THE RIGHT TO SOCIAL SECURITY

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2. PRIVATIZATION VERSUS THE RIGHT TO SOCIAL SECURITY: THE TAIWAN CASE[1]

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Since the early 1980s the privatization of social security has been the prevalent trend all over the world. This trend became especially apparent with the introduction of individual retirement accounts (IRAs) throughout Latin America. A question that has arisen is whether such a privatization scheme is in conformity with national constitutions and with international conventions, especially the right to social security.

In Taiwan, privatization of social security has also been occurring since the early 1980s. In 1984, with the enactment of the Labour Standards Act, employers were obliged to pay old age benefits and severance payments. This compulsory employer liability was the first wave of privatization of social security in Taiwan. Now, more than twenty years have passed since the introduction of this act. The policy of compulsory employer provision of old age benefits and severance payments has proved to be a failure. However, Taiwan has not learned from this privatization. To the contrary, Taiwan has introduced an individual retirement account under the Labour Retirement Benefit Act of 2004 to replace the employer liability as stated in the Labour Standards Act of 1984, that goes further along the road of privatization. Privatization of social security is therefore becoming even stronger than before. In comparison to the IRA in Latin America, the IRA in Taiwan means not only privatization, but also nationalization where the State serves as the sole and dominant administrator.

Therefore the question is whether such a compulsory employer liability and IRA is in conflict with the Taiwan constitution and with international conventions, especially the right to social security. Can the right to social security serve as an instrument to review such a privatization, and to declare that such privatization is null and void?

1 Sincere Thanks due to Mr. Paul Cameron for his kind help in editing.

Ming-Cheng Kuo

1. THE CONSTITUTIONAL BASIS OF SOCIAL SECURITY IN TAIWAN

Provisions relating to social security in the Constitution lie in Chapter 1, Article 1; Chapter 2, Articles 15 and 22; Chapter 13, Article 152 and Articles 155 to 157; and Article 10 in the Amendments to the Constitution.

In Chapter 1, Article 1 it states:

> *The Republic of China, founded on the Three Principles of the People, shall be a democratic republic of the people, to be governed by the people and for the people.*

The so-called Three Principles of the People as formulated by Sun Yat-sen are interpreted as the principles of nationality, the rights of the people and the well-being of the people.

In Chapter 2, concerning people's rights and duties, Article 15 is relevant to social rights and states that:

> *The right of existence, the right to work and the right of property shall be guaranteed to the people.*

In addition to this article, there is a universal declaration of the protection of the rights of the people, i.e. Chapter 2, Article 22:

> *All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.*

In Chapter 13, which concerns fundamental national policies, there are several Articles pertaining to social security. Section 4 of Chapter 13 is entitled Social Security and Article 155 of this section is most closely related to social security. It states that:

> *The State, in order to promote social welfare, shall establish a social insurance system. To the aged, the infirm, and the disabled who are unable to earn a living, and to victims of unusual calamities, the State shall give appropriate assistance and relief.*

Articles 152, 156, and 157, under the same chapter and section, are all related to social security, in particular to the right to work and medical services.[2] Article 152 regulates provisions in employment promotion. Article 156 provides for and emphasizes the protection of motherhood and children. In Article 157, the State is obliged to promote medical care and public health services.

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2 Please refer to http://www.president.gov.tw/en/.

In the Amendments of the Constitution, social security policies are re-emphasized. Article 10 of the amendments indicates that:

> *The State shall promote national health insurance and emphasize social assistance, welfare services, employment, social insurance and medical care. Priority shall be given to social assistance, and employment.*

From the constitutional provisions above we can conclude that: the right to social security is not categorized as one of the written rights of the people, as is the right of existence, the right to work, and the right of property. However, the State is obliged to introduce social insurance and social assistance as well as to promote the welfare of motherhood, children etc.

Based upon all the constitutional provisions above, both in writing and in praxis there is a consensus for the principle of a social welfare state. In praxis such a principle serves as a standard to review related legislation. For instance, the constitutional review of the National Health Act by Interpretation No. 472 of the Council of the Grand Justices (constitutional court)[3] stipulated that the State shall give appropriate assistance and relief to those who are not able to pay the premiums of the national health insurance and shall not refuse to pay benefits in order to fulfil the constitutional purposes of

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3 Holding of this interpretation: According to Article 155 of the Constitution: "The State, in order to promote social welfare, shall establish a social insurance system." Article 157 of the Constitution also specifies: "The State, in order to improve national health, shall establish extensive services for sanitation and health protection, and a system of public medical service." Furthermore, Article 10, Paragraph 5, of the Amendment of the Constitution provides: "The State shall promote national health insurance..." The National Health Insurance Act, promulgated on August 9, 1994, and implemented on March 1, 1995, is for the realization of the aforesaid provisions of the Constitution. Provisions in Article 11–1, Paragraph 1, Article 69–1, Paragraph 1, and Article 87 of the Act regarding compulsory subscription of insurance and premium payment are based on considerations of mutual social support, risk-sharing and the public interest, and therefore conform to the constitutional purpose of promoting national health insurance. The overdue charge prescribed in Article 30 of the Act is necessary to oblige a group insurance applicant or the insured to make premium payments. The aforesaid Article of the Act does not contradict Article 23 of the Constitution. However, to those who cannot afford to pay the premium, the State shall give appropriate assistance and relief and shall not refuse to pay benefits, in order to fulfill the constitutional purposes of promoting national health insurance, protecting senior citizens, the infirm and the financially disadvantaged.
Including those already covered, in accordance with law, by insurance for government employees, labor insurance, and insurance for farmers in the compulsory national health insurance system is necessary to promote the public interest, and therefore it is hard to argue that such decision contradicts the principle of trust and protection. Nonetheless, the authorities concerned shall, based on the provisions of Article 85 of the Act regarding presenting improvement proposals within a prescribed time period and this Judicial Yuan Interpretation No. 472, conduct at an appropriate time a full-range evaluation and implement improvement measures in aspects of the insurance operations (including diversification of the insurers), categories of the insured, the insured amount, premium rates, payment of medical insurance, austerity measures and the appropriateness of temporary suspension of insurance benefits.

promoting national health insurance, protecting the elderly, the infirm, and the financially disadvantaged.

In Interpretation No. 549[4], the Council of the Grand Justices declared the provisions of the Labour Insurance Act, whereby survivor benefits apply to non-dependents, unconstitutional due to the fact that it violated the primary purpose of social insurance stipulated in the Constitution which aims to protect a worker's dependents. Accordingly, such an interpretation declared not only that Article 155 of the Taiwan Constitution has the function of determining constitutionality of legislation, but also that any social insurance must conform to the purpose of social insurance as stated in the Taiwan Constitution. Otherwise it is unconstitutional.

2. NORMATIVE FUNCTION OF THE UN AND ILO CONVENTIONS RELATING TO THE RIGHT TO SOCIAL SECURITY

The normative function of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights of the UN, particularly the domestic normative effect of the right to social security, has been a crucial issue in judicial decisions for a long time.

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4 Holding of this interpretation: Labor insurance is a social security measure established to fulfill the fundamental national policies on labor protection (regulated by Article 153 of the Constitution) and implementation of the social insurance system (regulated by Article 155 of the Constitution and Article 10, Paragraph 8, of the Amendment to the Constitution). The sources of the insurance fund are the premiums paid by the insured, the subsidy provided by the government and the contribution disbursed by the employer. Therefore, the insurance fund is not the private property of the insured. The allowance that the survivor is entitled to claim when the insured dies is an income substitute and is purported to help the survivor avoid financial difficulties. The payment of the survivor allowance should therefore be based upon the survivor's need to be supported. The survivor allowance is also different from a lawful inheritance. Article 27 of the Labor Insurance Act provides that "The children adopted by the insured are not entitled to claim insurance benefits if the time between the registration of the adoption and the insurance peril is less than six months." The legislative purpose of this Article is to implement the social security and to avoid fraudulent claims. The regulations governing the survivor's benefits, stipulated in Articles 63 to 65 of the Act, are based on ethical relations and the principle of taking care of the survivor. However, it is a constitutional principle that the government is responsible for the people's welfare. Therefore, the adopted children and other survivors of the insured should be entitled to claim the survivor allowance when it is a fact that they were truly supported by the insured during his/her lifetime and they are unable to make a living after the insured dies. As a result, Articles 27, 63, 64 and 65 of the Labor Insurance Act should be amended within two years from the date of this Interpretation. Moreover, an overall examination and arrangement, regarding the survivor allowance, insurance benefits and other relevant matters, should be conducted in accordance with the principles of this Interpretation, international labor conventions and the pension plan of the social security system.

This issue is far from being particular to Taiwan, which is not a member of the UN and the ILO. Therefore, a question arises: what effect could the conventions of the UN and the ILO have on non-member countries?

Not only in practice but also in the schools of law, Taiwan has almost forgotten the existence of such international norms for a long time. Therefore, the speech on human rights and social insurance by Zacher made in Taiwan in 2000[5], could be seen as a new milestone representing that Taiwan again is paying attention to international norms.

Constitutional Interpretation No. 549, made by the Sixth Council of Grand Justices, represents a meaningful breakthrough. The reasoning for why the law was declared unconstitutional in this interpretation was its inconsistency with the purpose of social insurance as stated in the Taiwan Constitution. Additionally, Interpretation No. 549 held that international conventions must be taken into consideration in amending subsequent laws. In other words, the constitutionality of provisions can be justified as long as the provisions conform to international conventions. Accordingly, ever since this Interpretation of the Council of Grand Justices, conformity to international conventions has become an obligation of legislators in Taiwan.

Nevertheless, this interpretation did not declare the unconstitutional provision of the Labour Insurance Act null and void, but requested that an amendment to the Labour Insurance Act should be made within 2 years. This made the interpretation just a warning and until today the government and parliament have still not completed any relevant amendments. Regarding this issue, the Grand Justice, Yueh-Chin Hwang, formerly a professor of law at National Chengchi University, not only particularly stressed the necessity of international conventions as grounds for constitutional interpretation in his personal opinion paper, but also wrote an article which stressed this point again.[6]

In Interpretation No. 578 made by the Seventh Council of Grand Justices in 2004 (not including Hwang, who had retired) which is directed at the retirement benefit system in the Labour Standards Act, the Grand Justices held that the retirement benefit system of compulsory employer's liability is not unconstitutional; however, the Interpretation still requested that international conventions should be referred to when the law is amended. That is, in this interpretation, the Council of Grand Justices did not provide and proceed to a judicial review of the retirement benefit system in the Labour

5 Zacher, Human Rights and Social Insurance, in: Kuo/Zacher/Chan(eds.), *Reform and Perspectives on Social Insurance*, 2002. Refer also to Ming-Cheng Kuo, Social Constitution, in: J.C. Su, *Branch Constitution* (in Chinese), 2006, 313–352.

6 Yueh-Chin Huang, International Labor Convention and Constitutional Court (in Chinese), *the Constitutional Review*, Vol. 28, No. 3 (2003), 3–49.

Standards Act referring to international conventions but only requested that international conventions should be taken into consideration when the law is amended in the future.

This interpretation holds, in terms of old age protection for workers, that the state still has other measures as an alternative i.e. compulsory employer's liability to pay retirement benefits other than social insurance. However, an interpretation is not given on whether such a measure conforms to the standards of international conventions. In the interpretation No. 582 regarding the Code of Criminal Procedure in 2005, the Council of Grand Justices again resorts to laws of other countries and international conventions for its interpretation, and in particular refers to the International Covenant on Civic and Political Rights of the UN for its reasons to declare certain guiding cases regarding criminal procedure as unconstitutional.

3. PRIVATIZATION IN THE 1980s: RETIREMENT BENEFITS AS EMPLOYER LIABILITY REGULATED BY THE LABOUR STANDARDS ACT OF 1984

3.1. LAW ON PAPER AND IN ACTION

Under Taiwan's current labour laws as stated in the Labour Standards Act of 1984, employees have the right to claim retirement payment when retiring from enterprises when they have worked for 25 years, or for 15 years if they are retiring after age 55. However, the number of workers entitled to retirement benefits is very limited due to the fact that the average life of an enterprise is less than 15 years and the average tenure of a worker is less than 15 years.

The Labour Standards Act of 1984 stipulates that an employer should pay an employee retirement benefits at a maximum of 45 months of salary if the employee had worked 30 years for his/her employer. Workers would lose their benefits if they left their jobs because of a lack of vesting rules. By the law, an employer is obliged to deposit 2% to 15% of the monthly salary of an employee as a reserve fund; however, many employers in fact never deposit it. Only about 14% of employers in Taiwan contribute to the fund and about 57% of employees are covered by the fund.[7] Such a reserve fund is deemed to be the employers' property in practice. By law, the reserve fund is administered and managed by the State. In addition, the State may outsource part of

[7] For comprehensive information of this scheme please refer to http://statdb.cla.gov.tw/html/mon/rptmenumon.htm.

the fund to different monetary institutions. At the end of 2005 the total amount of the retirement fund reached NT$ 381.9 billion.In 2005, 36,027 retired workers received this old-age benefit. This amounts to about 23% of the total recipients of the old-age benefit of the Labour Insurance. Every retired worker's benefits amounted to 1,093,644 NT dollars, which is approximately 113% of the old-age benefit of the Labour Insurance.[8] This shows how large a burden this system is for the employer. It also illustrates how small a proportion of the retired can be protected by this system.

3.2. SOCIAL-POLICY ANALYSIS

Social insurance in Taiwan was introduced in 1950.[9] From that time onwards, social insurance has been continuously developed, and in 1995 a national health insurance, which covers all the inhabitants, was introduced.[10] Nevertheless, the old-age security system is still underdeveloped. The old-age/disability/survivor benefits of Labour Insurance remain in their original form, i.e. a lump-sum benefit.[11] The old-age benefit for example, of a retired worker, can be paid in principle at a maximum of 45 insured monthly salaries, if the retired worker had 30 years of insured working years.

In contrast to the privileged old-age security system of the public service (this includes civil servants, professional soldiers, and teachers and staff of the public schools and universities) the old age security of workers suffers not only from insufficient social protection, but also from social inequality.[12]

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8 Source: Council of Labor Affairs.

9 Kuo, Development, Reform and Perspectives on Social Insurance in Taiwan, in Kuo/Zacher/Chan (eds,), *Reform and Perspectives on Social Insurance*; 2002, 121–144; 50 Years of Social Insurance in Taiwan, in: Boecken/Ruland/Steinmeier(Hrsg.), *Sozialpolitik und Sozialrecht in Deutschland und Europa*, 2002, 421–433.

10 In practice more than 97% of the inhabitants are insured by this insurance scheme. See Ming-Cheng Kuo, Grundprobleme der Krankenversicherung in Taiwan, in FS für Zacher. For more information regarding the practices of the National Health Insurance please refer to http://www.nhi.gov.tw/english/index.asp.

11 For information on the Labor Insurance please refer to http://www.bli.gov.tw/english/.

12 In Taiwan a civil servant can with 25 years of service (possibly younger than 50 years old) retire and get lump sum benefits from the retirement benefit scheme and Insurance for government employees and teachers. If one is older than 50 years and has 25 years of service he/she can get a pension from the retirement benefit scheme and a lump sum benefit from the Insurance for government employees and teachers. All the lump sum benefit can be deposited in a privileged account with a 18% yearly interest rate. Altogether, the replacement rate for the salary of a retired civil servant (possibly only 50 years old) can exceed 100%. Please refer to Ming-Cheng Kuo, *Alterssicherung in Taiwan – Grundprobleme sozialer Sicherung in einem jungen Industriestaat*, 1990, 138–171; Kuo/Lin/Lin, *Taiwan Experience in Old Age Security, Taiwan National Report*, International Society for Labor and Social Security Law, 8th Asian Regional Congress, Oct. 31–Nov. 3, 2005, Taipei, Proceeding Vol. 2, 269–298.

In the late 1950s there was an administrative order promulgated by the Taiwan Provincial Government (local government), entitled "The Rule Relating to the Retirement Benefits of the Factory Worker". In praxis its normative function was controversial. Most people were doubtful that an employer would be obliged to pay a retirement benefit. Under such circumstances, the KMT government was still unwilling to introduce a pension scheme for the worker.

The reasons why the government chose such a compulsory employer liability in the Labour Standards Act of 1984 lay in the preferences of the political elites, and also in academe's anti-welfare point of view, mainly from economists. Among these economists, an economist named John Fei, a professor of economics from Yale University, was the most influential economist in Taiwan at that time.[13] Under his dominant influence, the development of social security in Taiwan was seriously hindered. Although the compulsory employer liability was not a suggestion of the economists, it was a compromise that led to the undoing of pension insurance in Taiwan, and a possible tactic at the time to ease social pressure for a comprehensive social welfare system in Taiwan.

3.3. LEGAL ANALYSIS

The Labour Standards Act was greatly debated by employers and economists throughout the lawmaking process and even after it was put into practice. The economists opposed both the social security system and the employer liability scheme. In contrast, there was only limited discussion of the Labour Standards Act by lawyers.[14]

The Council of Grand Justice's Interpretation No. 189, which appeared right after the enactment of the Labour Standards Act in 1984, clarified the administrative order of the Taiwan Provincial Government entitled "The Rule Relating to the Retirement Benefits of the Factory Worker". This Interpretation not only declared that the local government has the right to pass such kind of administrative orders, but also asserted that the government has the right to force employers to pay retirement benefits to retirees.[15] It should be pointed out that in the words of this Interpretation 'voluntary

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[13] Ming-Cheng Kuo, *Social Security System and Social Law* (in Chinese), 1997, 4.

[14] Please refer to Kuo, *ibid* (fn. 11), 1990, 184–217.

[15] The reasons were as follows: Article 153, Paragraph 1 of the Constitution provides: "The state, in order to improve the livelihood of workers and farmers and to improve their productive skill, shall enact laws and carry out policies for their protection." Article 154 of the Constitution further provides: "Capital and labor shall, in accordance with the principles of harmony and cooperation, promote productive enterprises. Conciliation and arbitration of disputes between capital and labor shall be prescribed by law." Under the above stated constitutional principles, the provincial government may enact necessary regulations to supplement the inadequacy of the statutes and

retirement' means that the workers have the right to retire voluntarily, and at the same time, the employers are obliged to give them retirement payments. This Interpretation doesn't mention whether or not the regulations were contradictory to an employer's freedom and property rights, nor does it mention whether or not due to the lack of vested rights one's freedom, property rights, and the right to social security were violated or not.

Since the Labour Standards Act has been enacted it has been criticized for its impracticability over the past two decades. Additionally, throughout the legislative procedure for the Labour Retirement Benefit Act, lawmakers did not argue about the Labour Retirement Benefit Act's conformity to the Constitution. Noticeably, at the time when the Labour Retirement Benefit Act was passed in 2004, the Council of Grand Justices court proposed Interpretation No. 578[16], which was in reference to the

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regulations of the central government. The Enforcement Rules of the Factory Act are authorized by Article 76 of the Factory Act. Article 36, Paragraph 12, of the Enforcement Rules provides clearly that retirement, pension, dismissal with severance pay, and other welfare shall be included. Since the voluntary retirement provisions provided in the Regulations Governing the Retirement of the Factory Workers of Taiwan Province are to provide protection for workers after retirement, they are consistent with the constitutional policy of labor protection. They also promote the replacement of retiring workers, raise productivity, and encourage professional service, all of which benefit the management of the factory. This development conforms to the constitutional spirit of harmony and cooperation between capital and labor in order to promote productive enterprises. Accordingly, there is no problem of constitutional validity.

16 Holding of this interpretation: Paragraph 1 of Article 153 of the Constitution stipulates that the state, in order to improve the livelihood of workers and to upgrade their productive skills, shall enact laws and implement policies for their protection. The Labor Standards Act is enacted to realize this fundamental national policy. Legislators possess a certain amount of discretion in determining the substance and methods of working conditions for workers' protection. But when a law has the effect of restricting the fundamental rights of the people as a result, the constitutional principle of proportionality should still be followed.
Articles 55 and 56 of the Labor Standards Act (hereinafter the "Act") respectively provide that employers are responsible for paying for workers' retirement pensions, and are obliged to deduct a certain amount of money every month and deposit the same into a special account as the reserve fund of workers' retirement pensions. These provisions, as one of the means to ensure workers' livelihood, help protect workers' rights and interests, strengthen employment relationships, promote overall social stability and economic development, and thereby do not exceed the scope of legislative discretion. The resulting restriction on employers' rights to freely determine the contents of employment contracts and to use and dispose of assets at their own discretion shall be deemed proper under the Constitution, since such restriction helps to accomplish the state's goal of caring for workers and takes into account the fiscal capabilities of the government, as well as confirming the obligation of the employers – as the recipients of workers' labor – to take care of their employees. The Act imposes fines on employers who violate the aforesaid compulsory provisions in order to compel employers to fulfill their retirement payment obligations, so as to ensure the livelihood and sustenance of workers after their retirement. In consideration of factors such as the context of the legislation, labor relations, the nature and impact of the interference with legitimate interests, and so forth, it is therefore necessary for the state to prescribe criminal fines. Such a compulsory provision, conforming to the principle of proportionality under Article 23 of the Constitution, does not contradict the constitutional purpose of protecting people's freedom to enter into contracts or violate people's property rights protected by Article 15 of the Constitution.

Labour Standards Act of 1984, and stated that the employer liability scheme does not contradict the Constitution. In addition to standing by the declarations in Interpretation No. 189, the Council of Grand Justices further declared in Interpretation No. 578 that:

- Such a measure is not against the principle of equality;
- Such a limitation to an employer's freedom to contract and property rights is not against the Constitution;
- Social Insurance is not the only means to protect workers; instead, the lawmakers still have alternatives;
- The legislators should adjust to the pace of social development. When making a new regulation, the lawmaker should not only abide by the Constitution, but also conform to the ILO Conventions.

Obviously, the Grand Justices believed that, to some extent, the Labour Standards Act is consistent with the rule of equality in the Constitution. Nevertheless, the rule of

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The Act imposes upon employers the obligation to pay for workers' retirement pensions, and it applies to all forms of labor relationships except for those that are difficult to enforce. Therefore, it does not contradict the equal protection principle stated in Article 7 of the Constitution. The pension system for workers put in place by legislators entails prioritized choices and designs, reflecting legislators' evaluation of the objective socioeconomic situations as well as the effective distribution of state resources. This, again, does not contradict the equal protection principle stated in Article 7 of the Constitution. Moreover, the Constitution does not prohibit the state from adopting means other than the provision of social insurance to accomplish the goal of protecting workers. Legislators, therefore, enjoy a certain degree of discretion in designing the overall system for workers' protection. Both the old-age benefits prescribed under the Labor Insurance Act and the retirement pension prescribed under the Labor Standards Act help to achieve the constitutional purpose of protecting the livelihood of workers. Since the two systems are different in nature, adoption of both systems can hardly be regarded as a violation of the Constitution. Nonetheless, legislators should consider the overall social changes and accordingly from time to time review the options regarding protecting the livelihood of workers. The Act was enacted and implemented in 1984, and issues such as whether the current workers' pension system has been effectively implemented, whether this approach needs to be examined, and how it can be improved to correspond to the overall social changes in order to keep up with the pace of changes and to be consistent with the constitutional goal of labor protection, should be reviewed at appropriate times. The decision of whether to integrate the existing workers retirement system and social insurance system in response to the emerging graying trend should also be considered, as such trends result from the changing demographic composition and are likely to impact the socioeconomic structure and the welfare system in the future, and such decisions will include everyone's interests and involve the issue of the distribution of social resources and the financial capabilities of the state to shoulder such burdens. The relevant authorities should, in addition to striking a balance between retaining the existing protection enjoyed by workers and noting the ability of employers to pay for workers' retirement pensions and the operational costs of enterprises, conduct a comprehensive examination of the current scheme in accordance with the fundamental principle of the Constitution to protect workers and the purpose of supporting and preserving the survival and development of small- and medium-sized enterprisees. The provisions of international labor conventions and the overall development of the nation shall also be taken into account.

equality that was declared in Interpretation No. 578 is different from that in Interpretation No. 485.[17] With regard to Interpretation No. 485, the Grand Justices asserted that a law is against the rule of equality of the Constitution unless there is equal treatment between different positions and different status. Under this definition, in the Labour Standards Act, the Grand Justices ignored the unequal social protections of industrial workers as compared to government employees.

Although Interpretation No. 578 stated that lawmakers could pursue alternatives other than a social insurance scheme, can a constitutional review be overlooked? At the very least, the following points should be examined:

- Will worker's freedom of employment be violated due to the lack of vesting rights and bankruptcy protection?[18]
- Will worker's property rights be violated?[19]
- Will the Labour Retirement Benefit Act be in conflict with the goal of social protection as stated in the Constitution?

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17 The Interpretation No. 485: The principle of equality prescribed by Article 7 of the Constitution does not mean a formal equality in an absolute and mechanical sense. Rather, it aims to guarantee the substantive equality of the people in the sense of equal protection under law. The legislative body, based on the value system of the Constitution and the purpose of enactment, could consider the differences of the addressed subject areas and reasonably treat them differently. The improvement of the people's welfare is one of the basic principles of the Constitution, which is self-evident in light of the Preamble, Article 1, the Fundamental National Policies in Chapter 13 and the 10th Amendment. The legislators, in consideration of social policy, have the authority to enact policies in order to make a restricted allocation of welfare resources. The Act Governing the Reconstruction of Old Villages for Military Personnel and Their Dependents and its Enforcement Rules prescribed: "The families that resided in original housing have a prior option to buy a new residence unit built pursuant to the said Act as well as the right to receive government subsidy for housing; such families can also apply for a loan with special interest rate for the down payment; and the government should provide appropriate assistance for the needs of such families. The purpose of the enactment of the Act does not violate the right of equality doctrine of Article 7. However, in light of limited state resources, the legislations of social policies have to consider the following factors to make appropriate allocation of welfare resources: the economic and financial conditions of the state, the principle of resource utilization, and should also try to attend to the equity between beneficiaries and other people. The legislations should also consider the beneficiaries' finances, income, costs for family support as well as the need of welfare and then regulate accordingly. It is forbidden to base the consideration of special treatment only on the beneficiaries' specific position or status. The rules governing the ways and amount of provision should also seek to be consistent with the basic needs of beneficiaries, and not to exceed the extent necessary for welfare purposes and thus result in overprovision. The legislative body should therefore revise any part of the abovementioned Act not in accord with the intent of this Interpretation.

18 Worker's retirement payment, without vesting rights, is merely a reward for his or her loyalty. Therefore, wages and other employment conditions are hard to be raised. Furthermore, worker's freedom to change jobs is confined as well.

19 Retirement payment is not merely a property right, but also a part of wages. Therefore, obviously, a worker will not receive his or her retirement payment if there is no regulation to protect worker's vesting rights.

Moreover, the Interpretation mentioned that the labour regulations should follow the ILO Conventions, but the Council of Grand Justices did not state whether or not the employer liability scheme is consistent with the ILO Conventions, the Universal Declaration of Human Rights, and the social rights addressed by the International Covenant on Economic, Social and Cultural Rights. Besides, we should take notice of Grand Justice Liao Yi-Nan's personal opinion.[20] He finds that because the government compels employers to pay both social insurance contributions and workers' retirement payments, this brings employers to bear a double burden. Hence, one cannot declare the Labour Standards Act constitutional only on the basis of Article 153 of the Constitution (an Article that deals with labour-management relations); a review on the basis of the principle of proportionality is necessary. Furthermore, he stated that this Act encroached on people's freedom; however, it could not protect the majority of workers. Hence, it is also necessary to review it on the basis of the principle of proportionality.

Interpretation No. 578 stated the opinion of academia. Among the fifteen members of the Council of Grand Justices, five of them are professors in law.[21] Of these five professors, four of them are from National Taiwan University and one is from National Chengchi University. In addition, it deserves to be mentioned that, three of them earned doctoral degrees in Germany, two received their doctoral degrees in the USA. Among them, there is no one who majored in labour law or social security law. Except for Grand Justice Liao, the others have had little to do with labour law or social security law. Although they all studied in Europe or America, most of them majored in constitutional, administrative, criminal and commercial law. The Grand Justice Hsu Tzong-Li, who graduated from Göttingen University wrote a doctoral dissertation entitled 'Verfassungsrechtliche Schranken der Leistungungsgesetzgebung im Sozialstaat' (Constitutional Limitation of Welfare Legislation in a Social State). However, he was passive in the Interpretation.

4. PRIVATIZATION IN THE 21ST CENTURY: LABOUR RETIREMENT BENEFIT ACT 2004

Although the old age benefits and severance payments for workers that were regulated through the Labour Standards Act of 1984 were severely criticized, the government did not make any reform in its social insurance scheme. On the contrary, privatization of social security has been sustained and promoted. Before the Democratic Progressive

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20 He obtained his doctoral degree in Germany and was once a full-professor at the Faculty of Law of National Taiwan University.

21 In addition to these five professors, the President Weng, vice-president Cheng, and Grand Justice Lai were also once full-professors in Law.

Party (DPP) came into power in 2000, the KMT had strived to replace the employer liability scheme with an individual retirement account scheme, but it did not get through the legislature. Before the DPP came into power, they doubted the feasibility of an individual retirement account scheme and asserted that a supplementary social insurance scheme was the only choice. However, they changed their position and promoted the individual retirement account scheme by all means after they came into power. Eventually, the Labour Retirement Benefit Act was promulgated on June 11, 2004, and put it into practice on July 1, 2005. Moreover, the annualization of the Labour Insurance Benefits (including Old-age Benefit, Disability Benefit and Death Benefit) was put aside, and the pension scheme, apparently, was entirely abandoned.

4.1. LAW ON PAPER AND IN ACTION

According to the Labour Retirement Benefit Act, employers should contribute 6% of each employee's monthly salary into an employee's individual retirement account every month. The government manages the individual retirement accounts centrally, and it can entrust a part of the fund to foreign or domestic monetary institutions.[22] This fund can be deposited or invested in public bonds, securities or stocks. When a worker retires, the sum of his or her retirement payment comes from the amount of his or her account balance and returns. The government guarantees the return rate, which equals the interest rate of a two-year certificate of deposit. As for the types of retirement payments, workers can choose between a lump-sum payment or monthly payments. This monthly payment is different from a pension payment system, especially because of its lack of a flexible payment system to resolve the problem of inflation etc. People who choose monthly payments must pay for this from their account balance to purchase a so-called long-life annuity insurance.

Workers who are employed after the act was implemented must abide by its regulations, but employees who were employed before the Labour Retirement Pension Act was implemented can choose between the old or new scheme.

According to Chapter 4 of the Act, if more than half of the workers in an enterprise that employs 200 workers or more vote for a private annuity insurance scheme, the employer should replace the individual retirement account scheme with the private annuity insurance scheme.

[22] Though the law relating to its authority is still pending, the existing fund of the labor insurance and of the retirement fund, regulated by the Labor Standard Act, is allowed to be invested widely, almost without limitation. According to the manuscript of the law relating to the authority of the investment, the manager should have a free hand.

Because the new scheme has been put into practice since July 2005, it is still hard to evaluate. There is one thing for sure though and that is that the new scheme has the same defects in common with all the individual retirement account schemes everywhere, such as the problem of inflation and risk sharing, and thus it is hard to realize the stated social goals of the constitution. Besides, this system is controlled by the government and the fund will be invested in the stock market. Therefore, it may end up being severely misused and lead to political and economic disaster.

At the end of January 2006 about 3,970,000 workers were holders of such an individual account.[23] The government every month collects about 8 billion NT dollars in IRA contributions. That means that every year the government receives about 100 billion NT dollars. This sum corresponds to the yearly payment of the lump sum old-age benefit of labour insurance. The sum is more than 30 times the yearly payment of the living allowance for low-income-families (in 2004 about 2.8 billion NT dollars). In ten years the IRA funding shall exceed one trillion NT dollars, and may even exceed two trillion NT dollars. If so, it shall be more than the government budget (in 2004 about 1.6 trillion NT dollars).

4.2. SOCIAL-POLICY ANALYSIS

Because the government asserted that the individual retirement account scheme has some advantages such as portability, and could alleviate the burden for the coming generations, they therefore thought that the individual retirement account scheme was the best option. However, not only the government, but also the lawmakers and scholars ignored the fact that social insurance has the same degree of portability. Somehow, the government, lawmakers, and scholars argued that social insurance could not solve the problem of caring for the elderly in Taiwan society. For this, Dr. Hu Sheng-cheng, who was once the director of the Economics Department of Purdue University, and the director of the Institute of Economics of the Academic Sinica, and presently the director of the Council for Economic Planning and Development (CEPD) of the government, should take the responsibility. He asserted that a social insurance program for the aged would suffer a financial crisis, and it would be unaffordable for the next generations.[24]

For this reason, he wholeheartedly supported the individual retirement account scheme. He not only quoted a lot of Martin Feldstein's papers, but also praised the

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[23] Please refer to http://www.cla.gov.tw/cgi-bin/SM_theme?page=431cf8c5#%A4T.

[24] Ming-Cheng Kuo, *The Policy-Making and Legislation of the Labor Retirement Benefit Act* (in Chinese), presented at the Symposium on the Labor Retirement Benefit Act, held by Taipei University.

success of the Chilean Model.[25] Though he did not refer to the World Bank's report, *Averting the Old Age Crisis*, obviously, he proposed similar suggestions and measures to it. With his promotion, most lawmakers accepted his ideas and supported the World Bank's point of view. Clearly, Dr. Hu's papers and statements and the World Bank's report had a great influence on the lawmaking procedure and gave the proponents of the individual retirement scheme strong support.

It is not clear if Dr. Hu knew of the criticisms of the World Bank proposal, in particular those of Stiglitz and Orszag, who criticized the World Bank proposal as follows:

> Unfortunately, as often happens, the suggestions have come to be viewed narrowly – focusing on a second pillar limited to a private, nonredistributive, defined contribution approach. Most of the arguments in favor of this particular reform are based on a set of myths that are often not sustained in either theory or practice.[26]

Furthermore there are the criticisms of Modigliani and Muralidhar:

> *In many cases, the reforms that emphasize three-pillar systems (with a funded, mandatory DC relying on individual accounts as a second pillar anchor) will lead to an enormous waste of resources and run the risk of leaving individuals with poor balances in their DC accounts while enriching asset managers.*[27]

It appears that to make a greater profit for private monetary institutions and private insurance is much more important to the government than a social security system. Moreover, perhaps the most crucial reason for the government's support of the individual retirement account scheme is for a political reason. The new scheme makes it possible for the government to control greater money than ever before and thus to control and manipulate capital and financial markets. In this way, the government not only could exert a great influence on the outcomes of elections, but also benefit specific persons. By means of the state-administered individual retirement account fund and by means of investment in the stock market not only will the money be collected, but also the power. In this case dictatorship will be an inevitable fate.

According to a plan put forward by the Council of the Labour Affairs in April 2006, the worker may have the option of choosing the entrusted monetary institution. If this were allowed, the privatization scheme would be enlarged. However, it is a choice

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25 Please refer to Ming-Cheng Kuo, ibid; Ming-Cheng Kuo, The New Labor Retirement Benefit Scheme: Upgrade or Downfall? (in Chinese), in: ILOE Foundation (ed.), *Labor Retirement Protection System – an International Comparison*, 2005, 1–18.

26 Orszag/Stiglitz, Rethinking Pension Reform: Ten Myths about Social Security, in: Holzmann/Stiglitz (eds.), *New Ideas About Old Age Security*, 2001, 17–56 (42).

27 Modigliani/Muralidhar, *Rethinking Pension Reform*, 2004, 222.

left to the government to decide. That means that the problem of nationalization and of state-controlled economic activity is still unresolved. Under these circumstances, the enrichment of the asset manager, including politicians and bureaucrats will continue as before.

It deserves to be pointed out, however, that this would not be the case if academia had not supported this scheme. Therefore, scholars, especially those economists who returned from the United States, should take responsibility for it.

4.3. LEGAL ANALYSIS

The lawmakers in Taiwan often neglect the constitutional conformity of privatization and international conventions. According to my paper in 2002[28], I noted that the individual retirement account scheme severely conflicted with the human rights declared by the constitution and international conventions. However, unfortunately this article did not awake the public to these critical issues.

Since the new scheme was enacted in 2004 and put into practice in mid 2005, the Legislative Yuan has not passed a law relating to the Supervisory Committee for the individual retirement accounts. Though the opposition parties argued that the government might control and misuse the funds, nobody questioned its constitutional conformity. In the light of the Grand Justices' Interpretations, Interpretation No. 578 for instance, we could, however, recognize that some Grand Justices had clearly expressed their preference for the individual retirement account scheme.

With regard to Interpretation No. 578, though it mainly expressed the Council's opinion vis-à-vis the employer liability scheme, two Grand Justices at the same time also commented on the individual retirement account scheme in a favourable light. With such support, the lawmakers would have no concerns about the problem of constitutionality. These two Grand Justice were Yu Syue-Ming[29] and Hsu Tzong-Li, who were mentioned above.

According to Grand Justice Yu's commentary document, he stated that "the problems of the aged sharply challenged the PAYG scheme" and most countries would transfer

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[28] Ming-Cheng Kuo, .The Constitutional Analysis of the Individual Retirement Account (in Chinese), in: *Modern Theories of Public Law Revisited, Festschrift in Honor of Prof. Dr. Yueh-Sheng Weng's 70th Birthday*, 2002, Vol. 3, 498–532.

[29] He obtained his doctoral degree at the University of California, Berkeley, and was a full-professor of law at National Taiwan University. He is specialist in commercial law and has published a book about the pension fund.

their systems "from a Defined Benefit toward a Defined Contribution". As to Grand Justice Hsu's opinion, though he mentioned the importance of constitutional conformity throughout his commentary document, he concluded, "With regard to the different approaches to the protection of the retirement life of the workers, such as a supplementary pension, individual retirement account scheme and so forth, the main battlefield should be in the parliament (Legislative Yuan), and not in the Council of the Grand Justices, although I personally favor the social insurance system and a supplementary-voluntary private pension scheme."

This clearly shows the opinion of professors of law, at least two professors of law, at National Taiwan University.

5. THE RIGHT TO SOCIAL SECURITY – A KEY TO THE SOLUTION TO TAIWAN'S QUANDARY

With regard to the passages above, the old-age security system in Taiwan since the 1980s has been inclined to privatization and nationalization rather than socialization, i.e. social insurance.

Up to a point, politicians' predilections have mainly led to the problems in Taiwan regarding the implementation of social security. In addition, problems may have arisen from academia and international factors as well. As regards academia, the support from the economists, Dr. Fei and Dr. Hu, who were faculty members in American universities, were decisive factors. As for the international factors, the World Bank's report, *Averting the Old Age Crisis*, had a tremendous impact on the development of social policy, while there has been little information and advice from the ILO and the UN. It is crucial to understand that Taiwan is not a member state of the ILO or of the UN. If Taiwan were a member state would it make any difference? Noticeably, the ILO and the UN seem to seldom assist their member states in in pension reform.

What is the meaning of the right to social security, which was declared by the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, and the ILO Conventions No. 102 and No. 128? What is their function? What is the extent of their impact? According to arguments by Beattie,

McGillivray[30], Schmähl[31], Barr[32], Stiglitz[33], Modigliani[34], and some empirical studies in Latin America[35], it has proven that the Individual Account scheme is unsustainable.

It also proves how impossible it is to expect a pension reform proposal from the economists and World Bank. It reveals that the economists, especially the neo-classical economists[36], are unqualified to deal with the problem of social policy, especially pension reform. These preceding arguments prove once more the Generation Contract or the so-called Machenroth Law. Under this economic law, a funding system cannot solve the problem of an aging society.[37] The funding system will lead to a double burden or dual coverage for the worker. With an individual retirement account, i.e. a compulsory saving, the country or the next generation cannot increase its or their property or assets, but can only increase debt. Hence, the argument of Hu, mentioned above, is controversial.

However, all of these papers ignored the problem of privatization's conformity to the right to social security. It seems unbelievable. One should query, do those declarations and conventions exist in name only? Are they nothing but ideals? Further, one should question, do they have any impact on pension reforms? If they have an influence on them, then, to what extent is the influence?

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30 Beattie/McGillivray, A Risky Strategy: Reflection on the World Bank Report Averting the Old Age Crisis, *ISSR* 3-4/95, 5–26.

31 Manfred Schmähl, Fundamental Decisions for the Reform of Pension Reform, *ISSR* 3/99, 45–55.

32 Nicolas Barr, *Reforming Pension: Myths, Truths, and Policy Choices*, 2000, IMF Working Paper WP/001/139.

33 Orszag/Stiglitz, *ibid* (fn. 25).

34 Modigliani/Muralidhar, *ibid*, (fn. 26).

35 From the numerous studies the reports by Rafael Rofman (*The Pension System and Crisis in Argentina: Learning the Lessons*, Background paper for regional study on social security reform, office of the chief economist, Latin America and Caribbean region, The Word Bank) and by Norbert M. Fiess (*Pension Reform or Pension Default? A Note on Pension Reform and Country Risk*, Background paper for regional study on social security reform, office of the chief economist, Latin America and Caribbean region, The Word Bank) are especially meaningful.

36 Almost all the economists in Taiwan are peddlers of neo-classical economics who received their doctorates in the USA. Some economist, like Huang, is a minority. See Shih-Shin Huang, Truth or Evil? Theory or Orthodoxy? – The Catastrophe of Neo-classical Economics (in Chinese), in: Li/Shiao (eds.), *Social Science in Taiwan*, 2002, 155–211.

37 The prolonging of life expectancy is a fact. However, due to modern improvements in people's health, and with the development of digital technology it is more possible to expect somebody who is 65 years or older to be able to work. In this case, society faces not an aging society, but in contrast, a younger society. With this development society needs to redefine what old age is. It is hence not necessary to pay too much attention to the so-called aging problem. However, how to reform the existing system in order for it to better correspond to the "aging" society is always a challenge.

If labor laws and social laws cannot encompass the right to social security and match the minimum requirements of the ILO Conventions, should these laws not be declared unconstitutional? With regard to the former employer liability scheme and the present individual retirement account scheme, they both don't include the minimum requirements of the ILO Conventions Nos. 102 and 128, especially the minimum standards of the 40% or 45% replacement rate.[38]

Moreover, if the right to social security serves as one of the people's basic rights, lawmakers will have diverse options only when we have a well-devised social security system. Accordingly, the argument that a "social insurance scheme is not the only choice" seems controversial. It should be amended as follows; "Social insurance may be not the only choice, but social security should be the first choice."

A constitutional review could rectify all the errors. Therefore, one should replace the statement "the main battlefield should be in the Legislative Yuan, not in the Council of the Grand Justices " with "the main battlefield is not only in the Legislative Yuan, but also in the Council of the Grand Justices." One cannot give up the ideal unless the constitution abolishes the goal of social security and the international organizations relinquish the right to social security. If the common consensus in the 21st century is to abandon the right to social security, then we should first amend the international conventions and declarations previously setting social security as a fundamental right and then abandon this ideal.

With regard to the failure of the Taiwan experience and the fallacy of the World Bank's report, *Averting the Old Age Crisis*, it is clear that social security is indispensable and should be refined. Furthermore, the right to social security should be implemented in those countries when it is necessary. That is, if the national constitutional court has no function, international organizations should take the responsibility. For this, the UN Human Rights Committee and the ILO should have their own criterions to investigate worldwide pension reforms.

In addition, such investigations should not be confined to member states. Should the UN and the ILO ignore a non-member state's welfare and human rights like it has done with Taiwan? If it is improbable to ask Taiwan to join them or make her accede to them, then cooperation in all forms should be improved.

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[38] Although together with the lump-sum benefit of the Labor Insurance it would still be difficult to realize the minimum standards, but if it could be realized under the Labor Insurance alone, then it is still problematic. Why, under such circumstances should the employer (in fact the burden of the worker) be forced to pay the contribution and suffer from the limitations on their economic freedom and property, and additionally suffer from the very possible poor balance in their IRA.

6. CONCLUDING REMARKS

1) There is no definite regulation of the right to social security in the constitution of Taiwan. However, the state is obliged to introduce social insurance and social assistance. Therefore, based on the universal protection of all the freedoms and rights of the citizen, which are regulated in the Taiwan Constitution and the right to social security, which is regulated in the Universal Declaration of Human Rights and other international conventions, the right to social security should no doubt be treated as one of the rights of the citizens in Taiwan.

2) In the 1980s, privatization in the social sphere in Taiwan found its beginning. The introduction of a compulsory retirement benefit as employer liability marked this. Nowadays, there is no indication of any change away from such a privatization. Due to the introduction of a state managed individual retirement account in 2005, privatization has enlarged its scale. This means that for two decades Taiwan has, through privatization, challenged the right to social security.

3) Privatization in Taiwan cannot improve the welfare of the citizen, and exactly the opposite has happened. The 1980s experiment with privatization has been declared a failure. The new individual retirement account is taking the same road, and its failure is almost guaranteed. The social goal of achieving an adequate pension system will be almost impossible to realize. Moreover, this continued privatization will result in an economic and political disaster.

4) The development of increased privatization of social welfare should be attributed to insufficient knowledge and selfishness of the politicians. Since 2000 the government is no longer in the hands of the KMT, but the DPP government has continued such a direction of privatization. The political change has not led to a change of social policy.

5) The development of increased privatization of social welfare should also be attributed to the academics, especially the economists. This includes not only the economists in Taiwan, but also in the USA. Nowadays, the American economists, such as Stiglitz, Modigliani etc. criticize severely the proposal of the World Bank as laid out in the report *Averting the old age crisis*. Are these criticisms nonsense? Can the peddlers of Individual Accounts, for example Ms. James or Prof. Hu prove, that all the arguments of Modigliani and Stiglitz cannot be supported and sustained? However, why did the economists discover such problems so late, and not before? What Stiglitz and Modigliani have now discovered is the inherent problem of economics and the weakness of economics to be involved with or to challenge social protections or social security. The dominant role of economics in the sphere of social science, especially

American economists there could be something different. It proves how dangerous the World Bank and the American economists are.

The Word Bank would probably defend itself with the argument that they never approved a state managed IRA. However, the World Bank should have thoroughly investigated the possible dangers in an IRA as well as the possible misunderstandings and misuse of an IRA. Nevertheless, IRAs, especially a compulsory IRA are false, even a fraud. Unless the World Bank can prove the Universal Declaration of Human Rights and the conventions of the UN and ILO as well as all the critics of Modigliani and Stiglitz are wrong, the World Bank should apologize and ask all the states to abandon all the compulsory IRAs, including all the variations such as the IRA in Taiwan.

The ILO should also be responsible and tell all the states, including Taiwan, that the IRA is in conflict with human rights, especially the Right to Social Security; a state with an IRA is a state without human rights. Hence, all the IRAs should be abandoned as soon as possible.

The Taiwan case has shown how unfortunate it can be if The Right to Social Security were to be forgotten. All the social security developments in Taiwan, especially with privatization, have not conformed to the Right to Social Security. A judicial review, with both a constitutional review at the national level and an international review, on the basis of international conventions, should be a way of going forward.

via the Nobel Prize has been a disaster, at least in Taiwan. What they have proved is nothing more than the need for and the correction of the right to social security, which has been discussed and supported by the academy of social policy and social law for more than one hundred years.

6) The World Bank should be condemned. Without the proposal of the WB, the disaster would not have been enlarged. Unfortunately, this proposal cannot be sustained, neither theoretically nor in practice. Such a proposal has led to a social disaster throughout the world, including Taiwan.

7) The ILO should also be responsible for such a negative development. Why has the ILO been so passive, while privatization has become so prevalent in Latin America? Throughout the process of privatization in Taiwan, the ILO delivered no technical assistance to Taiwan. The ILO must have no sense of the social disaster in Taiwan.

8) Under such circumstances, can justice and jurisprudence play a role? From the experience in Taiwan, it seems impossible to expect. However, there is no reason to abandon this last resource. A constitutional review, especially a review with regard to the right to social security can be a functional weapon against privatization, and perhaps the last chance.

9) In addition to the constitutional review, there should be an institution of international review. Both the Universal Declaration of Human Rights and the conventions of the UN and ILO should have their normative function and correspondingly the UN and ILO could act as a review institution. If such an institution based on these bodies seems unlikely to be achieved, another institution should be established.

10) Education and research in social security law should be a precondition of a functional judicial review, both national and international. From the Taiwan experience, the goal of achieving an effective judicial review of social security is in vain if the lawyers, in particular, the judges of the constitutional court have no understanding of social security law, especially the right to social security.

The Taiwan case is unique. The government, in fact the politicians and the bureaucrats in the name of the IRA, and in the name of the Word Bank have seized the money of the people for buying stocks and enriching themselves, while the workers and their dependents are suffering from poverty. The politicians, bureaucrats and judges, especially the judges of the constitutional court in Taiwan should be condemned. However, without the support of the Word Bank, and without the support of the