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論壇：比較視野下的憲法裁判

Forum: Constitutional Adjudication in Comparative Perspectives

Yeong-Chin Su, David S. Law**& Aharon Barak****

會議實錄

Yeong-Chin Su

各位來賓好。我們邀請到Aharon Barak院長演講。他不只是分析；在更多的時候，他用動人的語言去表達他對於現代國家的法官，怎麼樣去維護憲法和民主。這些都是我覺得這個演講特別難能可貴的地方。其他的演講重點還包括了解釋方法、目的性解釋、比例原則，以及最後有關比較法的重要。我的時間有限，我想就比例原則這部分，也是他在2012年的巨著 *Proportionality: Constitutional Rights and their Limitations* 中所闡釋的一些觀念，簡短回應一些感想。

首先，當然不同的國家在憲法維護的司法職責上，可能會有不同的設計。現在已有越來越多的國家是由特別的憲法法院，來承擔主要的憲法司法的工作。我曾提過，由不同的司法機關從不同的角

* Former Justice and Vice President of the Judicial Yuan, Taiwan; Adjunct Chair Professor, College of Law, National Chengchi University.
** Sir Y. K. Pao Chair in Public Law, The University of Hong Kong.
*** Former Chief Justice of the Supreme Court of Isreal.

度去維護憲法時，普通法院的法官和憲法法院的法官，好像在維護憲法上，站在不同的崗位。當法官去檢驗一個特別的司法或行政決定是否符合憲法時，所使用的方法，和憲法法院主要去審查一個抽象的規範（如法律、行政命令或者是條約）的時候，可能是不一樣的。有些國家是由同樣的司法者來承擔這個工作，像以色列、美國、加拿大；這些國家會把這些方法交錯使用，以它涉及到的不同問題而定。有時在方法上，比如說比例原則的檢驗，普通法院處理個案，與憲法法院在處理一個法律有沒有違憲的時候，兩者面對方法上的挑戰及困難，應該是很不一樣的。這是想要提出來的第一點。

就我的工作經驗，我非常知道當我們在做憲法解釋的時候，不只是去解釋基本權本身。基本權，毫無疑問地，很多時候重要的出發點，即在於是否有一個基本權以及其保護的範圍如何。更多的時候，更關鍵的往往是當基本權和國家之干預行為產生衝突的時候，怎麼樣去找出一個衡量的原則，一個必須去操作以保護基本權的原則。因此在這裡頭往往面對到更多的，即如同Barak院長所提到一些解釋方法上的問題。

作為特別是憲法法院的法官，他往往要去區分他的角色是一個球員還是一個裁判，因為他所面對的審查對象是國家行為，基本上是一個政治程序的結果。法官要做的判斷，則是一個司法程序的結果。誠如Barak院長講的，法官做這樣決定的時候，就有一些裁量的空間。這個時候他必須把自己放在裁判者的角色，避免成為一個球員、一個參與者、一個參與政治決定的角色；他必須保持一個裁判者的思考。而這在我們談到比例原則時，會產生一種特別大的困難。我們談到維護基本權的一些原則操作的時候，我們可以很粗略地區分兩種原則：一個是形式的原則，另一個是實質的原則。形式的原則會在方法上比較少爭議且比較容易被接受。例如法律保留原則、狹義的正當程序原則、法律明確原則、以及法律不溯及既往原則等，都是屬於這類較為形式的原則。在處理很多憲法問題上，它

們比較容易且被接受的原因即在於它們代表了比較純粹的法律價值或者法律理性，某種程度上也代表了衡量政治決定的基本規格。因此，它比較不會產生爭議。

相對的，我稱之為一個深水區的，就是當衡量的原則是較為實質的，某種程度跟理性政治的價值會重疊的，主要例如平等原則與比例原則。它們之所以容易會跟政治程序所形成的政治理性、政治決定重疊，是因為我們的憲法，基於民主的原則要求，基本上對政治程序跟組織，是按照平等和比例原則去設計的。它（憲法）追求的是要能夠通過這些組織與程序，去符合社會的需求。因此，我們也許可以說，政治理性和法律理性就此是重疊的（overlapped）。這讓我們有時候會感到這個司法者不太像是純粹的裁判者，有的時候更像是參與競賽的球員。如何在審查方法上能夠避免這樣的印象，便值得我們進一步討論。一個司法者被貼上標籤說他是某種意識形態的司法者，其實是很自然的，也常常會產生的一種偏頗的印象。這是在方法上特別困難的一點。

也許進一步在民主程序上來談。在民主程序裡頭，我們會按照平等的設計，比方一人一票的普選原則、票票等值的選區劃分，又比方在國會等場域裡頭所採取的多數決的原則。操作平等原則的司法決定問題比較不大，因為這是一個出發點的平等。出發點的平等基本上是高度符合法律理性，是基本民主程序、政治程序的規格。如果發現有些明顯的參與、進入市場不平等的時候，沒有太大的問題。最大的問題當然來自於涉及到利益交換時候的平等、實質的平等。但是它不會成為大的問題。這是因為我們的民主程序的設計，能夠落實到平等的方法或者是制度的並不多，所以程度並不高，有太多的原因是歷史、社會條件的不平等。這是在政治的過程很難自然去克服的，並需要司法者去糾正。John Ely的representation-reinforcing理論，即在強調司法的介入在這裡有很高的正當性。在我們司法的審判、判斷上，也往往借助於採取不同的審查標準，來反映社會一些對於平等的價值觀，以解決這樣的問題。

在深水區裡，平等的問題似乎比較容易克服，但是比例原則的問題則是比較大一點的。在民主的程序裡頭我們看到，比方國會在決定一個法律的時候，他會有讀會的程序、公聽會的程序、很多的辯論。這些辯論的主要內容，無非就是對政治的決定，它的合目的性、必要性和合比例性，以及更多政治考量的事物。對於法律要不要修正，也會有很多民主程序的考量，比方可以先累積經驗再修改法律。所以當司法者用比例原則去處理一個抽象的法規範——特別是國會生產的法律的時候，會產生一定程度的困難。我工作的經驗也是如此。在大法官重度使用、操作比例原則的時候，很多時候，大法官會較像是政治的參與者。從哪個角度來看，大法官會比國會定期改選的民意代表更能代表全民意志？從什麼條件來看，大法官會做出更好的、對法律的事後判斷？實際上大法官可能有更少的資訊和知識，也比較沒有那麼多元。此外，它的政治決定選項也比較有限。這是一般在談比例原則的時候可能也都有想到的問題，但是在實際經驗中可以感受到操作的困難。

新制度主義討論民主的組織設計的時候，有一個重要的二分法：一個就是所謂的多數型民主，另一個則是共識型民主。前者可能有比較大一點的空間去做比例原則的修正，因為那裡比較像是多數決的情形，比較容易產出零和的決定，但實際情況也未必如此。相當多國家的民主體制設計，已經包含很強的比例考慮，比方瑞士就常常自稱是一個Proporzdemokratie，亦即比例民主體制。誠如Barak院長剛才所說，在“we the people”與“I the individual”之間，難免存在衝突，有賴政治程序處理。比例原則和平等原則毫無疑問的是法律的理性核心、正義重要的內涵。這是毫無疑問的。比較大的問題是，當憲法法院在審查系爭法規範有沒有違反憲法比例原則的時候，如何審酌政治程序所做的比例原則考量。

就臺灣經驗而言，我們是比例原則的重度使用者。從民主化之後的1994-2003年，到民主漸漸成熟的2003-2015年，各位可以看到，使用到平等原則與比例原則的案件比例，從差不多三分之一變

成三分之二。我們原來在很多時候，會把比例原則的操作隱藏起來，例如在380號解釋或是443號解釋，大法官是用法律保留這種比較有說服力、比較不會有爭議的論點論證。可是現在我們發現，我們需要做更多實質的憲法論證，但這時候面對的困難蠻大的。我觀察臺灣的發展策略，是我稱之為one step forward、先走一步的策略。當我們國家還沒有完成民主化的時候，大法官其實會把他的重點放在形式的原則上。形式原則其實是非常好的觸媒，去促成民主化。但是當我們完成民主化以後，我們卻還不是一個成熟的民主；用二分法來講，我們只是程序民主（procedural democracy），除了定期改選以外，我們的民主的成分還很低，成熟度是不高的。比較實質的民主，除了選舉以外，有高度的參與和審議，還有清楚的責任。我們現在看到的情況是沒有的。因此，在這個時候，我們可以把比例原則內含的法律理性，作為一個提高政治理性的觸媒，來促進民主制度的發展。

但是一旦慢慢走到成熟的實質民主社會，這個原則的困難度會越來越高，因為在操作這類的原則的時候，大法官常常不大像是一個裁判，反而像是一個教練。因此，我們最後就要問，當臺灣的民主制度越來越成熟以後，比例原則會不會也走到比較窄的路？我自己的觀察是，就德國的憲法法院來看，比例原則的操作不是不斷地膨脹，而是在減少，更多的（操作）是用在普通法院，在那就沒有我剛剛提到有關民主跟比例原則衝突的問題。而在美國最高法院，則一直都沒有太多比例原則的思考。所以未來我國的比例原則審查是不是也會走向這種方法上的最小主義（minimalism），或許值得我們觀察。謝謝。

David S. Law

I would like to thank Justice Su for his extremely thoughtful and insightful remarks. They are very thought-provoking. I would also like to thank him for advancing a competing conception of adjudication in

democracy. With the consent of our participants, I would like to perhaps contrast the two conceptions of judging, in the context of an empirical question about what conception of judging works best in a country or society or court with less extraordinary judges.

In a sense, our sample today is not very good, right? We have Justice Su and Justice Barak, who are not average judges. The question is, which conception of judging is appropriate in the world in which not every judge is, frankly, at *this* level? Every court, just like every country, has tremendous variations. One conception of judging, which Justice Su touched on, is to view a judge as a referee, to use a sports metaphor. For those of us who have been following the American debate, this may remind us of Chief Justice John Roberts in his confirmation hearing when he likened judges to umpires. As he said, "I call them as I see them." That conception of judging has been heavily criticized as untenable and as perhaps dishonestly reducing the multifaceted exercise of judgment to the mechanical application of rules.

On the other hand, we have Justice Barak's conception, which does not use any sports metaphors, but is perhaps more appropriate with a metaphor from the Greek mythology—in particular, Ronald Dworkin's metaphor of the judge as Hercules. Judging is about the identification and application of profound and enduring social or political values in the face of social change and in a society that has opted for an open-textured text. That too demands a level of discipline and ability on the part of the judge, which may be difficult for some judges.

I was fortunate that when I was in graduate school, I had a neighbor named Jigme, who turned out to be an exceptionally talented, educated, and reasonable young man who was also next to line to become the king of Bhutan. I would never support monarchy. However, after meeting Jigme and getting to know him, I thought to myself: monarchy is great if

you have got a great monarch.

Many different conceptions of judging can work well if you have really great judges. Therefore, the question I would like to introduce to you here is: what conception of judging works best if you have average people serve as your judges?

Aharon Barak

[…] My answer to the question David presented to us is that judges are not umpires, because the rule of law is not like the rules of the game in sports. The umpire metaphor only works in a few cases, and it does not reflect the complexity of judging. The idea of Hercules does not reflect the idea of judging, either. In most of the cases, ninety-nine percent of them, you do not need a Hercules to answer the question. Judges are neither umpires nor Hercules; they are just human beings. They are human beings that have a special role to decide the dispute. There are easy cases and there are hard cases. You need the same judges for both kinds of cases. It's not that there is one type of judges for the easy cases (the umpire cases), and there is the other type of judges for the Hercules case. No, no, no. These are metaphors. Metaphors are very dangerous and can cause confusion.

I think what Justice Su said […] is right. We all have the same (young) democracy, but our democracy is older than yours, and I can see the changes. So yes, I can exactly understand from the beginning what you called the procedure of rights. And at a later stage, it can be more about substance than about procedure. So, there are movements. Law is never stable and neither are the judges. I accept it totally, and the situations in which you would not use proportionality at all are fine. Proportionality is not a must. Proportionality is a methodology to balance between the "I" and the "we", between the two pillars of

democracy. Of course, there are different ways to do (the balancing). Every legal system should have its own path, and within the legal system, things will change through time.

What I disagree with is the idea of counter-majoritarian (difficulty). This is the American idea planted by an American law professor, and it indicates that what the judges are doing is counter-majoritarian, and therefore problematic. I think this is a major mistake. Yes, if democracy means the majority rules, then judges are, of course, counter-majoritarian. They are counter-majoritarian, but why are they so? Because the Constitution is a counter-majoritarian document! That is the problem! Not that judges are counter-majoritarian, but the Constitution itself is a counter-majoritarian document. The Constitution enacted in the past tells the legislators and the president what to do and what not to do. If judges are counter-majoritarian, that will be a problem. However, if the Constitution is counter-majoritarian, then the problem is the Constitution itself. So, you can choose not to have a Constitution. But if you decide that you want the Constitution, it means that you have a counter-majoritarian problem. What the judges are doing is not counter-majoritarian. The judges are just reflecting the Constitution. Therefore, while we have a complicated life, I don't think by saying we are counter-majoritarian it will make our life as judges any easier. Yes, of course, I am counter-majoritarian, but that's because the Constitution is counter-majoritarian, and so is the judging according to the Constitution.

Yeong-Chin Su

[…] Last week, Professor Cass R. Sunstein visited us at the Judicial Yuan, and he made a speech on the ideas from his new book *Constitutional Personae*. He presented the different roles played by justices on the American Supreme Court: the heroes, the soldiers, the

minimalists, and the mutes. I do not know if you get it from these four words. By heroes, he referred to some justices who would do really great things like changing the world, the system, or the mode of thoughts, and sometimes swimming against the tide. Earl Warren is an example. Then you have soldiers. He took Oliver Holmes as an example of someone who is really abiding by the principles and keeps things under control. The third type are the minimalists, and being a minimalist is not equal to being self-restrained. A minimalist tries not to influence as many things as possible, and would only make decisions that are really needed. A mute justice, on the other hand, is someone who actually does nothing.

I think it is interesting. One of my colleagues raised a question about whether it is only an analysis of different roles played by justices in a certain country or court, or some prescriptions can be made in terms of which one is better, and, if so, whether the prescription depends on the development stage of the country, of the court, or on other social conditions. For instance, you need Justice Warren in the fifties, and he became a hero. You also need Justice Barak, without whom you wouldn't have judicial review in Israel. You need a hero when the time is ripe, when the time is for a hero. I personally share this view, so what I said today is a matter of dynamics. There are no general rules for what role judges shall play even if you have a Constitutional Court that is quite unique and unusual. You have to take many things into consideration, such as politics, economics, etc. So it has to be dynamic.

As for the Constitutional Court, we simply don't have a model that can tell us the kind of justice we need most. In our country, at this stage, we have fifteen justices. It is quite a lot, and we debate and deliberate on many things in much detail. Sometimes I think we have fifteen views. We need a lot of average people who are qualified enough to represent the values shared by all kinds of people in Taiwan. And the

representation is important. They should be outstanding in their legal training, of course, but not all of them have to be philosophers or heroes. That is what I meant when I said that proportionality is a good tool, a very important method, but not for every court at every time. Sometimes it is required, and as you can see, we are heavy users right now because we see that our democracy is still immature. There are many laws that you sometimes have to put more juridical rationality into them to catalyze the pursuit of mature democracy. But I am not sure if we go further, our democracy will become more mature. We still often and heavily use this principle, though.

Aharon Barak

I know Sunstein quite well. We are good friends. His four types are a very nice analysis of the American legal history. I think he is in favor of minimalist for the Americans now. Maybe it is fine for America, but I do not think minimalism is a good prescription for everyone. Suppose that the United States Supreme Court was minimalist in 1954. There would be no *Brown v. Board of Education*. No *Brown*!

Think of Israel today. We already have had a young democracy for seventy years, but only have had constitutional democracy for twenty years, because our judicial review was first established in 1995. So, Israel is still quite a young democracy. We are infants, and Israel and Taiwan are very similar in this respect.

It would be a disaster if all we have on the courts are minimalist judges. Minimalists would be unable to solve problems; it would take a long time for them to solve problems. It does not mean that all of us should be heroes. You are right. Out of fifteen judges, it will be a disaster if more than one or two are heroes. Of course we should think about minimalism, and there are cases in which the only way is to do

something with minimalism. […] However, at the beginning stage of the democratic development as you and we are, I think a minimalist mentality of judging means thinking small, not thinking big.

Of course, even now there are a lot of cases in which the best solutions are the minimalist ones. I hope you are right that this is the case for the Taiwan Constitutional Court. But the same cannot be said for us. […] It is very important to lay down the direction and provide some sense of security for people to expect what will occur in the future. I think having a minimalist policy is very dangerous during the times things are changed.

You are absolutely right about the proportionality principle. An American professor once told me, "You are proportionality guys. You are young guys. When you reach our age, all of you will develop scrutiny in an American way." Maybe, just maybe. But for now, it is fine with us. I do not know what will be the future of the proportionality review. I gave some suggestions in the last chapter of my book on how to amend proportionality to make it closer to an American way, and how to have a principle of balancing and not just *ad hoc* balancing, et cetera. But I do not know what will happen. Yet, for the time being and for a young democracy, I think proportionality is very good, and I think we all agree on that.

David S. Law

This is tremendously illuminating, and the answer makes enormous sense. I think what we heard from both Justice Su and Justice Barak is that the role of judging has to be adjusted, dynamic and situational as it is the case for all healthy human beings. We do not behave the same way all the time, regardless of where we are or what we are doing. Even within the role of a judge, there must be variations depending on

questions about what is the case, who is on the court, what is the moment in the nation's history, and if it is intolerable and/or unrealistic to adopt a particular conception of judging. Forgive me for introducing another sports metaphor: It's as if one day, soccer is being played, and the next day will be cricket. And it depends on the judge to recognize what game is being played on that day, and not try to play the game that was played yesterday or played in someone else's field. That requires judgment, which makes many critics uncomfortable. But if judgments were not required, then I don't think we would call it judging.

I would like to turn to a question that might interest many people in the audience, and that has to do with the use of comparative law that both the justices touched upon in their remarks. In particular, when we engage in a comparative analysis, we see that courts refer to the jurisprudence of certain countries more than others. So, some courts are heavy participants in the exchange while other courts are rarely heard from. Even when the courts participate more heavily in the dialogue, they will sometimes look in different directions. Within Asia, if we look at South Korea and Taiwan, for example, the justices have a keen interest in German constitutional jurisprudence. But look at Hong Kong. The judges there are also concerned with comparative law, yet they will not opt for Germany. Instead, they will look at Canada or South Africa, which we do not see much in South Korea or Taiwan. On the one hand, the comparison is going on and a lot of courts are very interested in comparative law. On the other hand, we see courts look sometimes in different directions.

In his comments, Justice Barak remarked that there must be a certain common ideological foundation for the appropriate and helpful use of comparative law. What I am wondering is, aside from the question of a common ideological foundation, what are the other factors playing a

role in whether and when judges look into particular countries? For example, factors such as the resources that are available to the court. One resource is the clerks. But where are the clerks educated? How is the institution designed? Does the court have something like a foreign law research institute, or are the judges required to be more self-sufficient? Another factor is the prestige of the court. There are some courts that have higher profiles and are more famous than others. Other factors also include patterns of legal education, history, language, education, and geography, etc. The question of relevant factors may be particularly interesting to a Taiwanese audience.

But if the test of whether comparative analyses should occur depends on the two countries sharing a common ideological foundation, then why don't we see more jurisprudential exchange between the Israeli Supreme Court and the Taiwanese Constitutional Court? These two courts are relatively young, and both are in extremely vibrant democracies that face existential threats to their security. They exist in the shadow of their neighbors that are not necessarily the friendliest in the world. They have placed heavy trust and faith in their courts, sharing the same security problems, and having close relations with the United States in particular. Also, they often struggle for diplomatic recognition or international diplomatic cooperation. There is so much in common. However, even though there are opportunities for dialogue as we see today, I do not see many exchanges between these two particular courts.

Aharon Barak

Well, there are several reasons for the answer "why not." I just wrote them down and this is not more or less important, just how it goes. First of all, history. History plays a tremendous role. Our constitutional and legal history is heavily influenced by the British. As you were

colonized by the Japanese, we were colonized by the British. The main contribution that the English had done with the colonial rules is the common law they gave us. This is a great treasure. So, we are a common law country. A common law country tends to learn from other common law countries. It is natural, so in the beginning, we went to England because this was what we knew. Every year some ten English judges would come to Israel. We knew their names and we wanted to see their faces. After twenty or thirty years, we knew their names and their faces. Through their judgements the Americans became quite influential in Israel, too. So I think history is very important.

Secondly, the education of the judges is also very important. Where are the sources for their legal education? Law schools are very important in this respect. What did they learn at law schools? Take America for example. They learned at law schools that comparative law is not important. Why do they not learn comparative law at law schools? Because the professors tell them comparative law is not important. Why do the teachers tell them that comparative law is not important? Because the Court says that comparative law is not important. Why does the Court say that comparative law is not important? Because when the judges were law students, they were told that comparative law was not important, and now it goes. You have to cut this circle. I think this cut is happening in the United States, but it depends on the education. Many judges and law professors I met within these days here in Taiwan were educated in Germany. Wonderful! So, it makes sense that your jurisprudence looks like German constitutional law. It makes sense. Most of the Israeli young scholars are going to the States nowadays; luckily, they are not yet the judges of the Supreme Court. Yet, when they become the judges of the Supreme Court, its jurisprudence will look like the American law. It is quite natural that the way the judges are educated

has an impact on them. Therefore, the law schools are so crucial. The moment the law schools are ready to introduce comparative law in their education, this will ultimately influence the judges.

Language is another factor. I may have admired the German Constitutional Court. But if I do not speak German, my use of the German judgments will be very selective. I will only be able to adopt the translation, yet not all the judgments are translated. Language is a major barrier. If all the world speaks in one language, it would be much easier to refer to many courts.

My last point, most importantly, is the quality of the judicial analysis. I admire the German Constitutional Court because of the quality of its analyses. It is the first and last constitutional court whose quality of its analyses is very high. I do not admire the American Supreme Court of today, because the quality of its analysis is not on the same level as it was in the past. That is the true story. So, I would tend to refer to the courts from which I could learn. In the United States, however, some of the Court's rulings would tell you, "Look, we are doing only for the Americans; it is not for you. We are special. This is an American specialty, and we fight with each other. The result shows what we want." In this kind of analysis, if it is good for America, it is fine. I do not care about it. Last year, I read very few cases from the U.S. Supreme Court. Professor Laurence Tribe, who is an expert in American constitutional law, wrote his book *American Constitutional Law*. There was the first edition, the second, and then he started to write the third. He sent me his third edition (volume one*)*. But since I did not get his Volume Two, I called him one day, asking, "Where is the second volume?" "Oh, I stopped writing it," he replied. I asked him why he stopped writing Volume Two. He told me, "Because I do not know what to write! I do not see a methodology. I can give some American cases,

but I do not know what to write!"

It is not so much about the results, which may reflect the society. It is about the way of serious thinking and the openness of the mind. For example, when I was referring to the American law, I would consult not only the majority opinions but also the minority opinions. Once I read a very great criticism on my judgment. It says, "This judge's reliance on Justice […]'s opinion is brilliant, but that was a minority opinion. So why does he not reflect on the majority opinion? That was an opinion concerning the Fourth Amendment and not concerning the First Amendment. How can you rely on the opinion from the Fourth but not from the First?" Sorry, I do not care about whether the opinion was from the majority or from the minority. This was not my point. I care about the way of Israeli thinking. I do not care about the American Amendments. I care about free speech. It does not matter how you analyze it.

So, I think these are some of the reasons. Now you ask me about Taiwan and Israel. You do not understand Hebrew, and I do not understand Chinese. We both need English translation. Few of the hard cases are translated into English. It is very hard to understand the legal system just from the translation of these cases. And of course since you are trained in great law schools, you may try to learn the language. I am sure I can learn from you; but when the time comes, I would have to rely on translations. Who knows what will happen if all the judgments of different laws are translated? The language is the major problem.

Yeong-Chin Su

Yes, in Taiwan, our constitutional thinking, with methodology and philosophy, is heavily influenced by the American and the German jurisprudence. That is quite clear. Judge Barak said that there must be

different reasons for this kind of phenomenon, and history could be one good explanation. For instance, almost eighty percent of our Civil Code and Criminal Code were actually transplanted from Germany and from Switzerland. In the areas of civil law, criminal law and administrative law, we are quite accustomed to the German ways of thinking and methods of law. As for the influences from the U.S., it has something to with all these frequent contacts in our political relations with the U.S., and the important position the US constitutional law holds in the world. We can see so many famous people, Justices and decisions coming from the U.S., and this could explain indirectly why we relate to them historically.

Speaking of education, the Justices are currently composed of law professors from the academy and experienced judges from the judiciary. If it is the case that all of the Justices came from the judiciary, just like the Justices of the Korean Constitutional Court, then the influence might not be that huge. Many law professors in Taiwan are educated either in Germany or in the U.S., and they could use the resources very easily. I think this also strengthens their willingness to consult foreign law. But in Korea, you do not have professors as justices. Still, Korean professors write papers and books that may influence the thinking of judges.

Sometimes I think it has become a bad habit, or a bad influence. We sometimes are too much influenced by the German or American jurisprudence, or misuse or abuse our knowledge about them. Our Constitution is related to the German Constitution but not to the *Grundgesetz*, the Basic Law. We are more related to the *Weimar Verfassung*. So, for example, we still keep three basic obligations, which are parallel to the basic rights. This is quite Weimar. But our constitutional lawyers and professors almost pay no attention to the existence of these three basic duties. They do not write papers on that,

and they do not bother to do any research on the relationship between basic rights and basic duties, simply because the German professors do not do so, and that's because you do not have basic duties in the *Grundgesetz*.

This habit appears to have derived from our civil law experience. When we write papers on civil law, we are used to citing the jurisprudence from the German civil law literature. It's just like you bought a machine from them, and you use their manual. After all, our civil law is largely transplanted from Germany. This is not the case for our constitutional law. Still, our constitutional lawyers unconsciously use their knowledge about the German or American jurisprudence, and they follow the German or American ways of thinking almost systematically, totally, and blindly, even though our constitutional law is very different from theirs. For instance, the case law thinking is very prevalent in the American constitutional law, but not in Taiwan. This kind of beautiful mistake happens all the time. You use foreign jurisprudence in the wrong way, but in the end, it is beautiful. History is made of mistakes.

The third reason is the prestige or the myth that using foreign jurisprudence would make it easier for you to persuade other members of the Court, the legal community, or the public. The idea is that if you can cite American decisions or some theories from Cass Sunstein, Alexander Bickel or Ronald Dworkin, your argument will be more powerful. This is prestige, but I also call it a myth. Actually, they might not help your argument. But it has also become a habit to use this kind of theory to help you persuade others. For me, it is more of a myth than prestige. I personally think we should go step by step beyond that stage. We should really begin to learn from others' experiences, which are really helpful to us. We can, for instance, learn from Israel, and you can even make the argument that, in this case, the Israeli experience is more

valuable than the American experience. We can also learn from Japan, Korea, Thailand and any other countries. I have made a tour this summer to Hungary, Austria, and Poland. I learned a lot! And there are some good ideas and I even put them in my plan to amend our law. I think you can always learn the experiences from other countries if you put aside all these myths or prestigious things. You should compare and learn from the valuable experiences for your countries, and reflect on the text of your Constitution, the way of thinking and the values shared by your community. What the judges should do is to compare and reflect on what your people really need. The comparative law is a tool to help you make judgments and make your Constitution more valuable in your country.

Aharon Barak

I agree. As you said and as you can see, we are very much alike. Comparative law is much needed, but the question is about the way your mind works in this respect. In a public debate with Justice A. Scalia about comparative law, I told him that, "Well, I agree with you that where there is no need for the comparative law, there is no discretion." He said, "There is never discretion." It means this person seems to know everything and does not need advice. So, for a person who thinks he knows everything and does not need any advice, he does not need comparative law. There was an English judge who once said, "I may be wrong, I may be right, but I am never in doubt." Maybe I am right, and maybe I am wrong, but I am in doubt! Not for all cases, but in cases where I found doubt, I tend to ask people who are cleverer than me. What is wrong with it? But ultimately, you have to come back to your text, and solve your doubt. This is your responsibility for yourself and your people, and that is clear. But if you are in the mood of someone being I-never-in-doubt, okay, do not use the comparative law.

David S. Law

We can have a conversation for hours on questions about comparative law, and I personally would love that. It will be interesting to know, for instance, whether these barriers to judicial dialogue will collapse or persist in the age of globalization.

Let us turn to the question of the role of judges. What roles do judges need to perform in a democracy? Justice Tokuji Izumi of the Japanese Supreme Court wrote an article a couple of years ago in the *Washington University Law Review.* The article discussed why the Japanese Supreme Court had such difficulty performing constitutional review in an effective way. Yesterday, the Japanese Supreme Court struck down the ninth statute in its sixty-plus years of history. That is, relatively speaking, a low rate, and maybe the legislature was exceptionally careful and conscious. Yet, one still has to wonder about the vitality of judicial view in Japan. Justice Izumi had forty-plus years of experience in the judiciary, and he said that the number one thing he needed, which his court did not have, was the ability of the Justices to hire their own clerks. His comment suggested that even if Justices work diligently, they, working alone, may not be able to perform judicial review effectively. This is something often ignored by scholars, but we know it's real. The institutional capacity and the resources available to judges to do their jobs are often ignored. Sometimes we act as if it does not matter how the court is designed; what matters is the philosophy of judging. So, I would like to take this opportunity to ask you, putting the philosophy of judging aside, when you need to perform your job, what is it that you do not have enough of, but you would like to have more of at this moment?

Aharon Barak

Well, there are differences, but I do not see they are really important. There is a library you can use, and there are computers and internet nowadays. So, Professor Law, I really do not think it is the question of clerks or the question of computers. It is your frame of mind. If you have an exploring mind, if you want to know something, if you understand your responsibility as a judge as well as your responsibility to the rule of the law, and the law of the proper rule which makes a balance between the "we" and the "I, " you will look for the resources. It is your sensitivity. It is to understand what you do not often see. You do not think because you became a judge of a Supreme Court, you are cleverer than the judges of lower courts. What you need is humility. This is what judges need. They need to understand they do not know everything and they should learn. They perform a tough job. Their role is not to satisfy the population. It is not to see where the wind comes from, but find all the values reflecting their Constitution and democracy. The rest is secondary.

Yes, we have clerks in our Supreme Court. When I was a junior judge, I had one clerk. When I was the Chief Justice, I had five. The clerks would not make me the right judge. When I was the guest of the Third Circuit in the United States, I asked the judges, "who wrote their judgments?" And they said, "The clerks." "Why were the clerks writing judgments?" I asked. They said, "We are so busy. We cannot write our own judgment, so the clerks are writing it. We read it, of course, and we are responsible for it. We read and change it, but the first draft is written by the clerk." I cannot operate like that. I think it is a failure of decisions, the bankruptcy of decisions. The judges should be able to write their own judgments. In my case, I would ask my clerks, "Hey, this is the topic, find out the literature! Give me the literature, and I will read it."

Then after I wrote the judgment, I would give it to them. I would like to have criticism from a sounding board. For me, the clerks are the sounding boards, not someone writing my judgment. On the other hand, the English Supreme Court does not have any clerks, yet they are a wonderful court. Clerks are clever students, but they don't have the maturity to be good judges. The time will come when they become very good judges, but until then you can only rely on them at a very low level, not to mention that the computer now even makes this level not so crucial. […]

Yeong-Chin Su

We had Albie Sachs from South Africa as a guest two years ago in our court. He made a speech depicting the uniqueness of his court in South Africa. He focused on the openness, including the informality of how Justices deliberate on the round table, and how people could go around in the courthouse, etc. The atmosphere was open. He tried to give us the image, which was indeed impressive. In our conversation, one of my colleagues said, "Yes, I agree with you on this. We do not even have our own toilets." Every country is different in terms of resources given. There may be one clerk, no clerk, or many clerks. In the U.S., the clerks are some of the best and smartest law school graduates. In Germany, you may have two or three outstanding and well-experienced judges as clerks. In Japan, there is no personal clerk. Instead, there are some thirty clerks working for all judges. And in Korea, like many of us, each judge has only one clerk.

I agree with Judge Barak that the issue of the clerks is not so important for a court. What we need is to be recognized by the society as the guardian of the Constitution, and I think we are still short of that. People know about the existence of Grand Justices, but most people do

not even know what these Justices are doing. We try to be transparent, but we only have a few public hearings in the public sessions. Things like these are what we should change, and that is why I have put more attention to the amendment of our laws. I think we should go to the public, and the public should be attracted to us. Resources are not of great importance. What we really need is the image. We need to polish our image, and we cannot blame the society for not giving us a chance. We have to show ourselves and make ourselves more important! I think that is very crucial and it is what we need.

David S. Law

We have a little time left, and I would like to ask an open-ended question that may be particularly interesting to our Taiwanese audience. For many scholars and observers, the distinction between domestic constitutional law and international law is increasingly difficult to make. My question concerns how you see the relationship between constitutional law and international law evolving and going forward. And in particular, are judges considering the application of international or supranational law, such as the European Convention on Human Rights, the Covenants, and the jurisprudence of the various human rights tribunals? Do these sources converge with domestic constitutional law?

Aharon Barak

Well, it depends on what your starting point is in terms of the methodology in your legal system. Our methodology is that treaty law is not binding unless the treaty is adopted by the statute and is put into the legal system. No statute, no treaty. The treaty itself is not binding. On the other hand, the customary international law is part of our common law. Whenever there is customary international law, it becomes a part of our legal system, but only at the same level as the common law. That is our

starting point and our attitude to international treaty law.

Let's talk about the human rights treaties, the bilateral or multilateral treaties like the two Covenants (ICCPR and ICESCR), European Convention on Human Rights, et cetera. They are not binding in our courts because they are not part of our constitutional scheme. Many of them are adopted through the common law, but our constitution is above the common law. As I wrote in some judgments, we think a statute should presumptively be interpreted to such extent that it would fit into international law. In other words, there is a presumption of compliance with this customary international law. But this is only a presumption, and you can revoke it. I was even ready to go one step further. If the action of the administration is against the international law, you can presume that it is unreasonable, but the presumption is rebuttable.

As far as the interpretation of our rights is concerned, we take international law very seriously. If there is a similar provision, I would read some literature on it. I would take it very seriously. We are not an island, though we are treated as an island in politics so to speak, but we should not conduct ourselves as an island. We are part of the international community, and therefore we should give international law a lot of respect. Respect what the European Court of Human Right and other international courts are doing in construing their documents or treaties. Yet, those courts can also make mistakes. In some cases they are engineering at a very low threshold, and the law on this level has the common agreement amongst those forty-seven judges. I'd take this very cautiously.

I study international treaties, international courts, and the decisions based on the treaties. I take them very seriously. I have great respect for them, because we should be part of the international community. This also has to do with the comparative law. When you give the judgment,

and, say, the same idea was reached by the European Strasbourg Court, it creates great respect for your position by all politicians. We forgot the politicians in the whole picture. Our politicians do not like our judgments because they are restrictions to them. And they would rather ignore them, one way or another. However, when we come to our politicians and say to them, “Look! This decision was also the decision of the German Constitutional Court,” or, “Our judgment is also the judgment of Strasbourg or Luxembourg,” our politicians may calm down a little. So, this is another reason for using the comparative law, but that is not that important. It gives you satisfaction in the real sense, but the satisfaction is only important as far as the politicians are concerned, because the politicians are ignorant about the way we think. They think that you think like they do, and that is a mistake. You never think like them. You have your own way of thinking. For them, if there is a majority, so be it! A politician might think, “I can get the majority by convincing my colleagues to trade votes with me.” “Vote for me on this case, and I will vote for you on the other ones.” This is how they do things. But we never do things in such a way. Never! It never crosses our mind!

Anyway, we take international law very seriously. Our constitution is not subject to those international documents. There are other countries that share different views. They told me that their Constitutional Court said their Constitution was subject to E.U. law. That is just not our way. We are more Germanic in this respect. The German constitution is above E.U. Law. And our constitution is above the international law.

Yeong-Chin Su

Yes, the status of international law, such as the Human Rights Covenants, is still an issue of debate in Taiwan. We have, in our

Constitution, only one article relating to this, which is stipulated in the chapter related to foreign policy. It says the state should respect the Charter of the United Nations and international treaties. What does that mean? Does that mean that once we become a member of a convention, the convention will have the same status as our constitutional law?

We have just held a conference last week at the Judicial Yuan with Professor Wen-Chen Chang. She is in this position that we should amend the laws since we have incorporated the two United Nations Covenants into our own domestic laws, and the Enforcement Acts stipulate very clearly that they are binding to all agencies. So Professor Chang is of the view that these new laws should have the status of constitutional law. But in the same conference, there were some professors opposing this view. They argued that, with few exceptions, most articles of the Covenants are merely ordinary laws.

In the Judicial Yuan and in our courts, we sometimes cited in our decisions the two Covenants, the rules set by the European Convention on Human Rights, or the decisions of the European Court of Human Rights as references. So, in my view, what we have done is treat these treaties as a kind of constitutional jurisprudence. The wisdom and the experience derived from the treaty interpretation are highly relevant to our constitutional laws, but the treaties are not a direct source of the law. I do not mean this is my personal view. I mean this is what we have done in our decisions. We do not treat them as legally binding, so we do not necessarily have to cite them. We cite them only when we need them.

Occasionally, we need to decide whether a certain right can be recognized as a new basic right according to Article 22. If we want to categorize it as one of our new basic rights, then the best way is to say that many signatory countries to some conventions have recognized this right. For example, the right of a child to know his/her parents. This right is

recognized in the Convention on the Rights of the Child. In some cases, where it is hard to explain and make a breakthrough, we may use these comments. Occasionally, when we want to persuade the public that this decision is of great importance, we may also use them. There is a new tendency that the Justices write in their separate opinions about the decisions pursuant to the international treaties, conventions, or the decisions of international courts so as to enhance their arguments. And I personally see this as a positive tendency, because it really could improve our new development and make us more confident in doing the right thing.

Aharon Barak

I read about Article 22, and I agree with you. But what makes me curious is, "What does Article 22 do?" I am curious because it has such broad language to recognize others' rights as the rights in Taiwan constitutional law. This is a very interesting question to me. As for the case mentioned by Justice Su about the children, we have the same problem in Israel. The way of thinking is, yes, this child has the right to know, but we have nothing about it in our Bill of Rights. What we have, however, is the right of dignity, which can be interpreted as embodying the constitutional right for children to know where their parents are as so recognized by the international convention. In fact, we do not have your Article 22 and we cannot declare rights we do not have in our Bill of Rights, which is a very partial Bill of Rights. With all those rights we do not have, as a judge, I cannot declare that we have them. Nevertheless, what I can do is to save it from falling—to the extent that the absence of those rights affects our dignity and liberty rights.

I thought this works for your country, too. You do not have the right of dignity, but you have the right to life. The constitutionally protected life is not the life of an animal. Life means a human life; it means a

dignified life, and therefore, dignity. So you can have the dignity right. But there comes a question. I shared the same idea with judges of the American and Canadian Supreme Courts. Both of the legal systems do not have the dignity right at all. I said to the American judges, "You do not have dignity, but look, you have liberty! You've decided that out of liberty comes privacy, so why can't you say that out of liberty comes dignity? They are all connected. The American Supreme Court said the reason we have privacy is because privacy is a peripheral right found in the penumbras of the rights we have. If privacy is in the penumbras of various constitutional rights, dignity is even more so! Why don't you take it?" And to the Canadian judges, I said, "Look, you have Article 7, and it is about liberty. You can derive dignity out of liberty." So, what I want to say is that where there are tools which the judges can use in order to give expression to rights that might not have been independently mentioned, there should be an awareness and a state of mind open to these rights. If such a right does not fit into your society, then do not do it. All of these should be taken into account. I agree with you, and I am very happy with this decision about the children under Article 22.

David S. Law

Well, I feel as if we had a feast in the last couple of hours on the ideas, insights and wisdom of these masters and their craft. But the feast metaphor is not completely appropriate, because we are still hungry for more. Unfortunately and sadly, the time has come to feed our bodies rather than our minds. I hope we can all give our hearty thanks for this absolutely incredible, enlightening and fascinating discussion. I do not want to leave this chair, but I do not think any of us has a choice at this point. So, I hope you will join me in thanking Justice Barak and Justice Su for teaching us today.