

## SUPREMA INTERVIEW

### Professor Tom Ginsburg<sup>1</sup>



Source: interviewee's personal collection.

### Introduction

Tom Ginsburg is a Professor of International Law and Political Science at the University of Chicago, engaging in the study of comparative law from an interdisciplinary approach. He has published several award-winning books, including *Democracies and International Law* (2021), *How to Save a Constitutional Democracy* (2018) - winning the best book award from the International Society for Constitutional Law -, “*Judicial Review in New Democracies*” (2003) – winning the C. Herman Pritchett Award from the American Political Science Association -, and “*The Endurance of National Constitutions*” (2009) - winning the best book award from the American Political Science Association (APSA).

Ginsburg is one of the most cited authors in articles of international law in the United States, holding a PhD in Jurisprudence and Social Policy from the University of California at Berkeley, a Juris Doctor Degree (J.D.) and a Bachelor of the Arts (B.A.) in Asian Studies. In addition to being a professor, he co-directs the *Comparative Constitutions Project*, an endeavor that allows the analysis and comparison of the Constitutions of all the nation-states existing since 1789. He is currently one of the hosts of the podcast *Entitled*, focused on the Human Rights theme, and is a member of the American Academy of Arts and Sciences.

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## Writing process, arts, and affections

**1. Suprema.** Professor, you are one of the leading names in Comparative and International Law, being one of the most cited authors in the United States in this matter. Several of your works have won world-renowned awards. What are your main motivations and goals when writing? Was such an impact on the academic world a personal mission or was it an unexpected result of your work as a professor?

**TG.** Thank you very much for the opportunity to speak today and for your very kind words. When I am writing an article or book, I'm not really doing it for anyone else. Instead I'm really writing it for myself, because there are questions I want to answer. And that's why I became an academic. So it's been very nice that sometimes people read some of my articles. All of us who are scholars write our works, but never know if there's actually going to be an audience for them. And I think my audience comes, not so much from my work, but because the questions that I wanted answered were important to the world at that time. What's the source of the rule of law? where does constitutional democracy come from? what makes constitutions endure? how can we understand the role of courts in a democracy, and how that role changes over time?

**2. Suprema.** An academic career demands a lot of time and effort from those who are committed to it. How important are your affections (family, friends, and personal life as a whole) for your professional development and achievements?

**TG.** I was married at a very young age and I had three daughters. And my family is very important to me. I was lucky that my wife really likes to travel, because her parents had taken her around the world when she was a young child. She was actually raised in Afghanistan and Greece because her parents were hippies, and on the run. And so when we had our kids we were able to travel and I could do my research in East Asia without any problem. My kids lived overseas with me and it was just something we always did as a family. Now they're all grown up and I can work all the time, but the basic answer to your question is that my family is everything to me and without them I would've done nothing.

**3. Suprema.** Besides being a great specialist in Law, you are also a strong reference in Political Science. How do you explain the importance of interdisciplinary studies for the youngest law students? Do you believe that the legal world, in general, needs to strengthen its relationship with other areas of knowledge?

**TG.** Yes, that's a great question. I think I'm lucky because in America the legal scholarship has always been a little more open to social sciences. It is not like a civil law country where everything is very formalist. I did not become a lawyer to become a lawyer; instead I became a lawyer because I was interested in questions about the role of law in our society. And so that meant that I had to be drawing from other disciplines, such as economics, political science, sociology, etc. The fact is that the rule of law is too important to be left to the lawyers. We have to all work together to try to understand how to advance law and justice.

**4. Suprema.** Still on the importance of interdisciplinarity, you are a member of the American Academy of Arts and Sciences, which deals with various topics, such as arts, humanities, democracy, justice, education, environment, science, technology, and international affairs. How do you believe that the arts and science can help in the process of understanding and studying Law? In addition, do the arts have a significant space in your everyday life?

**TG.** Oh that's a great question. My wife is an artist and so we are very connected with a lot of other artists on the southside of Chicago, where people use art to try to fight for social justice. I have a lot of artists in my life and I also love music, especially Brazilian music by the way. Art is just what makes us human. There's a well-known artist named Joseph Beuys who said art is the science of freedom. And I believe that too.

## Trajectory, studies, and teaching

**5. Suprema.** You were born and raised in Berkeley, California, and ended up studying at the University of your hometown from undergraduate studies to your Ph.D. Was it a personal desire to remain where you grew up? In addition, how was the process of moving to teach in other countries, such as The University of Tokyo and Seoul University?

**TG.** I really wish I could've stayed in Berkeley for my whole life, because it's a place I love, and I grew up in a very special time there in the 1970s and 1980s. I stayed there to study because I had no real other choices. As I said before I had children

very young and so I didn't really think about going anywhere else for college or law school. I didn't even apply to other law schools. Berkeley was a good place to grow up because it was a very dynamic place, very free in the aftermath of the 1960s. Berkeley is famous for being the place where the free-speech movement started; the civil rights movement was very much a part of the culture, and it was a racially mixed place which is unusual in the United States. It is also very close to Asia. The dominant part of the culture was in some sense from Japan and China, so in that environment it was very natural for me to study East Asia. But now I live in Chicago. It's completely different and it's not a place you move for the weather. The main reason I live in Chicago is because of the culture, which is very vibrant, and the ideas at the University of Chicago, which a place for the relentless pursuit of knowledge.

**6. Suprema.** Despite graduating and teaching in the United States of America, you have a B.A. in Asian Studies, being considered an expert in the field. Do you believe that the study of a region so different from the one you live in can help in the process of understanding, in some way, American democracy in terms of its culture? What motivated you to pursue a career in international studies?

**TG.** I think I was always interested in the rest of the world because of where I grew up. When I was really little, I liked to read the atlas, the book of maps and look at all the places of the world that I wanted to go. In terms of my studies, I don't really work much on the United States, and most of my teaching is about other countries. I believe that is very helpful for understanding the United States, both for me and my students. In the US you know we have a long tradition, called "American exceptionalism," which is the idea that America is unique and the problems of the rest of the world are far away. It is like we are an island and of course that's totally wrong, particularly in this era of democratic backsliding. I have found that looking at other countries is very helpful. With regard to Brazil in particular, I think our countries are very similar, we can learn from each other about the patterns of backsliding, the forces that caused them, the strategies that we can use to address them, and so on. The book I wrote with Aziz Huq, *How to save a constitutional democracy*, was motivated by trying to help Americans understand the role of constitutions and constitutional law in backsliding and what we now call "front-sliding", which means rebuilding our democracy.

**7. Suprema.** Along with Zachary Elkins and James Melton, you were responsible for the creation of the Comparative Constitutions Project platform, which greatly assists comparative research and constitutional studies in many countries. Can you briefly share where the idea of creating the Project came from and what it was like to put it into practice?

**TG.** The idea for that one came when Elkins and I met at the University of Illinois in about 2004. We had both studied at Berkeley, and he was in the political science department while I was in the law school. We were lucky to get James Melton as a graduate student to help us and our idea was to produce a database to look at all the constitutions of the world in terms of their contents. Our motive was really research. There were questions we wanted to answer such as how ideas spread from one country to another, how long constitutions last, what makes them work, and many other things about constitutions. That work is still ongoing. When we started that work, we were so surprised to learn that there are so many constitutions that in most countries they don't last very long. There is a much bigger universe even than we imagined when we started the project back then, so there is more work to do.

### ***“Democratic backsliding” in the Brazilian and global context***

**8. Suprema.** In an interview with *The Economic Times*, you made the following statement: *“Today’s authoritarians are very creative at turning democratic institutions to their advantage”*. Do you believe it is possible to reverse the wave of authoritarianism? If it is possible to reverse it, how would this process take place? To what factors do you assign this phenomenon of global authoritarian advance?

**TG.** The question of why authoritarianism is on the rise is a big and complicated one. Some people say it's economic factors, such as inequality; others say it has to do with the social media, which disrupts democracy; others argue that democracy itself was just a brief moment in global political history, a very short period, and that we are returning to the normal state of affairs, which has been dictatorship for most of human history. I myself am an eternal optimist, so I don't believe that we are doomed. I think to some degree today's dictators are digging their own graves. When you look at the aggressive foreign policy of China these days, or the invasion of Ukraine, you see that authoritarian powers make mistakes because they don't have a good information environment, they don't really understand the way the world works. Of course we see continued pressure on democracies, I don't want to run away from that issue. But we also see small places where democracy is coming back and there's some very good stories in small countries that also deserve a lot of attention. Kenya, Malawi, some countries in east Asia where democracy seems to be fairly robust.

**9. Suprema.** The Brazilian Constitution lasts for an impressive 34 years, having surpassed the “period of decay” at 19. The Charter suffers constant attacks, both in relation to its content and its creation. According to your book *The Endurance of National Constitutions* written in partnership with Elkins and Melton, some factors lead to agreements and consensus between society and the government that explain its permanence and make it more democratic. How do you see these criticisms, largely based on common sense, in opposition to what has been demonstrated by research and science about the value of “self-enforcing constitutions”?

**TG.** I think that basically we are in the tradition of “self enforcing constitutions”. There’s no external enforcer of the constitution for most countries in most places. Therefore, it has to be in the interest of everybody in the system to maintain the constitution. I think in Brazil is interesting in this regard. As I understand it, the 1988 Constitution was created through a very broad social consensus, with lots of interest groups that got involved. The result as that is a very thick document, with a lot of detail, that you can use as a doorstop because it’s so heavy. That fact means that now there’s lots of people who have an interest in the constitution’s survival. About 10 years ago I went to Brazil to ask people about the drafting of the constitution, and Elkins and I interviewed many of the drafters. When we talked to ordinary people we found that many of them didn’t know much about the Constitution, but they liked it. I remember this one guy on the beach at Ipanema, we asked him “What do you think about the constitution” and he said “*é boa, é boa*”, over and over again. He liked it, and that’s good that it helps the enforcement of the Constitution, if people care about it. Of course no constitution is perfect, but the Brazilian one has been largely self-enforcing.

**10. Suprema.** Considering that exogenous factors, such as changes in neighboring countries, can decisively influence internal governmental transformations, how do you analyze the current Latin American context? How can it affect Brazil?

**TG.** Obviously the continent is going through a bit of a left-wing surge now. Latin America is always going through like a pendulum from the right to the left, from the right to the left. Now it is shifting to the left, but there is also in many countries an instability. Peru I think is the worst, where the system has just broken down, with constraints, impeachments, and instability. Brazil has always been a little bit outside of Latin America as of linguistic differences and that works both ways: what happens in Brazil sometimes stays in Brazil, and what happens in the rest of the continent doesn’t automatically affect Brazil. I think the main thing I take away from Brazil these days is that the institutions survived a populist leader, and now the democracy is going to continue, and it will be messy but I hope will be a

positive example for other countries in the region, where democracy is in trouble, particularly in Central America.

**11. Suprema.** The Federal Supreme Court plays the role of a Constitutional Court in the Brazilian context. How do you believe that the Constitutional Courts help the global democratic order today? How do you view on one hand, the so-called “judicialization of politics” and, on the other hand, the attempt to undermine the independence of the judiciary in some countries?

**TG.** Yes, this has been a trend that is somewhat predictable. When in the 1990s constitutions assigned much more power to courts, then the judicialization of politics was inevitable. The problem is that that is usually followed by the politicization of the judiciary. Nuno Garoupa and I wrote a book about this a few years ago, called *Judicial Reputation*, and we view in the problem as one of cycles. Once the judiciary gets politicized, then sometimes there will be reform efforts to reduce the role of the judiciary; as it becomes more independent in a smaller sphere, it might then be able to gradually expand its role again. I think it’s a big dynamic process and the Brazil is probably a really important case for understanding this.

**12. Suprema.** Invited to give the first talk at the *Dialogues with the Supreme Court Program*, Professor Armin von Bogdandy visited the STF and stated that the Court has successfully faced threats to democracy. He considers that to be the most important message that comes from this Court. Do you have the same point of view?

**TG.** Yes, I think I agree with Bogdandy in this regard. Any democracy needs “neutral” institutions, by which I mean technocratic institutions that are not grounded in electoral legitimacy, to help it survive. When a democracy is under threat it is often those institutions, the courts, the military, the electoral bureaucracy, etc. that make the difference and I think the court is one of those institutions in Brazil which played such a role recently, but of course there are also dangers.

**13. Suprema.** Your most recent book *Democracies and International Law* explains the challenges faced by human rights and the importance of international legal cooperation. On this topic, the Federal Supreme Court recently released the second edition of the book *American Convention on Human Rights*, a systematic article-by-article commentary based on the STF and the Inter-American Court of Human Rights case law. What is your view on this kind of publication paving way to enhance a deeper jurisprudential interaction between the Courts?

**TG.** That is such a great question and it's a very important issue. The only way international human rights really work is by being internalized into the legal system of nation states and countries. So it's important for the judges in Brazil to understand the American Convention and to internalize it and to apply it. On the other hand, the relationship between national courts and the Inter-American Court, and the Inter-American Commission, can be complicated. Some courts in the region have their own interpretations of rights, that might be different from the view put forward by the Inter-American Court. I'm not someone who thinks that the national courts always have to follow the court of San José. I know legally that's what the court in San José says, but in fact we see in many countries around the world a kind of dialogue between the national courts and the regional human rights courts about what these rights actually mean. The German Constitutional court is very famous in this regard because they say that European law is superior most of the time, but ultimately at the end the German Constitution is the mechanism by which the European law applies, so in the sense that the German Constitutional court is above the European courts. I'm not saying there's a right answer but I think the dialogue about that's very important.

## New generations

**14. Suprema.** With such a brilliant and inspiring career, what advice would you like to give to the new generations of students, jurists, and academics?

**TG.** Research the questions that you want to know the answers to. That is the first thing. If you follow your interests then you will do the best work you can, and if you do the best work you can, you will ultimately be recognized for your work. Our field has become increasingly crowded. When I started there wasn't so much as a field of Comparative Constitutional Law and now is a big field and a very exciting field but there is still so much more work to do. So I think I am jealous of the younger people because they have time to do that work.