

Chapter 8

Horizontal Accountability and the Rule of Law:

The Judicial Yuan and the Control Yuan

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Democratic development in Taiwan is at a crossroads. On the one hand, two power turnovers, respectively occurring in 2000 and 2008, have fulfilled Samuel Huntington's minimal "two turnover" test of democratic consolidation. The rule of law has greatly improved. Constitutionalism is generally established. The overall level of protection of civil liberties and political rights has been high enough to have kept the country "liberal", according to Freedom House rankings, for well over a decade. Among the third wave democratizing countries, Taiwan is fortunate enough to have advanced to a liberal democracy.

On the other hand, Taiwan's political development has experienced notable setbacks in recent years. Throughout Chen Shui-bian's two terms in office, the minority DPP government faced aggressive majority opposition in the legislature, led by the majority KMT and PFP alliance. The partisan struggle was fueled by and has in turn worsened Taiwan's most salient political cleavage, namely the split in national identity. Former President Lee Teng-Hui aptly described the dire political conflict as an ongoing "democratic civil war."¹ Indeed, this severe political conflict has delayed, and oftentimes distorted, major reforms as well as all other significant public policy debates. In a word, while Taiwan's democratic regime has managed to remain liberal, the quality and effectiveness of its democratic governance has deteriorated.

Taiwan's inconsistent development of liberal democracy and the quality of democratic governance testifies to how rugged and twisted the path to democratic consolidation can be, even for a relatively advanced new liberal democracy. The momentum of liberalization gathered from the early stage of democratization may not always be conducive to consolidation. And the underlying social conflict released by electoral politics may prove to

be the most daunting challenge to further democratic development. In other words, Taiwan's experience suggests that sustained liberalness does not necessarily indicate consolidation, even though "liberalness" is an extremely important dimension of democratic development. Democratic consolidation is a matter of solid legitimization of the democratic institutions or "rules of the game". Yet Taiwan's experience bespeaks a twist that is often underestimated. Democratic institutions are not just "neutral" rules of the game. Rather, they embody the statehood to which all major political forces must pledge allegiance. Democratic rules of game cannot be fully legitimated if any administration must suffer from a serious deficit of legitimacy for the national identity and ideology it seeks to represent. For Taiwan's democracy to be consolidated, the fundamental challenge is whether or not the existing democratic institutions can help to solve or neutralize the problems caused by deeply divided politics, provided they themselves are not victimized by the problems.

This chapter deals with one dimension of democratic institutions, namely, horizontal accountability and rule of law. It focuses on the Judicial Yuan and Control Yuan. We evaluate the development of Taiwan's Judicial Yuan and Control Yuan and their contribution to democratic consolidation since the power turnover of 2000. The primary question we seek to answer is: Do the Judicial Yuan and Control Yuan constitute a solid part of the democratic institutions that will sustain Taiwan's further consolidation? To address this question we must also ask whether and how these two branches of government have promoted horizontal accountability; how they have been affected by Taiwan's deeply polarized politics; and how they have responded to these political cross-pressure.

Independence, Supremacy, Accountability and Capability

For all new democracies, one of the most important tasks is to establish a judiciary and relevant institutions to ensure horizontal accountability. These institutions must operate with

sufficient independence to apply general rules in an impartial, consistent and reasonably predictable manner. Yet independence of judges, ombudsmen or supervisors does not guarantee that their decisions would be respectfully accepted or implemented by other governmental branches. Hence “supremacy” should be distinguished from “independence” as a distinct analytical dimension of these institutions.² Supremacy means that the judiciary and other horizontal accountability institutions have obtained sufficient legitimacy and authority to command compliance, and the losers are restrained from attacking the institutions.

However, neither independence nor supremacy is an end in itself. The fundamental virtue of a horizontal accountability institution lies in its promise to fulfill social functions for which it is instituted. The debate is often framed as the tension between “independence” and “accountability”. While “independence” frees the judiciary and horizontal accountability institutions from undue intervention, “accountability” means that these institutions should be held accountable for their decisions.

In addition to “accountability” and “independence/supremacy”, to meet its social functions, the judiciary and other horizontal accountability institutions have to be “capable”. It involves the ability to deliver high quality decisions and conduct other judicial and semi-judicial actions properly. It concerns factors such as the quality of judges and ombudsmen, the efficiency and reasonableness of trial and investigation procedures, the proper application and reasoning of the decisions, the ability of the judiciary and horizontal accountability institutions as a whole to deliver consistent opinions, and so on.

Taken together, these dimensions of judicial and horizontal accountability development - - independence, supremacy, accountability and capability -- indicate the overall legitimacy the institutions might enjoy to enhance horizontal accountability. In the following sections, this chapter explores and evaluates how Taiwan’s judiciary and the Control Yuan have evolved and performed in these dimensions.

Frontrunner: Rule of Law without Democracy

Taiwan's development of rule of law is special, in that the authoritarian state initiated the transition to a rule of law decades prior to the democratization. To be sure, full independence and supremacy of the judiciary is not possible without democracy. The judicial capability and accountability was just as problematic due to the political constraints imposed on the judiciary in pre-democratic era. The administrative law litigation, for instance, did not fulfill its function to correct governmental wrongdoing until well after the transition to democracy.³ Nevertheless, Taiwan's early rule of law development set relatively favorable conditions for subsequent democratic transition and consolidation.

The timing of rule of law development matters to democratic consolidation in general and horizontal accountability in particular. Democratic politics inevitably creates winners and losers. Therefore, a successful democratic consolidation relies on functional third-party mechanisms to solve disputes. Many of the reverse development in young democracies witnessed today are partially attributable to the failure to establish dispute resolution mechanisms between contending political forces. For Taiwan, thanks to an early transition to a system of rule of law, a relatively functional legal system existed when Taiwan started democratizing in the second half of 1980s. And it has played a critical role in the rocky process of democratization.

The authoritarian KMT party-state's rationale for improving the rule of law was instrumental in nature. It used the rule of law as a substitute for democracy. As suggested by empirical studies, economic development and democracy are highly correlated — development raises people's demand for democracy which guarantees more freedom, while democracy in turn assures accountability, provides checks and balances, and benefits development.⁴ The KMT government, however, trickily separated rule of law from democracy and used it as a substitute, as part of its economic developmental strategy.⁵

Based on the colonial legacy of a transplanted civil law system introduced by Japan, the

KMT implemented a number of dual-track legal reforms. It placed more focus on laws governing economic life than laws protecting political and civil rights. On the one hand, a body of westernized civil laws was introduced to improve investment, corporate governance, and property rights. It met the rising demand for rights protection made by the beneficiaries of rapid economic growth, including state-owned enterprises, foreign companies, and the growing middle class. On the other hand, those who received less benefits, such as labor, were relatively satisfied with the trickle-down economic effects while expecting reforms promised by statutes more symbolic than effectual.⁶

Political factors, both domestic and international, accelerated the development of rule of law. Regular local elections served as an alternative law enforcement mechanism through which political activists frequently used laws to challenge KMT's policies in their campaigns.⁷ International influence succeeded in pressing the regime to carry out legal reforms and pay more respect to human rights, for the KMT desperately needed international financial aid and security support, mainly from the United States.⁸ Consequently, by the beginning of democratization, a functional court system and a relatively competent class of legal professionals were already extant, with nascent constitutionalism and increasing right consciousness among the general public.⁹

During the political transition, the independence and supremacy of the courts have greatly improved, with constitutionalism gradually taking root.¹⁰ The capability of the judiciary has increased, along with the improved quality of legal professionals.¹¹ Judicial corruption control has become increasingly effective (Freedom House 2005). In a 2006 survey of lawyers' view on judicial corruption and independence, a mere 3.8 percent of respondents expressed dissatisfaction with the integrity of judges and legal staffs, while only 4.7 percent cast doubt on judicial independence.¹² In addition, reformists within and outside the judiciary, including prosecutors, lawyers, and NGO activists, have frequently staged collective campaigns calling for judicial reforms. For instance, the Judicial Reform

Foundation has been conducting a nationwide evaluation of judges since mid-1990s and issuing annual reports. Volunteers are recruited to sit in on court trials to evaluating each judge's performance. Also, in 1999, an unprecedented Judicial Reform Rally led by lawyers also pressed the Judicial Yuan to hold a national Judicial Reform Conference, which resulted in a series of reforms in early 2000s.

Thanks to all these achievements, Taiwan's judiciary attained a meaningful degree of legitimacy by 2000. But the fiercely divided politics that ensued dragged the judiciary into the center of political warfare. It put the judicial legitimacy to the severest test by forcing the judiciary to decide upon highly political issues. In such cases, the judiciary would be cast in dangers of being revenged by contending political forces, with judicial supremacy undermined and capability strained. Despite substantial progress, it is not necessarily the case that the legitimacy enjoyed by Taiwan's judiciary on the eve of the 2000 power turnover could withstand the dangers that were to follow.

In the following sections, we illustrate this danger by reviewing the performance of two major sections of the judicial branch — the Grand Justices and the regular court system.

The Grand Justices

The Grand Justices,¹³ the Constitutional Court of Taiwan (hereafter, the Court), has won critical acclaim during Taiwan's democratic transition, as it steadily expanded its jurisdiction, accessibility, and power in the 1990s. However, the increasingly polarized politics after 2000 plunged the Court into a field of landmines. Increasingly, the Court has been asked to arbitrate or mediate political disputes. But the more it got involved, the deeper in the mud the Court got mired, and the more its independence, supremacy, and even capability were strained.

As an institution standing on the top echelon of judicial power, the Grand Justices faces the challenge of how to ensure compliance with its constitutional interpretations while

attaining independence and supremacy. The Court used to face only one paramount party actor that allowed its latitude—the KMT. But after 2000 it had to deal with multiple major actors that require the Court to resolve their disputes. This new political game has changed the ways the Court achieves its goal.

At critical moments of the democratic transition, the Court exerted its constitutional power to carry out fundamental reforms. The Court's monumental *Interpretation* 261 [1990], for example, ordered the old representatives in the Legislative Yuan, National Assembly and Control Yuan who remained in office for over thirty years to leave office by 1991. This Interpretation cleared away the strongest bastion of old guards and ushered in an age of extraordinary judicial activism.

However, in 2000 when it responded to the overwhelming public outcry against the National Assembly's self-aggrandizement in *Interpretation* 499, the Court triggered a nasty backlash. In this Interpretation, the National Assembly's constitutional amendments, including one extending the term of its own members, were declared unconstitutional. This interpretation provoked the National Assembly to the utmost degree and proposals such as abolishing the Court were in the air.

The fundamental issue illustrated by the two dramatic episodes is to what extent the Court can secure authority that stands on its own rather than relying merely on support lent from political forces. *Interpretation* 261, for instance, is less daring than it appears in a sense that it reflects the dominance of the reformist faction of the KMT over the old guard.¹⁴ Likewise, it could be said that the Court survived the crisis triggered by *Interpretation* 499 because it wittingly sided with the ideals endorsed by the loose yet dominant alliance of reformist KMT and DPP.

Nevertheless, this politically dominant power base would cease to exist in divided politics where political consensus is next to nothing. Once the Court's political base is no longer as strong and as unified in the 1990s, it is less able to do as well as it did in the past.

Strategic Ambiguity as Political Cushion

At first, the Court adopted the approach of strategic ambiguity to avoid direct confrontation with either party of the dispute, with the intent to play the role of a mediator to urge more deliberation between the political branches. In *Interpretation* 419 [1996], for instance, the Court refused to declare clearly whether the then Vice President Lien Chan could serve as the Premier at the same time. It did so to avoid being directly involved in the conflict between the KMT President/Premier and opposition parties including the DPP and the New Party.

However, when the Court adopted the similar approach in 2000, it suffered from severe backlash from both sides for not helping to resolve the political standoff between the DDP-controlled Executive Yuan and KMT-controlled Legislative Yuan. In *Interpretation* 520, the Court avoided a clear-cut answer about whether the Executive's unilateral decision to stop construction of a nuclear power plant was unconstitutional. As a result, both DPP and KMT claimed victory based on their partial and selective understanding of the Interpretation. The nasty political conflict continued.

The backlash of *Interpretation* 520 showed that ambiguity in a severely divided politics would prolong, rather than solve, a conflict between contending forces that have little trust for each other. Neither does it create more room for further deliberation and strategic maneuver. As the deadlock continues, indecisiveness is likely to incur serious attacks from both sides. In a true deadlock, strategic ambiguity puts the Court in a dangerous position, endangering its authority and legitimacy.

Constitutional Decisiveness at Risk of Political Punishment

The Court might have recognized the danger of ambiguity and decided instead to explicitly express its legal stance. However, it is also an inherently dangerous strategy in that constitutional decisiveness would necessitate siding with one of the contending forces. The

challenge then for the Court is how to preserve itself from attacks of the losing party, and how to offer incentives for the losing party to continue to comply with the Court.

One severe test came in the wake of the 2004 presidential election, in which President Chen narrowly won after surviving an assassination attempt. The KMT and People First Party (PFP) considered the assassination a conspiracy staged by Chen himself to attract popular sympathy. To seek the truth they desired, the pan-blue camp passed “the Act of the Special Commission on the Investigation of the Truth in Respect of the March 19 Shooting.” The Commission, with members appointed in proportion to the partisan distribution of seats in the Legislative Yuan, was granted exclusive jurisdiction over the investigation and extraordinary prosecutorial power to use compulsory measures. The Court soon faced this unprecedently tough issue after the Executive Yuan and DPP legislators vehemently condemned the Act as unconstitutional and filed a constitutional petition.

Similar to the role of the US Supreme Court in the 2000 presidential election dispute, the Court was in a position to overturn the election result, indirectly through affirming the legitimacy of the Commission which was very likely to endorse the opposition’s accusation against the legitimacy of the election result. Within two months, the Court held the Commission overall constitutional, but it invalidated certain crucial functions that were significant enough to justify the Executive Yuan’s resistance by withholding money, personnel, and documents. As indicated by the dissenting Justice Hsu Tsung-Li, the majority opinion actually went out of their way to allow the most room for the Commission. Nevertheless, the Court’s prudence did not earn appreciation from KMT and PFP legislators.

The Court did not get away just with severe criticism this time; much worse, it had to fight against the revenge of the opposition parties. With clear retaliatory intent, the Legislative Yuan soon cut down the budget of the Judicial Yuan as well as the Justices’ salaries, plus budget for administrative matters such as computerization of the Justices’ conference room, the Justices’ overseas business travel expense, vehicles renewal fees, and

legal research expense.¹⁵ In response, the Court had to declare in *Interpretation 601* [2005] the retaliatory salary budget cutting unconstitutional. But it was not able to save the budget of other administrative items.¹⁶

Despite the revenge, the Court was not deterred from challenging the Legislative Yuan. For instance, in *Interpretation 613* [2006] regarding the issues of nomination and appointment power for the members of National Communications Commission, the highest media regulatory organ, the Court declared certain controversial provisions unconstitutional and condemned the provisions as legislative self-aggrandizement. Yet to moderate the shock, the Court used the rather common technique of “invalidation with deadline” in an extraordinary way. The Court allowed the unconstitutional provisions to remain valid for over two and a half years, until after the 2008 legislative and presidential elections. The Court was signaling to the Legislative Yuan that it did not want to be accused of aiding the DPP government; rather, its unconstitutionality finding was based on non-partisan considerations. Perhaps due to this political prudence, this Interpretation met with mere vocal criticisms.

Overall Assessment and Explanations

During the eight-year period of DPP administration, the Court was over-loaded with political issues that placed its hard-won independence and supremacy under serious strain. Yet thus far, the Court has shown surprising resilience even though it did not come out unharmed. Several reasons help to explain this. First, the Court’s constitutional decisiveness with various moderating techniques did help break the political deadlock, although at the cost of its own authority. Second, the fact that the Court serves as a responsive and ultimate institutional mediator deters dissenting parties from launching any devastating attack. Last, the Court has shown impartiality that keeps competing parties in the game because the party losing this time still has the hope to win next time.

A caution should be noted. Despite its modest success, the Court was not able to

command compliance in all politically sensitive cases. For instance, due to the Legislative Yuan's boycott against the President's nominees of Control Yuan members, the Control Yuan remained vacant (during the last three years of Chen Shui-bian's term until August 2008 when Ma Ying-Jeou refilled the vacancies), even after the Court declared such boycott as "contrary to the constitution." [Interpretation 632, 2007]. Both the President and the Legislative Yuan showed little interest in breaking the deadlock during this period. Out of pure political calculation, contending parties decided not to comply with the Court's decision.

In the future, the constitution will continue to create difficult problems for the Court whenever divided government exists, with one party controlling the legislature and the other the executive. Without structural reforms such as constitutional amendments, such bitterly divided politics could continue to drag the Court into the center of political struggle. Such role of active arbiter may provide the Court with an opportunity to increase its power. However, in a context of polarized politics, it is no less a danger than an opportunity.

Regular Courts

Regarding the performance of regular courts, we focus on three areas of lawsuits that became central to the political struggle. They are defamation cases regarding the political speech market, election disputes, and the efforts of the prosecutorial system to curb political corruption.

Defamation Litigations in Political Speech Market

The severely divided politics has been both a cause and effect of Taiwan's pathological political speech market. The illness of political speech markets embodied most vividly in "the politics of rumors". It showcases grossly irresponsible muckraking as, ironically, one of the most effective strategies of political competition. National legislators, high level government

officials, party leaders and political talk show hosts all tried with varying frequency and accuracy to inflict damage on political enemies with irresponsible defamatory statements. Political elites from all parties rush to muckrake on each other, with or without substantial proof. Partisan media join the battle by providing forums and discursive ammunitions, appealing to a polarized and segmented citizenry. The political culture is not mature enough to contain the abuse. Muckraking legislators get re-elected or good approval ratings from their partisan supporters even if they score only one accurate shot out of ten. A polarized citizenry chooses what it wants to believe, not what is worth believing. The truth-seeking function of the political speech market has been in serious danger.

False statements of fact directed at specific individuals are among the few types of flaws in the political speech market that could directly be sanctioned by the judiciary. Unsurprisingly, defamation litigation becomes the only solution for defamed politicians to seek justice. Since 2000, high profile defamation cases have become one of the most prominent types of political litigations. Many party leaders, high-level officials or representatives, and famous media political talk show hosts are entangled in multiple defamation suits.

Thus far, Taiwan's judiciary has in general demonstrated commendable independence in these defamation suits. President Chen Shui-bian and former President Lee Teng-Hui as well as politicians of all political stripes have lost libel cases, either as plaintiffs or defendants. However, independence is but one virtue among many that would help the judiciary tackle the politics of rumors. Taiwan's judiciary should develop proper legal doctrines and actively regulate the political speech markets when all other speech-market-checking institutions are failing. But the judiciary did not succeed in this regard.

The defamation laws in Taiwan were given a momentous renewal in 2000 when the Constitutional Court issued *Interpretation 509*. The Court gave the criminal defamation provisions in the Criminal Code a new interpretation to the effect that defamers do not have

to prove the defamatory statements true in order to be relieved from criminal punishment. The defamers are required only to produce so much evidence as to prove that he or she has “substantial reasons to believe in the truth” of the statements in question. This Interpretation is one of the remarkable achievements of liberalization of the political speech market during transition.¹⁷

However, it also generated great confusion regarding its actual meaning and scope. Within four years following the Interpretation, different tribunals of the Supreme Court, which is Taiwan’s highest court in the chain of regular courts, but separate from the Constitutional Court, made contradictory decisions regarding whether *Interpretation 509* applies to the tort of defamation. In a headline-breaking case,¹⁸ in which the Vice President Lu Hsiu-lien sued the prominent news magazine *the Journalist* for falsely naming her as the source of a scandalous gossip about President Chen’s extra-marital affairs, the Third Civil Panel of the Supreme Court refused to apply the Interpretation 509 to tort cases and found *the Journalist* liable for the defamatory report. In stark contrast, later in the same year, the Fourth Civil Panel of the Supreme Court made an opposite decision and found the defendant, a famous writer and political commentator Li Aao, not liable for falsely accusing a prominent DPP legislator Chang Juin Hong of conspiring to “destroy” Li’s talk show and the host TV network.¹⁹ The inconsistency remains to this day and has percolated down to all levels of courts, which makes the result of tort of libel cases and the award of civil damages highly unpredictable.

Despite the doctrinal disorder, a relatively recurrent pattern of judicial decision across levels of courts has emerged. Seen in both criminal and civil libel cases, this type of decision relaxed the fault standards to an extraordinary degree, thus giving the defamers substantial freedom from tort or criminal liability. A large number of this type of decisions explicitly invokes the American doctrine of “actual malice” when the defamatory statements concerns public affairs. Yet when observed closely, the kind of “actual malice” employed is actually an

even looser standard than the American version.²⁰ It has created a radically speech-protective defamation legal framework.

Radically speech-protective defamation laws mean judicial evasion from the social function of promoting political truth and reveal institutional weaknesses of Taiwan's judiciary. First, the courts explicitly invoke the American doctrine of "actual malice" without accurate understanding, in ignorance of lots of work on the meaning of the doctrine done by Taiwan's legal academia. Second, a polarized politics gives little incentive for the Supreme Court to overcome the inconsistency among its panels, because a centralized resolution of the inconsistency might incur political pressure. The radically speech-protective interpretation might have been the safest strategy. The courts could have taken up a more difficult task of regulating the speech market consistent with *Interpretation 509*. During the transition in the 1990s, the mass media and legal reformists campaigned for the doctrine of "actual malice" to liberalize the previously strict defamation regime. As a rhetorical instrument of campaign, unsurprisingly, its meaning has been relaxed to serve the purpose of reform. The problem then is that the courts have been using this politically correct rhetoric at their easy convenience, in order to be safe from political pressure.

The Severest Test: Election Dispute

The dramatic 2004 presidential election turned out to be the severest test to Taiwan's judiciary. Upon revelation of a close election result, the Pan-Blue candidates Lien Chan and Soong Chu-yu refused to accept the result. Half a million pan-blue supporters took to the streets and asked for reelection or recount. Their initial requests for reelection and "executive recount" went nowhere because both lacked statutory base. Lien-Soong camp ended up accepting that the only way to unsettle the election result was through the court.²¹ This initial stage of forum selection showed that rule of law in Taiwan significantly constrained the strategic options available to the Lien-Soong camp.

The Lien-Soong camp filed two suits to the Taiwan High Court, exhausting all types of electoral litigation prescribed by law. One suit was against the Central Election Committee on the ground that the Committee held the election in an unlawful manner.²² The other suit was filed against Chen Shui-bian and Lu Hsiu-lien on the ground that the two re-elected officials used unlawful means to coerce voters.²³ These two suits were destined to be overloaded with issues too political to be handled aptly by the judiciary.

A comprehensive recount of over thirteen million votes was the center of all disputes. The volatile political environment almost guaranteed that any inadvertent mistake in the process could cast the whole society into disorder. The more daunting problem was who to carry it out—the group of people to shoulder the task would have to be trusted by both camps, and they must be motivated not just to serve partisan interest, but also to serve principles higher than the interest they represent.

After intensive negotiation, the historic task befell the legal profession and both camps recruited hundreds of attorneys to do the recount. This decision, urged by the presiding judges, proved to be wise. According to participant attorneys' own account, attorneys recruited by both camps showed reason and restraints, despite intensive and continuous arguments and negotiations. One participant attorney recalled that he worked with attorneys of the opposite camp who used to be fellow judicial reformists and this bond between them assured relatively peaceful though intense process.²⁴ In contrast to supporters polarized by the split of national identity outside of the court room, the professional identity shared by the attorneys provided a crucial bridge between hostile camps.

During the trial, the courts bore tremendous time and political pressure. In the process, the Lien-Soong camp reproached the judges for failing to investigate the evidence thoroughly. When the scheduled deadline of one of the decisions approached, pan blue legislators threatened the court with budget cutting and asked them to postpone the verdict, for fear of negative influence on the coming Legislative Yuan election. On the eve of the verdict,

speculations were in the air that pan-blue supporters would besiege the court.

In the end, both tribunals of Taiwan High Court delivered their decisions in favor of the DPP.²⁵ The Lien-Soong camp appealed both cases to the Supreme Court and both appeals were later denied. The most decisive reason is that the recount did not produce a different result. In their verdicts, the courts adopted the strictest interpretation of legal text under the *Act of Presidential Election and Recall* in order to avoid any controversy of legal interpretation.

This strategy is not surprising, since sticking to the text and the narrowest construal of the law gave the court the most secure ground to face the heated dispute. Yet it did not save the court from retaliation by the losing party. The Lien-Soong camp assaulted the court, and the Legislative Yuan controlled by the pan-blue camp cut the High Court's budget by ten percent in the following year.²⁶

Despite the harm inflicted on the court by the polarized politics, Taiwan's judiciary continues to play the role of the final arbiter of election disputes. In the high profile Kaohsiung City mayoral election in December 2006, the KMT candidate sued the DPP mayor-elect for manipulating the result by spreading false rumors on the eve of vote. The district court ruled in favor of the KMT candidate this time. The ruling was then overturned by the High Court. Both rulings invited harsh and loud protests from the losing side. Thanks to the legitimacy of the judiciary, the rulings have stood.

Prosecutorial System: Curb on Corruption

For the authoritarian party-state, the prosecutorial system was a crucial link in the whole power network. For the KMT's clientelism, the prosecutorial system offered crucial ways to discipline clienteles and so was indispensable to its maintenance.²⁷ Unsurprisingly, the reform of prosecutorial system in Taiwan not only came later; it was destined to be a more

treacherous undertaking than judicial reform.

Reform of the prosecutorial system culminated in the revision of *Judicial Organization Act* in January 2006. The revision made three significant reforms. First, it offered official status to the “Council for Deliberation of Prosecutorial Personnel Matters”, an achievement of the reform-minded prosecutors to dilute the personnel appointment and disciplining power of the Minister of Justice. Composed of nine members elected by all prosecutors and eight members appointed by the Minister and the Prosecutor General, the Council has critical *de facto* power over appointment of district chief prosecutors and job rotation decisions. Even though the deliberative results of the council are not officially conclusive and are subject to discretion of the Minister, the unwritten norms have been developed that the Minister should not ignore the council’s advice. This institutional design further shrinks the room for undue political intervention through personnel management.

The second achievement of the revision was to change the appointment process of Prosecutor General from direct ministerial appointment to Presidential nomination with consent of the Legislative Yuan. This revision elevated the status of the Prosecutor General and helped shield him/her from politically-motivated interference from the Minister. Officially, the Minister of Justice would have been left only with general policymaking power and would have little room for maneuver in individual cases.

However, it does not mean that the Minister is completely unable to influence the direction of criminal investigation, since the Minister retains the final power to appoint and remove district chief prosecutors. Under polarized politics, the DPP government came to be suspicious that some prosecutors might have been politically biased.²⁸ And so the DPP Minister of Justice stopped short of yielding more personnel power to the Personnel Council. In 2007, the Minister tried to work out a decision of an unexpected change of chief prosecutors during the absence of the nine popularly voted prosecutors. He met with roaring protests from the district level and finally had to compromise with the elected members. This

showdown demonstrates that the personnel power is politically important. The clash between prosecutorial autonomy and political accountability will continue to be an issue of prosecutorial reform.

The third major reform achieved in the 2006 revision is the establishment of the Special Investigation Unit (特別偵查組) at the Supreme Prosecutorial Agency, which came into full operation in April 2007. It is charged with the special task of pursuing crimes of corruption committed by the highest ranking officials, disturbance of national elections, and other serious white-collar crimes menacing social order. Establishment of this unit reflects the suspicion of the opposition dominated Legislative Yuan toward the impartiality of ordinary prosecutors, in the wake of the 2004 election dispute. Under the close watch of all parties in a volatile political environment, this unit has proved indiscriminate in its investigation. However, polarized politics has distorted the function of this unit and dragged it into the center of the political storm in the following years.

The first dramatic episode came in November 2006 when Taipei district prosecutor Chen Rui-ren prosecuted the first lady Wu Shujen and several core staffers of the President's office, for embezzling the “Fund of National and Presidential Affairs” (國務機要費) with irrelevant receipts. President Chen was clearly implicated, but spared only because of presidential immunity from criminal investigation. This breaking event sent unprecedented shockwaves through Taiwan's already inflammatory politics. DPP legislators took an aggressive posture and revealed that the then Taipei Mayor Ma Ying-jeou was also guilty of embezzling the “Special Fund for Head Officials” (首長特別費). The Special Investigation Unit was charged with investigating Mayor Ma as well as “head officials” of all political stripes. The result is that almost all prominent politicians came under investigation and Ma was later prosecuted. The Unit unwittingly became one of the most unnerving variables in Taiwan's politics.

The underlying issue in all these cases concerns the long-time customary practice of appropriating soft budget funds, which would be illegal in light of a strict interpretation of

anti-corruption laws but was rarely pursued in the past. As then Premier Su Chen-Chang commented, it was a “historical common liability” to be shouldered by all parties and politicians, and should not be made a crime. Yet politics was so bitterly divided that there was simply no room for rational deliberation and inter-party collaborative solution. The indictments had to stand because it became the most deadly weapon in the political struggle.

As a result, the Special Investigation Unit got mired in endless similar cases and the Prosecutor General failed to shoulder the duty to make consistent the prosecution standards regarding the Head Official Fund cases. As the Unit investigated Mayor Ma and other Head officials, some district prosecutors adopted an obviously looser standard in their investigation of the Mayor of Tainan City than that used in Ma’s case, and decided not to prosecute the mayor. Contrary to common practice, the Prosecutor General did not try to reach a consistent prosecution standard in these cases until late May in 2008, when the KMT officially took over both the executive and legislative branches. The unusual delay was obviously because the Prosecutor General feared being condemned as aiding any particular politician or political party.

Control Yuan toward Democratic Consolidation

Compared to the Constitutional Court and the regular courts, the performance of Control Yuan has been much less impressive. Reflecting Dr. Sun Yat-sen’s constitutional thought of “five-power” government, Taiwan’s Control Yuan is parallel with the Legislative Yuan, Executive Yuan, Judicial Yuan and the Examination Yuan. It serves as one of the main organs ensuring horizontal accountability. It retains the authority to audit the budget expenditures of state agencies, impeach unlawful governmental officials, and correct state agencies on ill-managed policy matters.²⁹

During the authoritarian era the Control Yuan served as a functional monitoring

mechanism under the KMT-led developmental state. That some members of the Control Yuan were liberal reformists and that the KMT also needed an internal mechanism to monitor the bureaucratic system contributed to the effectiveness of the Control Yuan in early years. At that time, the Control Yuan audited indiscriminately officials of different levels. For instance, prior to the 1980s, among the civil service officials impeached for violating laws and abusing discretions, middle-ranked officials accounted for 39 percent, while higher-ranked and lower-ranked officials account for 20 percent and 31 percent.³⁰

However, under the party-state, the Control Yuan's effectiveness was selective and limited. With respect to corrective measures and impeachments on unlawful state actors or agencies, the Control Yuan paid much closer attention to the financial and economic divisions than other divisions such as the police, civil, and social administrations. From 1948 to 1996, impeachment cases related to officials in charge of financial and economic affairs accounted for 44 percent of all cases, while police administration cases accounted for only 4 percent, judicial affairs 10 percent, land administration 3 percent, and social administration 0.6 percent.³¹ Apparently, a dual-track enforcement, with far more focus on economic affairs than others, existed in the operation of the Control Yuan. This dual-track enforcement reflected the KMT's strategy to use the Control Yuan as an instrument to monitor the bureaucracy for the sake of economic performance, while being reluctant to use it against organs charged with maintaining authoritarian hegemony and internal order.

During democratization, the Control Yuan was transformed from a semi-representative institution responsible for exercising horizontal accountability to a semi-judicial institution shouldering the same function. Prior to 1992, representatives of provincial councils elected the members of the Control Yuan. It was declared by an early Council of Grand Justices [*Interpretation 76*] as one house of the parliament, in addition to the Legislative Yuan and National Assembly. The 1992 constitutional amendment transformed the Control Yuan into a semi-judicial institution, with its members nominated by the president and approved by the

parliament (before 1993, the National Assembly; after 1993, the Legislative Yuan). The transformation reflected the rising status of the Legislative Yuan, which sought to monopolize the representative function, and the public demand that the Control Yuan be a more effective ombudsman free from political influence.

Throughout democratization, the powers of the Control Yuan remained in principle the same, with the organization of the Control Yuan reinforced with an expanded investigatory body of staff in 1998. The major change resulted not from its institutional structure but from the general political environment. The increasing rights consciousness among the general public during democratization has given rise to a rapid increase of petition cases to the Control Yuan during the 1990s and the 2000s, up from average 7,150 cases annually in the 1990s to 12,870 in the 2000s. Yet with its institutional power unchanged, the Control Yuan did not succeed in garnering solid support for its continued existence.³²

Challenges

Horizontal accountability is a way of institutionalizing mistrust, in order for the people as a principal to control the agent, namely the government.³³ However, when the people are divided and the logic of political conflict takes precedence over any constitutional consensus the polity may have, the healthy mistrust could well be distorted and become a means of political struggle. When such fear is rampant, the institution could be sacrificed on the battlefield of polarized politics. The Control Yuan became an institution merely in name from 2005 to 2008, as the opposition-dominated Legislative Yuan refused to exercise consent power over then President Chen's Control Yuan nominees. This deadlock was an extension of the 2004 presidential election dispute. Yet compared to the judiciary's resilience in the divided politics, the vulnerability of the Control Yuan reflected its inherent institutional weaknesses.

First, historical happenstance was the immediate cause of the deadlock. The opposition

pan-blue parties boycotted the President's nominees on the ground that the neutrality of the nominees selected by their political rival—President Chen—was problematic.³⁴ Yet this could hardly justify the wholesale boycott, since the Legislative Yuan could well have exercised its power to disapprove the nominees. The nature of the boycott was arguably part of the KMT and PFP's fight back in the wake of the 2004 presidential election dispute. In response, the DDP insisted on its constitutional power and demanded the Legislative Yuan exercise consent power. The President did not feel compelled to re-nominate and solve the dispute because the DPP's long-time stance had been to abolish the Control Yuan and transform the five-power constitutional structure to one with the US style three powers. As a result of this coincidental consensus between political rivals, the contested institution sat empty for most of Chen's second term, until Ma Ying-jeou assumed the presidency. From February 2, 2005 through July 31, 2008, the Control Yuan sat empty for a total of three and a half years.

Second, the design of appointment and consent process contributed to the deadlock. In a divided polity, with executive and legislative branches controlled by different parties, the executive branch has limited incentive to strengthen the horizontal accountability institution that might be used by the opposition party. The success of such an institution, therefore, depends partly on the goodwill of the executive leaders who are willing to improve good governance at the expense of their bargaining power with their rivals.³⁵

Third, the Control Yuan's powers set by the constitution are by design limited. Constitutionally, the function of the Control Yuan is mainly to activate the sanction mechanism held by the executive branch, the courts, and the Commission on the Disciplinary Sanctions of Functionaries of the Judicial Yuan.³⁶ Although the Control Yuan can impeach public servants and issue orders to correct illegal or politically objectionable matters, the final sanction decisions are made by the courts and executive organs in charge after receiving the Control Yuan's decisions. Even though impeachment or corrective measures could be

coexistent with criminal sanctions, the rigor and authority of the courts overshadows the impeachment procedure.³⁷ The Commission on the Disciplinary Sanctions of Functionaries often suspends the trial of impeachment cases until relevant criminal procedures are complete. Similarly, an increasingly independent prosecutorial system is a far more effective corruption pursuer than the Control Yuan, since it possesses all the compulsory powers of investigation not available to the Control Yuan.³⁸ In short, democratization brought about a rising judiciary, with a corresponding weakening of the Control Yuan.

As a result, many political scientists and legal scholars in Taiwan have been calling for re-allocation of its authority to either the judicial system or the Legislative Yuan. In fact, the evolution of the Control Yuan has also signaled the substitutive relationship between the Yuan and the judicial system. Statistics of impeachment passed by the Control Yuan show that the number of impeachments and corrective measures in the 1950s and 1960s was higher than in the following two decades as the judicial courts started taking root and playing a bigger role. Indeed, the overlapped or fragmented authorities held by the Control Yuan, the judicial courts, and the Legislative Yuan might have increased the transaction costs to ensure accountability.

Judicial and Prosecutorial independence in the Post-DPP Era

The KMT's landslide victories in both the presidential and legislative elections in 2008 put an end to the sharp clashes between the executive and the legislative branches of government. Even though the politics remains highly polarized, the political struggle between the KMT and DPP would be much less consequential. Given KMT's dominance of both political branches of the government, the judiciary would be much relieved from the burden of arbitrating or mediating between two conflicting governmental powers. However, the judiciary may be thrown into troubled water of another kind, as the solidly united KMT government becomes a daunting political force. This provides observers with a great opportunity to assess whether the independence shown by Taiwan's judiciary during the DPP

administration is more a matter of strategic guile than principled commitment.

The litmus test quickly came when the former president Chen Shui-bian was indicted on December 12, 2008 on multiple corruption charges. These charges include embezzlement of special presidential funds, money laundering, and briberies. According to the indictment, the amount of money engrossed by Chen and his family totaled more than US\$ 30 million. In addition to Chen, the dozen indicted included his wife, son, daughter-in-law, former close aides, family friends, and retired government officials.

Given the fact that Chen has been the focus of Taiwan's politics of *ressentiment*, his cases were destined to be politically charged. Any controversy may be escalated into an issue of judicial independence. Before the trial began, the detention of Chen in the prosecutorial investigation stage already aroused storms of controversies, which were triggered initially by the case assignment within the court. The three-judge-panel of Taipei District Court, headed by Judge Chou Chan-chun (周占春) decided to release Chen without bail on the ground that the Special Prosecutorial Unit did not prove the alleged risks that Chen would escape or tamper with evidence. This decision immediately invited fierce criticisms from the blue-camp, which mounted even fiercer rebuke mainly through political talk shows on Judge Chou's impartiality.³⁹ After the prosecutors swiftly appealed, the High Court struck down Judge Chou's ruling and remanded for another hearing at the district court level. However Judge Chou and his panel made the same decision after the second hearing, opining that serious felonies should not be the only reason for detention, and that the prosecutors did not convince the court that the defendant would escape or tamper with evidence. In response to the District Court's second decision, the prosecutors appealed for the second time and the High Court overruled Judge Chou's ruling again and remanded for another hearing.

The back-and-forth between the two courts highlighted one longstanding issue of Taiwan's criminal justice system—whether the severity of crimes could in itself constitutionally be the ground of detention, both before and during the trial. However,

Taiwan's polarized politics and distorted public sphere turned a great opportunity for legal reform into still another partisan battle. More controversially, Judge Chou's panel was then replaced by another panel led by Judge Tsai Shou-hsun (蔡守訓) on the ground of case merger. Judge Tsai detained Chen by reversing Judge Chou's decision. As the trial proceeded, he renewed the decision every time before the legally prescribed two-month detention period was due to expire. Judge Tsai's decisions in fact fly in the face of the spirit of the recent Interpretation No. 653 of the Grand Justices (December 26, 2008), which emphasized that detention "should be done prudently as the last resort of preservative proceeding. Unless the court is convinced that all legal requirements have been met, and that it is necessary to do so, detention shall not be taken."

The sudden change of panel plunged the independence of the Taipei District Court in serious doubt because it came at a time too opportune to be free of suspicion of political interference. The highly controversial timing of the change of panel and case merger, followed by the blue-camp-welcomed consequences, almost certainly tarnished the hard-won image of Taiwan's judicial independence.⁴⁰ However it is still too early to judge whether the substance of independence has already been compromised in addition to the stained outlook. First, any judicial decision is made by the panel as a whole rather than the chief of the panel (審判長) alone. The chief of the panel is only delegated the power and responsibility to preside over the courtroom proceedings. The chief does not have the power to overwhelm judgment of the other two judges. If someone wants to interfere with the panel, it is all three judges, not just the chief, that have to be bent over. One of the authors has interviewed several Taipei District Court judges about this case and all of them said that they have not heard rumors about undue political interference, and would side with the presumption that Judge Chou's panel made the decision autonomously. Such belief is not just aired by individual judges. A prominent reformist lawyer, Lin Yongsung (林永頌), stated in an public interview that "less and less people would seriously suspect that judges could be interfered

with by judicial administrative officials.”⁴¹ These statements indeed offer a high degree of plausibility to the impression among judges that, given the current state of Taiwan’s judicial system and the openness of the society, it is very difficult, even though not impossible, to coerce or threaten all three judges into making a decision they would otherwise not make.

On the other hand, the increasingly polarized media exerts more and more negative influence on the judicial reforms. As the well-known prosecutor Chen Ruiren, who shocked the nation by indicting the then first lady Wu Shuchen in 2006, remarked recently, “the judicial independence we talked about ten years ago is quite different from what it means today. Ten years ago, what we had to resist was political interference and bribery. That was what judicial independence meant back then. Now, the biggest challenge is how to be independent from the media.”⁴² To many, the fear of media and the furious forum of public opinion in a polarized society not only account for Judge Chou’s panel’s decision, but Judge Tsai’s repetitive decisions to detain Chen. As a senior journalist reported, “maybe the court does not want to be bombarded by the social lambasts”; “under the atmosphere, to detain Chen suffers from less social pressure than not to detain, said a judge commenting on Judge Tsai’s decision to detain Chen.”⁴³ In essence, the polarized media featured by partisan political talk shows has become a new factor that has exerted great influence on judicial performance; this is somehow ironic for a young democracy that is proud of its freedom of expression and free media.

CONCLUSION

Taiwan’s polarized politics has posed great challenges to horizontal accountability and rule of law. With respect to the four dimensions for evaluating institutions of horizontal accountability and rule of law -- independence, supremacy, capability and political accountability, Taiwan’s judiciary has shown generally convincing independence. Top governmental offices and high political influence did not shelter politicians from being

indicted or found liable in civil or criminal cases. All major political parties have their share of gain and loss. Taiwan's relatively developed rule of law and constitutionalism, together with judicial independence, almost ensured that the judiciary would be summoned to mediate and arbitrate political feuds, even though the judiciary may still be weak in other dimensions.

However, the judicialization of polarized politics is inherently dangerous to the courts and the judiciary's supremacy has undergone serious stress. The losing party in political cases avenged the court with judicial budget-cutting and debilitating rhetoric, thus undermining legitimacy of judicial decisions. Thus far, the Grand Justices have obviously not been intimidated by the Legislative Yuan's budget cutting.

Nevertheless, the judiciary as a whole survived the polarized politics at a cost to its political accountability. Political accountability has gained no ground under Taiwan's bitterly divided politics, because accountability to political branches means vulnerability to partisan preference rather than responsiveness to a deliberative political result. As a result, the judicial and prosecutorial reforms have largely neglected the need to make the courts and prosecutors more reasonably accountable to political branches.

On the capability front, the Council of Grand Justices as an institution has performed commendably in its decisiveness on constitutional review while skillfully using moderating techniques to avoid devastating political attacks. Regular courts, however, suffer from general institutional weaknesses, such as poor quality of legal reasoning, inaccurate comprehension of comparative legal doctrines, and doctrinal inconsistency. These weaknesses are magnified in politically charged cases, in which the courts are under tremendous political pressure. In defamation cases, for instance, the courts found shelter in the politically correct doctrine of "actual malice" and evaded the legally sound function of helping the speech market to seek political truth. Similarly, the prosecutor general feared becoming the target in the partisan battle, and so shunned his duty to coordinate prosecution standards in special allowance fund cases. It has left the application of law highly unpredictable and makes individual prosecutors

the bearers of overwhelming political pressure.

With regard to the Control Yuan, it has been a pure casualty in the warfare. In the wake of the contentious 2004 presidential election, it ceased to function because the Legislative Yuan refused to exercise consent power over former President Chen's nominees. The Yuan has been doubted on all fronts — independence, supremacy, and capability. Despite the new President Ma's will to restore the Control Yuan with his grip on both the Executive and Legislative Yuan, the Control Yuan's institutional vulnerability remains. The Control Yuan, without solid institutional design and systematic support such as legal professionals based on a vibrant legal career market that the judicial system has, will not be effective.

In the highly polarized politics of a new democracy, independence comes into even sharper conflict with capability and accountability. This indicates new challenges to horizontal accountability and rule of law in the post-DDP era. The KMT's resumption of power brought new challenges to horizontal accountability and rule of law. As shown in Chen Shui-Bian's indictment, there is strong presumption held by many judges and analysts that it is not direct political interference but social pressure exerted by the freewheeling and aggressive mass media that motivated the controversial decisions in Chen's case. What is now clear is that polarized politics is still preventing the judicial and prosecutorial system from making bolder moves to improve capability and accountability. This signals that Taiwan's democratic institutions continue to face grave challenges in the face of polarized politics.

¹ Lee Teng-hui(李登輝), *Sinshihdaitaiwanren* [新時代台灣人](Taipei: Taiwan Advocates[群策會], 2005), 34.

² Barry Friedman, "History, Politics and Judicial Independence," in *Judicial Integrity and Independence*, ed. Andras Sajo and Lorry Rutt Bentch et al. (Leiden: Martinus Nijhoff, 2004).

³ Weitseng Chen, *Cross the Bridge When There? China-Taiwan Comparison of Rule-of-Law-Without-Democracy Strategy for Transition* (Yale: Yale Law School Student Scholarship Series, 2007), 55.

⁴ Daron Acemoglu and James A. Robinson, *Economic Origins of Dictatorship and Democracy* (New York: Cambridge University Press, 2006); Adam Przeworski, “Democracy and Economic Development,” in *The Evolution of Political Knowledge*, ed. Edward D. Mansfield and Richard Sisson et al. (Columbus: Ohio State University Press, 2004).

⁵ Weitseng Chen, *Cross the Bridge When There? China-Taiwan Comparison of Rule-of-Law-Without-Democracy Strategy for Transition* (Yale: Yale Law School Student Scholarship Series, 2007), 55. Jacques deLisle, “Chasing the God of Wealth While Evading the Goddess of Democracy: Development, Democracy, and Law in Reform-Ear China,” in *Development and Democracy: New Perspectives on an Old Debate*, ed. Sunder Ramaswamy and Jeffrey W. Cason et al. (Hanover: Middlebury College Press, 2003).

⁶ Weitseng Chen, *Law and Economic Miracle: the Interaction between Economy and Legal System in Taiwan after World War II* (Taiwan: Angle Publishing, 2000); Sean Cooney, “The New Taiwan and its Old Labour Law: Authoritarian Legislation in a Democratized Society,” *Comparative Labor Law* 18 (1996): 1.

⁷ Weitseng Chen, *Cross the Bridge When There? China-Taiwan Comparison of Rule-of-Law-Without-Democracy Strategy for Transition* (Yale: Yale Law School Student Scholarship Series, 2007), 55.

⁸ Jacques deLisle, “Chasing the God of Wealth While Evading the Goddess of Democracy: Development, Democracy, and Law in Reform-Ear China,” in *Development and Democracy: New Perspectives on an Old Debate*, ed. Sunder Ramaswamy and Jeffrey W. Cason et al. (Hanover: Middlebury College Press, 2003); Tsung-Fu Chen, “The Influence of American Law on Taiwan,” presented in The East Asian Legal Studies Center, Wisconsin University Law School, USA (April 1, 2004); Sean Cooney, “The New Taiwan and its Old Labour Law,” *Comparative labor law journal* 18, no.1 (1996): 1.

⁹ Chin-Shou Wang (王金壽), “Judicial Independence Reform and the Breakdown of the Kuomintang Clientelism,” *Taiwan Political Science Review*[台灣政治學刊] 10, no.1 (2006): 103; Tay-Sheng Wang and Wen-Liang Tseng, *The History of Taipei Bar Association in the 20th Century* (Taipei: Taipei Bar Association, 2005); Thomas Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003) 147; Jane Kaufman Winn and Tang-chi Yeh, “Advocating Democracy: The Role of Lawyers in Taiwan’s Political Transformation,” *Law & Society Inquiry* 20 (1995): 561.

¹⁰ Thomas Ginsburg, *Judicial Review in New Democracies: constitutional courts in Asian cases* (New York: Cambridge University Press, 2003), 106-157.

¹¹ Heng-wen Liu (劉恆蚊), “A Study of the Judges and Prosecutors in Postwar Taiwan: An Observation Focused on Their Training Culture,” *Journal of the Humanities and Social Sciences*[思與言] 40 (2002): 125.

¹² Data source, Judicial Yuan, 2006.

¹³ The previous title of the institution is “the Council of Grand Justices”. However, in the constitutional amendment in 2000, the phrase “council” was deleted. As a result, the official title became “The Grand Justices”.

¹⁴ Thomas Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003) 147.

¹⁵ Chiang, Hwei-chen, *bushuanshixianxuansong xuanhousuanzhang* [不爽釋憲選訟，選後算帳？] (Unhappy with Grand Justices and electoral litigations, the Legislature seeks revenge?) *China Times*, January 13, 2005, A 13.

¹⁶ After the budget cutting, the DPP legislators soon responded with another petition to the Grand Justices with regard to the constitutionality of the act of budget cutting. In *Interpretation* 601, the Justices held that the salary budget cutting has violated Article 81 of the Constitution, which protects the salary of judges from being decreased without statutory base.

¹⁷ This interpretation also reflects the tremendous influence of American jurisprudence of the First Amendment on Taiwan’s legal academia and the judiciary. In two significant concurring opinions of this Interpretation, Justice Su Jyun-Hsiung and Justice Wu Geng both advocated, apart from the majority opinion, doctrines highly similar to the “actual malice” doctrine established in the US Supreme Court’s *New York Times v. Sullivan*.

¹⁸ Civil Judgment of the Supreme Court, 93 Tai Shan (台上) No. 851 (2004).

¹⁹ Civil Judgment of the Supreme Court, 93 Tai Shan (台上) No. 1979 (2004).

²⁰ It frees the defamer from liability when “the defamer did not utter the statement deliberately on total absence of grounds.” (A judgment of Taiwan High Court, 96 Shan Tsu (上字)No. 179, 1014, 775 (2007)) Extraordinarily, this interpretation deviates not only from the comparative legal source of American “actual malice”, but from the current statutory framework of liability of “negligence” in tort cases, and it is a radically loose interpretation of Interpretation 509 in criminal cases.

²¹ Hsu Shufen (許淑芬), *Mohuanmima: 2004 zongtongdasyuan-syuanjyususongjishih* [魔幻密碼：2004 總統大選選舉訴訟記事] (Mystic Codes: Chronicles of 2004 Presidential Electoral Litigations) (Taipei: Avanguard[前衛出版社], 2007).

²² The primary issues were whether the national referendum could be held on the same day as the presidential election, and whether the variety of problems and flaws detected in the election management was significant enough to invalidate the election.

²³ The nature of the suit was to dispute the legitimacy of the elected, such as whether the

votes received was forged or accurately calculated, and whether the elected used unlawful means to coerce and threaten voters or election staff. For example, (1) whether the President violated the “Act of Referendum” by holding the “defensive referendum”, whether it could be held on the same day as the Presidential election, and whether the Central Election Committee’s compliance with the President invalidated the presidential election? (2) Was the assassination attempt staged by President Chen himself? (3) Was the “national security mechanism” activated by the assassination part of a bigger conspiracy by DPP to keep off from the ballot booths a substantial number of military and police personnel, among whom KMT supporters presumably outnumbered those of DPP?

²⁴ Kao Yungcheng (高涌誠), “Congshihjidayanpiao-tansihfagaige [從世紀大驗票談司法改革],” *Journal of Judicial Reform* [司法改革雜誌] 51(2004): 6.

²⁵ Judgments of Taiwan High Court, 93 Xuan Tsu No. 2, 4 (2004) [台灣高等法院 93 選 2 號, 93 選 4 號判決].

²⁶ Lin He-ming (林河名), “Sihfayuanyusuan, guocindakan, lyupijiayuanbaofu[司法院預算, 國親大砍, 綠批挾怨報復],” *United Daily News*, January 13, 2005, A4.

²⁷ Chin-Shou Wang, “Judicial Independence Reform and the Breakdown of the Kuomintang Clientelism,” *Taiwan Political Science Review* [台灣政治學刊] 10, no.1 (2006): 103.

²⁸ During the five years of office from 2000 through 2005, the DPP Minister of Justice Chen Ding-Nan generally refrained from making interference in individual cases. Regarded by reformist prosecutors as a fellow reformist initially, however, Minister Chen did not want to forfeit his personnel power completely to the Personnel Council as the divided politics grows. T. M Chen (陳鎔銘), “jhihzuoleyiban-dejianchaguangaige[只做了一半的檢察官改革],” *Journal of Judicial Reform* [司法改革雜誌] 51 (2004): 24.

²⁹ The 1992 Constitution Amendment deprived the Control Yuan members of the latitude of serving simultaneously as congressmen and of the power to impeach the president and vice-president.

³⁰ Data source, Standing Committee of the Control Yuan.

³¹ Data source, Standing Committee of the Control Yuan.

³² The DPP has consistently regarded the Control Yuan as outdated and unnecessary. It is not uncommon to find a negative impression among the general public that the Control Yuan was good only at “smashing the flies while avoiding the tigers.”

³³ Guillermo O’Donnell, “Horizontal Accountability: The Legal Institutionalization of

Mistrust,” in *Democratic Accountability in Latin America*, ed. Scott Mainwaring and Christopher Welna et al. (New York: Oxford University Press, 2003), 34-54.

³⁴ C. V. Chen (陳長文), “Jianweitiming, siangzongtongshuo-No[監委提名，向總統說No](nomination of Control Yuan members, say no to the President,” *United Daily News*, December 18, 2006.

³⁵ For a relevant discussion about the interaction between the President and the Congress in models of veto bargaining, that is similar to the nomination process of the Control Yuan members, see Charles Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* (New York: Cambridge University Press, 2000), 83-122.

³⁶ ROC Constitution, Arts. 97 and 98; Public Functionaries Discipline Act, Art. 18.

³⁷ This sanction deficiency is by no means a new issue. Back to the 1950s, the Control Yuan members frequently criticized the Executive and Judicial Yuan for ignoring the impeachment decisions made by the Control Yuan. Tao Pai-chuan, a prominent reformist as well as a Control Yuan member, once said, “The nature of the Control Yuan members is simply a news reporter” since the Control Yuan did not have “weapons” as other fellow institutions did. See Tao Pai-chuan (陶百川), liánhé bào yǔ jiānchá yuàn [聯合報與監察院]“United Daily News and the Control Yuan,” *United Daily News*, September 16, 1955.

³⁸ Due to such competence concern, the majority of the former President Chen’s Control Yuan member nominees are either senior attorneys or judges. However, this move has triggered further debates. First, whether this arrangement violates the Act for the Control Yuan’s Organization that requires a diverse background of its members given the diversity of the cases. Second, why not re-organize and re-allocate the Control Yuan’s power to the judicial branch if the Yuan simply becomes another judicial organization, with incomplete judicial power.

³⁹ In addition to deliberating overlooking the constitutional legitimacy of detention solely grounded in severity of crimes, those attacks seemed to have chosen to ignore one obvious piece of counter evidence regarding Judge Chou’s integrity. Judge Chou happened to be the presiding judge of the panel that ruled Chen Shui-bian’s son-in-law, Chao Chien-ming, guilty for insider trading in 2007. And Chao was given an unusually severe sentence of six years in prison by Judge Chou.

⁴⁰ Freedom House has reportedly lowered Taiwan’s score from 1 to 2 on civil liberties in its 2010 report, due to the apparent political interference in judicial functions in Chen Shui-bian’s case. The complete report will be released in late spring of 2010.

⁴¹ Interview with Linyunsong (林永頌), *Judicial Reform Journal* [司法改革雜誌] 72 (2009) :46.

⁴² Interview with Chen Ruiren (陳瑞仁), *Judicial Reform Journal* [司法改革雜誌] 72 (2009) :34. See also the special issue on prosecutors and politics of Taiwan Prosecutor

Review, which discusses not only the relationship between politics and prosecutors, but politics and the judicial branch in general, in which the media's negative influence is repetitively highlighted. Taiwan Prosecutor Review, Vol.5, January 2009. It should be noted that although in terms of chains of command prosecutors belong to the executive branch, in Taiwan, prosecutors come into office through the same examination as judges, and both go through the same early training for "judicial officials". And in respects of salary system and protection of status, Taiwan's prosecutors like to see themselves as "judicial officials in general", which gives them stronger protection against arbitrary removal or reduction of salary, rather than as officials in the executive branch. That is why in many discussions, judges and prosecutors are treated similarly.

⁴³Tianxiru (田習如), "Xinsifajhengjihshihdai" [新「司法政治」時代](New Era of Judicial Politics), *Judicial Reform Journal* [司法改革雜誌] 70 (2009): 18.