

Article

Kelsen’s Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan

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I. KELSEN AND CONSTITUTIONAL COURTS

One of the most severe problems in establishing the rule of law in a number of Asian states has been the institutional organization of a supreme or constitutional court. This is because a constitutional court delivers teeth to constitutional provisions. This paper looks back on the early periods of constitutional courts in Europe. It is the systematic and theoretical insights which are of key interest here rather than the history and I will concentrate in particular on the question of what the inherent legal foundations of a constitutional court are. Therefore, I will turn to the era of the earliest constitutional courts as designed by Hans Kelsen.

Hans Kelsen is often and correctly quoted as the “father of modern constitutional review.” In addition to his theoretical foundation of the role of law in society¹ Kelsen designed the Austrian constitutional court and, a fact which is less well known, influenced the design of the constitutional court in the early Czech Republic.² Since naming whole continents in the headline is always misleading I should say here, that the Austrian model will stand *pars pro toto* for “Europe” here. Yet, there are a number of other countries (such as Germany and Spain in West and Hungary in Eastern Europe), which also owe parts of the construction of their constitutional system to Kelsen. Since this is not meant to be an exhaustive description of either system, but an analysis of legal principles, I hope to be excused for this one-sidedness.

The new Austrian Republic was formed in 1918 following a decree of Emperor Karl I in the aftermath of the Austro-Hungarian Empire.³ What followed was a provisional constitution, which gave the different pressure groups a relatively long time to negotiate and design a new constitution. The new Prime Minister, Karl Renner, approached Hans Kelsen to draft a new constitution.⁴ Originally Renner, on the recommendation of his advisors, contemplated a council of about three or four drafters, but, young scholar that he was, Kelsen managed to produce quite a number of suggestions and drafts concerning various parts of a future constitution, so that the council concept never became a reality.⁵ The introduction of a constitutional court was accorded less attention than the other proposals

1. NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 102 (1995, Frankfurt).

2. This is due to Kelsen's close friend Franz Weyr, who drafted the constitution there: Stanley L. Paulson, *Constitutional Review in the United States and in Austria: Notes on the Beginning*, 16 *RATIO JURIS* 229 [FN. 12] (2003); RUDOLF MACHACEK, *VERFAHREN VOR DEM VfGH* 22 (3d ed. 1997, Vienna).

3. “Revolutionary” only in the sense that it ended the monarchic system, THEO ÖHLINGER, *VERFASSUNGSRECHT* 39 (5th ed. 2003, Vienna).

4. GEORG SCHMITZ, *DIE VORENTWÜRFE HANS KELSSENS FÜR DIE ÖSTERREICHISCHE BUNDESVERFASSUNG* 27 (1981, Vienna).

5. *See id.* at 28.

Kelsen made. The political debate circulated more around the federal structure or the construction of the government and its relation to the parliamentary bodies.⁶ But Kelsen's theoretical approach as expressed in "The Pure Theory of Law" made it difficult for him to analyze the needs of a federal state correctly.⁷ The formation of a body of judicial/constitutional review was more in accordance with his personal beliefs than a system based on federal diversity.

To make clear what Kelsen's major intentions were we should have a look at two sources. One is Kelsen's theoretical opus dealing with the axioms of constitutional review (II.), the other his contributions to the concrete constitutions of his time (III.). Starting with the latter, it has to be said that constitutional courts in this sense are courts which have a centralized competence on constitutional cases and which are institutionally independent.⁸ This definition is still in use, for example, when the OSCE is assessing court systems in its member states. At the earliest stage it has been the basis for the constitutional courts of Austria, the Czechoslovakian Republic of 1921 and Liechtenstein (1926). This definition is narrower than the perception of constitutional courts as any kind of constitutional judicial review of acts of public authorities.⁹ This choice of a definitional framework does not indicate that I would consider any kind of so-called diffuse constitutional review as per se problematic; the goal simply to stick as closely as possible to Kelsen's concept, which sets out some arguments for a centralized constitutional review. The realm of a structure as prescribed by Kelsen's theory is limited; for example, there is no predetermination as to whether the system favors an abstract review or the adjudicative method.¹⁰

Kelsen's primary concern was with the legitimization of the constitutional court¹¹. Historically, this is explicable because of the shift from a multinational monarchy to a more or less German-Austrian republic. This question can be split into two. First, how can a constitutional court be legitimized democratically and second, how can it be legitimized legally? Since a constitutional court is usually founded in the constitution this implies the need to legitimize the constitution, especially where it will be binding for future, democratically elected,

6. See SCHMITZ, *supra* note 4, at 32.

7. Theo Öhlinger, *The Genesis of the Austrian Model of Constitutional Review of Legislation*, 16 *RATIO JURIS* 216 (2003).

8. Georg Brunner, *Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum*, REPORT TO THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, VENICE COMMISSION (March 28, 2001) available at [http://venice.coe.int/docs/CDL-JU\(2001\)022-ger.html](http://venice.coe.int/docs/CDL-JU(2001)022-ger.html) (last visited Nov. 20, 2003).

9. ANDREAS AUER, *DIE SCHWEIZERISCHE VERFASSUNGSGERICHTSBARKEIT* 5 (1984, Basle).

10. ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 209 (1992, New York).

11. Motivenbericht zum Entwurf eines Gesetzes über die Errichtung eines Verfassungsgerichtshofes, See SCHMITZ, *supra* note 4, at 309.

parliaments.¹² Nevertheless, this question of supremacy of a constitution over acts of parliaments can be considered a problem of general constitutional theory and factored out here. But a similar question arises within the constitutional systems of parliamentary democracies. How can judges, not being directly elected by the people,¹³ overrule parliamentary decisions?

The assumption behind this question is that legislators are entitled to generate law in the form of statutes, whereas judges should only apply law, without participation at its formation, or, as Montesquieu famously put it, just be “la bouche qui prononce les paroles de la loi.” Kelsen does not share this view. Contrary to this position he argues that no legislation is free in this formation of law, but is and should be bound by a constitution.¹⁴ Consequently, he takes the position that both legislator and judiciary deal with law creatively, while at the same time being subordinate to the constitution. The legislator is also applying law according to superior legal norms.¹⁵ A regime change, as in Austria, is a good example for this, because formally and substantially the legislator has to fit the—already existing—judiciary into a new system without losing the authority of the court system.¹⁶ From this perspective, law is a non-secluded system,¹⁷ which is usually determined by parliamentary statutes, but might also derive from judicial interpretation.

Focusing on the democratic premises of this argument, we have to respect constitutional courts and parliament as equally legitimized by the *pouvoir constituant*.¹⁸ Empirically, most of the democratic constitutions have recently preferred a designated constitutional court.¹⁹ As in Austria, many new democracies distrust the previous judicial system and its personnel;²⁰ a new court with a new appointment procedure promises to escape from the more traditional views of judges appointed under the former state order. Second, a constitutional court is more active in

12. This problem is discussed in relation to Kelsen's theory in N. W. Barber, *Sovereignty Re-examined: The Courts, Parliament, And Statutes*, 20 OXFORD JOURNAL OF LEGAL STUDIES 131 (2000).

13. Which, as it occurs, is not a principle in any of the countries.

14. Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, 5 VVDStRL 36 (1992).

15. Wolfgang Gaul, *Die Verfassungsgerichtsbarkeit im Verfassungsstaat*, 1/98 WHI-PAPERS 25.

16. Hans Kelsen, *Die Verfassung Oesterreichs*, 11 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 263 (1922).

17. I prefer this term to “open system,” because this might sound like a reference to Hart's “open texture” terminology: See H. L. A. HART, *THE CONCEPT OF LAW* 124 (1992, Oxford).

18. Werner Heun, *Supremacy of the Constitution, Separation of Powers, and Judicial Review in Nineteenth-Century German Constitutionalism*, 16 RATIO JURIS 196 (2003).

19. TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 6 (2003, Cambridge); John E. Ferejohn, *Constitutional Review in the Global Context*, 6 LEGISLATION AND PUBLIC POLICY 54 (2002).

20. See Ferejohn, *supra* note 19, at 53.

evaluating legislation when it comes to keeping the idea of limiting the power of parliament under a constitution alive. As Kelsen put it, the court may function as a kind of negative legislator.²¹

In addition to the democratic basis of constitutional courts, Kelsen also tried to explicate a legal foundation of constitutional review. He named three reasons why he preferred the institution of a constitutional court to a diffused system:²²

- protection of political rights demands a court which is especially concerned about human rights issues;
- independence in relation to other constitutional bodies is only sufficiently guaranteed when judges can claim a special authority on the same level;
- constitutional review requires judges who are educated and trained not only as judges but as scholars of constitutional law.

The final point resulted in provisions for the design of the bench of the constitutional court as a board of honorary judges. Although this model is still embedded in some of the provisions of the Austrian constitution (Art. 147, 87, 88), the workload today makes it necessary to rely only on full-time judges,²³ however, the other two points remain valid. Even in countries proud not only of their standard in human rights, but also of their democratic order need to ensure that these cannot be undermined easily. This then is the reason why the links between constitutional courts and their environment should be analyzed in an extra-European context (IV). Of course this could be done with the complete instruments of political theory, but having chosen Kelsen as the role model here, I wish to focus on a legal analysis only. It cannot be denied that quite a number of additional factors are needed to make a workable system of constitutional review, however, I cannot think of any remedies to correct a system which is corrupt in its legal base.

Kelsen's view of constitutional review remains valid, no matter which special type of review we are facing. But, additionally, his theory gives more specific arguments in favor of certain types of constitutional review. This is to address the gap between an American style supreme court-system and constitutional review concentrated at a special institution.²⁴ Again, there are a range of arguments in either direction, but

21. Hans Kelsen, *La garantie jurisdictionell de la constitution*, 44 REVUE DE DROIT PUBLIC (1928) at 197.

22. *Motivenbericht zum Entwurf eines Gesetzes über die Errichtung eines Verfassungsgerichtshofes*, see SCHMITZ, *supra* note 4, at 309.

23. HANS KLECATSKY & WALZEL VON WIESENTREU, VERFASSUNGSPOLITISCHE BETRACHTUNGEN ZU VORAUSSETZUNGEN UND WIRKUNGSBEDINGUNGEN EINER FUNKTIONSFÄHIGEN VERFASSUNGSGERICHTSBARKEIT 484 (1994, Festschrift Schambeck Berlin).

24. For a typology see GINSBURG, *supra* note 19, at 35; Klaus von Beyme, *The Genesis of Constitutional Review in Parliamentary Systems*, in: CHRISTINE LANDFRIED (ed.), CONSTITUTIONAL

I tend to select those based in legal theory. The main reason here is that there are such a number of political and historical contingencies²⁵ that it would be very hard to form an argument taking all these very often coincidental influences into consideration. Therefore we should, following Kelsen, concentrate on what we have expertise to do.

II. DRAFTING A CONSTITUTIONAL COURT

Kelsen's main work is on the relation between a constitutional court and parliamentary institutions in parliamentary democracies. While arguing for an influential constitutional court, Kelsen also saw the dangers of unlimited interpretation. The remarkable point however is that Kelsen found a certain balance between these extremes, which made it possible to put his ideas into action. But the ironical element of this development is that the courts had to leave Kelsen's "Reine Rechtslehre" (Pure Theory of Law) behind, or at least modify it, to establish themselves as powerful actors. On the other hand, it has to be acknowledged, that a more functional interpretation of the Pure Theory of Law allows understanding of the way in which it leads inevitably to judicial review on the constitutional level.²⁶

There is a view that the idea of a system of designated constitutional courts is a direct consequence of Kelsen's positive jurisprudence, especially a hierarchy of norms.²⁷ This seems to be a rather simplified understanding of both constitutional review and Kelsen's jurisprudence. It is precisely the fact that each positivist theory of law relies on a pre-positive gauge which evaluates the positive soundness of the system.²⁸ Whether a norm or an act of government can be justified by a superior norm and, finally, the basic norm, is a question of evaluation and always institutionalized in various forms of jurisdiction. In this general perspective, any kind of judicial review is a question of constitutional review.²⁹ What is of more interest here is that constitutional review in a formal sense can be distinguished from this more material view. Kelsen always used the design of constitutional courts in Austria as a prime example to justify the Pure Theory of Law against the allegation of being too abstract.³⁰

The first decision, which has to be made in order to follow the rule of

REVIEW AND LEGISLATION 21 (1988, Baden-Baden).

25. JÖRG FEDTKE, *DIE REZEPTION VON VERFASSUNGSRECHT* 422. (2000, Baden-Baden).

26. RENÉ MARCIC, *VERFASSUNGSGERICHTSBARKEIT UND REINE RECHTSLEHRE* 30 (1966, Vienna).

27. See GINSBURG, *supra* note 19, at 12.

28. See MARCIC, *supra* note 26, at 53.

29. HANS KELSEN, *DER RICHTER UND DIE VERFASSUNG*, 290 (1962, Vienna).

30. HANS KELSEN, *WER SOLL HÜTER DER VERFASSUNG SEIN?* 23 (1931, Berlin) against Carl Schmitt.

law, is to base the relation between the institutions of a state on law and not on power struggles. It does not come as a surprise that Austria, which had to deal with enormous tensions and, at least potentially, violent conflicts within its empire, was the birthplace of the new paradigm of the legal solution of conflicts.³¹ As already explained, if law is the ground on which conflicts have to be settled, there has to be some kind of court structure. The second decision is the design of the constitutional review. The practical reason for introducing the term “constitutional court” for the first time in a constitution (Art. 10 BVG) has been to defend the constitution itself against unconstitutional acts.³² Kelsen’s belief was that, if there is no special institution guaranteeing that unconstitutional acts are indeed cashed, erosion of the constitution itself would most likely be the consequence. If the limitations a constitution sets are not enforced an unchained political power struggle will take over. This is an eminent threat, especially in those states which cannot rely on an overall constitutional consensus.³³ A system which has to tolerate unconstitutional acts internally without the chance of eliminating them would pervert the idea of a constitution. Consequently, a constitution which does not implement rules and institutions for its own enforcement is no more than a wish, not a legal entity.³⁴

Since the elimination of unconstitutional acts requires interference in other constitutional bodies, constitutional review demands some institutional precautions. This is Kelsen’s answer to why a constitutional court should be something special in the constitutional system. In the end, constitutional review of statutes is “legislation with reverse algebraic signs.”³⁵ Therefore needs special competences such as *inter alia* effects. The special quality of a constitution in comparison with other statutory laws is mirrored by the institution of a constitutional court.³⁶ Second, legal hierarchy, as expressed in the Pure Theory of Law has the risk of developing into a *regressum ad infinitum*. The theoretical answer to this is the concept of the basic norm. In practice, however, a procedural solution for the same problem is necessary. Centralized and monopolized constitutional review, which is designed to balance the function of a court with the special needs of constitutional bodies, may end the search for even higher norms.

This splits the argument into two parts: Whereas the question whether there has to be constitutional review at all is a direct consequence of the

31. See MARCIC, *supra* note 26, at 56.

32. See Kelsen, *supra* note 14, at 78.

33. MIAOFEN CHEN, ZUM PROBLEM DES VERFASSUNGSKONSENSES 80 (1998, Göttingen).

34. See Kelsen, *supra* note 14, at 78.

35. See MARCIC, *supra* note 26, at 61.

36. Karl Merkel, *Aussprache*, 5 VVDStRL 102 (1928).

Pure Theory of Law, a more detailed sketch of how it should be carried out needs further consideration. In addition, for example, to a diffused system of constitutional review being inconsistent with the hierarchic structure of the norms the system has to evaluate legally, there is also the argument of a lack of legal certainty, if the review is exercised by different courts.³⁷

Still there are different models within this frame. One could leave constitutional review to a body which is close to the legislator in order not to harm the state sovereignty and the reputation of the parliament. Kelsen, however, is skeptical about this model, because it would leave the cassation of unconstitutional acts at the discretion of a constitutional body which created them.³⁸ This again would leave power with politically motivated organs and so deprive constitutional safeguards of their legal effectiveness.

Courts should not normally have the power to disobey statutory law. The whole Pure Theory of Law is constructed on the premise that it is possible to differentiate between interpretation of law (which is what lawyers and courts should do) and finding good reasons to qualify a law as good or bad (which is what courts should refrain from doing). In this interpretative understanding, a constitutional court takes competences which are not attributed to any other courts, namely interference in the process of law-making. This is precisely the reason why one could think of organizing institutions of constitutional review within reach of parliament.³⁹ But, as already mentioned, there are further arguments against such a model and Kelsen calls it "political naivety" to believe that the parliament, as the author of an act, would readily remove it again.

That is why Kelsen calls for an institution which independent from any other institution of legislative, executive or judiciary. Any subordination to other constitutional bodies, for example in the name of a misunderstood separation of power doctrine, is rejected by Kelsen, from the legal perspective he holds that there has to be a special institution of a constitutional court.⁴⁰

Kelsen concludes that this is the ultimate argument which can be made on the grounds of the Pure Theory of Law and legal reasoning. Any further questions about the appointment of judges or construction of the benches cannot be solved except on this basis. Arguments can be made concerning the function of a court. These arguments imply that the benches should allow a discussion between the judges as in other courts.⁴¹

37. See Kelsen, *supra* note 14, at 48.

38. See Kelsen, *supra* note 14, at 50.

39. See Kelsen, *supra* note 14, at 53.

40. Admitting that political reasons could lead the other way: See Kelsen, *supra* note 14, at 54.

41. See Kelsen, *supra* note 14, at 56.

On the same grounds he argues for that there should be at least a majority of trained lawyers, that judges should not be able to hold a seat in any parliament or part of the administration, and that there should be precautions against any kind of dependence through an appropriate nomination procedure. Kelsen even sets out a list of competences which a constitutional court should have. Some as the review of abstract norms and certain types of individual cases are of a more general nature, others are very much linked to the Austrian legal system of that time and might therefore not be appropriate in other legal systems.

If we follow this line of argument and agree that this is the purpose of purely legal arguments, we will see how it works. Kelsen intends to mirror the pyramid of norms in the court system. Is this anything more than an aesthetic demand for parallelisms? One alternative would be for an institution other than a court to decide what law is—that would be the parliamentary approach—alternatively, no institution whatsoever would dominate the others—the authentic interpretation approach.⁴² The latter approach is rejected by Kelsen, because there is a priority in powers; execution of norms is logically dependent on setting them, so governments are subordinated to parliamentary prerogatives.⁴³ The other alternative, priority of the parliament is rejected, because an eminent part of a pure theory is the question, how norms can be accepted as law. These rules of recognition—in Hart's terminology—would be of no value if they did not guide the parliamentary process and they would not be rules of law, if they were not enforceable.⁴⁴ In addition, a court is defined as an institution which decides arguments within the law.⁴⁵ A parliament, on the other hand, is required to take all manner of aspects into account, law not even being necessarily among them. Giving such an institution a primary role in constitutional matters would imply almost a negation of the concept of a constitution as a matter of law.⁴⁶

Given, that a constitution is understood as shaping the complete order of a state according to the rule of law, this means that everything done under the constitution, legislation, administration, governance, jurisprudence and so on, should be in accordance with the law.⁴⁷ This is of special relevance in states, which now rely on the integrating power of a

42. Werner Heun, *Original Intent und Wille des historischen Verfassungsgebers*, 116 AÖR (1991) at 199.

43. See Kelsen, *supra* note 14, at 31.

44. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 18 (1945, Cambridge). See also JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 78 (2d ed., 1980, Oxford) and HART, *supra* note 17, at 245.

45. See LUHMANN, *supra* note 1, at 297.

46. See Kelsen, *supra* note 14, at 53; Robert Alexy, *Kelsens Verständnis von 'Verfassung'* (unpublished).

47. Hans Kelsen, *Pure Theory of Law*, reprinted in MICHAEL FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 280 (7th ed., 2001, London).

constitution and not on the personal authority of a monarch or a president,⁴⁸ or to multinational entities such as the European Union, which has hence profited greatly from the strong role of the ECJ.⁴⁹ If it is indeed correct, that the text of constitutions make interpretation more open than other statutory norms,⁵⁰ and if abandoning the idea of embedding everything within the law is not an option because this would affect the entire state order, then we need to look for an institution, which helps us to make constitutional decisions law. In the same way as the state in a legal analysis can only be understood as a legal order,⁵¹ a constitutional system can only be expressed as a legal system through court decisions.⁵² The functioning of the constitution is to legitimize the law making process.⁵³ By this it borrows pieces of the more metaphysical Grundnorm. If the lawmakers, in other words politicians, were ultimately to decide which norms to apply, then this entire legitimization would fail.

It would take too much room here to justify the thesis underpinning this finding, namely that it is important to make a constitution an explicitly legal entity. The more established set of arguments concerns handing over the power to a centralized institution, which then enforces rules commonly decided on. There are also formal arguments, which I want to look at here. Having a constitutional review through a court is seen as a measure of prevention to ensure the legality of the production of norms within a state order. This then contributes to safeguarding the identity of the state.⁵⁴ By using the method of interpretation as a paradigm in constitutional law, substantial norms are created, which receive their legitimacy not only from the highest norm in the hierarchy,⁵⁵ but from the legitimacy of this norm as described by the quoted contractual theories. This is obvious in the American theory of the original intent, which tries to bind the later generations to the historical setting of the constitutional fathers.⁵⁶ It is no coincidence that it was in the early years of the Austrian constitutional court that a similar view, the so-called stone age-theory, has been formulated.⁵⁷

48. Günther Frankenberg, Tocqueville's Question, *The Role of a Constitution in the Process of Integration*, 13 *RATIO JURIS* 19 (2000).

49. JÜRGEN HABERMAS, *DIE POSTNATIONALE KONSTELLATION* 73 (1998, Frankfurt) available at http://europa.eu.int/futurum/forum_convention/documents/contrib/acad/0177_c_de.pdf (last visited March 24, 2004).

50. L. H. LARUE, *CONSTITUTIONAL LAW AS FICTION* 70 (1995, Pennsylvania).

51. A view especially Hermann Heller opposed. See HERMANN HELLER, *STAATSLEHRE* 38 (6th ed., 1983, Tübingen).

52. See MARCIC, *supra* note 26, at 63.

53. See Kelsen, *supra* note 47, at 280.

54. See Kelsen, *supra* note 14, at 43.

55. This supports the suggestion that the Grundnorm actually is not a norm at all. See Ian Stewart, *The Basic Norm as Fiction*, *JURID. REVIEW* 207, 221 (1989).

56. See LUHMANN, *supra* note 1, at 473.

57. See ÖHLINGER, *supra* note 3, at 31.

Consequently, the tension between parliament and constitutional review is almost non-existent in a Pure Theory of Law, because both institutions do more or less the same. The parliament enacts legislation by establishing norms within framework of the hierarchic structure of the legal system, meaning the constitution; the constitutional court operates within the same framework, only through the paradigm of interpretation. This is why constitutional review may also be characterized as “negative legislation.”⁵⁸ This definition is problematic in systems of diffused constitutional review because they are always struggling with the question of to what extent is each institution entitled to cash statutes. However, where there is a constitutional court centralization makes it easier to handle this definition more openly.⁵⁹ Hence, the difference between legislation and jurisprudence is not so much of a substantive or functional nature, as political theory might suggest; it is more the form in which the function is carried out. As a court, the constitutional court is characterized by its personal and material independence with all its facets and by the form of the verdict.⁶⁰

From the perspective of a Pure Theory of Law, the legal organization of both institutions is therefore, a key issue. Whilst both institutions pursue the same goal, which is to keep legislation in line with the constitution, they have developed different instruments to achieve this. The parliamentary process establishes the political responsibilities of ministers or members of parliament; constitutional review expresses itself through a legal nullification of unconstitutional legislation. Both derive from the sovereignty of the people, whereas the sovereignty of any state organ can never be a doctrine as such.⁶¹ If there was no means of removing an unconstitutional law through legal means, it would imply either that the hierarchic structure of the legal system would not be obeyed, because the hierarchy contained norms which did not receive any legitimacy from prior norms, or that the consequences would only be political, never legal. This would endanger the legal order as a whole.⁶²

Thus, both objections traditionally raised against constitutional review, sovereignty of parliament and separation of powers, loose ground in the larger context of popular sovereignty.⁶³ The question then is how to

58. See MARCIC, *supra* note 26, at 61.

59. See Kelsen, *supra* note 14, at 48.

60. See LUHMANN, *supra* note 1, at 320.

61. See Hans Kelsen, *supra* note 14, at 53.

62. Hans Kelsen, *Die Verfassung Österreichs*, 11 JAHRBUCH FÜR ÖFFENTLICHES RECHT DER GEGENWART 264 (1922), a view, which opposed other experts at his time, e.g. Anschütz. See also Martin Bullinger, *Fragen der Auslegung einer Verfassung*, JZ 2004, at 210.

63. See AUER, *supra* note 9, at 115; especially Heinrich Triepel in his *Wesen und Entwicklung der Staatsgerichtsbarkeit*, 5 VVDStRL 15 (1929), stressed this conflict; see also Bernd J. Hartmann, *The Arrival of Judicial Review in Germany under the Weimar Constitution of 1919*, 18 JOURNAL OF PUBLIC LAW 122 (2003).

handle unconstitutional norms in relation to popular sovereignty. Therefore, any collision between other diverging principles, such as sovereignty of parliament and rule of law, must be solved through the construction of the constitutional court.⁶⁴ It has to be noted, however, that this concept relies on the assumption that interpretation of a constitution can finally be seen as the application of law. This is one of the main reasons why courts are placing, and should place, such an emphasis on the *lege artis* justification of their findings.⁶⁵ Since the constitutional court is usually the head of the judicial system, this is motivated not by the risk of further appeal but by the need to explain the role of constitutional review as part of the court system. Another instrument of similar quality is the appointment of judges from the judicial branch, people who have formerly served as judges at the appeal level or the Supreme Court. Usually this has the status of a convention only, but it is meant to establish judicial standards within the system of constitutional review.

This theory determines also the nature of the review itself. Since the court has to guarantee the legality of the entire order, every legislative act must not only be reviewed according to the standards of domestic constitutional law, but, since this order is part of an international legal system, Kelsen suggests using international law as an additional gauge.⁶⁶ This indeed seems to be motivated by the idea that the constitutional court has to follow the hierarchy of norms thoroughly, because it raises some important questions as to the limits he establishes for constitutional review, such as a certain reluctance to use it in relation to human rights. He could not possibly foresee what relevance international law would acquire for national legal orders. On the other hand this is almost prophetic in terms of EU law, which has now gained supremacy over national law.⁶⁷

Overall, the theoretical base underpinning the idea and the institution of constitutional review is the completion of the political ideas of a state and a constitution in law.⁶⁸ All conflicts that seem to arise from the shift of power from the direct representatives of the people to a group of judges can be analyzed and resolved through the correct organization of the constitutional court. Constitutional review is necessary, because the sovereignty of the people is not fully expressed by the political discourse within a parliament and it has to be carried out by a court, which independence supports the legitimacy of acts of legislation under the roof

64. See Kelsen, *supra* note 14, at 55.

65. A full range of hermeneutic approach can be found in interpretation No. 392 of the Grand Justices.

66. See Kelsen, *supra* note 14, at 65.

67. ECJ, *Internationale Handelsgesellschaft* (1970) ECR 1125 even in relation to constitutions.

68. See Kelsen, *supra* note 14, at 81.

of a constitution. This is necessary to reach legal certainty in most cases, which might also be achieved through constitutional development. This means adjusting the interpretation of a constitution to various times and circumstances in order to keep everybody bound by the constitution.⁶⁹ This is precisely why a constitutional court refrains by law or through doctrine from interfering in concrete cases, even though these are the original motivation for a review. Instead the court should direct its reasoning towards the greater public of constitutional citizens usually by raising more abstract questions on the issue.

III. SPECIFIC REQUIREMENTS FOR CONSTITUTIONAL COURTS

So far I have talked about constitutional review in rather broad terms and most of what has been said would fit the American model as well as the European model, to name the major candidates for an institutionalized constitutional review. But it is evident from the fact that Kelsen suggested that in the end all questions are of organizational nature, as well as from his contribution to the Austrian constitutional court, that he did not stop at supporting any kind of constitutional review, but held some distinct views on how this court should be organized.

Beginning from what has been said so far, constitutional review must be carried out by a court, which is an independent body, reaching a final verdict on a question. These questions may vary from those other courts have to answer, for example by gathering evidence, which already supports the demand of a separate special court. This is actually a decision a legal body should make, because otherwise anyone, any administrative body or any citizen would be entitled to test unconstitutional law, which is, because it fails to fit in the hierarchic structure of the legal system, not law and therefore not binding anybody. It is only possible to prevent people from challenging any law if the positive law concentrates this power in one institution.⁷⁰ So, firstly, the alternatives are not so much, either one court or many courts carrying out constitutional review, but one court or anybody doing so.

But what if the positive law does not provide a centralized court, but a number of courts, the whole judiciary? The problem then is the verdict it has to deliver: whereas a centralized constitutional review does not multiply the institutions capable of calling certain legislation void, the diffused one does. Therefore, most such legal systems, if not limiting the scope of constitutional review, at least allow only non-application in certain cases, but never cassation *inter alia*. Finally, the argument of

69. THOMAS WÜRTEMBERGER, *ZEITGEIST UND RECHT* 213. (2d ed., 1991, Tübingen).

70. *See Kelsen, supra* note 14, at 45.

sovereignty, at least in democracies, is to a certain extent convincing, if the constitutional review is carried out by an institution of lower authority. If, by contrast, the constitution designs a constitutional court on the same hierarchic level and of the same authority as the parliament, it becomes difficult to see where the so-called sovereignty problem lies.⁷¹ Hence, the constitutional court must be organized as a court, but equal to the parliament, for instance through budgetary autonomy.

Since the main function of a constitutional court is to supervise legislative power, the main competence of a constitutional court is to test acts of parliament. Therefore in Kelsen's views constitutional courts should be in a position to scrutinize any parliamentary decision, be it a statutory act or any other (self-) binding norm; for example the approval of international treaties, bye-laws, and so on. This is especially to prevent the parliament from trying to renew cashed legislation in another form, (circumvention-argument).⁷² Of the variety of other possible competences Kelsen mentions some procedures, which are relevant only for federal systems and impeachments.⁷³ As mentioned already, Kelsen has been quite skeptical about human rights as a matter of constitutional review. Consequently, he did not discuss the possibility of individual complaints (like ECHR). What becomes obvious, however, is that no area remains, in which the parliament does not face a review of its actions.

The political acceptance of this kind of strict control is not easy to achieve. As Ginsburg observes, it can often be found in states, which use constitutional review as a tool to neutralize two or three political factions which need not be equally strong, but at least may realistically hope to govern the country sooner or later.⁷⁴ Countries which have a more homogeneous political landscape, like for instance, the Republic or Ireland or Finland are less likely to create a strong constitutional court.⁷⁵ This may be a matter of doctrines justifying certain kinds of parliamentarian prerogatives or even explicitly prescribed by the constitution. Having said that, it should be stressed that Kelsen, in spite of having the political situation of the post-Habsburgian empire in mind, would consider the outlined basic design of constitutional review something contingent. Understanding law as a coercive system of norms, the principle of the supremacy of constitution must be defended and coerced against impacts of sub-constitutional institutions.⁷⁶

71. See Gaul, *supra* note 15, at 24.

72. See Kelsen, *supra* note 14, at 59.

73. §10 VerfGG (Austria).

74. See GINSBURG, *supra* note 19, at 25.

75. Wolfgang Gaul, Stellung der Verfassungsgerichtsbarkeit im Verfassungsstaat, available at <http://www.rewi.hu-berlin.de/WHI/papers/gaul/gaul.pdf> (last visited March 26, 2004).

76. WERNER HEUN, FUNKTIONELL-RECHTLICHE SCHRANKEN DER VERFASSUNGSGERICHTSBARKEIT 12 (1992, Baden-Baden).

This supremacy of the constitution relies on the constitution as an autological text, a text, which declares itself as law.⁷⁷ A constitution is law, even though certain quite common legal rules, such as the *lex posterior* rule or changeability according to the will of the sovereign, do not apply to it. This argument can provide a more functional analysis of constitutionalism. Without going into details here, “constitutionalism means limited government. ... And indeed what function is served by a constitution which makes omnipotent government possible?”⁷⁸ With some scepticism that this limitation can be achieved through the wording of the text only, any loophole which allows limitations agreed on at an earlier stage to be broken must be closed institutionally.

Therefore, the constitution is the text against which any legislation or other acts of parliament should be tested. Following the distinction between a constitution in the formal sense and one in a material sense, Kelsen favors the material one, which understands a constitution as “superior principle, which determines the whole state order.”⁷⁹ Consequently, statutory norms can be considered part of the constitution, even though do not differ from other statutes in the way in which they are produced and amended, as long as they determine an essential part of a state’s legal order, *e.g.* elections, legislation. This makes it difficult to entrust a court with review according to these norms which is not institutionally put in a position to mark their difference to ordinary statutes. Additionally, it would be very difficult to specify the scope of constitutional review as opposed to normal jurisprudence. This problem becomes even more severe when a constitution includes human rights. Kelsen exemplifies this with expropriation cases: If an expropriation is executed contrary to a special provision in the constitution, the line between unlawfulness and unconstitutionality is difficult to draw substantially.⁸⁰ Neglecting it completely; however, would mean weakening the fundamentals of the hierarchic structure of the legal system.

As already mentioned, a special status is accorded within constitutional review to international treaties. Whilst they are in no respect constitutional law, they have “an equal” rank in the legal hierarchy. This slightly ambiguous position is still reflected in the position of some constitutional courts within the European Union towards the supremacy of EU law.⁸¹ But Kelsen refers to any kind of international law and allows it to be a benchmark for national law. This is a quite

77. See LUHMANN, *supra* note 1, at 472.

78. F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY* Vol. 1., 1 (1973, Chicago).

79. See Kelsen, *supra* note 14, at 36.

80. See Kelsen, *supra* note 14, at 40.

81. See the Maastricht cases of the Danish Supreme Court in Carlsen, 3 CMLR 854 (1999), and the German Constitutional Court in Brunner, 1 CMLR 57 (1994).

remarkable view because international law receives the enforcement it usually lacks.⁸² As we can infer from Kelsen's international law opus, one of the reasons for this view has been to form a definition of law in international law that is consistent with the one used in domestic law.⁸³ Still, this is not the only reason; closer to the subject of constitutional review, it can also be argued that a constitutional court as a law enforcing institution would be easily perverted, if it was to disobey international law on behalf of domestic law. On these grounds, even courts, which do not currently endorse the supremacy of international law, usually try to avoid any obvious collision with it.⁸⁴

The way Kelsen handles the question of constitutional interpretation through a court may seem to support the thesis that any constitutional judicial review undermines legal formalism.⁸⁵ This is sometimes presented as a result of comparative analyses of constitutional courts.⁸⁶ On other occasions it is seen to be the consequence of a broadening of the judicial *topoi* through constitutionalism.⁸⁷ This is incorrect for at least two reasons. First, the Kelsenian theory manages to provide us with an idea of the special characteristics of the kind of law used in constitutional review. This makes it consistent with his general understanding of law,⁸⁸ not by using formal differentiations applied otherwise, but by shaping them according to the special needs of a constitutional court. This has, secondly, a sometimes overlooked effect of leaving the constitutional court outside the political sphere, in which it would otherwise have to justify interference in certain types of law by other non-legal reasons.⁸⁹ Finally, if formalism makes sense at all, it depends on procedures, which ensure that norms are produced according to legal forms.

Constitutionality requires special forms. Some of the questions which make headlines when it comes to constitutional courts seem arbitrary to Kelsen. For example, Kelsen does not say much about the members of the bench at a constitutional court. His draft for the Austrian constitutional court promoted the highly impracticable model of honorary

82. See FREEMAN, *supra* note 47, at 270.

83. See Kelsen, *supra* note 47, at 366.

84. This refers not only to the US courts but also to Switzerland. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 48 (6th ed., 2003, Oxford).

85. Thomas C. Grey, *Does Constitutional Judicial Review Undermine legal Formalism?* available at <http://www1.law.ucla.edu/~workshop/papers/Marbury7.pdf> (last visited April 4, 2004).

86. ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000, Oxford).

87. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 118 (Boston 1939).

88. See Paulson, *supra* note 2, at 234.

89. This is a point, Richard Posner makes, who quite surprisingly finds an ally in his pragmatic approach on constitutional law. See RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 384 (Cambridge 2003).

appointments.⁹⁰ Apart from these remarks he considered this a more political question.⁹¹ This is quite surprising when looking at the premises Kelsen has been using, as well as considering the priority this issue can assume on the political agenda.⁹² From Kelsen's remarks about the court as an institution which requires utmost impartiality, we can infer that there should be rules guaranteeing that the judges are not subject to speculations about their political opinions right from the start. This could be by election through different bodies, for example, or through election by qualified majority. Even the principle of co-optation might be applied in order to establish an even dynamic independence. During their incumbency judges should not hold any other offices.⁹³ Even though constitutional review is seen as negative legislation, and Kelsen fights against the idea of a complete separation of powers, on the level of appointments he supports a stricter separation than on the substantive level.⁹⁴ Kelsen insists on judges having a legal qualification. Some constitutional courts have included non-legal appointees, as a way of expressing popular sovereignty.⁹⁵ Kelsen objects to this, because he considers legal expertise a mandatory requirement to be able to interpret a constitution properly. However, if this is correct and constitutional interpretation indeed requires a particular expertise, then the idea of honorary judges becomes difficult to justify. Additionally, appointing judges, who apart from working at the constitutional court serve any other function in the legislature or executive, severs the problems of legitimacy of the court in comparison with the other powers again. In fact, Kelsen referred to this problem in relation to impeachment procedures, without drawing any further consequences from it.⁹⁶ In the end, the appointment of full-time judges seems to be inevitable nowadays.

The problem Kelsen saw with other types of constitutional review, particularly with the US approach, was that it was not compatible with the doctrine of the hierarchic structure of norms and that it discredited the process of constitutional review more than it helped it. Whereas the first argument usually refers back to his earlier writings, the second argument highlights the practical necessities of modern states. The problems of the diffused model of constitutional review become obvious in some features of the recent US constitutional law. First, the return to the original intent

90. See SCHMITZ, *supra* note 4, at 306.

91. See Kelsen, *supra* note 14, at 53; also see SCHMITZ, *supra* note 4, at 308.

92. See TAIPEI TIMES, May 30, 2003 and Jyh-pin Fa, *Constitutional Developments in Taiwan*, 40 INTERNATIONAL & COMPARATIVE L. Q. 205 (1991).

93. Therefore the professorship-clause (§ 3 IV Federal Constitutional Court Act) in Germany would be problematic.

94. See Kelsen, *supra* note 14, at 53.

95. As in some German states, such as Brandenburg.

96. HERBERT SCHAMBECK, REGIERUNG UND KONTROLLE IN ÖSTERREICH 75 (1997, Berlin).

theories has not only been motivated by purely methodological insights, but also by idea of restricting constitutional interpretation through the US Supreme Court, basically for reasons of democratic legitimacy.⁹⁷ These are promises the doctrine in the end fails to redeem. Without any institutional limits the original wording of a constitution will not be an appropriate instrument to achieve supremacy of parliament, unless one gives up the idea of resolving any practical cases on the base of a constitution. Besides, as Kelsen argues (s. o. II) this supremacy is even difficult to justify under a pure theory of law-perspective.

Historically the formation of a special institution, a special court, can be seen as a symbol of a differentiation of the legal systems in constitutional law. Systems organized like this provide the merely political structure of the political system with legal armor.⁹⁸ That is why Kelsen passionately defended his model at the 1928 meeting of German Constitutional Lawyers in Prague against political agitation as well as against models which tried to mix political and legal review.⁹⁹ And there is indeed a remarkable restriction in Kelsen's support for a constitutional court; although he suggests on the one hand that constitutional review is part of any order of a state that claims to be a legal entity, he only seems to have matters such as competences, the electoral system and so on in mind as matters for review. In contrast, he fears that a review of constitutional human rights might carry the court too far into politics.¹⁰⁰

This can be accepted as a statement against cataloguing human rights in constitutions. However, once human rights are embedded in the constitution it follows that they must be used as a benchmark for constitutional review; otherwise they would either not be considered enforceable law in the same way as other provisions of the constitution are, which would then be inconsistent with the doctrine of the hierarchic structure of norms, or it would leave the human rights elements of a constitution to a different jurisdiction.¹⁰¹ This is certainly not what Kelsen would have intended.¹⁰² Control of the legislature would be incomplete if the court were not responsible for reviewing its adherence to

97. See Heun, *supra* note 42, at 186.

98. See LUHMANN, *supra* note 1, at 38.

99. Ludwig Adamovich, *A Constitution and Constitutional Justice* available at http://www.us-rs.si/media/slavnostni_govor_angl.pdf (last visited on April 3, 2004).

100. HANS KELSEN, *REINE RECHTSLEHRE* 200 (2d. ed., 1960, Vienna); also see Grey, *supra* note 85. Even though Kelsen mentions "equality" sometimes, he was obviously afraid of indefinable catalogues of rights (Kelsen, *supra* note 14, at 63); see Paulson, *supra* note 2, at 234.

101. One example is the Canadian Human Rights Tribunal. See Birgit Lindsnaes & Lone Lindholt, *The Effectiveness of National Human Rights Institutions*, in NATIONAL HUMAN RIGHTS INSTITUTIONS 31 (Birgit Lindsnaes *et al.* eds. 2001, Copenhagen), which remarkably has been suspected for violation of human rights: Canada (Human Rights Commission) v. Canada (Human Rights Tribunal), T-1802-96, December 11, 1997).

102. See Kelsen, *supra* note 14, p. 37.

all constitutional restraints. The conclusion must be that if a constitution contains human rights they must be enforced through more or less the same procedure as are all the other provision of the constitution.

To sum up, the pure theory of law may tolerate a diffused system of constitutional review, but the establishment of a special body which executes negative legislation through a court-structure is recognized as the more appropriate model.¹⁰³ On the one hand Kelsen presents a blueprint for the design of constitutional courts, covering gauges, state institutions, and certain elements of the qualification of judges. But on the other hand he presumes that other structural elements, such as the appointment procedure, are not prescribed by the Pure Theory of Law. Kelsen excludes human rights as a matter for a constitutional court, which, however, is not compatible with his theoretical framework.

IV. KELSEN'S LEGAL PERSPECTIVE OF CONSTITUTIONAL REVIEW IN TAIWAN

Kelsen's "Pure Theory of Law" has been influential in Japan, Korea, Taiwan and a number of other countries in Asia (so far the necessary limitation of "Asia"). His works have been quoted in order to explain the revolutionary change of a legal order in Burma¹⁰⁴ and by the Pakistan Supreme Court in the Benazir Bhutto Case, this time more surprisingly to establish democratization by means of multicultural juridical innovation.¹⁰⁵ Discussing the concept of a constitutional court in an Asian context, I intend to take a closer look at a particular constitutional court in Asia, the Grand Justices in Taiwan. As a consequence from what has been said so far, my remarks will concentrate on the function of constitutional review from the perspective of Kelsen's Theory. My remarks will deal with the basic justification of constitutional review within the Taiwanese constitution, as well as with the institution of the Grand Justices itself.

An extremely insightful analysis of the political and social condition under which the Grand Justices have been interpreting the constitution, as well as the mutual interferences between interpretation and the process of democratization, can be found in Tony Ginsburg's "Judicial Review in New Democracies," published in 2003. Ginsburg provides us—in addition to the system in Taiwan, about which I want to talk about,—with case studies from Mongolia and Korea. Because the objective is to learn about the social changes achieved by constitutional courts Ginsburg highlights

103. See Ferejohn, *supra* note 19, at 54.

104. Myint Zan, *Judicial Independence in Burma: No March Backwards Towards the Past*, 1 APLP 5 ASIAN-PACIFIC LAW & POLICY JOURNAL 18.

105. Upendra Baxi, *Constitutional Interpretation and State Formative Practices in Pakistan*, COMPARATIVE CONSTITUTIONAL LAW 132 (M. P. Singh ed., 1989, Lucknow).

the social and political effects of certain interpretations. His observation is that the council gained a certain control over the political agenda at the end of the nineties.¹⁰⁶ Apart from the general process of democratization, the Grand Justices have been able to establish the rule of law (Art. 23 CRC) as a fundamental and effective principle of the Taiwanese constitution.¹⁰⁷

Although the constitution gives quite some scope to how to institutionalize the Grand Justices it is firm in stating two things: First, that their has to be a special body, the Grand Justices, within, but distinct from the Justice Yuan as the head of the judiciary (Art. 79 II CRC). Second, what makes the Grand Justices so special is their competence described in Art. 78 CRC, namely to “interpret” the constitution. In spite of the establishment of a judicial structure, which was basically borrowed from the US system,¹⁰⁸ the existence of the Grand Justices is already proof of a specific quality of constitutional norms. Even if the historical explanation as a result of the “political dynamics of the day” was correct,¹⁰⁹ it fails to take the theoretical background into account, which is important in understanding the system of constitutional review as a whole.¹¹⁰

The system of constitutional review belongs prima facie to the Kelsenian model of constitutional review because other courts are prevented from delivering judgments, which do not comply with the Grand Justices' interpretation of the constitution.¹¹¹ This may be one of reasons why there has been some eagerness to establish the rule of law as the base of constitutionalism.¹¹² In a way, with quite open provisions about the Grand Justices one of the main differences seems to be that the Grand Justices had to invent themselves as a constitutional court, and have not been designed by a mastermind like Kelsen, which is an admirable achievement. This again can be explained by the specific political situation in Taiwan as a former one-party system,¹¹³ but it is at

106. And obviously we have not reached the end of that trend, as the previous presidential elections show. Notably on an official webpage summarizing what happened (*see* <http://www.gio.gov.tw/taiwan-website/4-0a/20040326/2004032604.html>, last visited April 5, 2004), the Grand Justices are described as merely “legal experts.”

107. Interpretation No. 520; *see* Chen, Tsung-fu, *The Rule of Law in Taiwan* at 108 available at http://www.mansfielddn.org/Programms_pdfs/09chen.pdf (last visited April 10, 2004), and also *see* GINSBURG, *supra* note 19, at 107.

108. *See* Fa, *supra* note 92, at 198.

109. *See* GINSBURG, *supra* note 19, at 116.

110. National Policy Foundation, RESEARCH REPORT (October 14, 2003).

111. Interpretation No. 177; additionally the Grand Justices gave any court the option to ask for preliminary rulings (No. 371).

112. Hsu, Tzong-li, *The Rule of Law in Taiwan – A Misplanted Western System of Rule-of-Law Taiwan?* in: PROCEEDINGS OF THE CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW (1999).

113. *See* GINSBURG, *supra* note 19, at 115. He labels one-party system as Leninist. The use

the same time an expression of the practical necessities, once a legal structure of the state is accepted.

I wish to look especially at the construction and interpretation tools of the Grand Justices Council in Taiwan. I wish to argue that the interpretative guidelines (such as in the Law of Interpretation Procedures) still follow very much the idea of clarification and need to develop into a more active theory of constitutional interpretation A. In addition, and this is the more political mission of this paper, I want to deal with the institutional development of constitutional review in Taiwan B. In spite of what has been said so far about the advantages of a special constitutional court and in spite of the trend in a number of European and African States, there seems to be a long-term perspective for the American Supreme Court model in Taiwan.¹¹⁴ There are different views about how determined this turn around is.¹¹⁵ For the sake of this paper, I assume that there still is an open window.

A. *Interpreting the Constitution*

In common with most other constitutions, Art. 78 CRC does not contain any guidelines on how to interpret the constitution. This sometimes results in quite different interpretative approaches depending on the country in which the judges received their legal training.¹¹⁶ However, this does not mean that no domestic constitutional approach exists.

The “Law of Interpretation Procedure for Grand Justices” (LIPGJ) describes the functions and procedures of constitutional review and through this influences the mode of interpretation. Art. 7 LIPGJ, for example, talks of appeals to the “uniform interpretation of law and regulation,” which makes the uniformity of the legal order of which the constitution is a part, a paradigm of interpretation.¹¹⁷ Another example is Art. 4 LIPGJ, which describes the competences of the Grand Justices, but at the same time qualifies this as a limitation of constitutional interpretation per se. Because no other institutions are competent to

of certain terms, such as Leninist or Confucian would be my major objection against his otherwise brilliant publication.

114. Hsu, Tzong-li, *Verfassungsgerichtsbarkeit in Taiwan*, DIE ROLLE DER VERFASSUNGSRECHTSWISSENSCHAFT IM DEMOKRATISCHEN VERFASSUNGSSTAAT 12 (C. Starck ed., 2004, Baden-Baden).

115. Interview by the author with Judge Prof. Dr. Hsu, Tzong-li and former Judge Prof. Dr. Su in Taipei on Dec. 31, 2003.

116. Hsu, Tzong-li, *Taiwanische Verfassungsrechtswissenschaft als Arena der deutschen und amerikanischen Verfassungsrechtslehre*, DIE ROLLE DER VERFASSUNGSRECHTSWISSENSCHAFT IM DEMOKRATISCHEN VERFASSUNGSSTAAT 59 (C. Starck ed., 2004, Baden-Baden).

117. Neil MacCormick, *Coherence in Legal Justification*, THEORY OF LEGAL SCIENCE 235. (A. Peczenik et al. eds., 1984, Dordrecht).

interpret the constitution (Art. 79 CRC), this is indeed imposing a functional approach on constitutional review.¹¹⁸

1. Institutionalized Constitutional Review in the Republic of China

In an attempt to create a typology of the Taiwanese situation, Ginsburg qualifies the constitutional review in Taiwan as “Confucian” without exemplifying or specifying what this might mean. Even though there is a justification for the idea that constitutionally Taiwan is more than a legal transplant from other legal systems,¹¹⁹ I find it hard to defend the assumption that the constitutional interpretation is particularly Confucian.¹²⁰ Precisely because the organizational structure of constitutional courts is so extremely relevant for their approach to constitutional interpretation,¹²¹ it is far more important than any historical background.¹²² Therefore, Confucianism might be the right term to describe the chronological development of judicial review in Taiwan,¹²³ but the nowadays-relevant paradigms have to be found elsewhere. Thus, it is necessary to review the institution of the Grand Justices in the context of Kelsen's functional approach.

Although the Taiwanese constitution creates the Grand Justices as a special court for constitutional review, it does not separate it from the Justice Yuan. The Justice Yuan controls the budget and supervises not only the Grand Justices, but also all other courts.¹²⁴ A similar entanglement becomes obvious in the person of the President of the Justice Yuan, who is—since 1997—one of the judges of the council. Having this in mind the

118. KONRAD HESSE, FUNKTIONELLE GRENZEN DER VERFASSUNGSGERICHTSBARKEIT 264 (1981, FS Hans Huber, Bern).

119. See Hsu, *supra* note 116, at 67, and also see Su, Jyun-hsyong, *Die Rolle des Verfassungsrechts in Taiwans staatlicher Entwicklung*, DIE ROLLE DER VERFASSUNGSGRECHTSWISSENSCHAFT IM DEMOKRATISCHEN VERFASSUNGSSTAAT 163 (C. Starck ed., 2004, Baden-Baden); about the general approach, see FEDTKE, *supra* note 25, at 56.

120. The opposite might be true (Hans van Ess, *Ist China konfuzianisch?*, 23 CHINA ANALYSIS 10 (May 2003); references about the general discussion can be found at GINSBURG, *supra* note 19, at 14; I do not analyze the content of the constitution here, but even in this field I remain not convinced.

121. An extremely demanding theoretical approach can be found at Ko Hasegawa, *How Can Legal Values Be Transferred Between Different Cultures?*, vv ASIA-PACIFIC LAW AND POLICY JOURNAL pp. (2003).

122. Chaihark Ham, *Law, Culture and Confucianism*, 16 (2) Columbia Journal of Asian Law 263 (2003), who holds he lack of a common understanding of Confucianism responsible, but also (*see id.* at 260) accepts that constitutionalism developed independent from it. Therefore the National Policy Foundation, (*see* National Policy Foundation, *supra* note 110) is exaggerating the relevance of these elements. They are, however, of relevance for the substantive constitutional law.

123. GINSBURG, *supra* note 19, at 109.

124. See Hsu, *supra* note 114, at 1; Lee, Chian-liang, *Die Verfassungsgerichtsbarkeit und Grundrechtsentwicklung in Taiwan*, STAAT UND INDIVIDUUM IM KULTUR — UND RECHTSVERGLEICH 153. (C. Starck ed., 2000, Göttingen)

question of whether the Grand Justices can be qualified as a primary constitutional body has to be answered negatively. Even though they are independent as a court in the fields mentioned before they are not autonomous, but instead can be seen as a part of the Justice Yuan. To a certain extent this is the result of Sun Yatsen's doctrine of the separation of powers, which takes Yuans and not single institutions as units.¹²⁵ Nevertheless, this construction, even more in the original model prior to 1997, limits the independence of constitutional review.¹²⁶ This might affect its function as a guarantor of a due process of constitutional law in a Kelsenian perspective.

However, in the substantial area of constitutional review itself the Grand Justices guarantee the independence of their interpretation. There is no direct interference from other powers into the actual interpretation of the constitution. Still, the concept of interpretation places certain constraints on constitutional review, for example, since interpretation focuses on a text, factual findings seem to be excluded from the first. Nevertheless, the constitutional review is related to the application of the constitution (Art. 4 LIPGJ), which also makes fact finding necessary. The extension of the submission procedure (Art. 5 I No. 2 LIPGJ) also improved the intensity of constitutional review. Although there is no petition against judgments, the Grand Justices may come to a final conclusion over a case¹²⁷ and overall, the two major criteria for a Kelsenian constitutional court are fulfilled.¹²⁸

This does not mean that the complete procedure follows court rules. In fact, the LIPGJ differentiated between court procedures, for example in cases of prohibition of political parties (Art. 19 LIPGJ), which are conducted through a more formal and transparent procedure, and interpretations of the constitution, which are organized more discretely. As explained in the first chapters, these contingencies do not change the construction as a constitutional court. Kelsen even recommends certain special procedures in order to ensure that parliament or executive are not damaged.¹²⁹ Hence, there is the functional structure of a constitutional review according to Kelsen in Taiwan.

125. Su, Jyun-hsyong, *The Constitutional Changes and the Judiciary Role of ROC in Taiwan*, 19 (1) SHAKAIKAGAU-KENKYU 190 (1998).

126. Federal Constitutional Court of Germany created this status itself: Das Bundesverfassungsgericht als Gericht und Verfassungsorgan, 6 JÖR 144 (1957).

127. See HSU, *supra* note 114, at 5.

128. See Kelsen, *supra* note 14, at 53.

129. See Kelsen, *supra* note 14, at 76; nevertheless he promotes public hearings.

2. *Constitutional Interpretation*

This brings us back to the question, in which way the Grand Justices interpret the constitution. There has been a long debate about the particular nature of constitutional interpretation in many legal systems¹³⁰ and in legal theory in general. The reason for this seems to be that the often metaphysical language of constitutions seems to resist the idea of controlling the process of interpretation by imposing a certain methodology. This is why constitutional interpretation is often seen as a particularly difficult task. Neither the text of a constitution nor an agreed methodology put boundaries on interpretation. Naturally this makes politicians even more uncomfortable with constitutional courts, because they cannot really foresee what judges might derive from a constitution. This makes it a stunning fact that a "Pure Theory of Law" has not been developed by an expert in private law, but by a constitutional lawyer, who was very much aware of the dangers. But somehow Kelsen's view has been that it is just a matter of drafting a good constitution - meaning one that concentrates on organizational matters and refrains from any metaphysical ballast—which will then keep a constitutional court on track.¹³¹

His predecessors were not always that credulous and thought of methodological limits, such as the stone-age theory in Austria or the original intent theory in the US. The idea is to structure the whole interpretation as if it was the same as interpreting the civil code. One perception is that the methodological standing within the Grand Judges merely depends on the educational origin of the judges;¹³² another view suggests that there is a distinct wish to form something like a genuine Taiwanese method of constitutional interpretation even though this is not always successful.¹³³ Generally speaking, it can be said that more than in other countries judges are trained to use comparatist methods when interpreting the Taiwanese constitution.¹³⁴ This might give the impression that the council only transplants foreign doctrines. In fact, these comparatist remarks always lead into quite sophisticated remarks on how this fits into the constitutional order of the Republic of China.¹³⁵

The Grand Justices do not follow a strict historical approach. Even

130. Ralf Dreier, *Zur Problematik und Situation der Verfassungsinterpretation* in *PROBLEME DER VERFASSUNGSINTERPRETATION* 13 (R. Dreier, A. Schwegmann eds., 1976); Adrienne Stone, *The Limits of Constitutional Text and the Structure*, 23 MELBOURNE UNIVERSITY LAW REVIEW 669, 696 (1999).

131. See Kelsen, *supra* note 14, at 54.

132. See GINSBURG, *supra* note 19, at 121.

133. See HSU, *supra* note 116, at 67.

134. For example Interpretation No. 165, 499.

135. Interpretation No. 372, 499.

though history matters, naturally, the council accepts that the situation of the state has changed dramatically during the past decades. The most famous evidence for this thesis is of course the interpretation No. 261, which reversed the notorious interpretation No. 31.¹³⁶ But the same argument, that history can only confirm a finding, but never justify it alone, can be found in a number of other interpretations, such as the “Two-Wives-Case (No. 242). Kelsen himself, although he was one of the designers of the Austrian constitution in 1920, did not advocate any dominance of the historical method.¹³⁷ He argued that no single mode of interpretation is capable of determining a single result and even a complete interpretation might leave more than one possible interpretation.¹³⁸ This is, incidentally, another reason for him to stress the need for a court structure in constitutional review, because this can solve the problem institutionally.

The political impact the Grand Justices have had in the recent times, became possible through an interpretation-method, which was not only concerned about the wording of a provision, as in the early days,¹³⁹ but more and more appreciated the telos of a provision, especially in the area of human rights (No. 443). Besides this, the teleological approach is easier to merge with US doctrines than other modes of the traditional European canon. Differences might still occur, when the function of a provision is arguable, but this is a more substantial and fruitful debate than that about the constitution as part of the legal system.¹⁴⁰ In a time in which the canon of interpretation modes is more and more criticized in Europe and in which the US Supreme Court faces similar criticism on its approach,¹⁴¹ the Grand Justices have managed to develop a reliable and consistent methodology, which prevents Taiwan’s blossoming constitutionalism from being trapped in methodological doubts. The credo of the council is to solve conflicts between the various principles and to rule in a way which takes the edge off the sometimes overheated political arena.¹⁴²

136. See Su, *supra* note 125, at 184.

137. See Kelsen, *Das Verhältnis von Staat und Recht im Lichte der Erkenntniskritik* in WIENER RECHTS THEORETISCHE SCHULE 96 (Hans Klecatsky et al. eds., 1968, Vienna).

138. See Kelsen, *supra* note 47, at 279. This is precisely the difference between universal moral norms and contingent legal ones.

139. Even though this has probably been more the result of the political situation: See GINSBURG, *supra* note 19, at 127.

140. MICHAEL STOLLEIS, KONSTITUTION UND INTERVENTION 18 (2001, Frankfurt).

141. See La Rue, *supra* note 50, at 41.

142. Interpretation No. 499 is significant for this.

B. *The Institutional Structure of Constitutional Review in Taiwan*

1. *Constitutional Courts in New Democracies*

The idea of a special institution for constitutional review is actually an old one. It is already mentioned in Aristotle's *Politeia*,¹⁴³ but it needed quite a long time to become reality. Kelsen himself saw a strong link between mature democratic systems and the existence of a constitutional court: Constitutions not implementing such a special court have mostly been designed in the light of constitutional monarchy doctrines, in which a parliamentary legislative enacting unconstitutional laws did not really exist and an objection against the monarch was only accepted in rare situations.¹⁴⁴

Although the process of democratic transformation in Taiwan has been ongoing for almost the last three decades now, we are still facing a completion of a fully institutionalized democratic system. Focusing on the judicial branch, one of the particularities of the Taiwanese systems becomes obvious immediately; the Taiwanese system not only consists of the judiciary itself and a governing branch within the government (ministry of justice), but also comprises the Justice Yuan as a special power.¹⁴⁵ This very special construction is based on Dr. Sun Yat-sen's political theory, which will not be reviewed in this place.¹⁴⁶ Yet, of practical importance are two facts. First, the Justice Yuan is primarily designed as a supervisory body.¹⁴⁷ Second, the Grand Judges, who are empowered to interpret the constitution (Art. 78, 79, 171 CRC), are part of the Justice Yuan. I would like to suggest that this has contributed at least to a more defensive and conservative approach on interpretation, because whereas a constitutional court may equal the legislator,¹⁴⁸ a supervisory body is of less dynamic nature. Even the famous interpretation No. 31, which had profound effect in undermining democratic developments in Taiwan,¹⁴⁹ can be understood in this way. It has to be admitted that Grand Justices managed to "clear up the constitutional mess" they had created 35 years later, but in the end this has been a stimulus to modify the role of the Grand Justices as a constitutional court in 1992 and 1993.

143. Aristotle, *POLITEIA*, IV 16, 1300b; VII 2, 1317b-1318a.

144. See Kelsen, *supra* note 14, at 35.

145. See Su, *supra* note 125, at 193.

146. See Audrey Wells, *THE POLITICAL THOUGHT OF SUN-YAT-SEN*, (2001, Basingstoke).

147. Sean Cooney, *Taiwan's Emerging Liberal Democracy and the New Constitutional Review*, in *ASIAN LAWS THROUGH AUSTRALIAN EYE* 166 (Veronica Taylor ed., 1997, Sydney).

148. See MARCIC, *supra* note 26, at 53, reflecting on Kelsen's dictum of a "negative legislator."

149. See Su, *supra* note 125, at 189.

In comparison with similar courts in Korea or Mongolia, examples I borrow from Ginsburg, or in the Philippines, a case study of this volume, significant for the development in Taiwan is that the Grand Justices in spite of being created under a one-party regime became a powerful actor in political life. The two competing theories of explaining the need for intensified judicial review, the insurance theory, which basically says that a constitutional court would minimize the risk of a party losing elections, and the commitment theory, which focuses on the feature of a constitution as a credible commitment,¹⁵⁰ differ in their prediction of the strength of a constitutional court under a dominant party system. Whereas the insurance theory predicts a strong constitutional review only in stalemate situations, when nobody can be sure of success in a political battle, the commitment theory predicts a powerful constitutional court, when party is dominating the political process.

Both theories fail to take into account the momentum which constitutional developments might have. Besides, one would have to discuss how a quality of a court in this context can be judged. Yet, if we choose to toy around with these theories, in the long run, the Taiwanese case study seems to support the commitment theory, because despite the fact that the Grand Justices in the beginning did not put up much resistance to KMT governments, the institution in the end proved to have the potential to develop into a powerful court. The insurance theory might argue that this potential only became reality, when the dominance of KMT began to crumble. In a way, this shows the dilemma of a non-legal analysis of legal structure quite clearly.

A mature system of constitutional review cannot hope to be a centre of judicial activism, it would lose the credibility it holds as a court. Therefore, in addition to the legal problems of a particular case, in all cases the implications for the entire legal order must be taken into consideration. The nuclear power plant decision of the Grand Justices from 2001 (No. 520) shows such careful jurisprudence. The dangers lie not only in potential conflicts with the government or the parliament, but also between different courts. In Korea as well as in Taiwan, there have been power struggles between the constitutional courts and the supreme courts.¹⁵¹ Although the Taiwanese system does not allow direct complaints against judgments these kinds of conflicts are almost inevitable. This again, along with Kelsen, calls for clear demarcation lines for the institution consigned to carry out constitutional review; otherwise the constitutional court risks no longer being seen as a legal mediator, but

150. See GINSBURG, *supra* note 19, at 28; Stephan Holmes, *Precommitment and the Paradox of Democracy* in CONSTITUTIONALISM AND DEMOCRACY 175. (J. Elster, R. Slagstad eds., 1988, Cambridge).

151. See GINSBURG, *supra* note 19, at 255.

as a partial actor in the political field.

2. *Decider and Decisions*

So far, we have been dealing with the court structure as Kelsen's first criteria for a constitutional court. Now I want to turn to the second criteria, an independent final decision. "Independent" refers to the judges (aa) themselves, whereas "final" looks at the quality of the decision (bb).

a. *Selection of Judges*

Whilst the Supreme Court model puts constitutional review in the hands of judges who are trained as judges and usually served as judges for quite some time, this is quite often an obstacle for the development of a consistent constitutional theory through the court. If the judges of the constitutional court lack theoretical knowledge it is difficult to form a consistent constitutional law in a system.¹⁵² The system of a specialized constitutional court allows appointing different kinds of judges. These can be legal scholars to stimulate the theoretical foundation of judgments. But there is also the option to appoint judges who are not trained lawyers at all in order to guarantee the transparency of the findings.

Kelsen, as we recall, demanded a certain expertise of judges at a constitutional court, which he usually saw as professors of constitutional law,¹⁵³ being one himself. The Grand Justices are more advanced in this respect than most of the other constitutional courts in the world. Most systems require only a general legal qualification (not different from those of other judges),¹⁵⁴ but the Taiwanese law forms five qualification groups (Art. 4 LIPGJ), which impose a number of necessary qualifications to ensure the required expertise and quora for each category to guarantee a mix of experiences. Some legal systems, under the guise of transparency and accountability, have lowered the requirements, but the Grand Justices still rely on quality.

The right to appoint judges was initially exercised by the president,¹⁵⁵ but since 1994 there has been a confirmation hearing at the National Assembly (Art. 79 CRC). Since this ensures the participation of all institutions which can be controlled by the Grand Justices, this can be

152. Richard Posner's view, that constitutional theory might be harmful in any way (*Against Constitutional Theory*, NYU LAW REVIEW 73, 10 (1998)) fails to see that in spite of forming a—pragmatic—theory himself.

153. See Kelsen, *supra* note 14, at 53.

154. See § 3 BVerfGG for the Federal Constitutional Court of Germany requires only the general qualification as a judge.

155. See GINSBURG, *supra* note 19, at 122.

seen as a reasonable precaution to prevent the court from being perceived as bailiff of one institution. This is especially important in cohabitation situations such as the present. There has to be an institutional guarantee that the right to appoint judges cannot be abused in order to interfere in the process of constitutional review. As far as I can see until now this has been accepted in Taiwan, with the problem of re-appointment alone being seen as critical under this aspect.¹⁵⁶

b. *Judgments of the Grand Justices*

Whilst there has been some concern that the general submission procedure (Art. 5 I No. 1 1. alternative LIPGJ) might degrade the Grand Justices down to a legal advisor of other institutions,¹⁵⁷ this type of procedure is helpful in establishing a general constitutionalism. A similar step has been taken within the ECJ and the preliminary ruling procedure, only limited to the courts of member states. Abolishing the preliminary ruling procedure completely would mean to throw the baby out with the bath-water. In the end, however, after a transitional period, it seems indeed preferable to restrict the council to a purely cassation-function in order to avoid attaching any strings to other government agencies.¹⁵⁸ Besides, the individual complaint (Art. 5 I No. 2 LIPGJ) can have a supplementary function.

In recent times, some legal systems have increased the transparency of constitutional matters by allowing audio-/video broadcasts from the courtroom. We all remember the last presidential elections in the US where we could follow the Florida Supreme Court in on the television screen thanks to the sunshine law.¹⁵⁹ The Federal Constitutional Court of Germany is the only German court, which can allow live broadcasts (§ 17a BVerfGG). The same is true, for example, of the Constitutional Court of Azerbaijan (Art. 22 Const. of Azerbaijan). Whilst bearing in mind the fact that generally the effect cameras in courts hard to determine,¹⁶⁰ in constitutional matters of democratic relevance utmost transparency should indeed be the ruling paradigm. This transparency will in the end contribute to the legitimacy a constitutional system can provide the whole state with, according to Kelsen.

The Grand Justices currently have the option to interpret the constitution as a constitutional court, but there is also space for

156. See Hsu, *supra* note 114, at 2.

157. Chen, Yi-Kai, *Die Verfassungsgerichtsbarkeit in Taiwan* in VOM PATERNALISTISCHEN ZUM PARTNERSCHAFTLICHEN RECHTSSTAAT 114 (Kim/Nishihara eds., 2000, Baden-Baden).

158. See Hsu, *supra* note 114, at 3.

159. Forthcoming: Thilo Tetzlaff, *Sunshine & Darkness*, (unpublished).

160. RICHARD K. SHERWIN, *WHEN LAW GOES POP* 153. (2000, Chicago).

clandestine forms of decision-making.¹⁶¹ To leave this to the discretion of the judges is problematic, although it is historically understandable. In the end increased publicity would make the public more aware of constitutional rights and be seen as a symbol of the rule of law in action.

V. CONCLUSION

The specific Kelsenian approach I have been applying here is to analyze constitutional courts in terms of law. After all, it is good to know that there are not only social or political reasons for installing a constitutional court, but predominantly legal ones. Kelsen believed that only the disposal of all “polit-theological ballast” could unearth the essential elements of the state, among which he counted the system of constitutional review.¹⁶² However, judgments and interpretations of constitutional courts are not without political consequences. A constitutional court is a significant part of the legal order of a state, which is then a prerequisite for its quality as a state.¹⁶³ Alternatively, a constitution can be seen as an expression of a political consensus with merely political consequences, but a limited legal function.¹⁶⁴ According to this view, which has become more popular recently, there are fears that constitutionalism might end up in a situation, in which the leeway for politics became too narrow.

Kelsen rejected this view of a constitution, which is not fully legally binding, precisely because some conflicts cannot be solved by politics without damaging the unity of the state.¹⁶⁵ Moreover, what becomes obvious especially in the case of human rights violations, is that the overall long-term consensus can be abandoned in favor of short-term political gains. To balance all this, judicial review is still the most reliable instrument; as the Grand Justices put it:

“The primary function of interpreting the law is to resolve overlap or conflict of rules, including doubts resulting from defects or gaps created by contradictory rules enacted in different times ..., and this should also be the duty for the institution charged with the power of Constitution interpretation.” (No. 499)

161. An exception is the dissolution of political parties. See Hsu, *supra* note 114, at 6.

162. Hans Kelsen, *Democracy and Socialism* in CONFERENCE SERIES NO. 15, 63 (April 30, 1954, Conference of Jurisprudence and Politics) (1955, The Law School, The University of Chicago).

163. Christopher Carolan, *The “Republic of China”: A Legal-Historical Justification for a Taiwanese Declaration of Independence*, NYU LAW REVIEW 75, 454 (2000), quoting Kelsen at FN 162, in treating constitutionalism as a matter of state quality.

164. See Bullinger, *supra* note 62, at 210.

165. See Kelsen, *supra* note 14, at 36.

Once it is decided that a constitution is meant to be the “Grundnorm” of a legal order, it is inevitable that institutions will be created, which ensure the supremacy of the constitution.¹⁶⁶ The constitution of the Republic of China, because of incentives from the Weimarer Reichsverfassung, clearly understands itself as a legal norm. This has, already in the early stages, been one of the groundbreaking characteristics of this constitution.¹⁶⁷ Quite in contrast to the Chinese history of the 19th century and the developments on the mainland, the constitution was always meant to be a palladium of legal certainty.¹⁶⁸ Therefore it is almost natural that in line with the general perception of the constitution the Grand Justices also took the constitution as the primary legal norm of the Taiwanese legal system (Interpretation No. 371): “The Constitution is the state’s highest *legal* authority.” Whereas some constitutional courts draw more or less political consequences from the constitution, the Grand Justices have concentrated on the concentration of legal consequences.¹⁶⁹

Having said that, it has to be noted that this legalization of politics can easily result in the politicization of legal interpretation;¹⁷⁰ Interpretation No. 499, which even conquered the power to amend the constitution formally, has been seen as a step in this direction.¹⁷¹ Kelsen was very clear about wanting a constitutional court to be on the one hand a powerful one, but on the other hand to leave it outside the realm of political activism.¹⁷² The Grand Justices have so far tried to tackle this danger by a political question doctrine, similar to that of the US Supreme Court (Interpretation No. 382), but they are nevertheless seen as drifting into a more political approach recently.¹⁷³ If, however, the political system, as in any democracy under the rule of law, is significantly designed as a set of mutual checks and balances, which in fact means different competences for different matters, then these competences to enact a certain policy through law or prevent another institution from doing so have to be supervised by a constitutional court. In a way, said Kelsen primarily referring to checks and balances in a federal system, the political idea of a democratic state is “only completed with the institution

166. See Heun, *supra* note 18, at 196. This is obviously a comparison, because obviously Kelsen does not consider the Grundnorm to be a legal norm at all.

167. Comprehensive: DENNY ROY, TAIWAN, A POLITICAL HISTORY 30 (2003 Ithaka); See Fa, *supra* note 108, at 199.

168. See Fa, *supra* note 108, at 199.; Wang, Tay-Sheng, *The Legal Development of Taiwan in the 20th Century* available at <http://www.law.ntu.edu.tw/Faculty/prof/tswang/wang%203.0.doc> (last visited April 4, 2004).

169. This becomes obvious in Interpretation No. 261, which would have left room for a more political judgement than the Grand Justices actually delivered.

170. See Bullinger, *supra* note 62, at 212.

171. See Wang, *supra* note 168.

172. See Kelsen, *supra* note 14, at 69.

173. References at Hsu, *supra* note 114, at 9.

of a constitutional court.”¹⁷⁴ And indeed, this is proven by a constant trend towards Kelsenian-style constitutional courts.¹⁷⁵ These questions cannot be solved by a metaphysical consensus, but require a capable constitutional court.

In conclusion, Kelsen provided us with a number of good legal reasons for a strong legal institution of constitutional review. The skeleton argument he created generally works independently from any cultural or historical setting. Any society which takes its own fundamental values seriously enough to give them a mirror in a legally binding constitution would react inconsistently if it simply did not allow for any satisfying tests as to whether political actors act according to these values.

“Different countries with different situations could not be expected to have the same systems and applications. Nonetheless, their purposes are all the same to protect the constitution’s highest authority in law, ... ” (Interpretation No. 371)

With respect to recent reform discussions, in which I refrain from interfering any deeper, from a purely legalistic point of view I would recommend changing the Justice Yuan into a complete constitutional court, independent from any administration of justice and without too many elements of a diffused constitutional review.

174. See Kelsen, *supra* note 14, at 81.

175. See Ferejohn, *supra* note 19, at 54. Even the term constitution itself, which originally meant the basic construction of any kind of system, even the body, was understood as the legal order of a state in a Kelsenian way: Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the late Eighteenth Century* in CONCEPTUAL CHANGE AND THE CONSTITUTION 35 (Terence Ball, John G. A. Pocock eds., 1988, Kansas).