data in yearbooks show an enormous influx of lawyers into Chinese Tier 1 cities in general and into Beijing in particular. This is unique and dramatic in comparative perspective. Part of the story is convergent with general migration patterns. The floating population in China is huge. About 200 million people form the floating population in China. And the single most common destination for migrant workers from rural areas is Guangdong. More migrant workers end up in Guangdong than anywhere else. In China as a whole, as many as 40% of all inter-provincial moves are into Guangdong. So part of the story of lawyer migration is the general migration of China as a whole. But movement into Beijing is above and beyond the general pattern. Lawyers want to move into Beijing more than anywhere else.

29. *Id.*

(b) Improving Access to Lawyers in China

Access to lawyers is improving everywhere as we can see very clearly. However, outside the Tier 1 cities, improvement has been much slower. Access to lawyers in the U.S. is much greater than China, but geographical concentration is also greater in the U.S. than China. Actually the concentration of American lawyers is higher than in China. But it has been very stable over the past thirty years, but the degree of concentration is higher in the U.S. than in China. In China, by contrast, there has been dramatic change. There has not been change in the U.S., but still even now there is less concentration in China than in the U.S. However, we also know from survey data I collected with Sida Liu that more than 22% of lawyers in China plan to move to different cities, which suggests the geographical concentration will continue to intensify in China. This trend will persist into the future.

(c) Should This Phenomenon be Alarming?

Is it a problem? I am worried about access to lawyers in China. There are already very few lawyers in China, and the shortage of lawyers will persist for most Chinese people outside the big cities. Before we become too alarmed or conclude it as a real problem, we need to know what these lawyers are doing in these places. How many of these lawyers are actually serving everyone in general? How many are serving companies? What kind of litigation are they doing? What kinds of clients do they represent?

We also need to know something about the demand for lawyers. Perhaps we do not need to worry about access to and the supply of lawyers if there is limited demand for lawyers outside the big cities. Maybe people find help from the basic-level legal workers and other actors like village heads. Maybe people do not want to hire lawyers.

We should also take into consideration how many of these lawyers move into Beijing and Shanghai are going to succeed, and how many of them will fail. We know from research that a lot of lawyers fail in Beijing. They come in huge numbers and they also leave in huge numbers. So maybe the market will solve these problems.

While I am worried about this trend, we need to temper or qualify my conclusion until we do more research in the future. I look forward to your comments and suggestions. Thank you very much.

III. COMMENTARY

A. PROFESSOR WEN-CHEN CHANG

I was wondering if our chairperson, Professor Yeh, would have something to add before I begin my discussion. Although Professor Yeh has

not done empirical survey or studies on the state of the legal profession in Taiwan or in other contexts, he is definitely the leading authority here in terms of the causes in the increase of lawyers, law schools, as well as other sectors in the legal profession in Taiwan or in other comparative Asian countries. Professor Yeh, please feel free to intervene if you wish.

1. *Similar Recent Trends in the Taiwanese and the Chinese Legal Profession*

As Professor Michelson discussed these themes, I could not help but discern similarities between the trends in China and those in Taiwan. I strongly wished that I had done some empirical studies on the legal profession in Taiwan so that we could discuss these trends and compare and contrast what we have in common as well as the differences. Nevertheless, there are some key phenomena that I would like to flesh out between China and Taiwan in the legal profession.

To begin with, there were significant increases in lawyers as well as in law schools over the past two or three decades. First, there was a huge increase in the number of lawyers in both sides of the Strait. In 1981, only two law students in a class would pass the bar, with fifty students passing in total.[30] Afterwards, there was an increase in the admission of lawyers around the 1990s. I think it was 1992 or 1993.[31] That year, for the first time, there were 120 lawyers who passed the bar exam. Since then, starting from the early 1990s, we have an annually the admission of more than 120 to 150 new lawyers. As of now we have around 2000 to 3000 lawyers in Taipei, with approximately 8000 in Taiwan by and large. Aside from lawyers, we have also witnessed the increase in the number of law schools in both Taiwan and China. When I graduated from this law school in 1992, there were only about ten to fifteen law schools nationally, and now we have about 50 law schools. Five years ago we even had 55 or 60, but some could not meet the market demand and closed down.

2. *The Role of the Government in the Asian Legal Profession*

Another aspect of the Asian legal profession, which Japan, South Korea, Taiwan and China all share with each other, is that the number of law

30. In 1981, the attendance number of the National Bar Exam in Taiwan was 1182 applicants, with 50 applicants admitted, leading to an admission rate of 4.23%. Heng-Wen Liu, *Chanhou Taiwan Ssufajen chih Yenchiu—Ssufakuan Hsunlienso Wenhua Weichu te Kuancha* [*Research on Postwar Jurists in Taiwan—Observation Centered on the Culture of Judges and Prosecutors' Training Institute*], SSU YU YEN : JENWEN YU SHEHUI KESHUEH TSACHIH [THOUGHT AND WORDS: JOURNAL OF THE HUMANITIES AND SOCIAL SCIENCE], Mar. 2002, at 125 tbl.6, 176.

31. *Id.*

schools, lawyers, and legal professionals such as bureaucrats and judicial officers are all controlled by the government. Not a single element in the legal profession has been put in the face of market challenges. In other words, when we look at these empirical studies, we have to be aware of an invisible hand behind all of this, which is not the market but the government. This was typically reflected in Taiwan at the time. After the opening of the number of lawyers in the 1990s, the bar association, which should have been the frontrunner of the legal profession, has not been supportive of expanding the number of lawyers as well as for the opening for foreign lawyers, with the Taipei bar association being a notable exception. Another phenomenon is that the Examination Yuan, a constitutional organ, is in charge of the total number of admissions of all legal professionals. These are examples of similarities that show China has much more in common with Taiwan than with the U.S., and which I like to flesh out first for discussion.

3. *The Rise of Cities with a National Development Agenda*

Now I like to postulate that what you have been presenting in your data of China regarding the concentration of lawyers in major cities reflects very similarly to the trends in Taiwan. The population in Taipei city and the new Taipei city constitutes one quarter to one third of the population of Taiwan, and the Taipei bar association probably constitutes more than 50 percent of the lawyers in Taiwan. If the concentration of lawyers in Taiwan and China are under certain similar contexts and development trends, what would those be?

Here I wish to focus my discussion on a special developmental pattern in Chinese political culture, namely the "capital cities directly controlled by the national government". The ROC Constitution stipulates capital cities aside from provinces. Now we have capital cities as well. Taipei City is the capital of Taiwan, but the city of Kaohsiung has commanded the same status as Taipei, enjoying privileged resources allocation. An example to evidence their privileged status is the participation of the mayors of Taipei and Kaohsiung in the Executive Yuan (Cabinet) meeting. To this effect, these two are not ordinary cities, but cities under the clout of the national government provided with the agendas for national developments. Similarly in China, Shanghai is not just a city, but a national or a nationalized power center in that sense. In the past, capital cities included only Kaohsiung and Taipei, but now we have Taipei City, new Taipei City, Kaohsiung City, Tainan City, and Taichung City, encompassing a total of five cities with national status. This idea of having these national or capital cities is in a sense cultural; in another sense political. This also reflects very nationally controlled ideas of development. With limited resources available, the government would

choose to develop and award privileges only to those regions strictly under its own control, instead of spreading those resources evenly among all regions. This is a different development method than that of the U.S. They are specifically for governing purposes. That is one point in comparing Taiwan and China. In addition, there is, of course, the fact that these cities are the "open doors" of China and Taiwan. So it is easy to understand why government agencies and big law firms would concentrate in these areas, resulting in very unequal access to justice in the less developed region.

A personal anecdote illustrating the concentration of lawyers in major cities would be from a young lawyer who was a student of mine. He was working in a major transnational law firm in Taipei, and one day he felt tired of the life being a corporate lawyer, and decided to move to the biggest law firm in Hualien, a beautiful county in Eastern Taiwan. It is notable to point out that the biggest firm in Hualien had only six lawyers. By working there, he thought he could finally say goodbye to the busy life of a transnational lawyer in Taipei. It turned out, however, that he had no life in Hualien as one of only six lawyers in charge of many, many cases.

4. *Democratization as a Differentiating Factor in Taiwan*

While the legal profession in Taiwan and China witnessed similar trends in the development, one major difference between Taiwan and China was democratization in the former and the lack of it in the latter. During the period of political and social changes in Taiwan, many reforming measures were advocated in the parliament, successfully put into legislation and implemented. Those kinds of legislation clearly have driven the demand of lawyers, and are related to the increase of lawyers in Taiwan. In contrast, that kind of causes for the increase of lawyers did not occur in China. The increase of lawyers in China was instead stemmed from a top-down initiative of the national government. This is one notable difference that requires further examination in the comparison of lawyers between China and Taiwan.

B. PROFESSOR YUN-CHIEN CHANG

1. *Possible Explanations for the Concentration of Lawyers in Major Cities*

To begin with, I would like to explore why lawyers concentrate in big cities such as Beijing and Shanghai. There may be several possibilities. First, we can intuitively think that people would want to move to these places because of their preference for the life style in big cities. The second

possibility would be that most of the major international law firms which pay better salaries are there. If this is true, when the subjects of your survey say that they are moving to the cities, they are actually saying that they are moving to an international firm. If the survey has not incorporated these possibilities in its questionnaire, we may not necessarily detect this incentive. A third possibility would be the housing and registration policies in China. My understanding is that in China, the government controls the flow of people from the countryside to the city. For example, the only way for a lawyer from Xinjiang to stay in major cities is by practicing in those cities for several years until he receives the permission to stay.

2. *Inquiries into Aspects of the Survey*

My second question would be to question the wisdom of comparing the U.S. and China in the current situation. Like the difference between apples and oranges, China is a developing country while the U.S. is a developed one in every sense. An educated guess would be that in the nineteenth century, there was also migration from the countryside to the city in the U.S., though the current census does not show data from that period. As such, a comparison of only the current U.S. and China may be subject to certain criticism.

Thirdly, an ordinary city resident would not care about the number of corporate lawyers in the city as much as they do about the number of litigation lawyers, such as criminal defense attorneys, in terms of access to social justice. Perhaps a subset of data on how many criminal lawyers per capita there are in the city in comparison to the countryside and whether there has been a change in that percentage or whether it has been distributed unequally would better reflect access to social justice for ordinary citizens.

Fourthly, I would like to ask how you chose your survey targets. Were they simply convenient samples? Were they from the top one hundred firms? What were the criteria for choosing the lawyers that you surveyed?

3. *Possible Inconsistencies between Registered and Physically Present Lawyers*

A final note would be to point out a possible inconsistency with the number of lawyers registered in an area with the actual physical presence of those lawyers. You mentioned about the situation in Taiwan. Following Professor Chang's comments, when I passed the bar about ten years ago, if I remember it correctly, the number of lawyers registered in Taipei City was 3000 with a total of 4000 for the whole Taiwan—highly concentrated, on its face. That number could be misleading as in Taiwan a lawyer is required to

register in a local bar association and a district court to practice in that city or county. In my time, you can only register to a maximum of four jurisdictions.[32] Theoretically, if one wished to serve the most clients from all the areas of Taiwan, I would certainly register in Taipei City, the biggest commercial and political hub in the country, in addition to my local district court. So the number we reported are simply the registered members of a local bar association or court, but not necessarily the number of lawyers physically active in that area. In the future, if you plan to do a similar survey, you may want to keep this in mind and add some questions to sort things out.

C. PROFESSOR CHI CHUNG

Thank you. It is an honor to participate in this roundtable discussion and to learn from all of you.

1. *Comparing Chinese and European Cities: Two Perspectives*

My first question relates to Professor Michelson's comparison of the population per lawyer ratio of Beijing and Shanghai to that of cities in Europe. You find that, by 2009, in Beijing alone, there was one lawyer for every 631 people, while in Germany the rate is about eight hundred people per lawyer. There may be two interpretations of your findings. The first would be to look at it in terms of social justice, and the average access to lawyers is measured by the population per lawyer ratio. Another interpretation would be to look at the broader economic landscape. As you mentioned, factors such as growth opportunities in urban areas, the concentration of commercial transaction litigation in the legal service market, and the practice of estate planning in Beijing and Shanghai may be similar to those in cities in Europe. In addition, the population per lawyer ratio may be influenced by government policy. One of Deng Xiao-Ping's policies is to "let a small group of people get rich first", and the concentration of resources and talents in a few urban areas serves that policy.

2. *Chinese Legal Professionals with Foreign Licenses Only*

My second question is about the observation that some of my Chinese friends from the U.S. law schools do not take the Chinese bar exam, but instead take the New York state bar exam and later work in the Chinese offices of foreign law firms. If they take the Chinese bar exam and become

32. This restriction was lifted in 2002. Attorney Regulation Act, art. 11 (1941) (amended 2010) (Taiwan), *available at* http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=I0020006.

Chinese lawyers, Chinese law prohibits them from being hired by a foreign law firm. As they choose to practice U.S. securities law and do the work such as the Initial Public Offerings (IPOs) of Chinese companies in the New York Stock Market, they choose not to take the Chinese bar exam. Are these Chinese legal professionals included in your report? What is your view on this corporate work?

3. *Is Population per Lawyer Ratio an Accurate Measure of Social Justice?*

I am also curious about the comparison between New York City and upstate New York. It seems that these statistics relate to your first point of population per lawyer ratio, but are they accurate measures of access to social justice in these areas? Would the fact that people in New York City, compared with people in upstate New York, can hire more lawyers necessarily mean that people in New York City enjoy more access to social justice? I have some doubts as to whether there exists a clear and universal causal link between the population per lawyer ratios and access to social justice in different areas.

D. PROFESSOR CHIA-SHIN HSU

1. *Rapid Growth of the Legal Profession Without Democratization in China*

My first question comes from Professor Chang's inspirational comment. Why did Taiwan's legal profession open after the initiation of democratization, while China's legal profession is rapidly increasing in a very high speed while it is open under an authoritarian regime? Is there a difference in government strategy? How does an authoritarian regime view the legal profession? To really understand the legal profession you have to understand its relationship with the government. I believe that it is the same case in China. Another factor to consider would be the self-perception of lawyers and bar associations in China. What kind of interests do they think they best serve or best want to serve? This may require more quantitative analysis.

2. *Relationship between the Growth of the Legal Profession and that of the Civil Society*

Something else that I am quite interested in but which may not be your immediate interest is the link between the growth of the Chinese legal

profession and the growth of the burgeoning civil society in China. To what extent is the legal profession serving the environmentalists, NGOs, and other socially active citizens? To what extent are they assisting with their work? To what extent are they being shunned by their lawyers? These statistics may shed significant insight on your main concern about the extent that the legal profession is serving the ordinary people. We also know that a lot of unrest is taking place in China due to government takeovers of land in certain areas. To what extent can or do lawyers take part in these disputes? Perhaps this may also be a future project for all of us.

E. PROFESSOR TZE-SHIOU CHIEN

I have a question about the slide showing the change in the concentration rate of lawyers in Shanghai and Beijing (Figure IV). I would consider this graph as misleading because I initially perceived the line presenting the concentration rate of lawyers in Shanghai and Beijing in the chart as flat, while the concentration rate of other place and the average rate of China were steeper. However, you mentioned that the former one represents the concentration rate in Beijing and Shanghai, and I realized that it is flat only because the base line is lower and the choice that you use a person as a basic unit rather than proportion of lawyer population to city population. Therefore, I would consider this graph visually misleading. I was wondering if my perception is correct or not?

(Professor Michelson: Yes, I think you are correct.)

IV. GENERAL DISCUSSIONS AND RESPONSE

Yi-Li Lee (College of Law, National Taiwan University):

Thank you, Professor. From your slides we can observe that the number of lawyers in China has increased in recent years. This may be an implication that lawyers are gradually becoming important actors in Chinese society. To this end, I would like to know whether lawyers in China form any bar association, and assuming that they do, do they have any chance to participate in government or judicial policy making? How do they monitor their government's policies? From your observations and research I understand that you are an experienced sociologist, so perhaps you can provide us with some insight.

Shao-Man Lee (College of Law, National Taiwan University):

Thank you. My name is Shao-Man Lee, and I am a research assistant of Professor Chang. Professor Michelson has analyzed the access of lawyers in China through the numbers of lawyers as well as their geographical distribution, but what could be just as relevant is what lawyers actually do in China. I heard from Professor Jerome A. Cohen[33] in a talk that a lot of lawyers were arrested in China because they helped local citizens in addressing issues of human rights, which is prohibited by Chinese authorities. So details of the cases that lawyers actually take in China may matter more here in this respect.

Professor Jiunn-rong Yeh

Before turning the floor to Ethan, I would like to briefly sum up a few points.

1. *Apples and Oranges: Comparing the Legal Profession with other Professions*

I understand from the data Professor Ethan presents that it is basically limited to the legal profession, particularly the concentration and the movement of lawyers, so the question here is whether these trends are special when taking into account major changes in geo-political structure. For example, what can we infer from here to the medical profession? What if the concentration and movement of medical doctors reflect the same trend? What if this finding reflects a broader geo-political development trend in China?

One possible deduction from this presentation is that this trend is unique to the legal profession, if we have enough data to support this hypothesis. However, my sense is that people are perhaps essentially attracted to the same incentives. Medical doctors would like to settle down in big cities, so would school teachers. Hence, whether this finding reflects a broader geo-political trend in China with features such as unequal, fast-paced, and one-sided development is yet to be clarified. A possible conclusion would be that what you have found is also similar to other professions, and may merely reflect a broader trend in China.

This may have several implications for understanding the legal profession in China. As we know, oranges and apples are very different. The

33. Jerome Alan Cohen, Professor of Law, New York University School of Law.

difference in oranges and apples exists not only between China and the U.S. but also between professions like medicine and law. For governments and civil society, the difference between these two professions is very significant. The government may have different preferences regarding the number of lawyers and doctors. If we discover that the concentration and movement of lawyers are the same as doctors and reflect the same trend in the society, it may imply that the special feature of lawyers as a profession in their political, civil and societal significance has been missing in some aspects, or different than those of other societies.

2. *Analysis of the Legal Profession through Income, Productivity, and Capacity*

In addition, what lawyers are doing is very important. I tend to believe that lawyers have a lot to do with civil society as well as the government. However, I would like to see an analysis of lawyers in terms of total income and productivity as a service sector. Besides numbers of lawyers, there are many other ways to access the impact of the legal profession, such as through comparison with other professions like architects or engineers, and whether they are doing relatively well in terms of income. My sense of the situation in Taiwan is that our annual service is perhaps going down. Whether lawyers can get access to international markets also has to do with the legal education and their ability. Last but not the least, I would like to conclude with a note of applause, as this is a very interesting topic and a wonderful presentation.

Professor Ethan Michelson

Thank you for your ideas and feedback. These are really good ideas, and just what I have been hoping to receive through this roundtable discussion.

Let me first renew the call to cooperate with you in the future. We do very much hope to create new collaborative research and relationship with you and also to better understand the Taiwanese legal profession. It is so important in so many ways, not just in terms of understanding legal careers, but lawyers as a profession are important socially, economically, as well as politically, and in Taiwan they have demonstrated all three areas of importance. The Taiwanese legal profession adds a comparative element as a sort of a natural experiment, or maybe even a quasi-experiment between the Mainland and Taiwan as many cultural elements are constant. For example, the influence of “Guanxi” (relationships), in the legal profession is something to be noted, though I'm not sure whether this came from China or Taiwan. There is a phrase in China, “打官司就是打關係”, roughly

translated into "the essence of litigation is the exercise of relationships", which I believe can serve as an example.

1. *General Civil Litigation instead of Corporate Work as the Bulk of Legal Practice*

Continuing, I would like to first highlight some common threads presented through the comments. One of them was the importance of differentiating lawyers by the work that they do. If I want to look into access to lawyers by ordinary citizens, I should limit the lawyers to those that represent individual causes and exclude lawyers that do corporate work. If I do that, supposedly the numbers in my data would change. Fortunately, though I have not shown it, we actually have detailed data on what lawyers actually do that can shed light into this problem. We have a long list of over thirty specific fields of practice and how much effort they devote to each of those. Here we can really see apples and oranges between the U.S. and Chinese legal professions. In the U.S., the top field is commercial litigation. In the larger landscape of the Chinese legal profession, however, commercial litigation and other corporate work is very limited. In a total population of more than 150 thousand lawyers in China, very few actually do corporate litigation.

If corporate work does not represent the bulk of legal work, then what kind of practice could it be? According to our data, the highest proportion has turned out to be debt collection. General civil litigation or basically what we call run-of-the-mill civil litigation, rather than commercial litigation, is what Chinese lawyers do more than anything else, and they represent more individual clients than corporate ones. Unfortunately, the official government data do not allow me to exclude lawyers that specifically do corporate work, though we could do that in our survey. Additionally, just for the sake of clarification, the kinds of friends that you may have working in an international law firm where lawyers are not licensed to practice law in China are not counted in our survey.

2. *The Significance of Jurisdiction Registration in China*

The other point I wanted to make was to applause your brilliant observation on the registration policies for legal jurisdictions. As you mentioned, only four jurisdictions are allowed for lawyers to register in Taiwan, and to encompass as much of the Taiwanese legal service market as possible, supposedly you would want one of those jurisdictions to be Taipei. This is similar to China. The total number of lawyers in Shanghai has more than doubled in 2009. Some of this movement in the data could be

migration, or the actual physical movement of lawyers into these cities, but not necessarily all of it. This is a very good point.

When you register a law firm in a jurisdiction in China, it carries the name of the city. If you register in a small town, you carry the name of the small town. As you can probably understand, this is not a good public relations move. For advertising purposes, you would want to put on your name card Beijing, Shanghai, or another big city. To reach this goal, what lawyers do is to go to Beijing to register your firm in there. It doesn't matter where you actually practice, but you have a jurisdiction listed as Beijing City. So differentiating between the amount of real movement and the amount of the appearance of movement is crucial in our report.

3. *The Weak Role of Chinese Lawyers in Public Policy Supervision and Human Rights*

To address a question raised by members of the audience, the extent of public policy influence for lawyers in China is low. In the U.S., politics is dominated by lawyers. I forgot the actual number but I think almost two thirds of Congress has a JD degree or is a lawyer. In China, however, very few of the deputies to the National People's Congress are lawyers. Chinese bar associations are weak politically as well. In China, bar association members and leaders are not elected but appointed by the Justice Bureau instead. They are politically weak, marginalized even, and sometimes deliberately so.

Another question from the audience concerns the role of lawyers active in human rights. While there are some activist lawyers in China, many are behind bars. So in terms of promoting human rights, very few lawyers in China actually practice in that due to the high probability of arrest. In fact, many lawyers are terrified of bad relations with the government or local officials. Some law firms may depend entirely on maintaining good relations with the authorities, so there are certain cases which they may choose not to take.

Finally, let me reiterate once more my deep appreciation to all of you and for this roundtable discussion. Thank you all and I look forward to staying in touch.

REFERENCES

Abel, R. L. (1989). *American lawyers*. New York, NY: Oxford University Press.

American Bar Association. 2009 ABA survey on lawyer discipline systems (S.O.L.D.). Retrieved from http://www.americanbar.org/groups/professional_responsibility/resources/survey_lawyer_discipline_systems_2009.html

American Bar Association Market Research Department. (2009). Lawyer demographics. Retrieved from http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/Lawyer_Demographics.authcheckdam.pdf

Attorney Regulation Act, art.11 (1941) (amended 2010) (Taiwan). Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=I0020006

Carson, C. N. (2004). The lawyer statistical report: The U.S. legal profession in 2000. Chicago, IL: American Bar Foundation.

Chu, Y.-C. (2009, November 19). Yike laowai tui Chungkuo lushih yeh te liangtzu tiaocha he shihnien kuancha [Two surveys and a ten-year observation of Chinese lawyers carried out by a foreigner]. *Fachih Jihpao* [*Legal Daily*]. Retrieved from http://www.legaldaily.com.cn/zmbm/content/2009-11/19/content_1183784.htm

Chungkuo Lushih Nienchien Pienchi Weiyuanhui [China Lawyer Yearbook Editorial Commission] (Ed.). (2011). Chungkuo lushih nienchien [China lawyer yearbook 2009]. Beijing, China: China Court Press.

Dau-Schmidt, K. G., Galanter, M., Mukhopadhaya, K. & Hull, K. E. (2009). Men and women of the bar: An empirical study of the impact of gender on legal careers. *Michigan Journal of Gender & Law, 16*, 49-145.

Garth, B. G., Nelson, R. L., Dinovitzer, R. & Sterling, J. After the JD. Retrieved from http://www.americanbarfoundation.org/publications/afterthejd.html

Heinz, J. P., & Laumann, E. O. (1982). *Chicago lawyers: The social structure of the bar*. Evanston, IL: Northwestern University Press.

Heinz, J. P., & Laumann, E. O. (1985). Chicago lawyers survey, 1975. Retrieved from http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/08218

Heinz, J. P., Laumann, E. O., Nelson, R. L., Sandefur, R., & Schnorr, P. S. Chicago lawyers survey, 1994-1995. Retrieved from http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/04100

Heinz, J. P., Nelson, R. L., Sandefur, R. L., & Laumann, E. O. (2005). *Urban lawyers: The new social structure of the bar*. Chicago, IL: The University of Chicago Press.

Kuo, G. S.-c. (2007). Seniority, confucianism, and the training programs for judges and prosecutors in Taiwan. *Korean Journal of Law and Society, 33*, 87-108.

Kuo, G. S.-c. (2005). Rethinking the masculine character of the legal profession: A case study of female legal professionals and their gendered life in Taiwan. *American University Journal of Gender, Social Policy & the Law, 13*, 25-57.

Liu, H.-W. (2002). Chanhou Taiwan ssufajen chih yenchiu—Ssufakuan hsunlienso wenhua wei chu te Kuancha [Research on postwar jurists in Taiwan—Observation centered on the culture of Judges and Prosecutors' Training Institute]. *Ssu yu Yen: Jenwen yu Shehui Kehsueh Tsachih* [*Thought and Words: Journal of the Humanities and Social Science*], *40*(1), 125-182.

Michelson, E. Survey on China's legal services work environment. Retrieved from http://www.indiana.edu/~emsoc/lawyer_survey.htm

Michelson, E. & Liu, S. (2009). [Chinese lawyers and their challenges: Findings from two surveys] Unpublished raw data. Retrieved from http://www.indiana.edu/~emsoc/LawyerSurvey/Report1_ENG.pdf

Miyazawa, S. (2002). Education and training of lawyers in Japan—A critical analysis. *South Texas Law Review, 43*, 491-498.

Pampell, C. (2011, May 24). At well-paying law firms, a low-paid corner. *N. Y. Times*, p. A1.

U.S. Census Bureau. (2010, May 28) Public-Use microdata samples (PUMS). Retrieved from http://www.census.gov/main/www/pums.html

U.S. Department of Labor, Bureau of Labor Statistics. Home page. Retrieved from http://www.bls.gov/

Winn, J. K. (1994) Relational practices and the marginalization of law: Informal financial practices of small businesses in Taiwan. *Law & Society Review, 28*, 193-232.

Winn, J. K., & Yeh, T.-C. (1995) Advocating democracy: The role of lawyers in Taiwan's political transformation. *Law & Social Inquiry, 20*, 561–599. doi: 10.1111/j.1747-4469.1995.tb01070.x

律師的接近與使用
——中國與美國的供給比較分析

Ethan Michelson

摘　要

臺大法律學院非常榮幸邀請到美國印第安納大學布魯明頓分校法學院Ethan Michelson教授，為我們演講關於中國及美國律師供給數量及其分布的實證研究結果與分析。Ethan Michelson教授比較中國及美國律師的供給，分析人民接近使用律師的發展趨勢，並根據統計資料，進一步討論兩國法律服務規模的擴張，解釋律師在城市之間的遷徙。與談人張文貞教授簡要比較中國及臺灣的法律專業發展，Ethan Michelson教授在回應張永健教授及其他與會學者的提問及評論時，同時討論中國及美國的律師處理案件類型的差異，並解釋中國律師登錄集中於大城市的原因，以及律師在公共政策與人權議題上所可能扮演的角色。

Roundtable

On the Creation of World Court of Human Rights

MANFRED NOWAK*

Moderator: PROFESSOR JIUNN-RONG YEH
(College of Law, National Taiwan University, Taiwan)

Speaker: PROFESSOR MANFRED NOWAK
(Professor for International Law and Human Rights, School of Law, University of Vienna, Austria; Director, Ludwig Boltzmann Institute of Human Rights, University of Vienna, Austria)

Discussants (in order of appearance):

PROFESSOR MAB HUANG
(Department of Political Science, Soochow University, Taiwan)

PROFESSOR JAU-YUAN HWANG
(College of Law, National Taiwan University, Taiwan)

PROFESSOR WEN-CHEN CHANG
(College of Law, National Taiwan University, Taiwan)

PROFESSOR SHIH-TONG CHUANG
(College of Law, National Taiwan University, Taiwan)

* Professor for International Law and Human Rights, School of Law, University of Vienna; Director, Ludwig Boltzmann Institute of Human Rights, University of Vienna, Austria; Former United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment. Dr. Iuris, University of Vienna (1973). E-mail: manfred.nowak@univie.ac.at.

INTRODUCTION

Human rights have always been an important issue worldwide. It is an honor for National Taiwan University College of Law to have Professor Nowak, a former UN Special Rapporteur on Torture, to provide an overview on the creation of the World Court of Human Rights. Based on the historical context, Professor Nowak discusses the rationale behind the creation of the World Court of Human Rights and provides eight reasons for the need in its creation. In response to the issues raised by Professor Mab Huang and other participants, Professor Nowak further explains the jurisdiction of this court and suggests ways in which Taiwan may participate in this regime if created in the future.

I. OPENING REMARKS

PROFESSOR JIUNN-RONG YEH

This is the second lecture of the Lei Chen Memorial Trust Fund lecture series. National Taiwan University College of Law is honored to have Professor Manfred Nowak with us. The lecture today is on the creation of an international human rights court, and the ideas and motivations behind this significant effort.

I am very pleased to have the opportunity to moderate this session. Also with us today are four local discussants. Let me introduce them one by one. From my left, we have Professor Jau-Yuan Hwang, a professor with this law school. Next is Professor Wen-Chen Chang, the person behind all the cooperation with the Lei Chen Memorial Trust Fund. Next is Professor Mab Huang from Soochow University, a very senior and respected professor in the area of human rights in Taiwan. Also joining us is Professor Chuang Shih-Tung, who just joined our law school this fall.

I think all of us recognize that there have been serious, widespread human rights abuses and violations. These are issues that have come with human civilization, the dark side of modernization, and industrialization and we have to face up to them. In the past, and even now, these problems have to do with war, with political conflicts, and with dictatorship. In recent years, as we have learned, some problems have to do with our structure of industrialization, our marketplace, and even our international trade system. Additionally because of climate change, there has been more and more serious extreme weather affecting human lives and our environment. A great many people have been victimized and become climate refugees seeking humanitarian assistance.

In the context of human rights, we are confronting with a wide array of

complex issues. How to tackle with these issues is indeed a daunting task for all of us. One approach is to create institutions such as courts. We have seen some regional human rights courts in Europe or in America that have functioned effectively. But whether it is possible, feasible, or even desirable to create an international court of human rights certainly requires further thoughtful articulation. Now, ladies and gentlemen, please join me to welcome Professor Nowak to discuss this critical and important topic.

II. SPEECH

PROFESSOR MANFRED NOWAK

Thank you, Professor Yeh and distinguished panelists. As professor Yeh has already mentioned in his introduction, there are many strong challenges to the international protection of human rights today. The issue on creating the World Court of Human Rights is only a small part in a bigger puzzle. The United Nations is in need of major reforms in many areas, starting with the Security Council and then the Human Rights Council that require certain 'face-lifting.' These are all major challenges, but today I would place my focus on the creation of the World Court of Human Rights and have my discussions in context of other developments.

1. *A Historical Overview of International Human Rights and Institutions*

In the 1940s when the United Nations (UN) was created, security, development and human rights were the three most important aims and objectives of this global institution. What was the vision of states and eminent individuals at that time working in the Human Rights Commission, such as Eleanor Roosevelt? I think, in their view, the task of the UN is to avoid another Holocaust as they had seen during the World War II.

The Human Rights Commission [1] was the main political body established as a specialized commission under the Economic and Social Council (ECOSOC) in accordance with Article 68 of the UN Charter.[2] The status of this commission revealed a certain difference between human rights bodies and other UN institutions. For security, we have the Security Council

1. The United Nations Commission on Human Rights (UNCHR) was a functional commission within the overall framework of the United Nations from 1946. However, the UN General Assembly voted overwhelmingly to replace UNCHR with the UN Human Rights Council on 15 March 2006.

2. U.N. Charter art. 68 ("The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.").

that was vested under Chapter 7 with the power to make binding decisions including economic and other sanctions under Article 41 and the authorization of military force under Article 42.[3] The recent use of military force in Libya was such an example. The Security Council is made into a very strong body dealing with international peace and security. For development issue, the second main objective, the ECOSOC was created as one main political body to deal with development issues, along with many other specialized agencies such as the International Labor Organization (ILO), the International Health Organization (IHO), United Nations Educational, Scientific, and Cultural Organization (UNESCO), and many programs such as the United Nations Development Program.

The third objective was on the protection of human rights, a subject matter not quite supported by states as it was seen as interfering with internal affairs of states. Consequently, the institution created to be in charge of this task was not provided with the status as it should have been—one of the main political organs of the United Nations—but instead was placed just as a little commission under ECOSOC with no major powers. The first task of this Commission was to draft the Universal Declaration of Human Rights (UDHR) which was adopted in 1948.[4] The Commission developed all kinds of visions. For instance, it was recognized that in order to protect human rights, a special body was in need, and this body should not be just somewhere in the secretariat, but the status should be similar to the High Commissioner for Refugees that was already in existence during the time of the League of Nations. As a result, a High Commissioner for Human Rights was created.[5]

During the Cold War, however, those more visionary concepts on the protection of human rights were buried because the two main global powers, the Soviet Union and the United States, could not agree on major

3. U.N. Charter art. 41 ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."); U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

4. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

5. The High Commissioner for Human Rights is the principal human rights official of the United Nations. The High Commissioner heads Office of High Commissioner for Human Rights (OHCHR) and spearheads the United Nations' human rights efforts. We offer leadership, work objectively, educate and take action to empower individuals and assist States in upholding human rights. We are a part of the United Nations Secretariat with our headquarters in Geneva. The current UN High Commissioner for Human Rights, Navanethem Pillay, was appointed by the General Assembly on 28 July 2008.

innovations. Yet by the end of the Cold War in 1989, because of the revolutions in Eastern Europe and elsewhere, there was emerging a new impetus for human rights. That was the reason that the United Nations agreed to hold a second world conference on human rights. The first one was in 1968 in Tehran. With the end of the Cold War, a new world conference of human rights was surely in need. Many people at that time even said that we could finally implement Article 28 of the Universal Declaration.[6] It was to further this vision that there was held the World Conference of Human Rights in Vienna in 1993.

I remember this conference very well because my institute was charged with the task of coordinating NGO's inputs. Whoever works in the NGO field, including my friend, Mr. Peter Huang, who is here as representative of the Lei Chen Memorial Trust Fund, knows it well: coordinating NGOs is an impossible task. These organizations do not like to be coordinated. At the time, we had more than 1,500 NGOs with more than 3,000 representatives coming to Vienna. It was a challenging task. But still, the NGOs had a major impact, and some of the big ones like Amnesty International said clearly that there must be an institutional outcome, or otherwise Vienna failed. That was the story behind establishing a high commissioner for human rights.

On the last day of the conference, June 25, 1993, there was an Asia-related conflict between universalists and those who were more inclined to uphold so-called Asian values indicating that they did not wish to have a high commissioner. But, they finally agreed. There were many important compromises. The Asian states eventually accepted that human rights were universal, and that it was a legitimate concern of the international community to protect human rights. On the other hand, western states had to agree that all human rights were indivisible and interdependent. That would mean that economic and social rights were as important as civil and political rights.

There were many important compromises and decisions in Vienna, but the most important one was to replace the former Center for Human Rights with an independent body called the United Nations High Commissioner for Human Rights. We have had some outstanding holders on this position. Mary Robinson,[7] for example, became the second High Commissioner and was very outspoken on human rights and criticizing governments in defiance with human rights protection. She actually managed, after her first term, to have all the permanent members of the Security Council against her. Not

6. Universal Declaration of Human Rights art. 28, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III) (Dec. 10, 1948) ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.").

7. Mary Robinson, the seventh and first female President of Ireland (1990-1997), and she served as United Nations High Commissioner for Human Rights from 1997 to 2002.

only the United States, People's Republic of China and the Russian Federation, but also the United Kingdom and France were not too eager to invite her for a second term. I think that was the best one could achieve as a High Commissioner for Human Rights: to be balanced and objective. In addition, we also have had Louise Arbour, a former prosecutor at the International Criminal Tribunal for former Yugoslavia (ICTY),[8] and the present mandate holder, Navanethem Pillay from South Africa.[9] I think these commissioners perform outstanding jobs on this position.

The second revolutionary and visionary idea came after the Nuremberg and Tokyo tribunals in the end of the World War II. It was about the need of a permanent international criminal court to hold war criminals as well as criminals of human rights violations accountable individually before an international criminal court, which could be found already in the 1948 Genocide Convention of the United Nations.[10] During the Cold War, however, there was no way to have the Genocide Convention fully implemented. After 1989, however, the new spirit and atmosphere prevailed even to the extent that the United States made a proposal to the Security Council in 1992 to establish an international criminal tribunal for the former Yugoslavia. In reaction to some of the worst atrocities–the first genocide in Europe exactly fifty years after the Nazi Holocaust in Bosnia and Herzegovina, the international criminal court was established by the resolution of the Security Council under Chapter 7, a binding resolution.[11] Many international lawyers felt that the Security Council went beyond its powers, but on the other hand, it was the highest body that decided itself to what powers it had been entitled to. This was the creation of the ICTY that now still exists, and has been successful. Military and political leaders, not only those of the Bosnian Serbs but also of the Croats and Muslims, have been brought to The Hague, Netherlands, where the ICTY is located. Those brought before trial included former President Slobodan Milošević of Yugoslavia, Mr. Karadzic, the political leader of the Bosnian Serbs, and Mr.

8. Louise Arbour, a former justice of the Supreme Court of Canada and the Court of Appeal for Ontario and a former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda. She has since July 2009 served as President and CEO of the International Crisis Group, She served as United Nations High Commissioner for Human Rights from 2004 to 2008.

9. Navanethem Pillay, the first non-white woman on the High Court of South Africa, and she has also served as a judge of the International Criminal Court and President of the International Criminal Tribunal for Rwanda. Her four-year term as High Commissioner for Human Rights began on 1 September 2008. *See supra* note 5.

10. Convention on the Prevention and Punishment of the Crime of Genocide art. VI, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 ("Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.").

11. S.C. Res. 827, ¶ 7, U.N. Doc. S/RES/827 (May 25, 1993).

Mladić, the military commander who was primarily responsible for the Srebrenica genocide,[12] among other crimes.

In 1994, genocide broke out in Rwanda, which was much more severe with 800,000 people slaughtered for purely ethnic reasons in a few months. The UN, however, was standing by, and did not intervene as it should have done. It was the new government of Rwanda that took the initiative to establish another international tribunal for Rwanda (ICTR), paving the way for the Rome Statute establishing a permanent International Criminal Court in 1998. A very highly contested issue for fifty years suddenly could be solved. In 1998, the Rome Statue of the International Criminal Court was adopted. However interestingly, the government that had originally initiated this whole development, the United States of America, voted against the Rome Statute. It was not the Bush administration but rather the Clinton administration that voted against it, since the government came to realize that the U.S. citizens might also be held accountable for major human rights crimes they might commit all over the world.[13] Indeed, the very idea of an international criminal court lies in that any individual, whatever his or her nationality is, can be held accountable for the most serious international crimes. The Bush administration even launched a crusade against the International Criminal Court. Yet, a great many states have ratified the statute, and it became an accepted and respected international institution that has been working since 2003 in the city of The Hague.

The third major proposal for a World Court of Human Rights was put forward by Australia in 1947, who thought that, firstly, a declaration was needed, which came into establishment within three years—the Universal Declaration of Human Rights. The second step was a United Nations Convention on human rights, a binding treaty, which must be supervised by a court, which would enable individuals to file a complaint if they feel that their human rights have been violated.[14] The logic was shared by many nations at the time when it was proposed. Among these three major institutional visions, however, the World Court of Human Rights remained the only one that had not been realized even after the end of the Cold War, since many may argue that it is still too utopian or even revolutionary for the UN to adopt such a comprehensive human rights treaty monitoring regime. Today, however, such arguments are no longer convincing. For instance, at the last Human Rights Council, some less powerful governments like

12. During the Bosnian War, more than 8,000 Bosniaks (Bosnian Muslims), mainly men and boys, in and around the town of Srebrenica in Bosnia and Herzegovina were killed by units of the Army of Republika Srpska (VRS) under the command of General Ratko Mladić.

13. HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, 1291-310 (3d ed. 2007).

14. *See* Herbert W. Briggs, *Implementation of the proposed International Covenant on Human Rights*, 42 AM. J. INT'L L. 389, 395 (1948).

Uruguay, Switzerland, and the Maldives indicated their political will to support the creation of a World Court of Human Rights.[15]

2. *Eight Reasons for Establishing a World Court of Human Rights*

There are eight reasons for establishing a World Court of Human Rights. The first is in regard with rights and duties, known well to lawyers: if you speak of a right, then there is a right holder. Where there is a labor right, a social right, a civil right or whatever else, there is always a duty bearer on the other hand. If I have a right, somebody else must have a duty. He or she owes something to you because you are a rights holder. If the duty bearer is not living up to his or her obligations to honor your rights, then you should have a remedy, usually a judicial one. That is the logic of rights and duties. Naturally there is a need for an institution that can deliver a binding judgment in regard to rights and duties. If I have a contract with you, for instance about the purchase of a car, and if I pay you the money but you do not give me the car, I must have somebody to whom I can go and say, "Please force him to live up to his contractual obligation." That is the simple logic of rights, and it is also more or less in all legal systems in the world. It is in civil law as well as in common law.[16]

We always hear that human rights are the most important rights that we have. These rights are enshrined at the level of constitutional and of international law. Why, then, should the above simple logic of rights and duties not apply to human rights in the sense that having a world court of human rights to address the remedy of human rights violations? We still hear from many governments that this idea is controversial or too idealistic. I think the UN may be still entrenched with a certain Cold War spirit. During the decades of the Cold War, in order to have human rights treaties concluded, it was necessary to have agreements between the Western and socialist countries. It was a difficult task. Many countries did not like to have binding international human rights agreements. For instance, the Soviet Union never liked international monitoring, considering it an interference with national sovereignty. Hence, individual complaints on human rights violations have not been included into any of the UN human rights treaties as a mandatory procedure. In terms of the civil and political rights covenant, we had an optional protocol already in 1966 as an ultimate compromise, which was very difficult to achieve. The protocol was put in a separate document

15. Manfred Nowak et al., *Protecting Dignity: An Agenda for Human Rights*, UDHR 60 (Dec. 19, 2011), http://www.udhr60.ch/agenda/ENG-%20agenda_print.pdf.

16. *See* Manfred Nowak, *Eight Reasons Why We Need a World Court of Human Rights*, *in* INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 697-98 (Gudmundur Alfredsson et al. eds., 2009).

because the Soviet Union would not have accepted the system of "individual complaints" nor ratified the covenant including that system. This was the spirit of the Cold War.[17]

The decisions of individual complaints, by an expert body instead of by a court, are termed as "views" rather than "judgments". The complaints are not complaints, petitions or applications in courts. They are called "communications," the weakest language imaginable. It is kind of anachronistic that, twenty years after the end of the Cold War, we still have the same five geopolitical groups within the UN: the Asian region, the African one, and the Latin American one, in addition to the Western one and the Eastern European one. Notably, many Eastern European countries are now members of the European Union (EU). When diplomats in Geneva have their pre-consultations, they first go to the EU—the twenty-seven countries from Portugal to Lithuania. They go to lobby the caucus of the EU around eight or nine o'clock, and then at nine or ten, these diplomat split up into the above five groups—hence the Czech ambassador proceeding to the Eastern European group, and the Austrian to the Western group.

Binding judgments by a court on human rights litigation are better than "views" that are not binding. As our moderator, Professor Yeh, has already mentioned, the idea of having a human rights court is nothing new especially in Europe. The Europeans were the first to adopt a binding human rights instrument on the basis of the Universal Declaration of Human Rights adopted in 1948.Two years later, the European Convention on Human Rights (ECHR) was adopted. It deals only with civil and political rights because the institution—the Council of Europe—that adopted this Convention was, classically, a Western organization. Yet, at least in implementing these civil and political rights, the treaty clearly dictated that the final decision on an individual complaint should be with the European Court of Human Rights (ECtHR). In 1998, due to the fact that the court had been flooded with cases, the ECtHR was reformed into a permanent court with fulltime, professional judges, substituting for the previous system in which judges fly to Strasbourg, France for a few weeks per year. The ECtHR now consists of judges who sit in Strasburg all year round. They have no other works because they have enough to do -more than 150,000 cases pending, from which they have been deciding more than 30,000 cases per year. This means that there are about 800 million people in Europe that have the right to launch complaints directly to a professional human rights court.

The Inter-American Court of Human Rights[18] was created under the

17. *See* Manfred Nowak, *The Need for a World Court of Human Right*, 7 HUM. RTS. L. REV. 251, 252 (2007).

18. The Inter-American Court of Human Rights, which is an autonomous judicial institution of the Organization of American States established in 1979, and whose objective is the application and

American Convention on Human Rights in 1969, and developed some of the most significant judgments in the American hemisphere—primarily in Latin America—because the United States and Canada have not ratified this convention. In the African Union, there is the African Charter of Human on Peoples' Rights, now with an optional protocol which recently led to the creation of an African Court on Human and Peoples' Rights. In the Asia-Pacific region, there is not yet any international political organization dealing with human rights, and thus you do not have any monitoring bodies such as a human rights court here. Although there is now the body of the ASEAN Charter,[19] but it is not yet a functioning regional organization dealing with human rights, nor having any court responsible for handing down judgments on individual human rights.

The UN Commission on Human Rights was replaced in 2006 by the Human Rights Council because, allegedly, the Commission had been too politicized and too selective. However, the Human Rights Council now is even more selective, more politicized than the Commission ever was. One of the institutional advantages of the Human Rights Council is the system of the Universal Periodical Review (UPR): every member state of the UN is subject to a peer review by other states. In principle, states are not the most objective evaluators of the factual human rights situation in other states. More often than not, the UPR is a highly politicized exercise. On the other hand, the UPR process is also based on independent reports. One report is of the state under review, but then the High Commissioner for Human Rights also prepares reports on the basis not only of reliable NGO information, but also of information from the UN treaty bodies and special procedures.[20] In

---

interpretation of the American Convention on Human Rights and other treaties concerning this same matter. It is formed by jurists of the highest moral standing and widely recognized competence in the area of Human Rights, who are elected in an individual capacity.

19. The ASEAN Charter is a constitution for the Association of Southeast Asian Nations (ASEAN). It was adopted at the 13th ASEAN Summit in November 2007, and the ASEAN Charter entered into force on 15 December 2008. The ASEAN Charter has become a legally binding agreement among the 10 ASEAN Member States. Charter of the Association of Southeast Asian Nations, Nov. 20, 2007, 2 J.E. ASIA & INT'L L. 299 (2009), *available at* http://www.aseansec.org/publications/ASEAN-Charter.pdf.

20. The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed. The UPR was created through the UN General Assembly on 15 March 2006 by resolution 60/251, which established the Human Rights Council itself. *See* G.A. Res. 60/251, ¶ 5, U.N. Doc. A/RES/60/251 (Mar. 15, 2006), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf. It is a cooperative process which, by 2011, will have reviewed the human rights records of every country. Currently, no other universal mechanism of this kind exists. The UPR is one of the key elements of the new Council which reminds States of their responsibility to fully respect and implement all human rights and

my opinion, if there were a World Court of Human Rights, it would be the court that provided binding judgments that a country violated certain human rights, and with this system, the UPR would make much more sense. The highest political body, the Human Rights Council, should supervise and enforce the judgment of the court, similar to the Council of Europe. If the European Court of Human Rights renders a judgment that Austria had violated certain human rights, the Committee of Ministers of the Council of Europe is in charge of supervising whether or not Austria had complied with the judicial decision.

Since the 1990s, there has been a general consensus that, laden with shortcomings, the treaty bodies as we have today are in need of reform. The state reporting system is totally overloaded. However, every type of reform that has been brought forward, including a super committee—merging all of the UN treaty monitoring bodies into one super committee—would all need an amendment by their respective treaties, a task so difficult that it is probably a mission impossible.

It would be much easier to create a World Court of Human Rights by drafting a new treaty, and then it is up to the states to ratify the treaty. The World Court would then gradually take over functions of the treaty bodies. For instance, if a state is a party to the first Optional Protocol to the International Covenant on Civil and Political Rights, that means the state, for example Austria, would now ratify the statute of the World Court of Human Rights. Henceforth, Austria would subject itself to the jurisprudence and the jurisdiction of the World Court of Human Rights.[21]

The principle of complementarity under the statute of the International Criminal Court (ICC) means that as soon as a state ratifies the Rome Statute, it accepts its jurisdiction. Yet the statute provides that the ICC is only competent if the states themselves are either unwilling or unable to really deal with the respective human rights or war criminals.[22] In this way, the ICC can never deal with all criminals in question. The principle of complementarity is also to strengthen national capacities to enforce international criminal law, the formation of which has been an ongoing process, with an increasing number of states creating its own national criminal court for genocide and crimes against humanity and training their judges. If these national courts perform their jobs very well, the ICC would have only little work to do.

---

fundamental freedoms. The ultimate aim of this new mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur. *Universal Periodic Review*, U.N. HUM. RTS. (Feb. 21, 2012, 3:00 PM), http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx.

21. *See* Nowak, *supra* note 16, at 703-04.

22. Rome Statute of the International Criminal Court art. 17(1)(a), July 17, 1998, 2187 U.N.T.S. 90.

The same principle of complementarity would also apply here in the context of human rights violations. If we had a World Court of Human Rights, states would be encouraged to improve domestic judicial systems for dealing with human rights by means of constitutional courts or special human rights courts. In this statute, there is even a global fund for national human rights protection systems to assist states to improve their domestic, judicial implementation systems for human rights.[23]

In a globalized world, states are only one of the main actors. Many transnational corporations have a budget much bigger than that of smaller states. Many global non-state actors, not only transnational corporations but also international organizations, are much more powerful than nation-states. In principle, the UN is bound by UN human rights treaties, but when it comes to holding the UN accountable, there may be a lack of mechanisms since the UN itself is not party to any of those treaties. The same is true if Shell, Exxon, Nike or any of the big transnational corporations violates human rights. While there is corporate social responsibility recognized in the Global Compact,[24] it would still be very difficult to hold any of those corporations accountable. Some civil courts have made an attempt, for instance, under the Alien Tort Claims Act in the United States,[25] but there has not yet been really successful litigation. With the World Court of Human Rights, the members of the Global Compact would be encouraged to voluntarily subject themselves to the jurisdiction of the court. The same goes to international organizations such as the World Bank, the UN, and the North Atlantic Treaty Organization (NATO), among others. There should be certain incentives for these organizations and corporations to accept the jurisdiction of the World Court of Human Rights. For a country like Taiwan, if even transnational corporations can accept the jurisdiction of the World Court, states that are not yet member states of the UN, should also be entitled to accept the jurisdiction of the Court.[26]

There are guidelines and principles of the rights of victims to remedy and reparation. This old idea has been recognized and codified in that if one is a victim of a human rights violation, he or she deserves more than a simple judgment saying "yes, you are a victim." One would need reparations for the harm suffered, whether it is rehabilitation of torture victims in a

23. JULIA KOZMA, MANFRED NOWAK & MARTIN SCHEININ, A WORLD COURT OF HUMAN RIGHTS: CONSOLIDATED STATUTE AND COMMENTARY (2010).

24. The United Nations Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.

25. The statute allows United States courts to hear human rights cases brought by foreigner for conduct committed outside the United States. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789).

26. KOZMA ET AL., *supra* note 23.

rehabilitation center, restitution if one's property has been expropriated without good reasons or other forms of satisfaction such as monetary compensation. Up to the present, even the European or the Inter-American Courts are not well equipped to provide human rights victims with proper reparation. With the World Court of Human Rights, we felt that it should have full powers to award the victim adequate reparations.[27]

Everything discussed above is a private initiative of a few academics and NGOs. We have written a small booklet that included a draft of a full statute for the World Court of Human Rights with a commentary.[28] The point is that: it is all prepared; it just needs to be taken up. There was a Swiss initiative by the Swiss Minister of Foreign Affairs on the occasion of the sixtieth anniversary of the Universal Declaration of Human Rights in 2008. I was the rapporteur of a panel of eminent persons chaired by Mary Robinson, and experts from all regions were invited. We drafted an agenda for human rights,[29] like the Agenda for Peace from 1992 and the Agenda for Development. In this agenda, we deal with many issues that Professor Yeh had just brought up such as global poverty, climate change, among others. There are more and more states that became interested in this Agenda for Human Rights as well as the idea of the World Court of Human Rights. The International Commission of Jurists,[30] for instance, stated its willingness to take it up and lead the way as an NGO. There may be more dynamics, and finally we need to go through a drafting process in the Human Rights Council, or to hold a special conference like the Rome Conference for the ICC. I think the best way would be an adoption by a resolution of the General Assembly of the UN as a treaty to be ratified by states. Thank you very much. I am very interested in your ideas from the panel of distinguished discussants and questions and comments from the audience.

III. COMMENTARY

A. PROFESSOR JIUNN-RONG YEH

Thank you very much, Professor Nowak. It was a very informative and

27. *See* Nowak, *supra* note16, at 705-06.

28. KOZMA ET AL., *supra* note 23.

29. Nowak et al., *supra* note 15.

30. The International Commission of Jurists (ICJ) is an international human rights non-governmental organization. The Commission itself is a standing group of 60 eminent jurists (judges and lawyers). The International Commission of Jurists is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. The ICJ has played a seminal role in establishing international human rights standards and working towards their implementation. Through pioneering activities, including inquiry commissions, trial observations, fact-finding missions, public denunciations and quiet diplomacy, the ICJ has been a powerful advocate for justice.

insightful lecture. It illustrates your rich experience and great devotion to this area. This undertaking is of great importance, and the NTU law school is very proud to be involved in this effort.

Let us begin with the discussion. We have four discussants. I hope to reserve some time for the floor. In order to do that, I would hope that each of our discussants talk for about eight to ten minutes, so we can save some time for the audience. I arbitrarily assign Professor Huang Mab to begin.

B. PROFESSOR MAB HUANG

Seven years ago, I had twice the privilege of meeting Professor Nowak, and since then, I have followed to some extent his career as a scholar, a practitioner and a rapporteur. I admire his work very much. Now Professor Nowak has given us a very well thought out proposal and a very skillfully crafted statute for the World Court of Human Rights.

I only have three comments. The first comment is that Professor Nowak emphasized, as in some of his earlier works, that the World Court is a purely voluntary measure on the part of the states. In other words, the World Court is a voluntary enterprise. Professor Nowak said that he has had quite substantial supports from Europe and from Latin America, but I am thinking about those people most in need of protection of their human rights, for example those in Asia living under an authoritarian government. Would they benefit from the World Court? Given the situation we are confronted with in Asia, it is not very likely that many of the authoritarian governments would opt in.

The second comment is about the Human Rights Council. So far, and I think Professor Nowak would agree, the appointments to the Human Rights Council have not been as excellent as would have been expected. Given this deficiency and the fact that as Professor Nowak has mentioned, the Council is so highly politicized, I have some reservations on whether we can really expect the Council to enforce binding judgments of the World Court of Human Rights with any sense of justice and fairness. I do not think we can really at this time compare the Human Rights Council with its counterpart, the European Council. We need to face up to the weaknesses of the Human Rights Council.

Referring to the Universal Periodical Review, I think in one of your papers—I do not know if you had in mind the exercise in 2009 of the Universal Periodical Review—you mentioned that in some cases, for instance the People's Republic of China, the exercise of the periodical review is almost a farce. Given this kind of discouraging performance of the Council, how much can we expect when it comes to the enforcement of the judgments of the Court?

Thirdly, in your proposal, Taiwan would be eligible for accession to the World Court of Human Rights. I would like to hear more about what Taiwan needs to do, how to get in, and what obstacles Taiwan would face in opting in. Thank you.

C. PROFESSOR JAU-YUAN HUANG

Thank you, Mr. Chairman, Professor Yeh and our distinguished speaker, Professor Nowak. It is my pleasure to be here and share some thoughts on this wonderful presentation of your ideas about a World Court of Human Rights. I only have one comment and two questions.

If I can summarize my response in one sentence, I may simply say that this is music to my ears. I fully endorse the idea of having a World Court of Human Rights in order to strengthen the current human rights treaties and the communication and compliance procedures as practiced by a variety of human rights treaty monitoring bodies. I do not have any trouble with the complementarity approach, as suggested by you, to invite states around the world to voluntarily opt into this new mechanism.

However, I do have some technical concerns. Here is my first question: what would be the institutional relationship between the World Court of Human Rights and the current international and regional courts? I am talking not only about regional courts of human rights like the European Court of Human Rights, the African Court of Human Rights or the American Court of Human Rights, but also about the ICJ and the ICC. Let me begin with the regional courts of human rights. Supposed Germany or Austria joins this new World Court of Human Rights and accepts its jurisdiction on individual complaints. Then the human rights victims in Germany or Austria would have two choices of courts for their remedy: the European Court of Human Rights and the World Court of Human Rights. If both courts grant jurisdiction on the same case, it would lead to some procedural problems. Should individuals go to the European Court of Human Rights before he or she goes to the World Court, or can he or she simply choose wherever he or she would like to go? Should he or she go to the regional court first, and then if he or she loses, then go to the World Court? In that sense, would the World Court evolve, in a certain way, into a kind of Supreme World Court or World Constitutional Court?

My above question applies to regional courts of human rights and international courts, for example, the ICJ, as well. I noticed that, in your draft statute, the Genocide Convention of 1948 is listed in Annex One. Thus, for those states that accept the jurisdiction of this World Court, the Genocide Convention would also fall within the jurisdictions of this new World Court. However, Article 9 of the Genocide Convention gives the ICJ the jurisdiction

to decide the cases between states involving the Genocide Convention. Furthermore, in your draft statute, you also mention third-party complainants, by which you mean a kind of inter-state complainant. What if we have a controversy over a genocide case? Both the ICJ and the World Court would have concurrent jurisdiction over the same issue. What would be the relationship between the two courts? Or, is there any resolution to this competition or, possibly, the jurisdictional conflict?

My second question should be an easy one and is not technical in nature. This new Court is complimentary in terms of its jurisdiction. Hence, if realized in the future, it would represent a significant progress toward the ultimate form of judicial development of international human rights and in international law. Having said that, I find this proposal is still a very humble and modest one. My question is: would you like this new Court to remain for a long period of time, or even forever? If there is a chance in the future, would you wish to improve it to have greater jurisdictions, or even a sort of compulsory jurisdiction over human rights matters? As we all know, the ICJ has been criticized for its lack of compulsory jurisdiction over international disputes. That might be a factor leading to a kind of inability to settle international disputes over the years. In the long run, therefore, I would like to hear what your ultimate idea of a World Court of Human Rights is. Do you envision an even more powerful World Court of Human Rights with compulsory jurisdictions, as you mentioned, not only over the states but also over non-state entities and NGOs? In conclusion, this proposal is indeed a work of inspiration. I very much look forward to its realization.

D. PROFESSOR WEN-CHEN CHANG

Thank you, Professor Yeh, the chair, our speaker, Professor Nowak, and all the distinguished guests and commentators. I have three suggestions to the proposal of creating the World Court of Human Rights. The first is about how to create and organize this World Court of Human Rights. In the end of your lecture, Professor Nowak, you suggest the best—and perhaps most feasible—way to establish this court is to have the UN Assembly pass a resolution to propose the Statute of the World Court of Human Rights as a treaty to be ratified by states. I think while this is feasible, it is a rather conservative way of creating such a court. I would instead propose that this court be created by a simple resolution of the UN Assembly, and that it would not have to be on a statute- or treaty-based. I have the following reasons for such an alternative method. I think the UN has had many treaty-based international human rights mechanisms implemented by courts. Professor Hwang already asked you a very complicated question about how these courts in the future may work with one another. It is time now for a

kind of charter-based human rights courts to be established within the UN, and such a court must have the jurisdiction over rights that have already enjoyed the status of *jus cogens* or customary international law. In my view, if any right enjoys *jus cogens* or customary international law status, it is universal, and hence should be enforced strongly by a World Court of Human Rights. To enforce such rights, you need not have the consent of states because those rights are not to be violated under any circumstances by any persons or by any states. Therefore, I would propose that if we create a World Court of Human Rights, we must entrust this Court with the enforcement of those truly universal rights. If the statute for the World Court of Human Rights would be ratified by member states, as Professor Nowak suggests, the member states must be willing to receive the jurisdiction of the World Court of Human Rights over the rights that enjoy the status of *jus cogens*[31] and customary international law.[32] Under such a proposal, the answer to professor Hwang's question would be: the World Court of Human Rights would enjoy primacy on the rights of *jus cogens* and customary international law over other regional or specified courts. That is my first comment.

The second comment is reflected upon my observation of how rights are undermined or infringed in domestic jurisdictions, and how they often cannot obtain their legal remedy within the domestic legal systems. One key factor is often concerned with standing to sue. When their rights are infringed, people often have difficulty claiming their rights in domestic courts because of very narrowly construed jurisprudence on standing to sue or access to courts. If we would have the World Court of Human Rights, the principle of standing to sue, or the expansion thereof, would be on the top of the concerns with this Court. This leads to some concerns about the proposal of Professor Nowak, because it still requires the rights claimer to exhaust domestic remedy. That would actually create a paradox because when individuals' rights are infringed, they often find their rights are not recognized as justiciable rights or not granted with legal remedy in their domestic legal system. In that case, they should be granted with standing to sue at the World Court of Human Rights, as procedural substitute to their domestic courts. This would not be a difficult task for the World Court of Human Rights should it formulate a lenient approach to the understanding of

31. *Jus cogens* means a peremptory norm of general international law, a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". STEINER ET AL., *supra* note 13, at 132-45.

32. Art. 38(1)(b) of the Statute of the International Court of Justice describes custom as "evidence of a general practice accepted as law. Custom is generally considered to have two elements: state practice and *opinio juris*. *See generally e.g.,* BIRGIT SCHLUTTER, DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW 10-11 (2010).

rights and standing to sue.

My last point is concerned with Taiwan. I am very fond of the proposal in that the World Court of Human Rights extends its jurisdiction even to transnational corporations, and states are not the only duty bearer in this court. I like to put forward an even more radical proposal extending jurisdictions to subunits of a federal states or autonomous regions of any states. Today, many states adopt a federal system or allow greater autonomies to their subunits. The state of California or New York in the United States, Scotland with the United Kingdom, or Hong Kong Special Administrative Region with People's Republic of China provides good examples. These subunits or autonomous regions must be also eligible for participating the World Court of Human Rights. If that were the case, the Tibetans, for example, regardless of their complicated (national or ethnic) relationship with People's Republic of China, could go to the World Court when their rights are violated. The same protection can be extended to the people in Taiwan or any foreigners in Taiwan. In this sense, the World Court of Human Rights would really function with complimentary jurisdictions to other regional and specified courts.

In conclusion, I would like to thank Professor Nowak once again for bringing this proposal to the audience in Taiwan, and I believe this idea will be widely, deeply, and thoroughly discussed here even after today's lecture.

E. PROFESSOR SHIH-TUNG CHUANG

Thank you Professor Yeh, the chairperson, Professor Nowak, our distinguished speaker, and Professors Mab Huang, Jau-Yuan Hwang, Wen-Chen Chang, and ladies and gentlemen. I am very pleased to be here to comment on Professor Nowak's brilliant speech.

Professor Nowak proposes a noble claim to advocate the creation of the World Court of Human Rights, and this noble claim, in my view, is not only a humanist proposal, but also a decent promotion of the protection of human rights. It is a humanist proposal because Professor Nowak argues that, firstly, that human rights without remedy are an empty promise, and secondly, that the Human Rights Council without a World Court of Human Rights is not a full promise for the promotion and protection of human rights. His decent argument presents a convincing reason, which explains why it is justified that we need a World Court of Human Rights. Inspired by Professor Nowak's noble claim, I attempt to give three remarks to echo his argument, and then offer two questions to invite Professor Nowak to answer. Firstly, I argue that human dignity and human rights are two faces of the human being. Secondly I address the necessary connection between human rights and the rule of law. Thirdly, I attempt to justify the independence of the rule

of law and the World Court of Human Rights. The two questions I would like to pose here are as follows: first, I would like to ask about the state's free decision premise offered by Professor Nowak in his essay, and second, about what Taiwan can do in this noble project.

Let me start from the first remark: human dignity and human rights are two faces of human beings. In my view, human dignity constitutes the moral face of human kind. To justify this argument, I refer to the views of Immanuel Kant and Ronald Dworkin. For Kant, humanity itself is a matter of dignity. In his classical work *The Metaphysics of Moral*, Kant claims that no human being can be used merely as a means, but must always be used at the same time as an end. Kant's view on human dignity, in a word indicates that each person has his or her own moral status, which is above all prices.

To echo Kant's version, Dworkin recently offered a sophisticated argument about human dignity, stating that the concept of human dignity consists of two principles. The first is the principle of intrinsic value, which means that each human life has a special kind of objective value, and the second is the principle of personal responsibility, which means that each person has a moral responsibility to realize his or her own life as a successful life. Both versions of human dignity, though slightly different, confirm the substantive interrelation of moral rights and moral duties. In other words, each person has a moral right to defend his or her dignity, but, at the same time, also needs to undertake the moral duty not to infringe on the moral rights of others. Based on this moral conception of human dignity, it leads us to the argument that human rights constitute the legal face of human beings. That is, human rights are not only the relational aspect of human dignity that justifies the interrelation of moral rights and moral duties; they are also the institutional aspect of implementing human moral rights and duties and the legitimate aspect to enforce a remedy for moral rights violation.

Secondly, based on my first remark, there is a necessary connection between human rights and the rule of law. First of all, I argue that the rule of law is a universal human good because the concept of the rule of law must comprise two meanings: first, the restraint of government tyranny, and second, the preservation of individual liberty. The rule of law, I argue, is a substantive conception. The rule of law as a substantive conception can be developed into three models. First, the minimum model argues that the main aspect of the rule of law is to protect human rights. Second, under the medium model, as a condition of social justice beyond the protection of human rights, the rule of law must also lead to social justice. Finally, the third model defends the maximum conception, which argues that the rule of law should fulfill the requirements of social welfare. Whichever model we prefer, it is, without doubt, that the rule of law has its minimum requirement—namely, the protection of human rights. Furthermore, in order

to strengthen this view, let me refer to one passage in the book titled *The Rule of Law and Human Rights: Principles and Definitions* published by the International Commission of Jurists in 1966.[33] It says that it is essential that men have courts as the last resort to rebel against tyranny and oppression, and human rights should be protected by the rule of law[34]. For me, the rule of law is the rule of human rights.

The rule of law and the World Court of Human rights are interdependent. First, the rule of law always needs an independent judiciary to defend its goodness, that is, something that restrains government tyranny and preserves individual liberty. Second, since the rule of law as a universal good calls for at least a substantive conception of the rule of human rights, the establishment of a World Court of Human Rights is necessary and legitimate, which supports the claim of the International Commission of Jurists that the World Court of Human Rights is considered to be necessary. This noble appeal has been a board consensus in the community of international jurists.

These are my thoughts on Professor Nowak's noble claim, but before I finish my brief remarks, I would like to offer two questions. The first question is a normative issue: Is a victim of human rights violation entitled to launch a complaint even though his or her state does not ratify the statute of the World Courts of Human Rights, and thereby refuses to accept the binding jurisdiction of the Court? The second question is a practical issue: How can Taiwan play an active role in this noble project? What is your suggestion to us?

Once again it has been a great pleasure for me to hear Professor Nowak's brilliant speech. Thank you for inspiring my thoughts, and also the audience for your kind attention.

IV. GENERAL DISCUSSIONS AND RESPONSE

PROFESSOR MANFRED NOWAK

Becoming Part of the Court

Thank you very much. The question and comments raised above were extremely well argued. I would try to meet the challenge, starting with Professor Mab Hwang's comments.

The idea of World Court of Human Right should be based on the treaty,

33. INT'L COMM'N OF JURISTS, THE RULE OF LAW AND HUMAN RIGHTS: PRINCIPLES AND DEFINITIONS (1966).

34. *Id.*

and the treaty needs to be ratified by states.[35] Otherwise, states have no obligations to follow the decisions made by the Court. I am not expecting that states that have seriously violated human rights would be the first ones to accept the jurisdiction of the Court. However, it has been a big success on the part of the UN that in this relatively short period of history—a little more than sixty years—we have had not only the two Covenants but also several special human rights treaties that were drafted and adopted with universal ratification. The Convention on the Rights of the Child has 195 state parties,[36] and the Convention on the Elimination of Discrimination Against Women has 189.[37] The Covenants have more than 160. In other words, there is not one country in the world, including North Korea, which would not have accepted at least two or three of the core treaties of the UN. In addition, there has existed some kind of monitoring mechanism on international human rights, to which states have subjected themselves, such as the Universal Periodic Review. While some claimed that the ICC was a utopia, a great many states have nonetheless ratified the statute of the ICC. It will indeed take some time for the World Court of Human Rights to be realized, but I am an optimist. Eventually, the more number of states ratifying such a treaty, the stronger the pressure gets on those states that have not yet ratified. They would not like to be outsiders.

Monitoring and Compliance under Current Institutions

I fully agree with Professor Mab Hwang's assessment of the Human Rights Council and that the way the People's Republic of China (PRC) dealt with the Universal Periodical Review (UPR) process may be a farce. If you would have just listened without knowing any human rights conditions there, you might have been mistaken that the PRC would be the best champion of human rights in the world because the states speaking in the UPR process all were saying that the PRC was excellent in terms of what they have done, and that there were no problems. When the states more critical of the human rights condition in China would like to speak, the time was already over. It was because those states were too late for the registration, and the representatives for the states befriended with China were already standing in

35. I would come to Professor Wen-Chen Chang's very interesting proposal on possibly a charter-based court later.

36. Chapter IV *11. Convention on the Rights of the Child*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Mar. 10, 2012).

37. Chapter IV *8. Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Mar. 10, 2012).

line at six o'clock in the morning waiting to sign in. I could give you many other examples like this.

Nevertheless, there is a new way of monitoring human rights compliance, from which one has to learn the lessons. For instance, in the Human Rights Council review today, this idea of signing in at six in the morning has been abolished. We should have different approaches to ensure that every state and NGO ambitious to speak has the opportunity to do so. In that sense, I agree with you that the Human Rights Council is not the best body to supervise and enforce the judgments of the World Court of Human Rights, but the Council can and has improved its work. To some extent, we should also be fair to the Human Rights Council, which, in the last year, became much less selective and more effective. For instance, it reacted very quickly to the massacres in Libya by expelling Libya from the Human Rights Council for the first time, and also encouraging the Security Council to take action. Similarly, in relation to Syria, the Human Rights Council has taken a strong stance.

Taiwan and the Eligibility

Would Taiwan be eligible for the World Court? Yes, definitely. On the one hand, Article 34 of our draft statute includes an all-states clause. All states are open to give their signatures to ratify. [38] "All states" includes not merely the members of the UN but also various other actors. In a footnote of our draft statute, we define the term "entities," by which—in response also to Professor Chang's thoughtful remarks—we mean that autonomous communities within states or federal states that exercise a certain degree of public powers should be enabled to accept the jurisdiction of the Court. This would definitely bring in states of the federal states or autonomous regions,[39] as well as Taiwan.

Jurisdiction and Complementarity

In response to Professor Jau-Yuan Hwang's remarks on the institutional relations of the World Court of Human Rights with regional or other courts, in the draft statute we have clarified that, procedurally, one cannot first go to the European Court of Human Rights or Inter-American Court and then to the World Court of Human Rights. If this would be allowed, the World Court would probably be dead from the beginning as it would not make sense and bring oppositions from honorable judges in the regional courts. Today, no

38. KOZMA ET AL., *supra* note 23, at 45 ("The present Statute is open for signature, ratification, accession and succession by all States.").

39. *Id.* at 82.

forum shopping is already part of international human rights law. Nor can one first go to the Human Rights Committee and then to the Committee Against Torture. For there is a general clause that if the same matter has already been subject to a decision under another comparable international body, then it is to be declared inadmissible by the Human Rights Committee or any other UN treaty bodies, and vise versa. Therefore, I think that it is clear that one has to make up one's mind, and if, for example, a German citizen complains about his right to fair trial, he would probably prefer to go the European Court of Human Rights because the jurisprudence of the court under Article 6 of the Convention[40] is much more highly developed than the jurisprudence of the Human Rights Committee under Article 14 of the ICCPR[41]. The European Court of Human Rights, however, has a very limited jurisdiction. No economic, social and cultural rights are protected under the European Convention. If Germany would accept the World Court of Human Rights and become a state body, and it like all the European states is a party to both Covenants, it would be better for German citizens claiming the right to food or the protection of adequate standard of living to go to the World Court of Human Rights as the European Court had already declared that social rights were inadmissible. Hence, I think one has to make up one's mind before choosing different forums for her or her rights redress.

More difficult is the question of the relationship of the World Court of Human Rights with the International Court of Justice. However, the International Court of Justice does not have any kind of jurisdiction in relation to individual complaints. Instead, it deals only with states and advisory opinions of the UN bodies. In the genocide case, we had litigation like Bosnia and Herzegovina against Serbia; the victims of genocide, however, can not go to the ICJ, and that is why in the draft statute we have

40. 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. The European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 222.

41. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://law.moj.gov.tw/eng/LawClass/LawContent.aspx?PCODE=Y0000041.

eliminated the idea of interstate complaints, so as to avoid competition with the ICJ. In reality, as with what Professor Hwang has mentioned in Article 9 of the Genocide Convention,[42] you would find in all of the core human rights treaties that if there is a dispute among states on the interpretation of the Convention Against Torture or the Convention on the Rights of the Child, you always can go to the ICJ. It is either because states exclude this by means of reservation, or because there would be specific monitoring bodies that stand in a much better position to supervise states' compliance with the treaties. And in that sense, I do not see any kind of competition between the future World Court of Human Rights and the ICJ. If there were an individual as a victim of genocide—hopefully there would be no more genocide in the future—and launched a complaint with the World Court of Human Rights, and at the same time there were also an interstate case before the ICJ, this would not be a disaster, and I think the two courts would mutually respect each other. Courts have been doing this for a long time. For example, there have been very well argued judgments of the Inter-American Court of Human Rights that took into account the jurisprudence of the ICJ and the jurisprudence of the ECtHR, and vice versa. It is good that we have differences in opinions. There would be sometimes different approaches, and I think it is good to learn from each other, and the best interpretation should finally succeed.

On the issue of complementarity, what Professor Hwang indicated is also my optimal solution. Many states call me utopian; I call myself a pragmatic realist. The draft statute is already a compromise. We had a provisional one that was much more far-reaching with the jurisdiction in relation to the UN. We had many discussions with others, and saw that there was no chance, and thus we made these compromises. For instance, I would also add that every state has to establish its own national human rights courts, which I think would be much better, because then you really ensure that all the treaties you have ratified should be incorporated directly into your domestic legal system. That would enhance the domestic protection of human rights. On the other hand, however, many states claim that they do not want to incorporate these human rights into their domestic judicial system because they adopt dualist systems. As a result, we gave up the kind of utopian ideas and made our compromises.

42. Convention on the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 ("Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.").

Jus Cogens and Standing

I think Professor Chang's idea is very interesting—that we should go much further, and do not even need treaties because *jus cogens* or customary international law is already binding and that we should create a World Court of Human Rights as a subsidiary body of the UN. Indeed, the General Assembly has the power to create various bodies like the Human Rights Council. The problem lies in that no one is really sure if *jus cogens* or customary international law exists, or what it is. If you ask an American scholar, they would say that the Universal Declaration of Human Rights is customary international law, whereas I would say definitely not. Rights such as the prohibition of torture and slavery have acquired this particular status, which might be achieved by changing the jurisdiction of the ICJ, because in principle, that is exactly what the ICJ should do—applying customary international law and *jus cogens*. Perhaps there could be another way of having an individual complaint to the ICJ.

With the standing to sue and the exhaustion of domestic legal remedy, I think if there is a functioning domestic system, why not exhaust it first? Only if the domestic remedies are ineffective can you resort to the World Court because we may hope the domestic systems to improve. But surely we like to avoid shortcomings with rigid procedural requirements. Hence, in our draft statute we include the wording that if the World Court finds that these domestic remedies are not effective, they can also dispense with this requirement.[43]

In regard with Taiwan, I already answered that Article 48 of the draft statute of the World Court include a all-states clause and also allows the subunits of federal states to participate. Unfortunately, I think that if a state has not ratified, individuals of that state cannot hold it accountable with the World Court. There might be an extraterritorial issue, but it is a different one. Right now, the draft statute only extends to states that have voluntarily subjected themselves to the jurisdiction of the Court and has also ratified the respective human rights treaties. That is the general principle unless we follow Professor Chang's novel suggestion in relation to *jus cogens*.

The Role of Taiwan

What could be the active role of Taiwan? That is a good question. I would be glad to include Taiwan in those who are lobbying for the World Court of Human Rights. In particular, it is significant that Taiwan is a country today that has ratified the two Covenants, but the ratification has not

43. KOZMA ET AL., *supra* note 23, at 35.

been formally accepted by the UN for the reasons you all know. Nevertheless, we hope people living in Taiwan to also benefit from the international protection of human rights. We would therefore very much welcome a World Court of Human Rights that accepts Taiwan as a state party as it might accept transnational corporations or federal states in other parts of the world.

PROFESSOR JIUNN-RONG YEH

Thank you very much, Professor Nowak, for your good will towards Taiwan. Now the discussion is open to the floor. I will try to make sure our audience the chance to talk.

Teresa Chu (Spokesman of Falun Dafa Human Rights Lawyers):

Professor Nowak, the distinguished speaker, I have a very short question about international justice. As a lawyer practitioner for many religions who files individual complaints against state perpetrators, I have three questions. Do you have any plan to help those individuals file collective suits in your draft statute of the World Court? Do you offer legal assistance to individuals with different languages and different cultural backgrounds? According to our discussion above, I think you can fully understand that for us this idea is quite new, so how can individuals understand those complicated mechanisms when they pursue a lawsuit with the World Court? I think those practical problems might need to be overcome.

The second issue is that, as our professors mentioned, the United States of America and China are not member states of the ICC, so do you foresee that the U.S. and China would be subject to the jurisdiction of the World Court? Finally, we have an ICC and an ICJ, and now we have a World Court, so what exactly is the relationship between these mechanisms? I think the individual complainant, the rights holder, would have a hard time understanding which court to go to, and I believe no state would educate their citizens how to file a complaint with these mechanisms as they do not like their citizens to pursue these remedies.

Yi-Li Lee (College of Law, National Taiwan University)

Professor Nowak, my question is, as we know, the United States is a leading country to oppose the ICC. Some officials would like to use the principles of separation of powers to criticize the ICC, arguing that the ICC has no other branch to check and balance with its power. In your opinion, would this be a critical question with the World Court of Human Rights?

Prof. Chih-kuang Wu (Department of Law, Fu Jen Catholic University)

I would like to know whether you agree that a successful court can hardly avoid the fate of being flooded with meaningless cases.

PROFESSOR MANFRED NOWAK

Accessibility

Thank you very much. In regard with collective suits, in the way we drafted it, the court may receive and examine complaints from any person, non-governmental organization, or group of individuals claiming to be the victim of a rights violation. That means also collective suits. I think it is important that those who put forth complaints must claim that they themselves have been suffering from a human rights violation.

With regard to legal assistance, first of all, you do not need a lawyer when you lodge a complaint with the World Court of Human Rights. This has been a principle and the practice in the regional human rights courts. Many applicants in Strasbourg for the ECtHR are represented by lawyers because they received legal assistance with the legal aid system. Also, if you win the case before the ECtHR, you always get, in addition to other reparations, all the cost of your lawyers reimbursed.

Access to regional human rights courts is not really the problem, and the same should be true for a World Court of Human Rights. I would even say that there should be a special fund for assisting states to improve their domestic human rights protection systems, and also have a special fund to assist victims who would like to bring complaints to the World Court of Human Rights. In addition, taken from the ICC statute, we also propose a victim witness protection system. It is very important because the victims often do not dare to bring an international complaint because they are afraid of reprisal.

The Role of the U.S. and China

It is true that the U.S. and China are not parties to the ICC. Some of the actions President Bush has taken in order to undermine the authority of the ICC were just outrageous, pressuring other states not to ratify. That has changed, however. First of all, now it is the Obama administration. And in relation to Sudan, for instance, it was the Security Council that reacted to the situation in Darfur indicting Al Bashir before the ICC.[44] Sudan has not

44. President of the Republic of Sudan since 16 October 1993. Mr. Al Bashir is allegedly

ratified the Rome Statute of the ICC, so the resolution of the Security Council was required. It was the first time the U.S. recognized that the ICC was in existence. The ICC's jurisdiction was further broadened with the situation in Libya this year. The resolution made by the Security Council was with the vote of the U.S., and China at least did not vote against it but merely abstained. Hence, the U.S. is no longer fighting a crusade against the ICC. I believe it will accept and ratify the statute of the ICC or of the World Court of Human Rights depending on future developments. As you know, the U.S. is among those states that always wish to tell everyone in the world what others should do, but when it comes to subjecting themselves to any kind of international monitoring, they say no. The U.S. probably has a worse record than any other country in the world in ratifying international treaties. It is one of the two states that have not ratified the International Convention on the Rights of the Child, the other being Somalia, which at least has a certain explanation because it does not have a government. The U.S. does have a government, but nonetheless, even the Obama administration has not ratified it as yet. The headquarters of the Organization of American States is in Washington. It was actually a creation by the U.S., but when it comes to ratifying the American Convention on Human Rights, however, it is one of the very few states in the whole hemisphere that has not ratified it, which means that you cannot bring a complaint against the U.S. in the Inter-American Court of Human Rights. Nor did the U.S. ratify the optional protocol of the ICCPR. By no means will the bringing of individual complaints against the U.S be possible. Hence, I am not very optimistic that the U.S. would be among the first ones to ratify a future statute of the World Court of Human Rights. However, you never know if there will be changes. I do not expect China to be among the first states that ratify the statute of the Court, either; however, China has ratified the Covenant on Economic, Social and Cultural Rights, the United Nations Convention Against Torture, and it is at least contemplating also to ratify the ICCPR. I think the pressure on states to become parties to universal human rights treaties is on the increase, and this even applies to states that are as powerful as the U.S. or China.

---

criminally responsible for ten counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator including: five counts of crimes against humanity: murder—Article 7(1)(a); extermination—Article 7(1)(b); forcible transfer—Article 7(1)(d); torture—Article 7(1)(f); and rape—Article 7(1)(g); two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities—Article 8(2)(e)(i); and pillaging—Article 8(2)(e)(v). Three counts of genocide: genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c). *Situations of Case ICC-02/05*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/ (last visited Mar. 10, 2012).

The World Court vis-à-vis the ICC and ICJ

As for the relationship between the ICC, ICJ and the World Court, as an individual, one can neither go to the ICC nor the ICJ. The ICJ is really the main UN court for interstate disputes on all kinds of international questions. Thus, whenever there is a dispute between two states as to whether or not one is violating treaty law or customary international law, it is the ICJ that decides. It might also relate to genocide or another human rights treaty, but primarily it is about the law of the sea and other issues totally different from human rights issues. The ICC is a criminal court, so it is not that individuals go to the ICC, but the other way around. The ICC is a classical criminal court, holding individuals accountable. In other words, it is the prosecutor who decides whether or not there should be an indictment in relation only to state parties, unless the Security Council transfers the situation to the ICC.[45] If the court agrees on the indictment, an international arrest warrant will be issued, and then there will be a criminal trial. It has a human rights implication, because crimes against humanity are nothing but the most gross and systematic human rights violations, and war crimes are human rights violations in times of armed conflicts, and genocide is the most serious human rights violation. However, it is not an individual complaint of the victim against the state; instead, it is a public prosecutor and the court that hold individual perpetrators accountable. In contrast, the World Court of Human Rights would be accepting the opposite. It is the individual that can bring a complaint against states or other non-state actors for their violation of International human rights law.

Caseload and Division of Labor with Other Courts

The ECtHR, as many people think, is a victim of its own success. They had to introduce further amendments to the European Convention for Human Rights in order to deal with their heavy caseload. Despite the time and effort it takes, they are managing well. The ECtHR decides in one year much more cases than all the UN treaty bodies have had since the 1970s combined, which would give you an idea of how much the UN complaint procedures are accepted. The Human Rights Committee, which is overall the most successful one, has altogether decided approximately two-thousand cases, about the number of binding judgments by the European Court in one year. I think it will take many years before the World Court is established, and the complaints will eventually come. If the World Court of Human Rights succeeds, then it should engender the positive effect that more and more

45. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

complaints are coming, by then, we should discuss what needs to be done. Professional judges should be dealing with these problems from the very beginning; if it is really becoming a major problem, then the national protection systems should be improved. Human rights protection is primarily state responsibility. Only when states really do not live up to their responsibilities can one as an alternative go to an international court.

Human Rights, Global Governance, and the Court

This brings me to the last question. We are not living in a world where human rights are protected all over, and many people say that they are getting worse and worse, in particular if you take the new huge challenges with globalization and the crises with the financial markets or the climate. From my point of view, the end of the Cold War created a paradigm shift and a new opportunity, and much was achieved in the 1990s. Notwithstanding genocides in Rwanda and other tragedies, it was a successful decade. The fact that human rights and its monitoring body play an important role in the UN peace missions is something unthinkable in the 1980s, to say nothing of other successes of the 1990s like the Millennium Development Goals, among others.

The last decade was a lost decade, however. It has to do with the 911 and aftermath. Not only has terrorism become a huge problem, but also anti-terrorism. Other developments, such as the power of the financial markets, also affect human rights. Having experienced another paradigm shift, we are now challenged by enormous human rights problems. The Arab Spring is, for me, comparable to the revolutions in Eastern Europe in 1989. It was a new wave of movements coming in the region with the worst human rights record. All of those countries are under dictatorships where torture and other forms of oppression are rampant and systematic. It is the people there who are saying that we have had enough of dictatorships and oppressions; we want freedom and we want human rights. It is not the Islamic fundamentalists, but instead the young people connected by the Internet with the help of the international community. Hopefully this will have further effects on people in the region, but it might also become a global movement. What you have now is the Occupy Wall Street movement and Global Action Days from Australia all the way to the United States. More and more people are demonstrating for human rights and against the power of the states, the banks and financial markets. They are demonstrating for human rights.

The second decade in the twenty-first century might become, again, a human rights decade, a time to realize that we need to take action. For instance, Tuvalu might be the first nation to disappear because of global warming. This is a global issue because it is not their fault; it is the fault of

all of us and, in particular, industrialized countries, which are creating global climate change. Thus, we should take up the responsibility. You cannot solve these problems on a national scale, so we need global governance based on our main values, that is, democracy, the rule of law, and human rights. That should be the basis for a new international order, but with effective global institutions independent from states. The ICC is the first of such institutions that is independent, and that it is the public prosecutor, instead of states, who decides whether or not somebody should be prosecuted.

The High Commissioner for Human Rights is another of these institutions, representing the conscience against major human rights violations. The World Court for Human Rights would be yet another one. The UN Charter had foreseen already that there would be a United Nations standing military. It would be much better if in the face of gross violations, the Security Council would authorize the use of force under Article 42. [46] With such a standing military, the Secretary General would not have to ask states "Would you be so kind as to please provide us with troops?" and then have them say "No" or "Yes, but not ground troops". That UN force would not be US soldiers or Pakistanis; they are the United Nations soldiers in order to implement the collective security system. That is what I mean by global governance, and I think that development in that direction would be coming to us much faster than most of us think today.

PROFESSOR JIUNN-RONG YEH

I am grateful to have found that those people who are pushing forward some great agenda are often equipped with certain optimism and marvelous ideas. Such attitude is indeed vital, especially in the area of human rights and has some implications for Taiwan, since the island is in need of optimism in order to move forward. It takes a lot of energy, however, to raise such critical issues as human rights. The law school is honored to cooperate with the Lei Chen Memorial Fund to host a forum like this. But this is not the end. Another lectures and discussions will be held on Friday and Saturday, and I hope all of you will continue to participate. Thank you for your participation today.

46. U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

REFERENCES

Briggs, H. W. (1948). Implementation of the proposed International Covenant on Human Rights. *The American Journal of International Law, 42*, 389-397.

Charter of the Association of Southeast Asian Nations, Nov. 20, 2007, 2 J.E. ASIA & INT'L L. 299 (2009), available at http://www.aseansec.org/publications/ASEAN-Charter.pdf.

Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

Convention on the Prevention and Punishment of the Crime of Genocide arts. VI, IX, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

G.A. Res. 60/251, ¶ 5, U.N. Doc. A/RES/60/251 (Mar. 15, 2006). Retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf

International Commission of Jurists. (1966). *The rule of law and human rights: Principles and definitions*. Geneva, Switzerland: Author.

International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171. Retrieved from http://law.moj.gov.tw/eng/LawClass/LawContent.aspx?PCODE=Y0000041

International Criminal Court. Situations of Case ICC-02/05. Retrieved from http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/

Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (1789).

Kozma, J., Nowak, M., & Scheinin, M. (2010). *A World Court of Human Rights: Consolidated statute and commentary*. Vienna, Austria: Neuer Wissenschaftlicher Verlag.

Nowak, M. (2007). The need for a World Court of Human Rights. *Human Rights Law Review, 7*(1), 251-259. doi: 10.1093/hrlr/ngl026

Nowak, M. (2008). *Protecting dignity: An agenda for human rights.* Retrieved from http://www.udhr60.ch/agenda/ENG-%20agenda_print.pdf

Nowak, M. (2009). Eight reasons why we need a World Court of Human Rights. In G. Alfredsson, J. Grimheden, B. G. Ramcharan, & A. Zayas (Eds.), *International human rights monitoring mechanisms* (2nd ed., pp. 697-706). Leiden, the Netherlands: Koninklijke Brill NV. doi: 10.1163/ej.9789004162365.i-728

Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

S.C. Res. 827, ¶ 7, U.N. Doc. S/RES/827 (May 25, 1993).

Schlutter, B. (2010). *Developments in customary international law*. Leiden, the Netherlands: Martinus Nijhoff.

Steiner, H. J., Alston, P., & Goodman, R. (2007). *International Human Rights in Context: Law, Politics, Morals* (3rd ed.). New York, NY: Oxford University Press.

The European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 222.

U.N. Charter arts. 41, 42, 68.

United Nations Human Rights. (2012, February 21). Universal Periodic Review. Retrieved from http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx

Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

世界人權法院的建立

Manfred Nowak

摘　要

臺大法律學院非常榮幸邀請到奧地利維也納大學法學院Manfred Nowak教授，同時也是前聯合國反酷刑調查官，帶來關於為何應建立世界人權法院的演講。Manfred Nowak教授從歷史的角度出發，解釋建立世界人權法院的理論基礎，並且提出八個需要建立世界人權法院的理由。同時，在回應黃默教授及其他與會學者的提問時，Manfred Nowak教授也討論了世界人權法院的管轄權問題，並對臺灣在世界人權法院可以扮演的角色提出建議。

Student Note

Locating the Value of Information Privacy in a Democratic Society: A Study of the Information Privacy Jurisprudence of Taiwan's Constitutional Court

Hsiang-Yang Hsieh*

ABSTRACT

This note reconsiders the relationship between information privacy and democracy, arguing that information privacy deserves constitutional protection because it not only ensures an individual's personal interests in his or her personal matters, but also promotes public values central to our democratic society. To make this argument, this note identifies three democratic values inherent to information privacy. First, information privacy limits the government's exercise of power. Second, information privacy secures democracy by providing citizens with certain procedural protections. Third, information privacy secures citizens' freedoms of thought, speech, and other intellectual activities.

This note also explores the information privacy jurisprudence of the Grand Justices of Taiwan's Judicial Yuan, Taiwan's Constitutional Court. Taking Taiwan's experience as an example, this note argues that in order for people to freely think, speak, deliberate, dissent, and participate in the democratic process, their information privacy must be protected. Without information privacy protection, people cannot enjoy a really free and democratic society. Information privacy is thus an important value for a democratic society.

Keywords: *Information Privacy, Democracy, Spatial Privacy, Communicative Privacy, Intellectual Privacy*

* J.S.D. Candidate, School of Law, Washington University in St. Louis. E-mail: hhsieh@wulaw.wustl.edu.

CONTENTS

I. INTRODUCTION

Information privacy has been considered one of the most important values in the human society.[1] While people may evaluate the importance of information privacy in different ways, this note attempts to locate its value in relation to the democratic society. Explaining why information privacy matters for democracy is essential to this note's argument that information privacy not merely secures one's autonomy to control personal information, but also advances public values that are vital to a democratic society. This argument is especially important when information privacy is balanced against other conflicting interests. Those who view privacy as just a personal interest usually subordinate privacy to other competing values. And, people who think in this way are all the more likely to regard information privacy and its nondisclosure protection as being in tension with democracy. This note, however, argues that information privacy is central to democracy in various contexts. Taking Taiwan's experience as an example, this note explores the mutually reinforcing relationship between information privacy and democracy, and reconsiders the significance of information privacy in a democratic society.

This note develops its arguments in six parts. Part I overviews the structure of this note and the problems discussed within it. Part II defines information privacy, and identifies information privacy's democratic value in three contexts. Drawing on these three kinds of democratic value of information privacy, Parts III through V examine the information privacy jurisprudence of Taiwan's Grand Justices of the Judicial Yuan—Taiwan's Constitutional Court. Part III addresses information privacy's democratic value in terms of its limiting of the government's exercise of power. This part discusses *J.Y. Interpretations Nos. 535*,[2] *585*,[3] and *631*.[4] Part IV discusses the "database problem" and information privacy's democratic value in providing procedural safeguards for data subjects. This part examines *J.Y. Interpretations Nos. 293*[5] and *603*.[6] Part V explores

1. For instance, U.S. Supreme Court Justice Brandeis in his dissent in *Olmstead v. United States* has stated that privacy, or the right to be let alone, is "the most comprehensive of rights and the right most valued by civilized men." *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

2. J.Y. Interpretation No. 535 (2001) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=535.

3. J.Y. Interpretation No. 585 (2004) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=585, .

4. J.Y. Interpretation No. 631 (2007) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=631.

5. J.Y. Interpretation No. 293 (1992) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=293.

6. J.Y. Interpretation No. 603 (2005) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=603.

information privacy's democratic value as a means of reinforcing free speech. This part considers *J.Y. Interpretation No. 689*,[7] and rethinks the relationship between information privacy and speech. Part VI concludes this note's arguments.

II. INFORMATION PRIVACY AND ITS RELATIONSHIP TO DEMOCRACY

For the purposes of this note, the right to information privacy means a legal protection for one's autonomy to control the flow of his or her information. This approach to understanding information privacy prevails in the information privacy law of the United States.[8] A paradigm of "information privacy as control" has been developed for decades. Under this paradigm, information privacy is seen as securing one's autonomy to control the disclosure and flow of his or her personal information.[9]

Information privacy is sometimes regarded as being in tension with democratic principles. Consider the dispute that led the Grand Justices to render *J.Y. Interpretation No. 293*. In 1992, the Taipei City Council requested that the Bank of Taipei, a bank owned by Taipei City, produce documents regarding the Bank's non-performing loans, overdue debts, and bad debts.[10] The City Council made this request because it suspected that the Bank had failed to collect some of its customers' overdue debts because of these customers' particular political backgrounds.[11] The Bank refused, contending that the Banking Act prohibited it from disclosing its customers' financial information. The City Council petitioned the Grand Justices for an *J.Y. Interpretation* as to whether the City Council would have authority to ask the city-owned Bank to deliver the requested materials for review. In *J.Y. Interpretation No. 293*, the Grand Justices replied in the affirmative, but only under certain conditions they set forth.[12]

---

7. J.Y. Interpretation No. 689 (2011) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=689.

8. U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 763 (1989) ("[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."). *See also* Michael D. Birnhack, *A Quest for a Theory of Privacy: Context and Control*, 51 JURIMETRICS J. 447, 449 (2011); Charles Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968) (emphasizing the notion of "control" when he defines privacy as "control over knowledge about oneself"—not only "control over the quantity of information abroad," but also control over "the quality of the knowledge" about oneself); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1205, 1266 (1998) (citing Clinton Administration's Information Infrastructure Task Force, Principles for Providing and Using Personal Information and stating that "control is at the heart of information privacy").

9. *See*, *e.g.*, ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) (stating that "[p]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others").

10. *J.Y. Interpretation No. 293*, (petition).

11. *Id*.

12. *Id*. (holding & reason).

This case illustrates the tension between information privacy and democracy. Out of respect for information privacy, the Bank should not disclose its customers' financial information without their consent. In the interest of democracy, however, under its supervisory authority, the City Council ought legitimately to able to review and ascertain whether the Bank had properly operated its business. As this case suggests, while information privacy often prefers nondisclosure, democratic principles usually favor transparency and disclosure. Some commentators stand on side of democracy, arguing that government and society should be open to citizens. Thomas I. Emerson and others have argued for an "open government," which means that the government should be transparent and accountable to its citizens.[13] Fred H. Cate has emphasized the importance of "the free flow of information."[14] In their view, openness, transparency, accountability, and the free flow of information are important to a self-governing democracy. Those who think in this way may consider information privacy and its nondisclosure protection as being in tension with democracy because they usually regard information privacy as an individual's desire to withhold information that he or she would not like to share with others.[15]

Information privacy, however, is not just a personal value; rather, it advances public values central to our democratic tradition. As Allan F. Westin has stated, information privacy "is an irreducibly critical element in the operations of individuals, groups, and government in a democratic system with a liberal culture."[16] As indicated below, information privacy not only secures the personal interests of each member in the society, but also benefits the society as a whole by restricting the government's unreasonable intrusions and by encouraging citizens to meaningfully engage in the

13. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 14-15 (arguing for a constitutional "right to know in obtaining information from governmental or private sources"). *See also* Wallace Parks, *Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 3 (1957) (arguing for an open government principle and stating "[t]he accessibility of information about the national executive and administrative agencies and their operations to those engaged in the collection and dissemination of factual and evaluative information to the various 'free publics' and to the Congress is required for our democratic system to function successfully").

14. Fred H. Cate, *Principles of Internet Privacy*, 32 CONN. L. REV. 877, 881-82 (2000) (suggesting that "the free flow of information" would be "the most important consideration when balancing restrictions on information" and indicating that "the free flow of information" "is not only enshrined in the First Amendment, but frankly in any form of democratic or market economy").

15. *See*, *e.g.*, Richard A. Posner, *An Economic Theory of Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 337-38 (Ferdinand D. Schoeman ed., 1984). Eugene Volokh also sees information privacy as an individual interest, stating that information privacy is one's "right to control your communication of personally identifiable information about me," namely "a right to have the government stop you from speaking about me." *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1050-51 (2000).

16. WESTIN, *supra* note 9, at 368.

democratic process.

Scholars have identified the democratic values inherent to information privacy in various contexts. Three of these are particularly important and therefore merit discussion here. First, information privacy is essential for democratic traditions because it limits the government's exercise of power. As Priscilla M. Ragan has noted, the constitutional guaranty against the government's unreasonable search and seizure helps the society to "establish the boundaries for the exercise of [the government's] power."[17] By keeping the government off our persons and out of our houses, correspondence, and private conversations, the constitutional protection for privacy preserves a private sphere that is essential for the development of a democratic society.

Second, information privacy secures democratic values by providing citizens with certain procedural protections. As Paul M. Schwartz has observed, information privacy's counterpart in Germany—the right and the principle of "informational self-determination"—suggests a procedural dimension of information privacy that ensures one's participation in the collection and usage of his or her personal information.[18] Schwartz argues for a notion of "privacy as participation," emphasizing information privacy's value to achieving deliberative autonomy and deliberative democracy.[19] This approach to information privacy is especially important when we consider that the government may access public and private databases that store private information about individuals.

Third, information privacy's democratic value can be found in its reinforcement of the freedoms of thought, speech, and other intellectual activities. Neil M. Richards has argued for "intellectual privacy," noting that the government's surveillance and censorship of individuals' intellectual activities could prevent them from thinking differently and generating new ideas.[20] Without privacy protection for individuals' "thinking, reading, and private discussion," he further explains, they cannot deliberate and

17. PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 225-27 (1995). Daniel J. Solove has also argued that the Constitution "protect[s] against random searches of the home because they pose a threat to us all. The value of protecting against such searches emerges from society's interest in avoiding such searches, not from any one particular individual's interest." *See* DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 99 (2008). Scott E. Sundby has offered another approach to understanding the constitutional protection against unreasonable searches and seizures, arguing that the Fourth Amendment, which keeps government officers out of people's "persons, houses, papers, and effects," can be viewed as a constitutional mechanism to maintain "a reciprocal trust between the government and its citizen." *See* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1777 (1994).

18. Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 555 (1995).

19. *Id. See also* Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1648-54 (1999).

20. Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 403-04 (2008).

participate in any democratic or social process.[21] Therefore, information privacy can be viewed as a precondition for a free and democratic society.

In the following parts this note will draw on the exposition of information privacy's values in these three contexts to examine the jurisprudence of information privacy of Taiwan's Constitutional Court.

III. INFORMATION PRIVACY'S DEMOCRATIC VALUE IN LIMITING THE GOVERNMENT'S EXERCISE OF POWER

A. *J.Y. Interpretations Nos. 535, 585, and 631*

J.Y. Interpretation No. 535 involves a challenge to the constitutionality of the police's stop and inspection practices. Under the then-effective Police Service Act, the police were able to, without a warrant, (1) stop a person in a public place, and then frisk, inspect, and even question him; (2) enter into a private place, and then inspect the place and persons therein.[22] Noting that this practice has interfered with individuals' privacy and other fundamental rights, the Grand Justices held that the practice is constitutional only if it is conducted pursuant to a law which specifically prescribes its requirements and procedures as well as the remedies for unlawful inspections. The Grand Justices further stated that when inspecting places, the police's authority is limited to those places where danger exists or where a reasonable reason indicates that danger may exist. In particular, if the inspected place is a private residence, such a place should be accorded the same protection as a home. When inspecting a person, the police should not exceed the degree necessary for the given circumstances. The Grand Justices also laid down several procedural rules for police inspections, including the requirements that the police should show the checked person their identification, state the purpose of each inspection, and should not take the inspected person to the police station except in the case of some limited exceptions.

Although the Grand Justices mentioned the right to privacy in *J.Y. Interpretation No. 535*, they did not further explain the nature of this right or state on what basis it was grounded. Three years later, in *J.Y. Interpretation No. 585*, the Grand Justices had an opportunity to revisit this "unfinished business." At issue was the constitutionality of the Act of the Special Committee on Investigation of the March 19 Shooting Event. The legislature passed this Act to establish a special agency to investigate a shooting event,

21. *Id.* at 392, 406 (arguing that intellectual privacy is essential to maintain an open society that tolerate people bearing all kind of opinions).

22. For instance, the petitioner of this interpretation alleged that the police stopped him when he was walking on the street at night. After refusing to show identification to the police, he was frisked and questioned by the police. *See* J.Y. Interpretation No. 535 (2001) (Taiwan) (petition), *available at* http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/535.pdf.

which happened one day before the 2004 presidential election. The Act set off a fierce constitutional debate because it attempted to delegate to the Commission the broad authority and power to conduct the investigation.

Among the Act's various controversial provisions, the Grand Justices held unconstitutional one provision of the Act that granted the Committee an unlimited interrogatory authority. Under this provision, the Commissioners could pose to the interrogated any question, and the interrogated could not refuse to answer even if that testimony might infringe upon his, her, or another's privacy. The Grand Justices held that this provision infringed on individuals' constitutional right to privacy. According to the Grand Justices, though not explicitly prescribed in the Constitution, the right to privacy deserves constitutional protection because "it is indispensible for human dignity and individuality." They furthermore asserted that, "the right to privacy not only preserves the integrity of personality, but also secures one's personal private sphere free from others' intrusions and one's autonomy to control personal information."[23] The Grand Justices grounded this right as an unenumerated fundamental right protected by Article 22 of the Constitution.

Three years later in 2007, in *J.Y. Interpretation No. 631* the Grand Justices held unconstitutional parts of the Communication Protection and Monitoring Act, which permitted prosecutors to issue a writ of communication monitoring and to conduct warrantless wiretapping. The Grand Justices based this decision mostly on Article 12 of the Constitution, holding that this Article protects individuals' privacy in private communications. Recognizing wiretapping as a form of government interference in fundamental rights, which is much more intrusive than searches and seizures, the Grand Justices held that under Article 12, a writ of communication monitoring should be issued by an impartial and independent judge.

B. *Spatial Privacy, Communicative Privacy, and Information Privacy*

These three interpretations relate to individuals' information privacy defined as the autonomy to control their private information. In each case, the government's purpose when intruding into people's private lives is to gather information from them. When stopping a person on the street, the police asked for the person's identification information. When interrogating a witness, the Special Committee looked for information which would help it "seek the truth" of the shooting event. When monitoring a person's phone conversations, the prosecutor expected to obtain incriminating evidence

23. *Id.* (reasoning sec. 5).

against him. The constitutional protection that the Grand Justices identified in each of these cases ensures people's autonomy to control the flow of their personal information against the government's arbitrary intrusions. Under such constitutional protection, the government could not obtain individuals' private information without complying with the Constitution's requirements.

These interpretations also illustrate the importance of information privacy in limiting the government's exercise of power, thereby securing a private sphere for individuals free from unwanted interference. For instance, the Grand Justices in *J.Y. Interpretation No. 535* attempted to set forth rules for the government as to when, for which purpose, and how it could intrude into a person's private life. In particular, *J.Y. Interpretation No. 535* delineated a concept of "spatial privacy" by emphasizing the significance of the home and other private residences.

Respect for the home's sanctity can be traced back to James Otis's argument in 1761. As a lawyer in colonial Massachusetts who argued against the British authorities' aggressive search and seizure practices, he famously contended, "[a] man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."[24] The U.S. Supreme Court incorporated Otis's idea that "a man's house is his castle" into its Fourth Amendment[25] jurisprudence in *Silverman v. United States*.[26] The *Silverman* Court stated that the Fourth Amendment secures "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[27]

Spatial privacy is important for democracy because it enables individuals to retreat from their public lives into a private sphere.[28] "A room of one's own" enables us to isolate ourselves from the public scrutiny in order to think freely, to deliberate and form political judgments, and to generate ideas that are new, unpopular, or even offensive to the society.[29] When people are aware that the government or others are watching or

---

24. James Otis, *Notes of the Argument of Counsel in the Cause of Writs of Assistance, and of the Speech of James Otis*, *in* 2 THE WORKS OF JOHN ADAMS 521, 524-25 (Charles Francis Adams ed., 1856).

25. The Fourth Amendment to the U.S. Constitution provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

26. Silverman v. United States, 365 U.S. 505 (1961).

27. *Id.* at 511.

28. WESTIN, *supra* note 9, at 24 ("Personal retreats for securing perspective and critical judgment are also significant for democratic life.").

29. VIRGINIA WOOLF, A ROOM OF ONE'S OWN 2 (1929) ("[A] woman must have money and a room for her own if she is to write fiction . . . ."). *See also* Richards, *supra* note 20, at 413; Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 450 (1980) (arguing that privacy serves as a shelter for people with unfavorable opinions and thus enhance their willingness to "declare their unpopular views in public"). *Cf.* James Griffin, *The Human Right to Privacy*, 44 SAN DIEGO L. REV. 697, 715 (2007).

observing them, they are unlikely to insist on their own beliefs. In such situations, most people will likely change their minds to conform to the watcher's views.

The work of Henry David Thoreau suggests that everyone needs a "Walden Pond" to develop new ideas.[30] In his book *Walden*, Thoreau described how much he enjoyed the solitude at Walden Pond, a place away from the usual lives of most people.[31] Only in a place where we can freely reject society's prevailing views and fully embrace our own beliefs may we generate new and different ideas that contribute to deliberate judgments and the diversity of ideas.

J.Y. Interpretation No. 631 involves privacy in a different sense, that is, communicative privacy. The Grand Justices in *J.Y. Interpretation No. 631* stated that Article 12 of the Constitution secures people's privacy in private communications. We usually expect more privacy protection for our communications in letters, telephone calls, and private conversations. As to letters and other private written correspondences, the U.S. Supreme Court in *Ex parte Jackson* held that sealed letters could not be opened and read by the government without a warrant.[32] As to telephone conversations, the Court in *Katz v. United States* held that the government's overhearing of individuals' telephone conversations constituted a search within the meaning of the Fourth Amendment.[33]

The constitutional protection of private communications is central to democracy. This is because the success of a democracy requires the deliberation and free exchange of ideas on public issues by its citizens. Many people (especially political dissenters) might decline to express their thoughts to others when they are aware that the government might overhear their conversations. In addition, the lack of protection for information privacy may prevent them from sharing ideas, especially when they fear that the ideas in their minds are not ready to be submitted to public criticism.[34] While information privacy is often considered to be one's claim to withhold his or her private information, it can also be understood as one's desire to disclose information to the persons he or she trusts, believing that they will

30. HENRY DAVID THOREAU, *Where I Lived, What I Lived for*, *in* WALDEN 88 (Mercer Univ. ed., 2011) (1854) ("I went to the woods because I wished to live deliberately, to front only the essential facts of life, and see if I could not learn what it had to teach, and not, when I came to die, discover that I had not lived."). *See also* NEIL M. RICHARDS, INTELLECTUAL PRIVACY (forthcoming 2014) (manuscript Ch. 6, at 2) (on file with author).

31. THOREAU, *supra* note 30, at 128.

32. *Ex parte* Jackson, 96 U.S. 727, 733 (1877) ("[T]heir papers, thus closed against inspection, . . . can only be opened and examined under like warrant . . . .").

33. Katz v. United States, 389 U.S. 347, 353 (1967) ("[Government's] activities in electronically listening to and recording [telephone conversations] . . . violated the privacy upon [the petitioner] and thus constituted a 'search and seizure' . . . .").

34. Richards, *supra* note 20, at 424.

keep it in secret.[35] Thinking of information privacy in this way suggests that information privacy encourages individuals to share with others ideas, questions, or conclusions in their minds, while keeping their communications in secret.[36] In this sense, information privacy provides protection for private discussions and exchanges of ideas, in the context of which different thoughts and conclusions usually occur.

Communicative privacy is essential for democracy because the government's surveillance of its citizens has posed a significant threat to free communications. This is why U.S. Supreme Court Justice Brandeis has argued for "a right to be let alone" against the government's wiretapping practice. In his famous dissent in *Olmstead v. United States*, he argued that government wiretapping should be considered as a search under the Fourth Amendment.[37] Emphasizing the significance of the constitutional protection of one's beliefs, thoughts, emotions and sensations, Justice Brandeis argued for a "right to be let alone" against "every unjustifiable intrusion by the government upon the privacy of the individual."[38] Justice Brandeis's argument highlights the importance of constitutional protection of private conversations in which the exchange of ideas usually takes places.

Free discussion is a core value of the freedom of the speech. In *On Liberty*, John Stuart Mill explained why free discussion (the "freedom of the expression of opinion") is important.[39] According to Mill, the freedom of discussion serves as the best way to prevent true beliefs from "becoming a mere formal profession," which is "in danger of being lost," because, without the freedom of discussion, people might hold true beliefs "in the manner of prejudice, with little comprehension or feeling of its rational grounds."[40] When understood in this way, communicative privacy demonstrates its democratic value in encouraging the free exchange of ideas, which reflect people's thoughts on matters of politics, religion, science, the arts, or intimacy.

At the core of the privacy issues presented in *J.Y. Interpretation No. 585* is the question of whether the government may achieve its goals by all means regardless of whether these may interfere with people's fundamental rights and freedoms. We can find the answer to this question by reading *J.Y. Interpretations Nos. 535* (spatial privacy) and *631* (communicative privacy) together, which reveal the value privacy holds in relation to the limitation of the government's exercise of power. The Constitution and the democratic

35. WESTIN, *supra* note 9, at 31.
36. Richards, *supra* note 20, at 421-22.
37. Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).
38. *Id*. at 478.
39. JOHN STUART MILL, ON LIBERTY 33, 69 (J. Gary & G.W. Smith eds.,1991) (1859).
40. *Id.* at 69-70.

values it supports never tolerate the unlimited exercise of government power. Undoubtedly, the government has a legitimate interest in exercising its policing power in order to maintain public order and security. Information privacy, however, along with other fundamental rights, constitutes a constitutional constraint upon the government's policing power. In light of this, *J.Y. Interpretation No. 585* correctly confirmed that granting a government agency a broad, unlimited interrogatory authority violated this constitutional constraint.

IV. THE DATABASE PROBLEM AND THE PROCEDURAL DIMENSION OF INFORMATION PRIVACY

A. *J.Y. Interpretations Nos. 293 and 603*

As indicated above, *J.Y. Interpretation No. 293* revolved around the controversy as to whether the City Council could request that a city-owned Bank deliver to it documents pertaining to customers' information.[41] Although the Bank contended that the Banking Act prohibited it from disclosing its customers' financial information, the Grand Justices held that the City Council had the authority to make such a request in order to perform its duty to supervise and investigate the city-owned Bank. Nevertheless, the Grand Justices set forth conditions for the Bank's disclosure, including the requirements that the City Council must pass a resolution to request the Bank to produce the requested materials; that the Bank must remove customers' names from the documents; and that the City Council must review the documents in a nonpublic session.[42] *J.Y. Interpretation No. 293* was the first time the Grand Justices mentioned the term "the right to privacy." The Grand Justices, however, did not further elaborate as to what the right is, merely stating in passing that the Banking Act's nondisclosure provision attempted to secure bank customers' right to privacy in their financial records.

J.Y. Interpretation No. 603 is a landmark case. At dispute was the Household Registration Act's fingerprint requirement, under which citizens who are fourteen or older must be fingerprinted before being issued a new ID card. The Grand Justices held this requirement unconstitutional because it violated people's constitutional right to information privacy. The Grand Justices stated that the Constitution secures a fundamental right to information privacy, which is essential to one's dignity and integrity of personality. In the reasoning, the Grand Justices further explained that the

41. *See* J.Y. Interpretation No. 293 (1992) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=293.

42. *Id.* (holding & reasoning)..

constitutional right to information privacy secures one's right to determine whether, to what extent, when, to whom, and in which manner to disclose his or her personal information. This right, the Grand Justices added, also guarantees one's right to control and to be informed of the usage of his or her personal information. If his information is inaccurately recorded, according to the Grand Justices, the individual must have a right to correct it. Recognizing that the right to information privacy was not absolute, the Grand Justices held that the legislature may enact a statute to limit this right if this is necessary to accomplish a legitimate purpose. But the legislature must provide specific purposes for the limitation. Adequate data security measures would be required as well. And, if the government attempts to collect individuals' sensitive information, a higher level of legitimacy would be required in order for such collection to pass judicial scrutiny.[43]

The Grand Justices therefore struck down the fingerprint requirement. Noting that the Household Registration Act did not stipulate any purpose for collecting fingerprints, the Grand Justices held that the Act was inconsistent with the constitutional guarantee of information privacy.[44] Defending the Act's constitutionality, the Ministry of Interior contended that the fingerprint requirement did achieve several public interests, such as preventing false claims of ID cards and identifying roadside unconscious patients.[45] The Grand Justices, however, rejected these defenses altogether, considering them insufficient to legitimize the government's compulsory collection of fingerprints. In the Grand Justices' view, fingerprints deserve more protection than other forms of personal data because of their greater sensitivity. Due to the uniqueness and immutability of fingerprints, the Grand Justices explained, once stored in a database and connected to one's identification, fingerprints would enable the government to access one's personal data profile by cross-matching the fingerprints with other personal information.[46]

B. *The Database Problem*

J.Y. Interpretations Nos. 293 and *603* both involve the database problem—an information privacy concern that arises in the context of databases. *J.Y. Interpretation No. 603* involves the question of whether the government may compulsorily collect and store people's fingerprints in a

43. J.Y. Interpretation No. 603 (2005) (Taiwan), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=603.

44. *Id.*

45. *Id.* (summary of the MOI's arguments), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=603.

46. *Id.* (reasoning).

database. *J.Y. Interpretation No. 293,* on the other hand, is concerned with whether the government may access a publicly owned bank's database containing customers' financial information.

The advent of this database problem can be attributed to the expansion of governments in modern times. The twentieth century witnessed an expansion of the modern state's roles, powers, and functions. As a modern state assumes an active role and takes more responsibility for the wellbeing of its citizens, it must gather more information from its citizens.[47] Governmental agencies collect private information for various purposes. Advances in information technology have enabled the government to collect and process information more efficiently; in particular, new and improved technologies have made it possible to combine all data stored in various databases in various forms into a centralized database. This means, for instance, that when a person submits his income data to a tax-collecting agency, it is possible that this data may be disseminated and stored by another agency for subsequent use.

The U.S. Supreme Court in *Whalen v. Roe* has recognized the database problem and "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files."[48] In many respects, as the Court noted, government administration relies on "the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed."[49]

The Grand Justices in *J.Y. Interpretation No. 603* expressed a similar concern related to public databases, and declared that the government could collect and store people's fingerprints in a large-scale database only in the pursuit of certain compelling public interests.[50]

Similarly, private businesses also engage in widespread collection and storage of individuals' personal information. In our everyday lives, we constantly provide personal information to banks, telephone companies, search engines, social network websites, and online stores. These entities keep our records in databases to know us better. Yet, these detailed personal data profiles have become a sellable product on the market,[51] and while most companies issue privacy policies under which our data's confidentiality ought to be respected, this situation still gives rise to some privacy concerns. Among them, data insecurity is most salient, especially after reports of

47. *See*, *e.g.*, Paul M. Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 HASTINGS L.J. 1321, 1331-33 (1992).

48. Whalen v. Roe, 429 U.S. 589, 605 (1977).

49. *Id*.

50. *J.Y. Interpretation No. 603*, (holding).

51. *See*, *e.g.*, Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1156-60 (2005).

several instances of high-profile data leakage. The problem of scam organizations has demonstrated just how worrisome the issue of data insecurity is. In order to fool their victims, members of these organizations usually begin a scam phone call by showing that they already know something private or specific about the victim, and this information was acquired from certain private databases.

We expect the government to regulate private databases and their commercial trading of personal data. Nonetheless, we should not overlook privacy violations arising from the government's access to private databases. The case of *Gonzales v. Google, Inc*. is a good example of this concern.[52] In 2006, the U.S. government requested that Google and other search engines provide the government access to records of their users' search terms and other records.[53] The records that the government obtained from search engine companies not only indicated which websites a user visited and which terms were searched, but also revealed the user's reading habits, intellectual activities, lifestyles, and details concerning other intimate matters. With such access to private databases like search engines or social network websites, the government may easily engage in surveillance of our private activities, online or offline.

C. *The Procedural Dimension of Information Privacy*

The "information privacy as control" paradigm, however, is insufficient for dealing with the database problem. This is because the control approach focuses more on the autonomy question: whether data subjects have consented to the disclosure of their data to the databanks. Data subjects' autonomy, however, is often not fully respected when the subjects provide their information to a database. For instance, when taxpayers file their tax returns with the authorities, they supply a lot of personal information. The government, however, has never attempted to seek consent from taxpayers. In such situations, "information privacy as control" makes little sense

52. Gonzales v. Google, Inc., 234 F.R.D. 674 (N.D. Ca. 2006).

53. The U.S. Department of Justice (DOJ) made such a request because it was preparing to respond to a challenge to the constitutionality of the Child Online Protection Act (COPA) in another pending case, *ACLU v. Gonzales*. *See* Danny Sullivan, *Bush Administration Demands Search Data; Google Says No; AOL, MSN & Yahoo Said Yes*, SEARCH ENGINE WATCH (Jan. 19, 2006), http://searchenginewatch.com/article/2059843/Bush-Administration-Demands-Search-Data-Google-Says-No-AOL-MSN-Yahoo-Said-Yes; *ACLU v. Gonzales,* 478 F. Supp. 2d 775, 778 (E.D. Pa. 2007). To collect information regarding search engine users' search queries, the DOJ served Google, and other search engines, subpoenas which required Google to produce the text of users' search queries. The DOJ hoped that the requested materials could assist the government in defending the COPA, by demonstrating that the statutory restrictions in COPA effectively protect "minors from exposure to harmful materials on the Internet." *See id.* at 679.

because people do not have a meaningful choice at all.[54]

The case of *J.Y. Interpretation No. 293* is another good example illustrating aspects of the database problem. The customers of the city-owned Bank in the case of *J.Y. Interpretation No. 293*, could hardly have conceived of the possibility that the City Council would request that the Bank disclose their information. Instead, they may reasonably expect that the Bank would keep their financial records confidential. In the database context, thus, to address whether each data collector respects each data subject's autonomy might provide less insight for resolving the database problem.

To address this concern, it is helpful to consider information privacy's counterpart in Germany—the right and principle of "informational self-determination." In its 1983 *Census Act Case*, the Federal Constitutional Court of Germany developed a fundamental right of informational self-determination.[55] The Court grounded this right in its jurisprudence of "free development of personality." Noting that data processing technology may threatened one's integrity of personality, the Court found that Article 2 (1) of the Basic Law, in conjunction with Article 1(1),[56] protects a right of informational self-determination, which assures an individual's right to determine whether, when, and how to disclose his or her private information to others.[57]

Emphasizing the significance of informational self-determination, the Court stated that if an individual does not know which information about him or her is known by others in social life, his or her capacity for self-determination will be greatly inhibited. Such a lack of information protection, the Court added, would not only prevent an individual from developing his personality, but would also harm society as a whole. This is because, the Court explained, self-determination is a precondition for a free society, and a free, democratic society is built upon the premise that its citizens can meaningfully act and participate in social processes.[58]

---

54. Fred H. Cate, *Protecting Privacy in Health Research: The Limits of Individual Choice*, 98 CAL. L. REV. 1765, 1776-77 (2010).

55. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (Ger.) [hereinafter *Census Act*]. *See also* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 323-25 (2d ed. 1997).

56. Article 2(2) of the Basic Law provides in part, "[e]very person shall have the right to life and physical integrity." Article 1(1) of the Basic Law provides that "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority". The English translation of the Basic Law, *see* BASIC LAW FOR THE REPUBLIC OF GERMANY 15 (Christian Tomuschat & David P. Currieet trans., German Bundestag 2010), *available at* https://www.btg-bestellservice.de/pdf/80201000.pdf.

57. KOMMERS, *supra* note 55, at 324-25 ("Mit dem Recht auf informationelle Selbstbestimmung wären eine Gesellschaftsordnung und eine diese ermöglichende Rechtsordnung nicht vereinbar, in der Bürger nicht mehr wissen können, wer was wann und bei welcher Gelegenheit über sie weiß.").

58. *Id.*

The Court has further developed the principle of informational self-determination. Under this principle, the government may collect individuals' information only pursuant to a law that specifies the purposes and conditions of this information collection practice. Any collection of individual information which may interfere with individuals' informational self-determination must serve as a means necessary to protect public interests and must be consistent with all constitutional principles, such as the principle of proportionality. In addition, the informational self-determination principle requires the government to adopt adequate organizational and procedural measures to ensure that citizens are protected from unwanted invasions of privacy.[59]

The *Census Act* Case suggests a procedural dimension of information privacy. According to the *Census Act* Court, informational self-determination requires that the government or a database ensure that each data subject is informed of which information about him or her is collected and stored in the database. In addition, the government should set forth procedural mechanisms to encourage data subjects to participate in the processing or usage of their information. Informational self-determination also requires some organizational measures to oversee data security within the processing and usage of personal data.

J.Y. Interpretations Nos. 293 and *603* involve this procedural dimension of information privacy. Although the Grand Justices in *J.Y. Interpretation No. 293* might not have articulated a clear notion of information privacy, they implied their perception of data protection by setting forth some procedural requirements. Instead of giving substantive protection—which would have forbid disclosure or required the Bank to seek consent from customers—the Grand Justices set forth procedural requirements under which (1) the City Council must pass a resolution to request the Bank to produce the documents; (2) the Bank should remove the customers' names from the requested materials; and (3) the City Council must review the materials in a nonpublic session.

We can also find procedural protections for information privacy in *J.Y. Interpretations No. 603*. In fact, the rationale and structure of reasoning in *J.Y. Interpretation No. 603* appear to be similar to those of Germany's *Census Act* case. In particular, like Germany's principle of informational self-determination, *J.Y. Interpretation No. 603* also attempted to develop a general data protection principle. For instance, the Grand Justices said that each data subject should have the right to be informed of the collection and usage of his or her information, and when information has been inaccurately recorded, he or she has the right to correct it.

59. *Id.*

These procedural protections are more about procedural rules and organizational design. They thus move the focus of data protection law away from the "information privacy as control" paradigm. As indicated above, Paul M. Schwartz has argued for a "privacy as participation" approach to understanding data protection and information privacy. Under Schwartz's approach, information privacy law should be restructured to include: (1) a statutory definition of databases' obligations as to personal data usage; (2) "the maintenance of transparent processing systems;" (3) a declaration of data subjects' substantive and procedural rights; and (4) an effective oversight mechanism.[60] By refining data protection law in this way, he purports to secure the individual's capacity for decision-making. Schwartz argues that data protection law "must structure the use of personal information so that individuals will be free from state [surveillance] or community intimidation that would destroy their involvement in the democratic life of the community."[61]

Professor Schwartz's argument reminds us of information privacy's democratic value in securing "deliberative autonomy" and "deliberative democracy." Under the theory of deliberative democracy, an ideal democracy depends on its citizens' deliberation and discussion of public issues, which requires the citizens' capacity for "deliberating and judging the justice of basic institutions and social policies, as well as the common good."[62] Equally important, an ideal democracy depends on its citizens' "deliberative autonomy," which demands that citizens possess the capacity for "deliberating about and deciding how to live their own lives."[63]

The data privacy problem, however, has become a threat to individuals' capacity for living their private lives and forming their own judgments. Cases like the *Census Act* decision and *J.Y. Interpretation No. 603* have shown that the government is eager to establish a vast database to store people's personal information. While we may find ourselves displeased about this common practice, it is hardly for us to deny the government's "need" to collect and store our information. People who argue for the government practice of creating and maintaining databases usually point out that systems of public records and databases improve the policymaker's capacity for making good decisions and thus promote the general welfare.[64] This is why we need procedural protections for our privacy. Without information privacy protections against these practices, individuals might

60. Schwartz, *supra* note 18, at 563-65.

61. *Id.* at 561.

62. JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 3, 39 (2006).

63. *Id.* at 3.

64. HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 205 (2010).

lose the capacity for making autonomous, independent decisions. As Spiros Simitis has warned, the government's data collection and processing activities "increasingly appears as the ideal means to adapt an individual to a predetermined, standardized behavior that aims at the highest possible degree of compliance with the model [citizen]."[65] In light of this concern, many scholars view information privacy as "prerequisite to the capacity to participate in social discourse." [66] By applying restrictions to the government's data processing practices and encouraging individuals to participate in social processes, information privacy and its procedural protection contribute to a social environment that favors citizen participation and deliberation.

V. THE DEMOCRATIC VALUE OF INFORMATION PRIVACY IN REINFORCING FREE SPEECH

A. *J.Y. Interpretation No. 689*

In *J.Y. Interpretation No. 689,* the Grand Justices grappled with two competing values: privacy and freedom of the press. At issue was the constitutionality of a provision in the Social Order Maintenance Act, which authorizes the police to fine a person who stalks another without justifiable cause and fails to take advice and stop. The petitioner is a journalist who was fined under this provision because he followed celebrities on the street in order to gather information for a news story. He challenged this provision's constitutionality, alleging that it restricted his constitutional right of newsgathering, which is guaranteed as part of freedom of the press.

The Grand Justices upheld the Act's stalking provision. Nonetheless, the Grand Justices said that when a journalist is following and observing a person for reporting a matter of a legitimate concern to public and his or her means of gathering information are not offensive to society, the journalist's stalking cannot be considered as unjustifiable within the meaning of the Act. By so doing, the Grand Justices attempted to resolve a conflict between freedom of the press and privacy.

The matters at hand in *J.Y. Interpretation No. 689* is different from the Grand Justices' previous privacy cases. Here, the privacy violation arose from a private person's interference with the victim's "right to be let alone," not from a state action. Thus, the Grand Justices further articulated the

65. Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 733 (1987).

66. *Id*. at 734. *See also* Schwartz, *supra* note 19, at 1648-58; Danielle Keats Citron, *Fulfilling Government 2.0's Promise with Robust Privacy Protections*, 78 GEO. WASH. L. REV. 822, 842-43 (2010); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423-28 (2000).

meaning and protection of privacy in the reasoning. First, the Grand Justices affirmed the right to privacy as a fundamental right protected by the Constitution. Due to the significance of privacy for human dignity and integrity of personality, the Grand Justices declared, the government has an obligation to prevent violations to privacy, regardless of whether that violation is from the government or a private person.

Second, the Grand Justices found that an individual may not dispossess him or her of this privacy, for instance, simply because he or she is in a public place. Noting that advanced technology has made it easier to monitor others, the Grand Justices formulated a notion of privacy that preserves a private sphere for individuals where they are free from unwanted surveillance. According to the Grand Justices, individuals can still enjoy privacy protection even if they are in public places, as long as they have exhibited an expectation of privacy, and this expectation is regarded as reasonable by society.[67]

B. *The Relationship between Information Privacy and Speech*

J.Y. Interpretation No. 689 illustrates the inherent tension between the nondisclosure protections of information privacy and the values of a free press and free speech. As indicated above, the Grand Justices attempted to strike a balance between these two competing values. By doing so, they refined the boundary between the public and private spheres, and afforded qualified protection to people who are in public areas but have a reasonable expectation of privacy. The Grand Justices' public/private dichotomy can be traced back to *J.Y. Interpretations Nos. 535* and *631*, in which they preserved a private sphere for citizens free from unwanted interference. Although this dichotomy has encountered criticism for its inability to clearly delineate the scope of the privacy right,[68] the dichotomy appears to be especially helpful in cases involving the conflict between privacy and speech. Actually, the idea that the public/private dichotomy would help to balance privacy against free speech came from Warren and Brandeis's 1980 article, "*The Right to Privacy.*"[69] They distinguished public from private, limiting private protection to injuries caused by a speaker's intrusion or disclosure of private

67. The Grand Justices might adopt this approach to privacy by following U.S. Supreme Court Justice Harlan's famous test for the Fourth Amendment privacy right: in order for a defendant to invoke the protection under the Fourth Amendment, he must, first, "have exhibited an actual (subjective) expectation of privacy" and second, the expectation should be "one that society is prepared to recognize as 'reasonable'." Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

68. *See, e.g.*, NISSENBAUM, *supra* note 64, at 113-25.

69. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-16 (1890).

matters.[70]

The tensions between information privacy and speech were recognized when privacy was thus "invented" by Warren and Brandeis. This, however, is not the whole picture of the relationship between the two competing values. Information privacy protection reinforces free speech values in some significant but often neglected ways. As discussed above, Neil M. Richards has explained how information privacy protection for our intellectual activities supports free speech values. He notes, "[i]n order to speak, it is necessary to have something to say, and the development of ideas and beliefs often takes place best in solitary contemplation or collaboration with a few trusted confidants."[71] He thus argues for a theory of "intellectual privacy," which articulates a privacy right protecting one's thoughts, reading lists and habits, private communications, and a private sphere where ideas are generated and developed.[72]

Professor Richards's arguments reflect the democratic value in information privacy's supporting of free speech. We may locate the ways in which privacy supports speech in many contexts. For instance, as *J.Y. Interpretation No. 535* has suggested, information privacy protection against unreasonable searches and seizures implies a notion of spatial privacy, which preserves a private sphere where individuals may embrace their beliefs without worrying about public scrutiny. In this sense, information privacy ensures our freedom to develop new thoughts and ideas. Moreover, the communicative privacy in *J.Y. Interpretation No. 631* encourages individuals to share their thoughts and ideas. Information privacy, therefore, not only promotes exchange of ideas, but also reinforces our right to receive new ideas from private, informal discussions with others. In addition, as *J.Y. Interpretations Nos. 293* and *603* have shown, information privacy's procedural dimension protects our data privacy against the government's surveillance and censorship of our private activities. These procedural rules and data protection shore up our capacity to deliberate and participate in social processes. Even in cases involving the press, we can still find information privacy's support for the press in its protection of the offices of the press against the government's unreasonable searches, as well as in its protection for journalists' information sources.[73] The lack of protection for spatial privacy, communicative privacy, and data security will not only restrict our ability to develop our personalities, but also set off chilling

70. *Id.*

71. Richards, *supra* note 20, at 389.

72. *Id*. at 407-26.

73. *See*, *e.g.*, Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 150-51 (2007).

effects which democracy does not tolerate.[74] When we think about the collective significance of these cases together, they demonstrate that information privacy not only protects individuals' personal interest in nondisclosure, but also secures important public interests that are vital to a democratic society. For instance, political dissenters need communicative privacy to further develop their dissenting opinions. They also need privacy protection for their associational activities. These cases thus indicate that to the extent that we need information privacy protection to think, speak, deliberate, dissent, and participate within the context of democratic and social processes, information privacy possesses a demonstrable value in relation to the strengthening of democracy.

VI. CONCLUSION

Taking the Grand Justices' jurisprudence of information privacy as an example, this note reconsiders the relationship between information privacy and democracy. Identifying three of the democratic values inherent in information privacy, this note argues that information privacy can be regarded as a public value that reinforces democracy. As the conventional wisdom focuses too much on information privacy's nondisclosure protection, we often neglect the value of information privacy to democratic society. This note thus argues that when balancing privacy against other competing values (for instance public security), we should not regard privacy as a personal interest and therefore afford it less protection. As this note has shown, in order for people to freely think, speak, deliberate, dissent, and participate in the democratic process, they need protection of their information privacy. Without this, people cannot enjoy a truly free and democratic society. Information privacy, thus, is an important value for a democratic society.

74. *Id*. at 154-59.

REFERENCES

ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D.Pa. 2007).

Birnhack, M. D. (2011). A quest for a theory of privacy: Context and control. *Jurimetrics: The Journal of Law, Science, and Technology,51*, 447-480.

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (Ger.)

Cate, F. H. (2000). Principles of internet privacy. *Connecticut Law Review, 32*, 877-896.

Cate, F. H. (2010). Protecting privacy in health research: The limits of individual choice. *California Law Review, 98*, 1765-1804.

Citron, D. K. (2010). Fulfilling government 2.0's promise with robust privacy protections. *George Washington Law Review, 78*, 822-845.

Cohen, J. E. (2000). Examined lives: Informational privacy and the subject as object. *Stanford Law Review, 52*, 1373-1438.

Emerson, T. I. (1976). Legal foundations of the right to know. *Washington University Law Quarterly, 1976*, 1-24.

Ex parte Jackson, 96 U.S. 727 (1877).

Fleming, J. E. (2006). *Securing constitutional democracy: The case of autonomy*. Chicago, IL: University of Chicago Press.

Fried, C. (1968). Privacy. *Yale Law Journal, 77*, 475-493.

Gavison, R. (1980). Privacy and the limits of law. *Yale Law Journal, 89*, 421-471.

Gonzales v. Google, Inc., 234 F.R.D. 674 (N.D. Ca. 2006).

Griffin, J. (2007). The human right to privacy. *San Diego Law Review, 44*, 697-722.

Kang, J. (1998). Information privacy in cyberspace transactions. *Stanford Law Review, 50*, 1193-1294.

Katz v. United States, 389 U.S. 347 (1967).

Kommers, D. P. (1997). *The constitutional jurisprudence of the Federal Republic of Germany* (2nd ed.). Durham, NC: Duke University Press.

J.Y. Interpretation No. 293 (1992) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=293

J.Y. Interpretation No. 535 (2001) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=535

J.Y. Interpretation No. 585 (2004) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=585

J.Y. Interpretation No. 603 (2005) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=603

J.Y. Interpretation No. 631 (2007) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=631

J.Y. Interpretation No. 689 (2011) (Taiwan). Retrieved from http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=689

Mill, J. S. (1991). *On liberty.* (J. Gary & G.W. Smith, Eds.). New York, NY: Routledge. (Original work published 1859)

Nissenbaum, H. (2010). *Privacy in context: Technology, policy, and the integrity of social life*. Stanford, CA: Stanford University Press.

Olmstead v. United States, 277 U.S. 438 (1928).

Otis, J. (1856). Notes of the argument of counsel in the cause of writs of assistance, and of the speech of James Otis. In C. F. Adams (Ed.), *The works of John Adams* (pp. 521-525). Boston, MA: Little, Brown.

Parks, W. (1957). Open government principle: Applying the right to know under the constitution. *George Washington Law Review, 26*, 1-22.

Posner, R. A. (1984). An economic theory of privacy. In F. D. Schoeman (Ed.), *Philosophical dimensions of privacy* (pp. 333-345). New York, NY: Cambridge University Press.

Regan, P. M. (1995). *Legislating privacy: Technology, social values, and public policy.* Chapel Hill, NC: University of North Carolina Press.

Richards, N. M. (2005). Reconciling data privacy and the First Amendment. *UCLA Law Review, 52*, 1149-1222.

Richards, N. M. (2008). Intellectual privacy. *Texas Law Review, 87*, 387-446.

Richards, N. M. (in press). *Intellectual privacy*. Manuscript submitted for publication.

Schwartz, P. M. (1992). Data processing and government administration: The failure of the American legal response to the computer. *Hastings Law Journal, 43*, 1321-1390.

Schwartz, P. M. (1995). Privacy and participation: Personal information and public sector regulation in the United States. *Iowa Law Review, 80*, 553-618.

Schwartz, P. M. (1999). Privacy and democracy in cyberspace. *Vanderbilt Law Review, 52,* 1609-1702.

Silverman v. United States, 365 U.S. 505 (1961).

Simitis, S. (1987). Reviewing privacy in an information society. *University of Pennsylvania Law Review, 135*, 707-746.

Solove, D. J. (2007). The First Amendment as criminal procedure. *New York University Law Review, 82*, 112-176.

Solove, D. J. (2008). *Understanding privacy*. Cambridge, MA: Harvard University Press.

Sullivan, D. (2006, January 19). Bush administration demands search data; Google says no; AOL, MSN & Yahoo said yes. Retrieved from http://searchenginewatch.com/article/2059843/Bush-Administration-Demands-Search-Data-Google-Says-No-AOL-MSN-Yahoo-Said-Yes

Sundby, S. E. (1994). "Everyman" 's Fourth Amendment: Privacy or mutual trust between government and citizen?. *Columbia Law Review, 94*, 1751-1812.

Thoreau, H. D. (2011). Where I lived, what I lived for. In Mercer University (Ed.), *Walden* (pp. 79-96). Macon, GA: Mercer University Press.

Tomuschat, C., & Currie, D. P. (Trans.). (2010). *Basic law for the Republic of Germany*. Berlin, German: German Bundestag. Retrieved from https://www.btg-bestellservice.de/pdf/80201000.pdf

U.S. Const. amend. IV.

U.S. Dept. of Justice v. Reporters Comm.for Freedom of Press, 489 U.S. 749 (1989).

Volokh, E. (2000). Freedom of speech and information privacy: The troubling implications of a right to stop people from speaking about you. *Stanford Law Review, 52*, 1049-1124.

Warren, S. D., & Brandeis, L. D. (1890). The right to privacy. *Harvard Law Review, 4*, 193-220.

Westin, A. F. (1967). *Privacy and freedom.* New York, NY: Atheneum.

Whalen v. Roe, 429 U.S. 589 (1977).

Woolf, V. (1929). *A room of one's own*. New York, NY: Harcourt Brace Jovanovich.

重新檢視資訊隱私的民主價值

謝 祥 揚

摘 要

本文旨在重新思考資訊隱私與民主社會的關係。本文主張，資訊隱私為重要的基本權利而應受憲法保障，其原因不僅在於資訊隱私與個人自主決定權密切相關，更在於資訊隱私有助於落實諸多重要民主價值。經本文觀察，資訊隱私的民主價值至少有三：一、個人資訊隱私之保障可限制國家權力的行使。二、建構與個人資訊隱私保障的相關程序機制。三、促使人民得以充分享有思想自由、言論自由以及從事其他智慧活動的自由。此外，本文亦分析臺灣司法院大法官資訊隱私相關解釋。藉由臺灣資訊隱私案例之探討，本文進而主張：資訊隱私不僅止於保障人民對於其個人資訊的自我決定權，更進一步確保人民得以自由思考、發表言論、思辨公共議題、發表不同意見、進而得以參與各種民主程序。從而，資訊隱私可謂為現代民主社會所不可或缺，自應受憲法保障。

關鍵詞：資訊隱私、民主、空間隱私、通訊隱私、智慧隱私

National Taiwan University
Law Review
Volume 6, Number 2, September 2011

Contents

【Articles】

【Roundtables】

【Student Note】

National Taiwan University

56HTWCE0701

ISSN 1812-6324

00450

9 771812 632000

GPN: 2009504723

Angle Publishing

5F No.18, Goan-Chian Rd, Taipei, 100 Taiwan

TEL:+886-2-2375-6688

FAX:+886-2-2331-8496

http://www.angle.com.tw