

Global Constitutionalism and Judicial Activism in Taiwan

JOU-JUO CHU

Centre for Innovative Research at Southern Taiwan Science Park, National Chung Cheng University, Tainan, Taiwan

ABSTRACT *In sociological research, law is usually considered as either a variable independent of the force of social change or a variable dependent on its shaping and moulding. Any changes in law, if not caused by social change, must be its effects. The post-1980s activism of the Council of Grand Justices (the Judicial Yuan) marked the emergence of what might be called the “global new constitutionalism” in Taiwanese society. Claiming a holistic concept of citizenship, the Grand Justices revamped the anachronistic pseudo-democratic mechanism through the medium of constitution interpretations. In order to facilitate democratic consolidation, the Grand Justices also painstakingly amended earlier versions of administrative law to facilitate the development of a reliable bureaucracy and enhanced public administration. As the battle for enhancing administrative accountability complicated the interplay between the judicial activists and other political actors, judicial activism unexpectedly linked to processes of regime change. At the same time, this activism provides researchers with a window on Tom Ginsburg’s insurance thesis and Ran Hirschl’s hegemonic preservation thesis regarding judicial activism.*

KEY WORDS: Constitutionalism, globalisation, judicial activism, accountability, citizenship, legal change

With globalisation, people’s daily lives have been influenced by international forces well beyond the immediate social, economic and political context of any one society. Globalisation is thus defined as a variety of dynamic processes at work constructing and weaving networks bringing together states and turning them into a global community. McGrew (2000:107) identified two important dimensions of globalisation, which he called stretching and deepening. “Stretching” focuses on scope and records the spatial connotation of globalisation, as numerous economic, political and other social activities become stretched across national boundaries into the international arena. “Deepening” indicates the intensity of globalisation and stresses the degree of intensification in the levels of interaction and interdependence between states. Through the simultaneous forces of stretching and deepening, globalisation makes its indelible impact on national and local communities. Given the emphasis

Correspondence Address: Jou-Juo Chu, Centre for Innovative Research at Southern Taiwan Science Park, National Chung Cheng University, 3F-1 No.19 Nanke 3rd Rd, Sinshih Township, Tainan, Taiwan 741.
Email: labjoujuo@ccu.edu.tw

McGrew placed on the stretching and deepening dimensions of globalisation, he may also have echoed Giddens (1990) repeated reminder that globalisation should be understood as the re-ordering of time and distance in our lives along the line of modernisation.

Theoretically, legal development has been considered intertwined with the historical processes of industrialisation, urbanisation and modernisation. Arjomand (1992: 2003) has examined political reconstruction and democratic consolidation and offered a sketch of five stages in world constitutional history – the medieval and pre-modern era, the modern stage of political reconstruction, the age of modernisation, the era of ideological constitutions and the era of “new constitutionalism.” Whereas each stage had its typical mode of constitution-making, the era of new constitutionalism made for a distinct mode of constitutional rationalisation in the era of globalisation. Constitutional democracies characterise the era of new constitutionalism and uphold the idea of the rule of law, where a constitution embodies the basic framework of rules about its government organisations and its fundamental values. In addition, new constitutionalism highlights the protection of human rights by establishing necessary implementation and review procedures. The constitutional order defines the hierarchical relationship between statutes and the constitution. Since it is from the constitution that all other laws of the nation obtain their validity, this hierarchy has to be defended if the rule of law is to be observed. On this account, the German constitution accentuates that if a constitution is to mean anything at all, constitutional law has to be considered not only different from other kinds of law but superior to statutes (Kelson, 1961). Likewise in Britain, the constitution is considered as “the law behind the law” (Alder, 1989: 3).

In the last decade of the twentieth century, the human rights revolution opened a new stage of global constitutionalism and encouraged the continuation and expansion of the international constitutional tradition (Arjomand, 2003). According to Klug (2000: 9-10), the era of new constitutionalism began in 1989 and has been characterised by the massive adoption of bills of rights and of constitutional courts. The new wave of global constitutionalism upheld constitutional supremacy and demanded a return to a constitutional order.

In the late 1980s, the activism of judicial actors in Taiwan, mainly the Grand Justices in the Judicial Yuan (the Council of Grand Justices), emerged as a case in point, reflecting the influence of global constitutionalism.¹ Against this background, this article attempts to elaborate the connections between new constitutionalism and judicial activism in Taiwan and examines how the post-1980s activism of the Grand Justices fits into this picture. In addition, the article seeks to answer a series of questions: What has revealed the rise of the post-1980s judicial activism? What was the macro socio-political milieu in which the post-1980s Taiwanese judicial activism emerged? What challenges did the judicial activists set for the post-authoritarian regime in the early stages of democratic liberalisation? Can the legal changes achieved by the judicial activists be maintained and expanded?

In the following section, a theoretical framework is presented to serve two functions – delineating the connections between democratic constitutionalism and judicial activism and highlighting the structural forces that contribute to the rise of post-1980s judicial activism. It does this through attention to the arguments proposed by Ginsburg (2003) and Hirschl (2004).

Global Constitutionalism and the Rise of Judicial Activism

The new constitutionalism has had impacts on all democratic governments, from developing and fragile democracies to those that are long-established. Post-apartheid South Africa is an important case. South Africa's democratisation was accompanied by a legal revolution in which a tradition of parliamentary sovereignty was replaced by democratic constitutionalism. This experience of democratic constitutionalism illustrated the reintroduction of the rule of law and the prosecution of officials of the old regime who violated human rights that were protected by the constitution and pointed to a new approach to the questions of democratic consolidation by crafting justice in relation to past injustice. This approach encouraged an analysis of the role of the constitution as well as the mechanism of judicial review in the process of political reconstruction. In the South African case, Klug (2000, 2003) noted that the formal adoption of bills of rights as the essential marker of constitutional change could be identified as a hallmark of democratisation, signalling the transition to a new democratic order. Conversely, when a self-proclaimed democratic polity stopped paying attention to the rights granted in the constitution, its democratic credentials were challenged.

Agreeing that the adoption of a bill of rights is an essential criterion for identifying the stage of democratic constitutionalism, Henkin (1994) suggested nine principal elements of constitutionalism: (1) government according to the constitution; (2) separation of power; (3) sovereignty of the people and democratic government; (4) constitutional review; (5) an independent judiciary; (6) limited government subject to a bill of individual rights; (7) control of the police; (8) civilian control of the military; and (9) no state power (or very limited and strictly circumscribed state power) to suspend the operation of some parts of, or the entire, constitution.

Henkin's definition not only depicts the significance of the constitution as supreme law, but also offers a key to the institutional connection between democratic constitutionalism and the rule of law. The main focus of the new constitutionalism resides in the area of human rights. It places the fundamental rights of the individual beyond the government's reach. Fundamental rights are not gifts from government. On the contrary, fundamental rights need protection from infringement by the government, legitimate authority and elected representatives of the people. The constitution provides the basic structure necessary for the protection of fundamental rights with the greatest emphasis on judicial review, which is also the most important means provided by the constitution to protect human rights.

The new constitutionalism with an emphatic focus on human rights and government responsibility departs from an older concept of democracy, which narrowly focused on majority rule and political liberties. In Beer's (1992: 18) view, the constitutionalisation of human rights combines the features of majoritarian democracy and constitutionalist restraint on power and accentuates the limitation of government by law as prescribed by a constitution. Developing Beer's definition, Arjomand (2003: 27) considered that the new global constitutionalism comprises three elements: (1) majoritarian democracy and organisation of the state authority; (2) human rights; and (3) constitutional courts and/or other national and transnational organs for judicial review of administration and legislation.

The new global constitutionalism places a strong emphasis on the role of the constitutional court as an instrument to limit the government. The establishment of a constitutional court can be considered as a useful criterion for identifying the presence of, or a return to, democratic constitutionalism, though the political motivation to establish one may vary. As far as the post-authoritarian southern European and post-Communist Eastern European countries are concerned, the institution of a constitutional court becomes all the more attractive for it holds the promise of joining Europe (Arjomand, 2003: 11). For developing countries, the pursuit of the rule of law and new constitutionalism in the transition to democracy may be attributed to massive international development assistance that was implemented in the 1990s (see Klug, 2000: 66).

In terms of the political origins of judicial activism, Ginsburg (2003) has proposed an "insurance" model to explain the emergence of constitutional supremacy and judicial review. This model is based on a detailed study of the establishment of judicial power during the periods of political transition in Taiwan, Korea and Mongolia. In his view, judicial actors were able to gain autonomy and independence only in a political system with general electoral competitions (Ginsburg, 2003). When the ruling party elites were under no pressure to win elections or when their prospects of remaining in power were high, they lacked the incentive to support an independent judiciary; neither did they see the need for empowering judicial actors. Conversely, once the political climate changed and led to a diminishing expectation of the ruling party elites to retain their position, they would become more willing to support an independent judiciary in order to increase the difficulty for succeeding governments to reverse policies already made into law and to ensure that the next ruling party could not achieve its policy goals through the judiciary. In other words, Ginsburg considered that the judiciary could gain independence only under conditions of electoral uncertainty when ruling elites might lose control of the legislature so as to limit the future options of their political opponents by increasing judicial independence. In this case, mechanisms such as judicial reviews and constitutional interpretations were regarded as powerful instruments of insurance to protect the interests of prospective political losers under conditions of political uncertainty.

In established democracies, a new wave of judicial activism emerged in the 1960s. This was related to the crisis in legitimacy described by Habermas (1996). In many consolidated democracies, voter turnout was low and discontent with elected officials came to light along with civic awareness that most politicians were unresponsive to the public between elections but worked to benefit themselves and the special interests that supported them directly to the exclusion of others. As the authority of legislatures, presidents, prime ministers and political parties withered, more and more pressure accrued for the political branches of government to rely on the courts to make policy choices. Against this background,

judicial activism came into existence when courts did not confine themselves to adjudication of legal conflicts but adventure to make social policies, affecting thereby many more people and interests than if they had confined themselves to the resolution of narrow disputes (Holland, 1991: 1).

In this case, the strength of judicial activism can be measured by the degree of power that the judiciary exercises over citizens, the legislature and the administration.

In search of a better understanding of the rise of judicial activism in the global constitutionalism, Hirschl (2004) proposed a hegemonic self-preservation model on the basis of his study of four recent cases of constitutional transition in Canada, South Africa, New Zealand and Israel. He refined Ginsburg's insurance model and suggested that recent constitutional transitions in the four countries well illustrate the political self-interest of the governing forces that supported the constitutional reform movement. More importantly, Hirschl did not consider a threatened position of the ruling elites in the electoral competitions to be the necessary condition for the rise of judicial activism. On the contrary, he showed that whenever self-interested politicians view judicial empowerment as a means of furthering their interests, such transfers of power to the judicial actors do take place, even though the voluntary self-limitation may run counter the interests of power holders in legislatures and executives (Hirschl, 2004: 11). In other words, judicial empowerment can come out of the self-interested and risk-averse motivations of ruling elites who want to preserve or expand their hegemonic position.

Apart from the controversy concerning the circumstances in which judicial activism emerged, judicial activism was often charged with usurping the power of the legislature (Leishman, 2006; Roosevelt, 2006). No matter whose interests the judicial actors served, the opponents of judicial activism contended strongly that the usually unelected judicial branch had no legitimacy for overruling the policy choices of a duly elected government. This view was opposed fiercely by judicial actors who argued that democracy was far more than just majority rule and pointed out the untrustworthiness of the democratically elected politicians who easily betrayed their promises made in elections. From the perspective of judicial activists, the deficiencies of electoral politics and majoritarian rule proves that democracy requires that courts act on specific issues between elections. With the mechanism of judicial review, when the opportunity arises, the judicial activists and their supporters can uphold the constitution, fulfil the mission of the constitutional court, protect minority rights and strike down unconstitutional laws passed by a legislature.²

Post-1980s Taiwanese Judicial Activism

Following the explanation of judicial activism, this section of the article seeks to identify the key indicators of judicial activism in post-1980s Taiwanese society. From the previous section, two quantitative measures (the intensification of the participation of judicial actors in judicial review and the set up of a constitutional court) and three qualitative measures (the prioritisation of human rights of the citizens over state authority, the restoration of the supreme status of the constitution over all lower order norms and the implementation of substantive constraints on public authority) are identified. With these five measures in mind, an evaluation of post-1980s judicial activism in Taiwan is presented as an illustrative instance of new global constitutionalism. These measures are elucidated for judicial activism as it emerged in the socio-political context of Taiwanese society in the late 1980s.

In the Taiwanese case, proclaiming the idea of "democracy" and enforcing "democratic practice" can be traced back to the 1949 retreat of the Nationalist (the Kuomintang, the KMT) regime to Formosa Island, or even further back to the establishment of the Republic of China by the KMT (Chou and Nathan, 1987; Chu,

1994; Lin and Ma, 1992). However, this “democratic” system, which Ginsburg (2002, 2003) called “Confucian constitutionalism,” was practised in the context of the overwhelming leadership of Chiang Kai-shek and the dominant one-party rule of the KMT. Despite this, there was gradual constitutional reform and the evolution of a relatively weak and politically dependent court – the Council of Grand Justices. Even so, after the 40-year practice of so-called Confucian constitutionalism, democratisation finally gained some momentum in the process of political reconstruction in the late 1980s, in which such democratic practices as majoritarian rule at the national level, preservation of human rights and judicial review of administration and legislation have gradually become a general principle of social life in Taiwanese society (Chang, 2001; Chen, 1996; Chu, 2000, 2002a, 2002b).

Before the 1986 establishment of the Democratic Progressive Party (DPP) and the 1987 lifting of martial law (the short name for “The Temporary Provisions Effective during the Period of National Mobilization for the Suppression of the Communist Rebellion”), one-party rule was seen by the KMT as an adequate instrument to overcome the problems of Taiwan’s backwardness and the most appropriate vehicle for economic development. Even so, the KMT sought to limit the extent to which the bureaucratic party–state machinery was an exclusively non-representative system by recruiting into the party-government system those who had similar ideology and party loyalty from all walks of life (Chou and Nathan, 1987). Nevertheless, the preference of the KMT for appointing Chinese mainlanders to key political positions, including Grand Justices, created a long-standing political bifurcation between Chinese mainlanders and Taiwanese islanders in Taiwan’s politics (Chu, 1994).

Martial law and one-party rule meant a lack of political competition and gave birth to a passive Council of Grand Justices, impeding the development of a powerful judiciary. In essence, the judges, together with the chief executive and the legislative majority, all belonged to the same party. It was patently absurd to expect them not to follow the party line. After the establishment of the DPP, however, political opportunities opened various opportunities for the emergence of judicial activism (Chang, 2001). In 1987, there were more than 1800 cases of petitioning, rallies and demonstrations for various issues across Taiwan. In total, nearly 270,000 policemen were mobilised to keep order. In this context, the predominant slogan of the late 1980s was “no confrontation, no gain” (Chu, 1993: 178). It was from this socio-political context that judicial activism emerged and gained momentum. In the movement, the judicial actors, the Grand Justices in the Judicial Yuan, caught the moment and played a critical role in shaping the trajectory of political reconstruction for transition to a new democratic order.

Apart from political domination by the KMT, Taiwan also suffered from the problem of how the international community viewed its sovereignty *vis-à-vis* China, especially after 1972. Practically, sovereignty is not only about the constitution of a state that sets out rules of how it is to be governed, but also the international legal recognition of the state. In other words, the concept of popular sovereignty is not equivalent to the concept of state sovereignty. An internally agreed identity, whether achieved through constitutional reforms or social consensus, is not sufficient for a state to acquire its sovereignty. Sovereignty requires acceptance by both external and internal agencies. In the international community, it seems that, since the 1980s, principles of self-determination, human rights and democracy have been considered

as a measure to settle such questions. For this reason, all the efforts made by the Grand Justices to transform Taiwan into a constitutional democracy in the late 1980s and early 1990s had an ultimate goal; that is, to extract international endorsements for Taiwan's sovereignty. It was hoped that once Taiwan upheld constitutionalism and the rule of law, its people would be entitled to the same rights as the people of other liberal democratic states elsewhere in the world. The pursuit of new constitutionalism was expected to obtain strong international backing and to provide a degree of support for Taiwan either remaining a separate state from the People's Republic of China, to remain the Republic of China, or to become the Republic of Taiwan under the principle of self-determination (Chu, 2000: 317).

From the first to the fifth terms,³ the appointed Grand Justices performed seven functions: the preservation of the constitutional system; the protection of human rights; the resolution of the disputes over government power between different branches of government; the invalidation of unconstitutional rules and regulations; the harmonisation of laws and orders; the interpretation of constitutional controversies; and the maintenance of social order (Weng, 1994d: 442; Wu, 1998: 26). Generally speaking, the Council of Grand Justices did not become vigorous and dynamic until the fifth term that commenced in October 1985 and terminated in September 1994 (Chu, 2002a). More precisely, it is since 1988, one year after the DPP formation, that the Grand Justices have been increasingly active, calling numerous meetings to interpret the constitution and to unify the interpretation of laws and orders. There are two or three times more cases interpreted by the fifth-term Grand Justices than the Grand Justices in any prior term (Table 1).

Between 1988 and 2003, the Council of Grand Justices rendered an annual average 39 constitutional interpretations. In 1994, when the sixth-term Grand Justices were appointed, they showed a strong disposition to promote human rights constitutionalism and the rule of law and this temperament can be detected easily in the constitutional interpretations they made. In addition, within the 15 appointed Grand Justices, only four were Chinese mainlanders, a complete reversal from the previous fifth-term Council which consisted of only three Taiwanese islanders. This new

Table 1. Cases of interpretations by Grand Justices: 1948-2007

Terms (periods)	Grand Justice interpretations	
	Cases	Percentage
First: July 1948-September 1958	79	13
Second: October 1958-September 1967	43	7
Third: October 1967-September 1976	24	3
Fourth: October 1976-September 1985	53	9
Fifth: October 1985-September 1994	167	27
October 1985-September 1987 (20 cases, 12%)		
October 1987-September 1994 (147 cases, 88%)		
Sixth: October 1994-September 2003	200	32
Seventh: October 2003-present (January 2007)	57	9
Total	623	100

Source: Judicial Yuan (2007).

ethnic composition of Grand Justices made a significant impact on the operation of the Council. Between 1994 and 1998, the Council decided about 30 cases annually and the ratio of its judicial invalidation of statutes and rules was as high as 40% (Chang, 2001: 505). Moreover, the revised 1992 Constitution resolved that a constitutional court should be composed of Grand Justices to make adjudications to cases concerning the dissolution of political parties violating the constitution. As a result, the Council of Grand Justices was renamed the Constitutional Court and given a new function supervising the operation of democratic politics.

In this case, the increase activism on the part of judicial actors seems to fit well with Ginsburg's "insurance" model. As Ginsburg (2003) argued, constitutional courts, together with the power of judicial review, provided solutions to the problem of uncertainty in constitutional design. Shifts in power away from the legislature to the judiciary manifested the imminent demise of the ruling party. Once the threatened ruling elites perceived that they would soon lose power in the general elections, the transfer of power to the judicial branch through the mechanism of constitutional interpretations to substantiate the values of the prevailing majority would become a commonly adopted tactic to place constitutional constraints on those who would soon come to power. The KMT finally lost power to the DPP in the 2000 presidential election, and the empowerment of Grand Justices may be interpreted as a response by the ruling elite associated with the KMT to insure against their weakening position in elections. The KMT drew from the US and German legal traditions with the design of a constitutional court, which would empower the Grand Justices to alter the structure of public law away from executive-centred approaches of the past. In other words, one can argue, like Ginsburg, that it is the political uncertainty emerging in the process of political liberalisation in the late 1980s that pressed the KMT to relinquish some of the power of the legislature and the President to the Grand Justices as a partial shelter against electoral risks.

Post-1980s Judicial Activism and Constitutional Interpretations

Democracy reflects not only a form of political organisation but also a set of social values. Sometimes it is considered synonymous with civic sovereignty and citizenship (see Touraine, 1995: 258). In the early and mid-twentieth century, it became impracticable to conceptualise the modern liberal-democratic state without the complementary notion of citizenship. As defined by Marshall (1965), citizenship represents a status that holds the key to three types of rights and powers. Civic rights refer to freedom of speech and equality before the law. Political rights include the right to vote and to organise politically. Socio-economic rights take account of economic welfare and social security. Thus, the types of citizen rights and powers granted to the people by their government can be considered straightforwardly as a yardstick to assess the degree of democracy as well as the stage of democratisation the polity has reached (Chu, 2002b).

The liberalising political environment preceding and following the lifting of martial law stimulated the Grand Justices to devote themselves to advocating the democratic demands of the citizenries against the government that strayed from human rights promises with the attempt to reshape the political environments in which they were situated. In the wave of post-1980s judicial activism, the Grand

Justices referred to global constitutionalism and endeavoured to revitalise the human rights-related articles of the old constitution, which was adopted on 25 December 1946 and put into effect on 25 December 1947 by the National Assembly convening in Nanjing. In addition to the preamble, the 1946 Constitution comprised 175 articles in 14 chapters. During the period of KMT authoritarian rule, the 1946 Constitution had remained good on paper, but gained little opportunity to be applied properly. With reference to the three qualitative measures elucidated above, four cases of constitutional interpretation described below exemplified the active efforts of the Grand Justices throughout the 1990s to uphold a holistic concept of citizenship and to end an era of authoritarian rule that paid lip-service to the lofty ideals promulgated in the 1946 Constitution. Besides, they were also useful pieces of evidence to verify that the post-1980s activism of the Judicial Yuan was able to exercise independently over the legislative and executive branches of the government *vis-à-vis* the rights and interests of the citizens. A summary of the four cases is provided in Table 2.

Reasserting Political Citizenship

Constitutional Interpretation Number 261 concerns the debate over whether the first-term representatives of the three national legislative bodies – the National Assembly delegates, the Legislators and the members of the Control Yuan – should be allowed to exercise their powers indefinitely without periodic re-election. The 1946 Constitution actually specified the number of years for all elected national representatives to hold office – six years for the National Assembly Delegates, three years for the Legislators and six years for the Members of the Control Yuan. However, after the KMT was defeated by the Chinese Communist Party and retreated to Taiwan, it froze all 1947-elected first-term offices of the national representative bodies in order to assert that it was the only legitimate government for

Table 2. Constitutional interpretations and the types of citizenship

Interpretation No.	261	251	384	472
Date	2 June 1990	19 January 1990	28 July 1995	29 January 1999
Type of citizenship	Political	Civic	Civic	Social
Law caused disputes	Constitutional Interpretation Number 31	Act for Governing the Punishment of Police Offences	Statute for Prevention of Gangsters	National Health Insurance Act
Issue	Legitimacy of the first-term national representatives	Measures taken by the police to restrict physical freedom of the people	Infringement on the people's freedom and rights	Unconstitutionality of a compulsory national health insurance system

Source: Judicial Yuan (2007).

the whole of China. The refusal to open up all seats in the three national representative bodies for re-election was to prevent the KMT regime from becoming merely the government of Taiwan rather than the government of China (Chu, 1994: 47-8). The legal measure taken to serve this goal was Constitutional Interpretation Number 31, which stated that before second-term representatives were elected and convened in accordance with the laws, all of the first-term representatives of both the Legislative Yuan and Control Yuan should continue to exercise their respective powers. In addition, Constitutional Interpretation Number 31 eliminated the need for the president to seek the approval of the Legislative Yuan to declare martial law and to govern by decree during severe political and economic crises.

Therefore, when Constitutional Interpretation Number 261 ordered that the senior members of the national representative bodies should leave office by the end of 1991 and demanded that the election of second-term representatives should take place soon afterwards, it overruled Constitutional Interpretation 31 and put an end to more than 40 years of undemocratic operation by the three national representative bodies. That is to say, Constitutional Interpretation 261 restored the political rights of Taiwanese citizens to vote and to seek political office in the free election of the national representative bodies. This Interpretation removed the necessity for electing Mainland Chinese representatives. It also manifested a commitment by the Grand Justices to developing a sense of Taiwanese nationalism that was considered conducive to placating secessionist sentiment. At the same time, the Council of Grand Justices may be criticised for taking sides in the political struggle concerning the shaping and reshaping a Taiwanese national identity under the cloak of constitutional development.

According to Touraine (1995: 275), the concept of democracy is of no use unless it can help identify its main enemies in the society. He used France as an example to illustrate the undemocratic nature of the slogan of many anti-democratic movements – France for the French. Touraine indicated that the slogan actually excluded those who wanted to be integrated while maintaining their own culture. The quest for homogenisation became a most dangerous threat to democracy. In other words, apart from empowering people with political citizenship in the period of transition, a democratic political culture, cultivated by judicial activism, and based on constitutionalism, asserts fundamental human rights while accepting the limits of political power.

Upholding Civic Citizenship

Quite a number of constitutional interpretations pertain to civic rights. Two significant pieces are sampled to illustrate the fact that the Grand Justices have created a new set of priorities that place the protection of personal rights above the preservation of the social order. Constitutional Interpretation Number 251 concerns attempts to rectify the unconstitutionality of several articles of the Act for Governing the Punishment of Police Offences (the AGPPO). This Interpretation redefines and constrains the authority of the police to detain a person, subject him or her to reformatory education or force him or her to complete hard labour. In the period of political contraction, the police often misused the authority of the AGPPO and arrested political dissidents with the excuse of preserving good social order. Interpretation 251 bolsters the protection of an individual's physical freedom

specified in the 1946 Constitution and asserts that no one should be arrested, detained, tried or punished by a judicial or a police agency unless proper legal procedures have been accorded. After the Grand Justices declared that the AGPPO violated the spirit of the constitution and the executive procedures specified in the AGPPO were inappropriate and unlawful, they also issued a recommendation for the expeditious revision of the law and subjected all related arrests or detentions to the court in accordance with proper legal procedures.

Likewise, Constitutional Interpretation Number 384 settled debate concerning the authority of the police. In the case of alleged gangsters, questions were raised regarding the circumstances and manner in which the police could rightly charge (or arbitrarily categorise) a person as a gangster and then arrest him or her and impose a rehabilitative programme upon the person. The Grand Justices specified that several articles of the Statute for Prevention of Gangsters (SPG) contradicted the spirit of the constitution aimed at protecting personal liberty and citizens' rights to lodge a lawsuit and to seek remedies through litigation. Interpretation Number 384 established that all the unconstitutional articles of the SPG should be void and null after 31 December 1996.

This piece of constitutional interpretation is related to one important aspect of the rule of law called due process. Namely when the police attempt to deprive one of liberty, property or life, they have to heed one's legal rights. Moreover, this interpretation also highlights the imperative for the police to notify detainees of charges or proceedings against them and to provide an opportunity for the accused to be heard at the proceedings. In the past, the major problems pertaining to the impeachment of the legal rights of individual citizens by the police included lengthy detention of suspects without trial, long delays in processing cases, unequal application of the law, terrible prison conditions and use of torture to obtain confession. Many cases indicated long periods of detention without formal charge, confessions obtained forcefully, the right to counsel denied and trials being held behind closed doors. The emphasis of Constitutional Interpretation 384 on due process extends protection to all government proceedings that can result in an individual's deprivation from administrative hearings to criminal trials.

Highlighting Social Citizenship

Between 1994 and 2003, there have been few constitutional interpretations pertaining to the social rights of citizens. Of these few, Constitutional Interpretation Number 472 is especially worthy of attention. This Interpretation has to do with social citizenship because it was related to the debate over whether the practice of a compulsory national health insurance programme and whether the imposition of overdue charges were unconstitutional.

The concept of social citizenship usually covers citizens' welfare and entitlements to state provision of social welfare services and benefits, such as pensions and healthcare, and state guarantees of economic security. It broadly includes those rights and duties of citizenship in relation to work, income, education and health. Although in the late twentieth century the welfare state was reconstructed significantly by both structural and ideological forces in most Western societies (Roche, 1995), this development did not discourage the Grand Justices from

embracing social citizenship. Indeed, in order to settle heated discussions and strengthen the welfare functions of the government, the Grand Justices upheld Article 155 of the constitution. They decided that the government should be obliged to establish a social insurance system for the purpose of promoting social welfare and implementing a system of public medical service for the improvement of national health by providing extensive services for sanitation and health protection. The Grand Justices maintained that the National Health Insurance Act – promulgated on 9 August 1994 and implemented on 1 March 1995 – should realise the constitutional purpose of the improvement of national health through the medium of a national health insurance programme. The compulsory subscription of insurance and premium payment should be applied on the basis of mutual social support, risk sharing and public interests. Besides, in order to positively fulfil the constitutional purposes of protecting the aged, the sick and the financially handicapped, the government should not refuse those who cannot afford to pay premium access to benefits.

A careful consideration of the constitutional articles interpreted by the Council of Grand Justices shows that they have attempted to play an important role in shaping the environment of political liberalisation and improving the accountability of other political branches. In view of the rise of judicial activism and its subsequent dynamic development during the process of transition to democratisation, a two-stage periodisation of the active judicial reform movement can be delineated. As stated above, the post-1980s judicial activism that came mainly from the fifth-term Council of the Grand Justices and this momentum was maintained by the Grand Justices of the sixth term, all of whom were appointed by Lee Teng-hui, from whom the KMT regime was transferred to the hands of the DPP leaders. When Chen Shui-bian was re-elected to the Presidency in 2004, he retained only five Grand Justices from the sixth term and appointed eight new Grand Justices to the Council for the seventh term. Hence, it may be claimed that, before 2000, judicial empowerment was used by the KMT elite as an instrument for political insurance and by the political dissidents from the DPP as a means to correct systemic deficiencies that prevented them from achieving their political aims. After 2000, many cases have shown that the constitutionalisation of rights was driven by the attempts of the DPP top leadership to maintain the social and political *status quo* and to block attempts that would seriously challenge its rule through democratic politics more than by commitment to the progressive notion of social justice.

Amendments to Administrative Law and Political Accountability

Administrative law is an aspect of constitutional law. The differentiation between constitutional and administrative law is merely one of practical convenience (Alder, 1989: 6). A variety of administrative laws substantiate the fundamental values committed in the constitution and deal with the work of the executive branch of government and how executive power should be controlled (Weng, 1994a). Administrative law generally can be subdivided into particular branches of executive activity, such as military services, public health, immigration control, housing and education. The most significant issue pertaining to the function of administrative law is how a variety of administrative acts and regulations make the government controlled and accountable.

Constitutional democratic procedures with an emphasis on the rule of law are built upon the priority of laws and the requirement of specific legislative enactment. The principle of the legality of administration denotes the separation and balancing of powers. The main emphasis of administrative law is on the legality of the exercise of powers conferred on public servants (Weng, 1994b, 1994c; Wu, 1995). The activity of a public administration is subject to the law and the public administration should act within its statutory authority. This requirement of statutory authorisation has the effect of nullifying regulations, ordinances, agency rules, orders and other administrative acts that contradict a legal statute. As administrative power goes to establish and organise the making and applying of law, it should operate in circumstances that provide enabling conditions. In other words, when the administration takes on functions that go beyond the domain of law implementation, restrictive legal requirements subject all legislative and adjudicative measures taken by the administration to judicial reviews.

Through the medium of constitutional interpretations, the Grand Justices also exerted their influence to review administrative decisions. This underscores the second characteristic of the post-1980s judicial activism – the Grand Justices repositioned themselves as the guardians of the constitution to reinstall the superior status of the constitution *vis-à-vis* other lower order norms. The Grand Justices painstakingly worked through the medium of constitutional interpretations to ensure that administrative decisions conform to the constitution rather than emergency decrees, which under the KMT rule had been witnessed to a certain degree of fusion between legislative and executive power. To rectify this, the Council of Grand Justices has, since the late 1980s, invalidated many administrative decisions on the ground that the administrator involved violated the principle of the rule of law (Chang, 2001; Chen, 1996; Chu, 2002a). More often than not, the Council instructed that administrative agencies should provide notice of adverse decisions and give the affected parties an opportunity to be heard by an impartial tribunal. With this mechanism, the administrative discretion of public officials is regulated and limited by the Grand Justices.

The third significant area affected by post-1980s judicial activists was their participation in the amendment of administrative law. In respect of the authoritarian period of the pre-1980 KMT rule, the rule of law was enlarged to mean the rule by executive regulations and by a series of flawed executive regulations and the unchecked abuse of executive power (Wu, 1995). Once disputes occurred, the basic rights of citizens, guaranteed and protected by the constitution, came under threat because the administrative court, acting like an organ of regime preservation, usually supported the decision of the executive branch (Chen, 1996: 180). At the beginning of the 1980s, the Judicial Yuan set about amending the old Administrative Litigation Law. After 11 years, a more elaborate administrative litigation law was finally accomplished and passed in the Legislature on 2 October 1998. This law subjects all administrative decisions to judicial review. From the mid-1980s onwards, the Council further moved to challenge executive authority, invalidate many executive orders and take positive actions to restore statutory supremacy. The Council of Grand Justices decided that executive rule should be null and void if it did not observe the constitution. Moreover, an executive order would be considered to be valid only if delegated by statutes that provide clear and specific purposes, contents and scopes (Interpretations 337 and 390).

All in all, the post-1980 judicial activists have announced the advent of new constitutionalism by adding a layer of substantive constraints on the use of public authority. This can be observed easily from the determination of the Grand Justices to take on themselves the responsibility of defending the superior status of the constitution and ensuring the conformity of all lower-order norms to the higher law.

In spite of the modification of the old Administrative Litigation Law, the fourth measure exploited by the Grand Justices to subject public servants to administrative accountability is to activate the State Compensation Law (the SCL). The SCL was first enacted and promulgated in 1970s, but it had remained good on paper ever since. Under the SCL, ordinary citizens who suffer loss as a result of invalid administrative action, can seek compensation from the government as long as the administrative action can be proved unlawful. In terms of the adjudicative role, the administrative courts hold the authority to decide whether a particular action or policy initiated by the public administration comes within its constitutional powers or not.

Such decisions by the Grand Justices have enormous political and policy consequences. As the rights created by the administrative courts in their policing of administrative decision making tend to be procedural rather than substantive, this might lead to the administrative courts, by providing procedural guidelines, actually find ways of legitimating, not blocking, government actions. As to the question of whether the characteristics revealed by recent judicial activism are sufficient to direct Taiwan towards democratic consolidation, the answer is in the hands of the judges themselves. Since the judges' impartiality plays a decisive role in safeguarding Taiwan's constitutional democracy and administrative accountability, the involvement of judges in partisan politics may see Taiwan heading back down the track of authoritarian rule.

Herein underlies the difference between sociological and jurisprudential approaches to the effects of law (Black, 1989: 19-20). From a jurisprudential perspective, law is fundamentally an affair of rules, acting as a powerful independent variable. The rules explaining a legal case normally pre-determine how the established facts are to be assessed. Hence, the incorporation of human rights into the constitution may be considered as a useful sign reflecting the genuine commitment of ruling elites to the realisation of social justice and universal rights. Is that so? There is no guarantee of a positive answer. From the sociological point of view, the effect of law is a variable and it changes from case to case with the social characteristics of the parties involved. Especially, in discussion of legal change, sociologists usually consider the effect of law as a dependent variable. Who are involved in a case? Who are the judicial actors? Are they associated with the same political party? Do they share a similar political ideology? Once the macro socio-political contexts are given, the factors that grab the attention of sociologists at the micro-level of social interaction are the relative social statuses of the adversaries, namely the social structures of a dispute or a lawsuit. In other words, the power relations between the parties may pre-determine the fate of a legal action. In every society, the social location of the complainant is usually the most important predictor of how a legal action will be handled in the process. That is why the commitment of the judiciary to justice, impartiality, objectivity and fairness was especially highlighted and stressed in the 2001 national conferences of judicial reform

in Taiwan. Apparently, how this commitment is carried out will affect the future trajectory of the activism of the Grand Justices and should certainly become the focus of evaluating the political consequences at the subsequent stages of judicialisation of politics.

Current Challenges to Judicial Activism

Post-1980s judicial activism can be considered simply as a limited act of judicial interpretation by the Grand Justices to strike down laws as unconstitutional. Or their activism can also be interpreted as judicial empowerment or judicialisation of politics. Judicial activism through the medium of constitutional interpretations has restored many aspects of citizenship, with far-reaching political connotations conducive to democratic consolidation.

In pursuit of the rule of law, the impact of judicial activism on the power structure extends beyond individual citizens. The empowerment of citizens by the rule of law is central to the development of civil society (Arjomand, 2003: 28). Judicial activism has secured Taiwanese citizens and civic organizations not only access to ordinary courts but also to the constitutional court. This represents a form of political enfranchising of a politically excluded population by means of constitutional complaint. The form of enfranchisement gives ordinary Taiwanese citizens a new channel for participation in constitutional reconstruction. With the right of access to constitutional and administrative courts, the rule of law can be more valuable than a single vote in local, parliamentary or presidential elections. As more and more individuals and civic organisations use the newly acquired right of access to the Grand Justices and the constitutional court, the generation of constitutional legal norms will have the chance to be set in motion and the review of administrative acts be secured further (Weng, 1998).

The political legitimacy of judicial activism depends on public confidence in the judicial review of constitutional decisions conducted by the Grand Justices. The Grand Justices have to be alert to political struggles in case their involvement turns the Council of Grand Justices into a pseudo-parliament and results in the weakening of public confidence in judicial power. The conspicuous involvement of the Grand Justices in politics by means of constitutional interpretations might also lead to the unconstrained expansion of judicial power and grow into a constitutional crisis of some sort, especially if the Grand Justices interpreted new constitutional provisions with an eye towards redefining Taiwan's national identity. This proclivity would normally win plaudits from pro-DPP supporters but could engender disagreement from the pro-KMT faction of the political spectrum. Such disagreement may easily result in suspicions about the motivations of the Grand Justices for judicialisation of identity politics. Thereupon, most influential judicial activists in the 1990s decided to adhere to the principle of judicial self-restraint to avoid the politicisation of the judiciary (Weng, 1994d: 444).

Judicial power is evaluated not just in relation to other branches of government, but also in relation to the citizens on whose behalf the power is exercised. It is worth mentioning that empowerment is not a zero-sum game. As stated above, post-1980s judicial activism has resulted in the political empowerment of individual citizens. Taiwan has made the transition from an authoritarian one-party rule to a two-party

democratic polity. In 1994, the constitution was amended for the direct election of the president and vice-president. This led to the direct election of Lee Teng-hui in 1996 and made him the first popularly elected president in Taiwan. Subsequently, Chen Shui-bian, a native Taiwanese from the DPP, won his first term in the direct presidential election of 2000 and was re-elected in 2004 by a margin of just 0.2%. Chen's 2000 presidential victory ended more than 50 years of the KMT rule.⁴ Five years later, the National Assembly – the once-powerful body that approved KMT presidential nominees – was disbanded.

Before long, President Chen Shui-bian was surrounded by a string of corruption allegations against his family and advisers in 2006. The prosecutors arrested Chen's son-in-law on insider trading charges and also indicted Chen's wife for corruption and forgery. Former Presidential Office deputy secretary-general Ma Yung-cheng, Presidential Office director Lin Te-hsun and Treasurer Chen Chien-hwei, together with President Chen Shui-bian's wife, Wu Shu-jen, were all charged over the state affairs fund scandal. Wu was especially suspected of pocketing a total of \$NT14,800,408 (\$US449,600) from the state affairs fund through receipts not used for state affairs. In the face of the charges, Chen Shui-bian the young native-born President shamelessly searched for excuses from the misdeeds of the old authoritarian KMT leaders, such as Chiang Kai-shek and his son Chiang Ching-kuo, to legitimise the corrupt conduct of his family. The dramatic scenario has built up public expectation on the judicial actors to hold justice and provide leverage that can be used more easily and precisely than voting.

Since President Chen Shui-bian is not constitutionally obliged to step down in the case of these corruption scandals, he can remain in office until his term ends in May 2008. As long as he continues to stay in office, he enjoys immunity from prosecution on all charges except sedition. In this case, the corruption case of President Chen will probably be the best litmus test of the one most crucial facet of post-1980s judicial activism – the independence of the courts. The political atmosphere of the first decade of the twenty-first century apparently has become another critical moment that reminds the judicial actors of the fact that their judicial role is so closely dependent on forces outside legal control. Would the prosecutors give themselves away and be controlled by the presidential and executive power? Or would they be determined to maintain the independence of judicial power? The answers to the questions foretell the direction of Taiwan's political reconstruction and the future of Taiwan's new constitutionalism advocated by the post-1980s judicial activism.

Concluding Observations

Judicial activism represents a constitutional rights revolution in Taiwan. The political consequences of the post-1980s activism of Grand Justices are apparent and influential. At the formative stage, the Grand Justices facilitated a return to constitutional politics and made a great effort in constitutional interpretations which gave the constitutional catalogue of rights an opportunity to be implemented. The power to supervise the implementation of constitutionally granted rights may well make up the necessary institutional framework for judicialisation of politics. However, to what extent the activism of the Grand Justices has raised judicial power and generated a high quality of judicialised politics in terms of the realisation of

social justice may remain questionable. As indicated by Hirschl (2004), there are evident limits to what judicial actors can and will deliver in terms of the goals espoused by advocates of political and constitutional reform. In the case of Taiwan, the Grand Justices represent only one group of actors that participate in the political arena. Their participation provides an alternative forum to the legislature and their articulation of views that would otherwise not to be heard is expected to increase the quality of democracy. Even so, the Grand Justices do not have the capacity to resolve complex questions of public policy, not to mention bring about economic growth. Given the absence of an improvement in unemployment and economic growth, it would be folly to hope that the Grand Justices can accomplish the lofty goal of economic equality or social justice.

In contrast to Ginsburg's argument that judicial review facilitated effective transition to democracy by providing insurance to prospective electoral losers, Hirschl (2004) claimed that in the constitutionalisation scenario, judicial empowerment could be driven by forces and interests antithetical to democratic governance simply out of the motivation of hegemonic preservation. As far as the activism of Grand Justices is concerned, it arose in a period of political liberalisation in which the judicial actors struggled to maintain and enhance their stature within a political environment that lacked an established tradition of judicial independence and constitutional supremacy. Such transferring of power took place when the ruling KMT elites who were apparently about to give up their power regarded the transfers as a useful instrument to advance their self-interest. Therefore, it is plausible to argue that constitutional reform and judicial activism were based on the terms conditioned by the key values held by the pro-Lee KMT elites. Afterwards, especially when power was placed firmly in the hands of President Chen, it becomes unnecessary to attribute continuous constitutional negotiations and the judicialisation of politics to systemic uncertainty at times of political transition. Instead, it may be understood more appropriately as the outcome of a deliberate strategy undertaken by hegemonic political elites – in association with economic and judicial elites sharing compatible interests – who found strategic disadvantages in adhering to democratic decision-making processes.

Both the Hirschl and Ginsburg models address the political origins of judicial activism and demonstrate a credible usefulness in probing the dynamics of the activism of the Grand Justices in Taiwan. Hirschl (2004: 200-6) especially illustrated that the governing majority was able to constrain a newly empowered judiciary that deviated from the newly proposed "constitutional agenda" and keep it faithful to the majority's plan. Hence, it is not unexpected to discover that an outwardly humanitarian constitutional reform of the Grand Justices probably carried an essentially self-serving agenda. In order not to antagonise more powerful potential adversaries, the Grand Justices had reason to expand their legitimacy and scope of influence in preparation for the arrival of the prospective regime change. As the newly-elected President Chen holds control over the selection of Grand Justices, this institutional arrangement inevitably presses the incumbent Grand Justices to take on agendas in favour of President Chen for this may be the simplest way to serve their best interests at the midst of political transition. Under a democratic system of electoral competition, any dominant and popular political party inevitably has to face a relatively higher chance of losing power than it would under a one-party system (Ginsburg, 2003). In the case of Taiwan, one can argue that the mechanism of

judicial review was used initially by the KMT ruling elites under the leadership of Lee Teng-hui to maintain power in face of prospective electoral defeats. To them, judicial review actually provided an alternative forum to the legislature and through the medium of articulation of views gave the general public the chance to hear their voices. In addition, the empowerment of judicial actors may have opened a new field for the DPP or pan-green politicians to play identity politics.

The age of global constitutionalism hails constitutional reform and judicial empowerment as progressive forces towards equality, distributive justice and control over excessively partisan governments. However, once judicial politics in Taiwan become intertwined with identity politics, will judicial activists abuse their constitutional mandates? Will they substitute their own political preferences or partisan prejudices for the mandate of the constitution? Will they exercise their own will and impose partisan values on the rest of society? Will they actually make rather than interpret the law? The 2008 presidential election will be critical both for the KMT and the DPP political elites. For the KMT, it represents a chance to win back power. For the DPP, it will be a battle to remain in power. Until that election, will the Grand Justices be involved in hegemonic preservation of the DPP rule, or the even narrowly-defined Chen regime? What will happen after 2008? Will the post-1980s judicial activism move towards constitutional stalemate? Given the fact that judicial activism has increased the awareness of Taiwanese citizens of the catalogue of constitutionally-granted rights, the answers to the above questions may be the best indicators for evaluating the future trajectory of judicial activism.

Notes

- ¹ The Judicial Yuan is one of Taiwan's five branches of government and the highest judicial organ. It also supervises the lower courts. Members of the Judicial Yuan are the Grand Justices.
- ² Some comment is required concerning why no relevant social movement theories, such as those elaborated by McAdam's political process model or Tarrow's thesis regarding political opportunities structure, were addressed in discussing the political origins of judicial activism. The political process model was based on the resource mobilisation approach and attempted to integrate macro-, meso- and micro-approaches (McAdam, 1996; McAdam et al., 1996). The political opportunities structure thesis especially stressed the possibilities and limits for the development of social movements affected by the political situation in a given time span of a country (Tarrow, 1996). Both may be useful for explaining the rise of post-1980s judicial activism in Taiwan. Nevertheless, post-1980s judicial activism was limited to a group of Grand Justices who sought constitutional reform within the system and had little motivation to challenge the power holders. This characteristic stood in contrast to the typical definition of a social movement provided by Tilly (1994: 7) – "a social movement consists of a sustained challenge to power holders in the name of a population living under the jurisdiction of those power holders by means of repeated public displays of that population's numbers, commitment, unity and worthiness." Therefore, when this research was first undertaken, it was not based on the framework of social movement theories. Neither did it make reference to social movement literature.
- ³ All the Grand Justices, including the Head and the Vice Head of the Judicial Yuan, are nominated and appointed by the President, with the consent of the Legislative Yuan. Under the 1947 Constitution, each Grand Justice was a life-long appointee and generally served a term of nine years for reappointment. The first term started in 1948 and the fifth term ended in 1994.
- ⁴ During Chen's presidency, he has been able to manoeuvre skilfully to strengthen his personal leadership by the removal of four DPP leaders from office after promoting them to the premiership. In spite of that, the failure to keep electoral promises and to curtail the persistently widening gap between the rich and poor has apparently made it harder to refurbish Taiwanese citizens' confidence in his rule.

References

- Alder, J. (1989) *Constitutional & Administrative Law*, Houndsmills: Macmillan Press.
- Arjomand, S.A. (1992) "Constitutions and the Struggle for Political Order: A Study in the Modernisation of Political Traditions," *European Journal of Sociology*, 33, 4, pp. 39-82.
- Arjomand, S.A. (2003) "Law, Political Reconstruction and Constitutional Politics," *International Sociology*, 18, 1, pp. 7-32.
- Beer, L.W. (1992) "Introduction: Constitutionalism in Asia and the United States," in L.W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia*, Seattle: University of Washington Press, pp. 1-54.
- Black, D. (1989) *Sociological Justice*, Oxford: Oxford University Press.
- Chang, W.C. (2001), "Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective," Phd Thesis, Yale Law School.
- Chen, T.F. (1996) "Judicial Review and Social Change in Post-War Taiwan," Phd Thesis, School of Law, New York University.
- Chou, Y.S. and A. Nathan (1987) "Democratizing Transition in Taiwan", *Asian Survey*, 27, 3, pp. 277-99.
- Chu, J.J. (1993) "Political Liberalisation and the Rise of Taiwanese Labour Radicalism," *Journal of Contemporary China*, 23, 2, pp. 173-88.
- Chu, J.J. (1994) "The Rise of Island-China Separatism," in Gary K. (ed.), *Taiwan in the Asia-Pacific in the 1990s*, Canberra: Allen & Unwin Press, pp. 44-58.
- Chu, J.J. (2000) "Nationalism and Self-determination: The Identity Politics in Taiwan," *Journal of Asian and African Studies*, 35, pp. 301-21.
- Chu, J.J. (2002a) "Xingzhengfa zhi kuozeng yu minzhuzhengzhi zhi shenhua: Taiwan jingyan jixi" [Amendments of Administrative Law and Democratic Consolidation: the Case of Taiwan], *Faxue Congkan [China Law Journal]*, 47, 4, pp. 1-14.
- Chu, J.J. (2002b) "Xianzhengzhuyi de quanqiuhua yu gongminquan de chongjian: Taiwan jingyan jixi" [Global Constitutionalism and Restoration of Citizenship: the Case of Taiwan], *Xianzhengshidai [Constitutional Review]*, 28, 2, pp. 3-18.
- Giddens, A. (1990) *The Consequences of Modernity*, Stanford: Stanford University Press.
- Ginsburg, T. (2002) "Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan," *Law and Social Inquiry*, 27, 4, pp. 763-99.
- Ginsburg, T. (2003) *Judicial Review in New Democracies: Constitutional Courts in East Asia*, Cambridge: Cambridge University Press.
- Habermas, J. (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity Press in association with Blackwell Publishers.
- Henkin, L. (1994) *Elements of Constitutionalism*, New York: Columbia University: Centre for the Study of Human Rights, Occasional Paper Series.
- Hirschl, R. (2004) *Towards Juristocracy*, Cambridge: Harvard University Press.
- Holland, K.M. (1991) *Judicial Activism in Comparative Perspective*, Houndsmills: Macmillan.
- Judicial Yuan (2007) *Dafaguan Shixianan di 1-623 hao [Grand Justice Interpretations Nos. 1- 623]*, Taipei: The Judicial Yuan.
- Kelson, H. (1961) *General Theory of Law and the State*, New York: Russell and Russell.
- Klug, H. (2000) *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge: Cambridge University Press.
- Klug, H. (2003) "Postcolonial Collages: Distributions of Power and Constitutional Models, with Special Reference to South Africa," *International Sociology*, 18, 1, pp. 114-31.
- Leishman, R. (2006) *Against Judicial Activism: The Decline of Freedom and Democracy in Canada*, Montreal: McGill-Queen's University Press.
- Lin, C.T. and H.H.P. Ma (1992) "Republic of China (Taiwan): The Constitution and Government of the Republic of China," in L.W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia*, Seattle: University of Washington Press, pp. 88-127.
- Marshall, T.H. (1965) *Class, Citizenship and Social Development*, New York: Anchor Books.
- McAdam, D. (1996) "Conceptual Origins, Current Problems, Future Directions," in D. McAdam, J.D. McCarthy and; M.N. Zald (eds), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, Cambridge: Cambridge University Press, pp. 23-40.

- McAdam, D., J.D. McCarthy and M.N. Zald (1996) "Introduction: Opportunities, Mobilizing Structures, and Framing Processes – Toward a Synthetic, Comparative Perspective on Social Movements," in D. McAdam, J.D. McCarthy and M.N. Zald (eds) *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, Cambridge: Cambridge University Press, pp. 1-20.
- McGrew, A. (2000) "The State in Advanced Capitalist Societies," in J. Allen, P. Braham and P. Lewis (eds) *Political and Economic Forms of Modernity*, Cambridge: Polity Press, pp. 65-126.
- Roche, M. (1995) "Rethinking Citizenship and Social Movements: Themes in Contemporary Sociology and Neo conservative Ideology," in L. Maheu (ed.), *Social Movements and Social Classes: the Future of Collective Action*, London: Sage, pp. 186-219.
- Roosevelt, K. (2006) *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions*, New Haven: Yale University Press.
- Tarrow, S. (1996) "States and Opportunities: the Political Structuring of Social Movements," in D. McAdam, J.D. McCarthy and M.N. Zald (eds), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, Cambridge: Cambridge University Press, pp. 41-61.
- Tilly, C. (1994) "Social Movements as Historically Specific Clusters of Political Performances," *Berkeley Journal of Sociology*, 38, pp. 1-30.
- Touraine, A. (1995) "Democracy: From a Politics of Citizenship to a Politics of Recognition," in L. Maheu (ed.), *Social Movements and Social Classes: the Future of Collective Action*, London: Sage, pp. 258-77.
- Weng, Y.S. (1994a) "Lun sifayuan dafaguan huiyi zhi gongneng" [Functions of the Council of Grand Justices of the Judicial Yuan], in Y.S. Weng (ed.), *Fazhiguoqia zhi xingzhengfa yu sifa* [The Administrative Law and the Judiciary in a Rule-of-law Country], Taipei: Yuedan Publisher, pp. 353-69.
- Weng, Y.S. (1994b) "Jinnianlai dafaguan huiyi jieshi zhi yanjiu: Youguan remin quanli zhi baozhang" [A Study of the Recent Interpretations of the Council of Grand Justices: The Cases of Human Rights Protection], in Y.S. Weng (ed.), *Fazhiguoqia zhi xingzhengfa yu sifa* [The Administrative Law and the Judiciary in a Rule-of-law Country], Taipei: Yuedan Publisher, pp. 373-88.
- Weng, Y.S. (1994c) "Xianfa zhi weihuzhe: huigu yu zhanwang" [The Guarantor of the Constitution: Reflection and Prospect], in Y.S. Weng (ed.), *Xingzhengfa yu xiandai fazhiguoqia* [Administrative Law and Modern Rule-of-law Countries], Taipei: National Taiwan University Press, pp. 391-410.
- Weng, Y.S. (1994d) "Dafaguan gongneng yanbian zhi tantao" [A Study of the Changing Functions of the Grand Justices], in Y.S. Weng (ed.), *Fazhiguoqia zhi xingzhengfa yu sifa* [The Administrative Law and the Judiciary in a Rule-of-law Country], Taipei: Yuedan Publisher, pp. 413-45.
- Weng, Y.S. (1998) "Woguo shixianzhidu zhi tezheng yu zhanwang" [Characteristics of and Prospects for the System of Constitutional Interpretations in Taiwan], in Judicial Yuan (eds), *Symposium in Honour of the 50th Anniversary of Constitutional Interpretation by Grand Justices of the Judicial Yuan*, Taipei: Judicial Yuan, pp. 285-324.
- Wu, G. (1995) *Xingzhengfa zhi lilun yu shiyong* [The Theory and Practice of the Administrative Law], Taipei: Samin Bookstore.
- Wu, G. (1998) "Jibenquan de sanhongxingzhi – jianlun dafaguan guanyu jibenquan jieshi de liluntixi" [Three Characteristics of Basic Rights – On the Theoretical Framework of Grand Justices' Interpretations of Basic Rights], in Judicial Yuan (eds), *Symposium in Honour of the 50th Anniversary of Constitutional Interpretation by Grand Justices of the Judicial Yuan*, Taipei: Judicial Yuan, pp. 1-52.