

Oct. 5 (Mon) 4-6 PM/ Furman Hall 120

"Constitutional Review and Consolidation of Constitutional Structure"

SYLLABUS

Justice Professor Dennis T. C. Tang©

I. Horizontal Separation of Powers among Five Branches (五權分治，平等相維)

I.1 **Overview: Separation of Powers in Comparison (Figures)**

- Q Why is there a separation of powers among five branches?
Cf. The teachings **bequeathed** by Dr. Sun Yat-sen for founding the Republic of China, i.e., excellent Chinese tradition
- Q What are the two additional branches about?
Cf. §83 (administration of examination and civil servants); §90 (consent, impeachment and auditing)
- Q What's the difference between the S/P in the US & ROC
Complexity on the surface: 6 v. 20 checks-and-balances relationships
Substantive inequality among the 5 co-equal branches

I.2 **Prohibition of Holding Office across Branches**

Interpretation No. 1 (May a legislator concurrently hold a government post?) &

- Q Is the Interpretation just a textual construction?

Interpretation No. 30 (May a legislator concurrently be a delegate to the National Assembly? **Conflict of interest** as a criterion announced)

- Q Why does it declare that "allowing a legislator concurrently to be a delegate to the National Assembly is incongruent with the spirit of Articles 25 and 62 of the Constitution"?
Cf.

Interpretation No. 75 (May a delegate to the National Assembly concurrently hold a government post?)

- Q Is Interpretation No. 75 consistent with Interpretation No. 30?
- Q Why did the Justices adopt a historical, instead of structural, construction here?

Interpretation No. 419 (May the Vice President concurrently hold the office of Premier (President of the Executive Yuan?)

- Q What does it mean by declaring that "The facts that triggered the present Interpretation should *be properly disposed of* in accordance with this ruling"? Is it unconstitutional, or constitutional?

I.3 **Permission to Share (Statutory) Bill-Proposing Power**

Cf. Art. 58 & 87

Interpretation No. 3 (May the Control Yuan propose and present statutory bills over the subject matter under its authority to the Legislative Yuan?)

- Q According to the Justices, "It is in compliance with *the spirit of the Constitution* that the Control Yuan may propose statutory bills to the

Legislative Yuan concerning matters within its authority." What does "the spirit of the Constitution" mean? Constitutional structure of separation of powers among five branches?
&

Interpretation No. 175 (May the Judicial Yuan propose and present statutory bills over the subject matter under its authority to the Legislative Yuan?)

Q Is the *rationale* of Interpretation No. 175 (the constitutional system of "separation of powers" and "checks and balances" (五權分治，彼此相維) among the five branches) slightly different from that of Interpretation No. 3 (the system of the *separation of the Five Powers and equalinterdependence*) (五權分治，平等相維)?

I.4 **Substantial Checks and Balances among Each Other**

Interpretation No. 461 (Is the Chief of Joint Staff obliged to be present for interrogation at Committee meetings of the Legislative Yuan?)

Q Why is the Chief of Joint Staff not obliged to be present for interrogation at Legislative Yuan ensemble meetings, but at its Committee meetings?

Interpretation No. 632 (May the Legislative Yuan constitutionally refuse to exercise its consent power over the nominees of Control Yuan members presented by the President of the Republic?)

Q May one say that *fidelity to the Constitution*, both action and inaction, is a common obligation of all organs of the state?

Cf.

Interpretation No. 14 (Are members of the elected bodies, at both the central and local government, subject to the exercise of control power?)

Q Why does it *go without saying* that the members of representative bodies, who are subject to public opinion, either directly or indirectly, thus shall not be subject to the supervision of Control Yuan?

I.5 **Mutual respect among each other**

Interpretation No. 328 (*political questions* are beyond judicial review)

Q How shall we understand (or define) "political questions"?
Cf. Baker v. Carr, 369 U.S. 186 (1962)

Interpretation No. 319 (Is there a margin of judgment (*Urteilspielraum*) in examination grading to be respected by other co-equal branches?)

Q Is the *threshold (quorum) for reaching a decision* the core of judicial Power and thus shall be respected by other co-equal branches?

Interpretation No. 461 (May the Presidents of the Judicial, Examination and Control Yuans, based on *mutual respect and constitutional convention*, refuse invitations from the Legislative Yuan to be present for interrogation?)

Q How would legislative interrogation interfere with the independent exercise of powers by these branches?

Q Even if there is a margin of judgment (*Urteilspielraum*) in grading answer sheets, shall *the general policy-making of examination* (e.g., the subjects to be tested in the national bar examination and the

way(s) of deciding its pass ratio) still be interrogated by the Legislators? Or may the Legislators enact specific statutes to prescribe these policies?

Interpretation No. 342 (Is the issue of whether a bill has been passed by following the legislative procedures subject to judicial review?)

Q Where there are palpable material (grave and evident) defects in the legislative process, shall the parliamentary autonomy end and therefore be subject to judicial review?

Q What does such "palpable material (grave and evident) defects of process" mean in practice? A more lenient (deferential) standard of judicial review?

Interpretation No. 357 (Is the Auditor-General guaranteed a 6-year tenure?)

Q Why must the Justices step in to refute legislators' attempts to bring the Auditor General under congressional control?

Q Is the Auditor General actually an independent agency subject to the common control of five branches?

Cf. §104

I.6 Evaluation of the feasibility of separation of power among five branches

II Evolution of the ROC constitutional structure

Dennis Tang, Reflections of the Constitutional Reform in the Republic of China on Taiwan in the 1990s

II.1 Modified (weak) parliamentarism(修正式內閣制): 1946 Constitution

Q Why would the compromise reached upon drafting the Constitution opt for such a modified, actually weak, parliamentarism?

II.2 Semi-Presidentialism(半總統制): Temporary Provisions

Q Why did Chiang Kai-shek propose such provisional amendments to the Constitution?

Q Do such amendments facilitate national mobilization for suppressing Communist rebellion?

II.3 Modified (weak) presidentialism(修正式總統制): since Constitutional Amendments of 1997

Q Does the popular election of the President help shift, though maybe unconsciously, the constitutional structure towards Presidentialism?

Q From a viewpoint of comparative constitutional law, what are the most serious defects of such a modified, actually weak, presidentialism?

II.4 Interpretations have not sensibly (correctly) reflected the evolution

Interpretation No. 387 (Shall the premier, i.e., President of the Executive Yuan, submit his resignation, together with the Cabinet, to the President prior to the swearing in of the newly elected legislators?)

Q What did the Justices envision about the constitutional structure when they based their holding (i.e., the Premier shall resign with his/her Cabinet prior to the swearing in of the newly elected legislators to enable (or compel) the President to nominate a new Premier to be consented by the newly elected legislators) upon

"popular politics and accountability politics"?

Interpretation No. 520 (Is it constitutional for the Premier to suspend the implementation of a budgetary bill good for several years which had been passed by the Legislative Yuan for the construction of the 4th nuclear power plant?)

Q Is this a concrete (particular) controversy between the Executive and the Legislature over their respective constitutional role (functions) to be decided (adjudicated) by the constitutional court, or simply a doubt (*Zweifel*) about the separation of powers between the Executive and the Legislature to be interpreted (elaborated) by the constitutional court?

Q What do the justices mean by saying that "if the Legislative Yuan should decide to oppose or form other resolutions, depending upon the contents of the resolution, *all related agencies should then negotiate a solution..., or to select a proper channel* within the current constitutional mechanism *to end the stalemate*"?

Q What is the proper channel of dispute resolution? Why would the Executive and Legislature petition the Justices for interpretation?

Interpretation No. 585 (Is it constitutional for the Legislative Yuan, by legislation, to establish the *Special Commission on the Investigation of the Truth of the 3/19 Shooting Incident* to exclusively and independently conduct the investigation?)

Q Why would the justices ascertain the enactment of the Act (and the ensuing establishment of the Commission at issue) as the legislature conducting the power of investigation which is necessary for the exercise of legislative power?

Q Instead of making such *circumlocutory reasoning*, why did the Justices not simply recognize the Act at issue as an organic act for establishing an *independent administrative agency in charge of investigating a specific mysterious incident*?

Cf. *Morrison v. Olson*, 487 US 654 (1988)

Interpretation No. 613 (May the Organic Act of the National Communications Commission, an independent administrative agency, *almost completely deprive the Premier of his power of nominating the commissioners*?)

Q Is the "*principle of administrative unity*" (行政一體原則) a constitutional principle? Even if it is, shall the establishment of independent administrative agencies be an exception to the principle? To what extent can such an exception be constitutional?

Q Actually, *what is wrong with the Act* from the viewpoint of separation of powers? Even if one agrees that "the provisions in dispute *practically* deprive the Executive Yuan of substantially all of its power to decide on personnel of the Commission", how do they transgress the limits on the checks and balances exercisable by the legislature on the Executive Yuan's power to nominate Commissioners?

Q How shall one read the majority opinion which held on the one hand that the provisions at issue have violated the "*principles of politics of*

accountability"(責任政治), while elaborating on the other hand that the existing constitutional structure is not one of parliamentarism.

Interpretation No. 627 (May the President claim a privilege of classifying any information whose disclosure he believes may endanger the national security as top state secrets and therefore be exempted from disclosure?)

Q What kind of constitutional structure is envisioned by the Justices when they elaborated that "Subject to the scope of his executive powers granted by the Constitution and the Amendments to the Constitution, the President is the highest executive officer and has a duty to preserve national security and national interests"?

Q Why did the Justices fail to consider the "conflict of interests" issue involved?

Cf. **Nixon**

II.5 Is **further modification** of constitutional structure **desirable**?

III. Interpretations striving for judicial independence

III.1 Organizational independence (from the Executive)

Interpretation No. 86 (Shall the High Courts and District Courts be subordinate to the Judicial Yuan, instead of the Ministry of Judicial Administration, Executive Yuan?)

Q **Why is it important to separate the administration of prosecutors from that of judges?**

III.2 Adjudication independence (from the interpretive rules of administrative agencies)

Interpretation No. 216 (Are judges bound by interpretative rules of administrative agencies in the course of adjudication?)

Q What is the appropriate standard of judicial review for interpretive rules of administrative agencies?

Cf. **Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944)**

III.3 No abatement of Judges' salary

Interpretation No. 601 (Is it constitutional for the Legislative Yuan to delete, or reduce, the budget appropriated as a specialty premium for the Justices?)

Q **Why did the Justices not recuse themselves from this case?**

III.4 **What are the challenges facing the Judiciary in the wake of judicial independence?**