

Judicial Review and the Transition of Authoritarianism in Taiwan

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Introduction

Judicial review (*See, e.g.*, H. Abraham 1975, 280; Alexander Bickel 1962, 1), known as the power of a court to strike down and invalidate legislative and executive actions as unconstitutional, has become a popular feature of modern constitutionalism. The fundamental concept of judicial review rests on several premises (Mauro Cappelletti 1989, 117-118). First, a written constitution, primarily conceived as a codification of individual and social values, is considered as a Higher Law with relative immutability. Second, no laws (usually labeled as statutes or acts) enacted by popular representatives (legislature) or actions taken by an administrative agency may contravene that Higher Law. Third, as part of the Doctrine of Separation of Powers, the judicial branch is entrusted with the power to review the constitutionality of statutes and administrative actions.

The Constitution of the Republic of China (ROC) (*hereinafter* referred to as "the Constitution"), which was enacted on December 25, 1946 and came into force one year later, embraces a full-fledged judicial review. Section 1, Article 171 of the Constitution prescribes: "[l]aws⁽¹⁾ that [are] in conflict with the Constitution shall be null and void."⁽²⁾ Section 2 of the same Article goes further: "[w]hen doubt arises as to whether or not a law is in conflict with the Constitution, interpretation

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(1) The term "laws" used in the Constitution, according to Article 170 of the Constitution, means a legislative bill that has been passed by the Legislative Yuan (the ROC legislature) and promulgated by the President of the Republic.

(2) Article 172 further prescribes: "[Administrative] Regulations that are in conflict with the Constitution or with laws shall be null and void."

thereon shall be made by the Judicial Yuan." Article 78 of the Constitution reiterates that "[t]he Judicial Yuan shall *interpret the Constitution* and shall have the power to *unify the interpretations of any law or regulation.*" (*emphasis added*) Section 2, Article 79 of the Constitution confirms: "[t]he Judicial Yuan shall have a certain number of Grand Justices to take charge of the matters specified in Article 78 of this Constitution, who shall be nominated and, with the consent of the Control Yuan, appointed by the President of the Republic."

This article investigates the role the judiciary played in the transition from authoritarianism to democracy on Taiwan. Section I provides a general background of the judicial review of Taiwan from a comparative perspective. Section II explains how the Grand Justices, by exercising their power of constitution interpretation, could, on the one hand, uphold the legitimacy of authoritarian rule in 1954, and yet finally end authoritarianism and embrace the worldwide trend of democratization in 1990. Section III searches for explanations for such a distinct about-face by the judiciary. Section IV synthesizes lessons from this unique experience by suggesting revisions for the present judicial review system.

I. Judicial Review of Taiwan: A Comparative Perspective

By the authorization⁽³⁾ of the Constitution, Taiwanese legislators shaped the complex organization of the Judicial Yuan. Section 3 of the Organic Act of Judiciary Yuan of 1947 prescribes that "[i]n the Judicial Yuan there shall be a Council of Grand Justices consisting of 17 Grand Justices to exercise the power of interpreting the Constitution and unifying the interpretations of laws and regulations. The Council is presided⁽⁴⁾ over by the President of the Judicial Yuan." Section 4 of the same Act fixed the tenure for the Grand Justices at nine years. In practice, the Grand Justices have been customarily re-appointed, except those who are 65 years or older, when their term of service ends.⁽⁵⁾

The tenure of the Council of Grand Justices began in August 1948 and the first meeting of the Council convened on September 15, 1948 in Nanking City, Mainland

(3) See Article 82 of the Constitution ("The Organization of the Judicial Yuan and the various grades of courts shall be prescribed by law").

(4) The president only presides at the final meeting of decision, without the right to vote or argue. Nor does the president participate in the pre-decision meetings.

(5) After the latest revision in 1992, Section 2, Article 5 of the Organic Act of the Judicial Yuan reads: "The tenure of a Grand Justice is nine years per term" (*emphasis added*). It strongly suggests that a Grand Justice is entitled to be reappointed. Since 2003, however, the tenure of a Grand Justice will be fixed at 8 years and no reappointment will be allowed. See Section 2, Article 5 of the Additional Articles of the Constitution enacted in 1997.

China. The Council resumed meeting in Taipei, Taiwan, on April 14, 1952. The Council is now in its 6th term and as of February 1999 has rendered more than 477 decisions (officially known as "interpretations").

From a comparative law perspective, there are several noteworthy characteristics of the Taiwanese judicial review process.

I.1 Centralized Judicial Review

Partly because of the Constitution's mandate,⁽⁶⁾ and also due to the influence of other Civil (Continental) Law countries (such as Austria),⁽⁷⁾ the power of judicial review has been monopolized by the Council of Grand Justices.⁽⁸⁾ Such a *centralized judicial review* means that ordinary courts need not, in practice, pay attention to constitutional issues.⁽⁹⁾ The resulting remoteness of the Constitution has, in my view, indirectly contributed to the maintenance of a decades-long authoritarian government.

The gap between the Constitution and citizens has narrowed since 1995. In that year, the Council handed down Interpretation No. 371 which stated that when in doubt concerning the constitutionality of an applicable statute in a pending case, judges from courts of any judicial level may suspend proceedings and apply for an interpretation from the Council of Grand Justices. In fact, since this decision was passed, only 5 of 116 interpretations rendered by the Council have been applied for by lower court judges.

As a specialized judicial body⁽¹⁰⁾ that exclusively conducts judicial reviews, the composition of the Council of Grand Justices is radically different from that of

(6) Article 78 of the Constitution precisely prescribes that within the Judicial Yuan there shall be a certain number of Grand Justices to interpret the Constitution and to unify the interpretations of statutes and regulations.

(7) See the Austrian Constitution of October 1, 1920 (known as *Oktoberverfassung*).

(8) In contrast, in a decentralized judicial review system every court has the power and duty to determine the constitutionality of statutes when they come before the court.

(9) The worst situation occurred during the 1st session of the Council of Grand Justices (August 1948-August 1958) when only state institutions, not individuals, were allowed to apply for judicial review (constitution interpretations).

(10) Article 77 of the Constitution characterizes the Judicial Yuan as "*the highest judicial organ of the State*" responsible for the trying of "civil, criminal, and administrative cases as well as disciplinary punishments of *fonctionnaire public*" in addition to judicial review. Yet the Judicial Yuan has never *de jure* been a court. Various statutes (i.e., the Organic Act of Courts, the Organic Act of Administrative Court, and the Organic Act of Committee on the Discipline of Civil Service) have assigned these jurisdictions to variant subordinate courts. The relationship between the Council of Grand Justices and the Judicial Yuan is also ambiguous, as the President of the Judicial Yuan has never simultaneously served as a Grand Justice.

Whether the Judicial Yuan should be transformed into a *real supreme court* has been ardently debated in the Judicial Reform Committee. See e.g., Judicial Yuan, *Proceedings of Judicial Reform Committee*, Vol. II (1996), pp. 652-662.

ordinary courts. According to Section 4 of the Organic Act of the Judicial Yuan, a Grand Justice must possess at least one of the following qualifications:

- (1) have served as a judge of the Supreme Court for more than ten years *with a distinguished record of service*;
- (2) have served as a member of the Legislative Yuan for more than nine years *with distinguished contributions*;
- (3) have taught principal subjects of law for more than ten years in a university, and produced specialized writings;
- (4) have served as a judge of the International Court of Justice or authored authoritative works on public law or comparative law; or
- (5) be erudite in jurisprudence and have experience and be renown in politics.

The number of Grand Justices to be appointed by virtue of any of the above-listed categories shall not exceed one-third of the total number allotted. (*Emphasis added*)⁽¹¹⁾

Compared to career judges in ordinary courts, the Grand Justices who meet the above criteria inevitably come from very different backgrounds, making the council more flexible, more adaptive to social changes, and more able to make comprehensive deliberations on constitutional issues.

I.2 Abstract Judicial Review

A much more far-reaching characteristic of judicial review in Taiwan lies in the fact that the Council of Grand Justices may interpret the Constitution in the abstract,⁽¹²⁾ i.e., they are not subject to the "case or controversy" requirement (*See, e.g., Lea Brilmayer 1979, 297*). The abstract judicial review stands in sharp contrast to ordinary courts in both Case law and Civil law countries.

Though the Organic Act of the Judicial Yuan created the Council of Grand Justices, it left the Council's procedures to be ruled by the Council itself. The Council promulgated the Rules of the Council of Grand Justices on September 16, 1948. Modeled after Austria's Constitutional Court, Article 3 created an abstract judicial review process that allowed any organ from the central or local governments to seek a "constitution interpretation" from the Council whenever they had pure and simple "doubts or problems" regarding the application of the Constitution, statutes, or regulations when exercising its duties. The Council endorsed the abstract judicial review by passing Interpretation No. 2 on January 6, 1949.

(11) The Act was originally enacted in 1947, and amended in 1957, 1980, and most recently in 1992. The provisions, with emphasis, represent the revisions of 1957. No modifications have been made regarding the qualifications thereafter.

(12) As to the other power of the Council, i.e., to unify the interpretations of laws and regulations, can only be exercised in a dispute or controversy by the nature of things.

It reads:

Article 78 of the Constitution prescribes that the Judicial Yuan has the power to interpret the Constitution and to unify the interpretations of statutes and (administrative) regulations. It states that the Judicial Yuan both *interprets* the Constitution while also *unifying* the interpretations of statutes and regulations. Such wording obviously carries distinct meanings. Article 173 of the Constitution stipulates that the Constitution shall be interpreted by the Judicial Yuan; *therefore*, any organ from either the central or local government that has doubts regarding the execution of the Constitution while exercising its duties is entitled to apply for an interpretation [of the Constitution] from the Judicial Yuan. The same applies to doubts arising from whether a statute or regulation contravenes the Constitution. Whereas doubts arising from the application of statutes or regulations by a competent organ from either the central or local government shall first investigate its meaning and subsequently apply it. In such cases, there is no need for such an organ to apply for an interpretation [of statutes or regulations] by the Judicial Yuan. However, when the opinion held by an organ regarding the interpretation of a particular statute or regulation differs from that held by the organ applying for an interpretation or by yet another organ regarding the interpretation of the same statute or regulation, and when, according to law, such an organ's opinion shall neither be bound by the opinion of the organ applying for an interpretation nor by the opinion of any other organ, and neither will the opinion be subjected to any other organ's review, then there is a real need to apply for an interpretation from the Judicial Yuan for unifying the various interpretations under dispute. If and only if such a ruling occurs, may an organ apply for a unifying interpretation (*Emphasis added*).⁽¹³⁾

Regardless how plausible, the reasoning of Interpretation No. 2 committed a serious mistake by equating "centralized judicial review" with "abstract judicial review". Indeed, the Council may still exclusively enjoy the power of judicial review yet "interpret" the Constitution (i.e., review the constitutionality of a statute or regulation involved) solely in cases or controversies as numerous ordinary courts have been doing for so long. In terms of legislative policy, the abstract judicial review is problematic as it allows the Grand Justices to waive the "case or controversy requirement." Such an "abstract judicial review" is prone to surpass the limits of the judicial branch and become either constitution framers or super legislators (*See Dennis T. C. Tang 1998c, 67 for details*). I will elaborate on this point later (in Section IV).

(13) *See* Judicial Yuan, *Compilation of Interpretations by the Council of Grand Justices* (August, 1991), p. 24.

In the wake of the Council's Interpretation No. 76⁽¹⁴⁾ (May 3, 1957), the Legislative Yuan in 1958 enacted the Act Governing the Council of Grand Justices of the Judicial Yuan to limit the power of judicial review. However, the Act continued in the footsteps of Interpretation No. 2 by defining the Council's jurisdiction. Article 3 of the Act⁽¹⁵⁾ states:

Matters of *constitution interpretation* by the Council of Grand Justices shall be as follows:

- (1) Matters relating to *doubts and problems* arising from the application of the Constitution;
- (2) Matters relating to whether a statute or regulation is in conflict with the Constitution;
- (3) Matters relating to whether the statutes for self-governance of provinces and counties, and the ordinances and regulations promulgated by provinces and counties, are in conflict with the Constitution. (*Emphasis added*)

Article 4 of the Act further provides:

Application for a *constitution interpretation* is admissible under one of the following circumstances:

- (1) Whenever an organ from the central government or local government has doubts while performing its duties as to the proper application of the Constitution; or [if an organ of the central government or a local government] has a dispute with another organ as to the proper application of the Constitution while performing its duties; or [if an organ of the central government or a local government] has doubts as to whether the applicable statute or regulation is in conflict with the Constitution;
- (2) If an individual, whose constitutional rights have been infringed upon and who has already instituted a judicial action in accordance with the law, has doubts⁽¹⁶⁾ as to the constitutionality of a law or regulation as it was applied in the final decision of such person's case by the court of last resort.⁽¹⁷⁾

(14) The Interpretation ruled in essence that members of the Legislative Yuan, the Control Yuan, and the National Assembly are all qualified representatives for attending the activities of the Inter-Parliamentary Union. See Judicial Yuan, *Compilation of Interpretations by the Council of Grand Justices* (August, 1991), pp. 109-110.

(15) Similarly, Art. 93(1)2, GG and Section 13(6) *BVerfGG* (*Gesetz für Bundesverfassungsgericht*) permit the Federal Constitutional Court of Germany to review legislation upon request of certain constitutionally enumerated parties (known as "*abstrakte Normenkontrolle*").

(16) "Doubts" hereinafter "disputes" or "controversies".

(17) This means the individual petitioner must first exhaust all regular legal avenues before bringing the case to the Council. Fortunately, the Council has lowered this procedural barrier by rendering Interpretation No. 371 in 1995. See *supra* text pp. 4-5 for the details.

The Council shall reject the application if it fails to meet the above prerequisites. (*Emphasis added*)

Since 1993, the abstract judicial review has been sustained, or actually extended, following the repeal of the Act Governing the Council of Grand Justices of the Judicial Yuan of 1958 by the Act Governing the Hearing of Cases by the Grand Justices of the Judicial Yuan.

I.3 Decision-Making Process

Similar to its counterpart in the US⁽¹⁸⁾, the Council's Rule required a quorum of two thirds of the Grand Justices residing where the Central Government is located, and an accord of one half of the Grand Justices present for making a ruling.⁽¹⁹⁾ Interestingly, there was no differentiation in terms of the votes required between a "constitution interpretation" when the Council *interprets the Constitution* and a "uniform interpretation" when the Council *unifies various interpretations of a particular statute or regulation*. It is the Revisions to the Organic Act of Judicial Yuan of 1957 and the Act Governing the Council of Grand Justices of the Judicial Yuan of 1958 that prescribed different thresholds. While a decision dealing with the uniform interpretation of statutes or administrative regulations only requires a simple majority of the Council, three-fourths of the total number of Grand Justices are required for a quorum and at least three-fourths of those present must concur before a "constitution interpretation" is conferred.⁽²⁰⁾ The restricting effects of such different thresholds are obvious if one compares the totals of "constitution interpretations" rendered by the 1st and 2nd Councils (Table 1).

The threshold for passing a "constitution interpretation" was lowered in 1993 when the LY enacted the Act Governing the Hearing of Cases by the Grand Justices of the Judicial Yuan, replacing the Act Governing the Council of Grand Justices of the Judicial Yuan of 1958. Section 14, subsection 1 of the new act prescribed:

When rendering a constitution interpretation, a quorum of two-thirds of the total number of Grand Justices currently in office, and an accord of two-thirds of the

(18) 28 U.S.C. § 1.

(19) Section 12, the Rules of the Council of Grand Justices of 1948.

(20) Section 6, Organic Act of the Judicial Yuan of 1957; Section 13, the Act Governing the Council of Grand Justices of 1958.

The author believes that these restrictions are unconstitutional as they violate the Doctrine of the Separation of Powers by infringing upon the essence of judicial power. See Dennis Tang, "A Critical Review of the Council of Grand Justices' Interpretations of the Separation-of-Powers Doctrine," in Dennis T. Tang, *Separation of Powers Revisited* (1998), p. 145.

Table 1. Composition of Judicial Review Decisions

| Term of Grand Justices | Total of Interpretations Rendered | Constitution Interpretation | Uniform Interpretation |
|--|---|-----------------------------|------------------------|
| 1 st . (07/14/1948~09/24/1958) | 79 (Intr. No. 1~No. 79) (100%) | 25 (31.65%) | 54 (68.35%) |
| 2 nd . (09/25/1958~10/01/1967) | 43 (Intr. No. 80~No. 122) (100%) | 8 (18.6%) | 35 (81.4%) |
| 3 rd . (10/02/1967~10/01/1976) | 24 (Intr. No. 123~No. 146) (100%) | 2 (8.33%) | 22 (91.67%) |
| 4 th . (10/02/1976~10/01/1985) | 53 (Intr. No. 147~No. 199) (100%) | 31 (58.49%) | 22 (41.51%) |
| 5 th . (10/02/1985~10/01/1994) | 167 (Intr. No. 200~No. 366) (100%) | 149 (89.22%) | 18 (10.78%) |
| 6 th . (10/02/1994~) | 121* (Intr. No. 367~No. 487) (100%) | 118 (97.52%) | 3 (2.48%) |
| Grand Total | 487 (100%) | 334 (68.53%) | 154 (31.47%) |

Source: Author's own characterization and statistics based upon interpretations appearing in the Judicial Yuan, *Compilation of Interpretations by the Council of Grand Justices* (August 1991) [hereinafter *Compilation*]; *Compilation Supplements I* (August 1991); *Compilation Supplements II* (August 1991); *Compilation Supplements III* (June 1990); *Compilation Supplements IV* (June 1990); *Compilation Supplements V* (October 1991); *Compilation Supplements VI* (April 1993); *Compilation Supplements VII* (June 1994); *Compilation Supplements VIII* (June 1995); *Compilation Supplements IX* (June 1996); *Compilation Supplements X* (June 1997); *Compilation Supplements XI* (May 1999); *Compilation Supplements XII* (June 1999).

*As of July 9, 1999.

Grand Justices present is required; however, for ruling a regulation unconstitutional, only an accord of one half of the Grand Justices present is required.

The Council's interpretations have another unique characteristic, as compared to the decisions of other courts. That is, since 1957, separate opinions⁽²¹⁾ (including

concurring opinions and dissenting opinions) have been issued, and since 1977 the author of each separate opinion has been made public (See Dennis Tang 1999, 38 for details).

I.4 General Binding Effect

Due to the absence of the principle of *stare decisis*, as well as the fear that a law or regulation that had been deemed unconstitutional remained in force and binding, it was decided by the Council that its interpretations had a general binding effect. This far-reaching application was significant, as lower court decisions were restricted to individual effect only. In Interpretation No. 185 the Council unequivocally announced that "interpretations rendered by the Judicial Yuan shall have a binding effect on all agencies and people." (Judicial Yuan 1991a, 23) Furthermore, interpretation No. 188 decreed that "an interpretation rendered by the Judicial Yuan shall, unless otherwise specified in the interpretation, come into force on the same day when the interpretation is publicly announced." (See Judicial Yuan 1990, 1)

In fact, under a general binding effect ruling a constitution interpretation can only be repealed through either a constitutional amendment, which requires a special majority⁽²²⁾ of the National Assembly, or re-interpretation by the Council itself.

I.5 Overview of Achievements

As of July 9, 1999, the Council of Grand Justices has rendered 487 decisions, officially known as "interpretations". Among them, approximately 70% were "constitution interpretations" while only 30% were "uniform interpretations." Moreover, the amount of "constitution interpretations" has been consistently increasing since 1976 (Table 1). Table 2 shows the contrast between "abstract

(21) In the early days, the Council did not distinguish concurring opinions from dissenting opinions, and until August 1987 "separate opinions" were treated as dissenting opinions in calculating the votes needed for passing an interpretation.

(22) Art. 174 of the Constitution provides for:

Amendments to the Constitution shall be made in accordance with one of the following procedures:

1. Upon the proposal of one-fifth of the total number of the delegates to the National Assembly and by a resolution of three-fourths of the delegates present at a meeting having a quorum of two-thirds of the entire Assembly, only then can the Constitution be amended.
2. Upon the proposal of one-fourth of the members of the Legislative Yuan and by a resolution of three-fourths of the members present at a meeting that has a quorum of three-fourths of the members of the Yuan, an amendment may be drafted and submitted to the National Assembly by way of a referendum. Such a proposed amendment to the Constitution shall be publicly published half a year before the National Assembly convenes.

constitution interpretations" and "concrete constitution adjudication" rendered by Grand Justices up to Interpretation No. 489 (July 9, 1999). About three-fourths (257 out of 339) of the constitution interpretations rendered were concrete adjudications, while abstract interpretations played a dominant role prior to 1976. Most "concrete adjudications" were presented (applied) by individuals. As an agency may easily apply for an "abstract interpretation", there have been few adjudications arising from disputes over competence between agencies (Table 3). As for "abstract interpretations", most (around eighty percent) are executed due to doubts over the Constitution. The preventive review of the constitutionality of statutes and regulations, equivalent to the *abstrakte Normenkontrolle* in Germany, has indeed played a very limited role (Table 4). Furthermore, one may roughly divide "constitution interpretations" into two categories: "separation-of-power interpretations" and "human rights interpretations". The first is primarily abstract whereas the second consists almost always of concrete adjudications. While the percentage of "separation-of-power interpretations" among the total number of interpretations rendered has decreased over the years, in contrast, "human rights interpretations" have steadily increased during the same time period. Most of the "separation-of-power interpretations" have been "abstract interpretations", yet almost all "human rights interpretations" have been concrete adjudications. Table 5 provides a detailed breakdown of these trends.

II. Judicial Review and the Legitimacy of Governance

The Council of Grand Justices played a critical role in removing all legal obstacles for the transition from authoritarianism to democracy in Taiwan. The growth of judicial review parallels this transition.

II.1 Initial Crisis and Interpretation No. 31

After withdrawing from the Mainland, the Nationalist government led by President Chiang Kai-shek continued to proclaim itself as the legitimate government of China while also actively preparing for the recovery of the Mainland. The government had yet to fulfill its declaration when the three-year term of service for members of the 1st Legislative Yuan expired on May 7, 1951. However, the KMT government was reluctant⁽²³⁾ to hold a general election that could only take place on the province of Taiwan and outlying islands. As an exigency, the

(23) Most members of these representative bodies had followed Chiang Kai-shek to Taiwan. It was believed that these representatives had a strong political appeal to people from the Mainland. More importantly, since the KMT lost governing control of the Chinese mainland, a general election in accordance with apportionment provisions (Art. 26, 64 & 91) of the Constitution was not possible.

Table 2. Composition of Constitution Interpretations

| Term of Grand Justices | Total of Constitution Interpretations Rendered | Concrete Adjudication | Abstract Interpretation |
|--|--|-----------------------|-------------------------|
| 1 st . (07/14/1948-09/24/1958) | 25 (Intr. No. 1 - No. 79) (100%) | 2 (8%) | 23 (92%) |
| 2 nd . (09/25/1958~10/01/1967) | 8 (Intr. No. 80~No. 122) (100%) | 1 (12.5%) | 7 (87.5%) |
| 3 rd . (10/02/1967~10/01/1976) | 2 (Intr. No. 123~No. 146) (100%) | 0 (0%) | 2 (100%) |
| 4 th . (10/02/1976~10/01/1985) | 31 (Intr. No. 147~No. 199) (100%) | 28 (90.32%) | 3 (9.68%) |
| 5 th . (10/02/1985~10/01/1994) | 148** (Intr. No. 200~No. 366) (100%) | 127 (85.81%) | 21 (14.19%) |
| 6 th . (10/02/1994~)* | 119*** (Intr. No. 367~No. 487) (100%) | 99 (83.19%) | 20 (16.81%) |
| Grand Total | 333 (100%) | 257 (83.18%) | 76 (16.82%) |

Source: Author's own characterization and statistics based upon interpretations appearing in the Judicial Yuan, Compilation of Interpretations by the Council of Grand Justices (August 1991) [hereinafter Compilation]; Compilation Supplements I (August 1991); Compilation Supplements II (August 1991); Compilation Supplements III (June 1990); Compilation Supplements IV (June 1990); Compilation Supplements V (October 1991); Compilation Supplements VI (April 1993); Compilation Supplements VII (June 1994); Compilation Supplements VIII (June 1995); Compilation Supplements IX (June 1996); Compilation Supplements X (June 1997); Compilation Supplements XI (May 1999); Compilation Supplements XII (June 1999).

* As of July 9, 1999.

** As the application brief for Interpretation No. 204 did not appear in the COMPILATION, the author can not determine if it is a "constitution interpretation." The total of 148 interpretations therefore does not include Interpretation No. 204.

*** Interpretation No. 391 contains both a concrete adjudication and an abstract interpretation. Therefore the total is one more than normal.

Table 3. Composition of Concrete Constitution Adjudication

| Term of Grand Justices | Total of Concrete Constitution Interpretations Rendered | Concrete Adjudication | |
|--|---|----------------------------------|---|
| | | Brought by Individuals or Judges | Disputes over Competence Among Agencies |
| 1 st . (07/14/1948~09/24/1958) | 2 (Intr. No. 1 ~ No. 79) | NA | 2 |
| 2 nd . (09/25/1958~10/01/1967) | 1 (Intr. No. 80 ~ No. 122) (100%) | 1 (100%) | 0 (0%) |
| 3 rd . (10/02/1967~10/01/1976) | 0 (Intr. No. 123 ~ No. 146) | 0 | 0 |
| 4 th . (10/02/1976~10/01/1985) | 28 (Intr. No. 147 ~ No. 199) (100%) | 27 (96.43%) | 1 (3.57%) |
| 5 th . (10/02/1985~10/01/1994) | 127** (Intr. No. 200 ~ No. 366) (100%) | 121 (95.28%) | 6 (4.72%) |
| 6 th . (10/02/1994~)* | 99 (Intr. No. 367 ~ No. 487) (100%) | 96 (96.97%) | 3 (3.03%) |
| Grand Total | 257 (100%) | 245 (95.33%) | 12 (4.67%) |

Source: Author's own characterization and statistics based upon interpretations appearing in the Judicial Yuan, Compilation of Interpretations by the Council of Grand Justices (August 1991) [hereinafter Compilation]; Compilation Supplements I (August 1991); Compilation Supplements II (August 1991); Compilation Supplements III (June 1990); Compilation Supplements IV (June 1990); Compilation Supplements V (October 1991); Compilation Supplements VI (April 1993); Compilation Supplements VII (June 1994); Compilation Supplements VIII (June 1995); Compilation Supplements IX (June 1996); Compilation Supplements X (June 1997); Compilation Supplements XI (May 1999); Compilation Supplements XII (June 1999).

NA: Not Applicable

* As of July 9, 1999.

**As the application brief for Interpretation No. 204 did not appear in the COMPILATION, the author can not determine if it is a "constitution interpretation." The total of 148 interpretations therefore does not include Interpretation No. 204.

Table 4. Composition of Abstract Constitution Interpretations

| Term of Grand Justices | Total of Abstract Constitution Interpretations Rendered | Abstract Interpretations | |
|--|---|---|---------------------------|
| | | Pure and Simple Doubt over Constitution | Abstrakte Normenkontrolle |
| 1 st . (07/14/1948~09/24/1958) | 23 (Intr. No. 1~No. 79) (100%) | 23 (100%) | 0 (0%) |
| 2 nd . (09/25/1958~10/01/1967) | 7 (Intr. No. 80~No. 122) (100%) | 6 (85.71%) | 1 (14.29%) |
| 3 rd . (10/02/1967~10/01/1976) | 2 (Intr. No. 123~No. 146) (100%) | 2 (100%) | 0 (0%) |
| 4 th . (10/02/1976~10/01/1985) | 3 (Intr. No. 147~No. 199) (100%) | 2 (66.67%) | 1 (33.33%) |
| 5 th . (10/02/1985~10/01/1994) | 23** (Intr. No. 200~No. 366) (100%) | 19 (82.61%) | 4 (17.39%) |
| 6 th . (10/02/1994~)* | 22*** (Intr. No. 367~No. 487) (100%) | 14 (63.64%) | 8 (36.36%) |
| Grand Total | 80 (100%) | 66 (82.5%) | 14 (17.5%) |

Source: Author's own characterization and statistics based upon interpretations appearing in the Judicial Yuan, Compilation of Interpretations by the Council of Grand Justices (August 1991) [hereinafter Compilation]; Compilation Supplements I (August 1991); Compilation Supplements II (August 1991); Compilation Supplements III (June 1990); Compilation Supplements IV (June 1990); Compilation Supplements V (October 1991); Compilation Supplements VI (April 1993); Compilation Supplements VII (June 1994); Compilation Supplements VIII (June 1995); Compilation Supplements IX (June 1996); Compilation Supplements X (June 1997); Compilation Supplements XI (May 1999); Compilation Supplements XII (June 1999).

* As of July 9, 1999.

** Both Interpretations No. 329 and 342 contain both a concrete adjudication and an abstract interpretation. The total is thus two more than normal. The application brief for Interpretation No. 204 did not appear in the COMPILATION, therefore the author cannot determine if it is a "pure and simple doubt over the Constitution". The total (23) therefore does not include Interpretation No. 204.

***Both Interpretations No. 391 and 450 contain pure and simple doubts over the constitution and abstrakte Normenkontrolle. Therefore the total (22) is two more than normal.

Table 5. Composition of Constitution Interpretations

| Term of Grand Justices | Total of Constitution Interpretations Rendered | Human Rights Interpretation | | Separation-of-Power Interpretation | |
|--|--|-----------------------------|-------------------------|------------------------------------|-------------------------|
| | | Concrete Adjudication | Abstract Interpretation | Concrete Adjudication | Abstract Interpretation |
| 1 st . (07/14/1948 ~09/24/1958) | 25 (Intr. No. 1 ~No. 79) | 0 (0%) | 2 (100%) | 0 (0%) | 23 (100%) |
| 2 nd . (09/25/1958 ~10/01/1967) | 8 (Intr. No. 80 ~No.122) | 0 (0%) | 2 (100%) | 0 (0%) | 6 (100%) |
| 3 rd . (10/02/1967 ~10/01/1976) | 2 (Intr. No. 123 ~No. 146) | 0 (0%) | 1 (100%) | 0 (0%) | 1 (100%) |
| 4 th . (10/02/1976 ~10/01/1985) | 31 (Intr. No. 147 ~No. 199) | 27 (96.43%) | 1 (3.57%) | 1 (33.33%) | 2 (66.67%) |
| 5 th . (10/02/1985 ~10/01/1994) | 149 (Intr. No. 200 ~No. 366) | 123 (95.35%) | 6 (4.65%) | 6 (30%) | 14 (70%) |
| 6 th .* (10/02/1994 ~) | 119** (Intr. No. 367 ~No. 487) | 89 (93.68%) | 6 (6.32%) | 9 (37.5%) | 15 (62.5%) |
| Grand Total | 334 (100%) | 239 (71.56%) | 18 (5.39%) | 16 (4.79%) | 61 (18.26%) |

*As of July 9, 1999.

**Interpretation No. 392 contains both a concrete adjudication and an abstract interpretation. Therefore the total is one more than normal.

Executive Yuan (Cabinet Meeting) passed a resolution requesting, with the consent of the President, that the President acquire the approval of the Legislative Yuan for extending its members' term of service by one year. The term of service for Legislative Yuan members was thus extended in 1952 and again in 1953.⁽²⁴⁾ In light

(24) Attachment to Interpretation No. 31 (Application Message submitted by the Executive Yuan). See Judicial Yuan, *Compilation of Interpretations by the Council of Grand Justices* 55-56 (August 1991).

of the fact that the 2nd legislative term, as well as the 1st term for members of both the National Assembly and the Control Yuan were all expiring, the Executive Yuan applied in January 1954 to the then newly resumed Council of Grand Justices for an interpretation. On January 29, 1954, the Council of Grand Justices rendered its far-reaching Interpretation No. 31, which proclaimed the following:

Article 65 of the Constitution stipulates that members of the Legislative Yuan shall serve a term of three years; Article 93 of the Constitution stipulates that members of the Control Yuan shall serve a term of six years. These terms originally constituted a period that started from the date of inauguration to the end of the period prescribed in the Constitution. However, given that the country is currently facing a serious crisis, it is not lawfully possible to hold an election for the members of the following term. Were the Legislative Yuan and Control Yuan to remain non-functioning, the constitutional purpose for establishing the five Yuans (branches) would then be violated. Therefore, before the members of a second term can be lawfully elected and convened, the first-term members of the Legislative Yuan and Control Yuan should continue to exercise their duties (*Emphasis added*).

As a result of this Interpretation, the de facto terms of the members of the Legislative Yuan and the Control Yuan elected in 1947 were indefinitely extended. This is the origin of the so-called "millennium congress."

This Interpretation did not touch, however, the problem of re-electing the National Assembly. Since the Constitution provides that "[t]he term of office of the Members to each National Assembly shall terminate on the day that the next National Assembly convenes,"⁽²⁵⁾ and since the next Assembly had not as yet been able to convene, the members of the 1st National Assembly had *de facto* enjoyed an indefinite term of office based upon the same reasoning as Interpretation No. 31.

Over time, the government recognized the problem of political stagnation and sensed the rising demands of the citizenry for participation in the policy-making process at the central government level. Due to Taiwan's population growth and a declining number of "senior" representatives, the National Assembly passed in 1966 a new article supplementing the Temporary Provisions for the Duration of Mobilization to Suppress the Communist Rebellion (tentative amendments to the Constitution, hereinafter "Temporary Provisions") which authorized the President of the Republic to promulgate regulations to fill vacancies and to increase the number of members within the three central representative bodies (*i.e.*, the National Assembly, Legislative Yuan, and Control Yuan).

(25) Art. 28, Section 2, ROC Const.

The first "supplementary" election of central representatives for the Taiwan area was held in 1969. Twelve, six, and two members were elected to the National Assembly, the Legislative Yuan, and the Control Yuan, respectively. The numbers were certainly too few to satisfy the growing desire for participation by a new generation of citizens. In 1972, the National Assembly further revised the Temporary Provisions, and authorized the President to promulgate measures to supplement the three representative bodies without regard to the limits set by the apportionment provisions of the Constitution.⁽²⁶⁾ Since then, the number of elected representatives has substantially expanded, while at the same time the senior members elected in 1947 has subsequently declined due to old age (Table 6). Only after the 1986 election have new members in the Control Yuan become dominant forces, a trend that can also be found in the Legislative Yuan following the 1989 election.

II.2 Downplaying the Crisis

Given that Interpretation No. 31 failed to provide a definite time limit on the duration for which first-term representatives would continue their duties, the Council had to downplay the legitimacy crisis by lowering the convention quota and by curbing the succession of "senior" representatives in the coming years.

According to section 8 of the Organic Act of the National Assembly, more than one third of the members of the National Assembly shall constitute a quorum. The precedents of the National Assembly had calculated the quorum based upon the total number of representatives within the Assembly. However, given the passing away of senior representatives, Section 8 of the above-cited quorum requirement needed to be adjusted. On February 12, 1960, the Council ruled in Interpretation No. 85⁽²⁷⁾ that "at present the calculation of the total number of the National Assembly Members mentioned in the Constitution shall only include those who were lawfully elected and were able to be summoned into consideration."

In Interpretation No.117⁽²⁸⁾, dated November 9, 1966, and Interpretation No. 150 (*See* Judicial Yuan, 1991a, 12-27), dated September 16, 1977, the Council of

(26) Art. 6, the Temporary Provisions.

These newly elected members of the Legislative Yuan serve a term of three years, newly elected members of the National Assembly and the Control Yuan serve a term of six years. *Id.* Art. 6(2). The members elected in 1969 enjoyed an indefinite term, because there was no such a provision as Art. 6(2) when they were elected.

(27) *See* Judicial Yuan, *Compilation of Interpretations by the Council of Grand Justices* (August 1991), pp. 133-134.

(28) *See* Judicial Yuan, *Compilation of Interpretations by the Council of Grand Justices* (August 1991), pp. 273-279.

Table 6. Composition of Central Representative Bodies in Taiwan around 1990

| Organ | Members Elected in 1947 in Mainland | Change in Members | | | | |
|-------------------|-------------------------------------|----------------------------|-------------------------|-------------------------|-------------------------|----------------------------------|
| | | Total | Members elected in 1947 | Members elected in 1969 | Members elected in 1986 | Members elected in 1989 |
| NATIONAL ASSEMBLY | 2953 | 706 ^a (100%) | 671 (95.04%) | 11 (1.56%) | 84 (11.90%) | |
| | | ↓ | ↓ 612 ^d | ↓ | ↓ | |
| | | 651 ^f (100%) | 580 (89.09%) | 11 (1.67%) | 80 (12.29%) | |
| LEGISLATIVE YUAN | 760 | 294 ^b (100%) | 188 (63.95%) | 6 (2.04%) | 101 (34.35%) | |
| | | ↓ | ↓ 138 ^d | ↓ | | |
| | | 250 ^f (100%) | 115 (46.00%) | 6 (2.4%) | | ↓ 129 ^e (51.6%) |
| CONTROL YUAN | 180 | 67 ^c (100%) | 21 (31.34%) | 2 (2.99%) | 32 (47.76) | |
| | | ↓ | ↓ 18 ^d | ↓ | ↓ | |
| | | 49 ^f (100%) | 16 (32.65%) | 2 (89.09%) | 31 (67.23) | |

Source: Secretariat, National Assembly; Department of Accounting, Legislative Yuan; Office of Statistics, Control Yuan; FREE CHINA J., Vol. VII No. 47, p. 1 (June 25, 1990).

^a As of February 10, 1990.

^b As of February 11, 1989.

^c As of March 17, 1988.

^d As of June 25, 1990.

^e Originally, there were 130 Members elected in 1989. ^f As of October 12, 1990.

Grand Justices respectively upheld a statute and administrative regulation that forbade the succession of "senior" members (by "reserve" members) of the National Assembly and the Legislative Yuan. From an ex post facto analysis, the policy implication was quite obvious, namely, Interpretation No. 31 would sooner or later be overwritten.

II.3 Turning a Crisis to an Aspiration: Interpretation No. 261

As a result of the non-re-elected "millennium congress" issue, and despite the introduction of "supplementary" elections since 1969, the KMT government's legitimacy has been increasingly and more seriously questioned by the general public.

After the enactment of the Voluntary Severance Act for the Senior Central Representatives in January 1989 failed to "bribe" (by providing affluent severance pay) the "millenium congressmen" to step down as scheduled,⁽²⁹⁾ an unprecedented large-scale student hunger strike was held at the Chiang Kai-shek Memorial in March 1990. On March 21, 1990, President Lee Teng-hui announced immediately after his election by the National Assembly as the 8th President of the Republic his intention to summon a National Affairs Conference to solicit views on constitutional reform. On April 3, 1990, the Legislative Yuan passed a resolution applying for an interpretation from the Council of Grand Justices.

On June 21, 1990, a week before the scheduled opening of the National Affairs Conference, the Council of Grand Justices rendered its Interpretation No. 261, which held the following (*See* Judicial Yuan 1991c, 96-100):

The terms of the central government's representatives are clearly stipulated by the Constitution. Since their lawful inaugurations, first-term representatives cannot presently be reelected due to a serious crisis faced by this country. As a result, the continuation of their duties is required for the maintenance of the constitutional system. However, *periodic reelections are necessary as a means to reflect the people's will and to fully carry out democratic constitutionalism.* Furthermore, *Interpretation No. 31* as rendered by this Council, the provisions of Article 28 Section 2 of the Constitution,⁽³⁰⁾ as well as Articles 6 Sections 2 & 3 of the Temporary Provisions⁽³¹⁾ *was never intended to allow first-term central representatives to continue exercising their duties indefinitely, to alter their term of service, or to prohibit the government from holding elections for second-term central representatives.* In fact, since 1969, the central government has held general elections for central representatives in free China in the effort to gradually supplement central representative institutions. In order to address present circumstances,

(29) Many refused to step down as they asserted they represented the ROC's legitimate claim of sovereignty over the Mainland.

(30) Art. 28, Sec. 2 of the Constitution reads:

The term of office of the delegates to each National Assembly shall terminate on the day on which the next National Assembly convenes.

(31) Art. 6, Sec. 2 & 3 read:

2. The original representatives of the central parliamentary bodies have all been duly elected by the people in a nation-wide election and have exercised their functions and powers according to law. This also applies to those representatives of the same bodies elected later in by-elections either through a subsequent increase in the number of representatives or to fill vacancies created by deaths.

As for areas on the Mainland, as soon as they are recovered, elections shall be held in each succeeding area for representatives of the central parliamentary bodies.

3. Representatives of the central parliamentary bodies to be added and elected shall exercise the same functions and powers as the original representatives.

the first-term central representatives who have not been periodically re-elected and are either in fact not able to exercise their duties or are often absent from duties, should be verified and dismissed immediately. In addition, the remaining representatives *should stop exercising their duties by December 31, 1991.* In addition, the central government *should, in accordance with the spirit of the Constitution, the intention of this Interpretation, and the relevant statutes and ordinances, hold a timely national election for second-term central representatives, so that the function of this constitutional system can be insured.* (*Emphasis added*)

The Interpretation which concluded the so-called "millenium congress" in one stroke⁽³²⁾ was passed by a vote of 13 to 2.⁽³³⁾ Though the deadline set for compulsory retirement in the Interpretation had in theory little support, one nevertheless wholeheartedly welcomed the ruling. Unless one entirely denies Judiciary discretion, the very fact⁽³⁴⁾ that "December 31, 1991" was, after a series of deliberations, agreed upon by a majority of Grand Justices, demonstrates that the "due process" requirement was met and thereby legitimizes the Interpretation. It turned out that all parties involved in the follow-up Constitutional Reform accepted the deadline set by the Council, with a period of a year and a half being sufficient time for adjustment.

In addition, the Interpretation led the way to constitutional reform by suggesting in its "reasons of interpretation" that a certain number of seats in the forthcoming general elections shall be determined through a *nationwide constituency.* Since 1991 the Additional Articles of the Constitution (*hereinafter* Additional Articles) has adopted formula for *proportional representation*, in order to allocate seats allotted for national constituencies.⁽³⁵⁾

(32) There were 612 members of the National Assembly, 138 members of the Legislative Yuan, and 18 Control Yuan members when the ruling was announced. *See Free China J.*, Vol. VII, no. 47 (June 25, 1990), p. 1.

(33) Four Justices reserved their concurring opinions for publication. *See* Yu-ling Yang, "Interpretation No. 261 and the Development of ROC Constitutionalism: the Origin and Conclusion of 'Millenium Congress'," *The Constitutional Review* 23: 3 (Jan. 1998), p. 1.

Grand Justice Lee Chih-peng wrote a dissenting opinion asserting that the retirement deadline should coincide with the 1992 election for the National Assembly and Legislative Yuan and the 1993 balloting for new members of the Control Yuan, instead of a uniform deadline of December 31, 1991.

(34) There were 9 deadlines proposed during deliberations, including immediate resignation, December 1980, June 1981, August 1981, December 1981, February 1982, June 1982, December 1982, and after the holding of the 2nd general election. After a series of multi-choice votings, December 31, 1981, gained the most support. *See* Y. Yang, *supra* note 37, p. 5.

(35) *See, e.g.*, Article 1, Section 2 of the Additional Articles of the Constitution of 1997.

III. Behind the Transition

On the surface, both Interpretation No. 31 and Interpretation No. 261 embrace the same *doctrine of "changing circumstances"*; yet, interestingly, they reached opposite conclusions. What might have caused the Council of Grand Justices (of different compositions, of course) to change its mind by adopting a new interpretative approach?

Generally speaking, studies of regime transformation fall into two types. A macro-oriented approach tends to emphasize objective conditions, mainly economic and social ones, and uses a language of determination. The micro-oriented approach emphasizes the strategic behavior of political actors embedded in concrete historical situations (Adam Przeworski 1986, 47). Both approaches are descriptive of Taiwan. Moreover, I agree with Professor Przeworski that "objective factors constitute at most constraints to that which is possible under a concrete historical situation but do not determine the outcome of such situations." (Adam Przeworski 1986, 48)

III.1 External Pressures

The external pressures that might have pressured the Council to change its course in 1990 can be roughly grouped into two categories.

III.1.1 Domestic Aspirations for Change

It is widely agreed that successful economic development⁽³⁶⁾ and steady educational improvements in Taiwan since the 1960s have contributed to the country's transition to democracy in late 1980s (See, e.g., Samuel P. Huntington 1991, 59, 71-72). More specifically, regular elections for county magistrates, mayor, and members of local legislative assemblies since 1951 have nurtured opposition leaders and forged strong appeals for political reform. With the declining legitimacy of governance, the ruling KMT led by President Chiang Ching-kuo adopted more tolerant and adaptive policies.

On September 28, 1986, long-time opposition forces announced the establishment of the Democratic Progressive Party (DPP), essentially the first new political party since the declaration of *état de siège* on May 20, 1949.⁽³⁷⁾ Even more significant is the fact that the KMT-led government did not impede the DPP's activities.

In October of 1986, President Chiang Ching-kuo announced, during an inter-

(36) The core of the so-called "Taiwan Miracle" lies in an outstanding record of "growth with equity." See, e.g., T. Gold, *State and Society in the Taiwan Miracle* (1986).

view with *The Washington Post*, that in view of the progress in social change on Taiwan, the ROC government planned to lift the "state of siege" soon. After the Legislative Yuan passed the National Security Act in late June, the *état de siège* was formally lifted on July 15, 1987. In September of 1987, the decades old ban on the people on Taiwan from traveling to the Chinese Mainland was removed.⁽³⁸⁾ Starting with January 1, 1988, the restriction on the number of newspapers and post-publication censorship was abolished. Despite these and other efforts (See Dennis T. Tang 1990, 313-314), mass demonstrations for various causes took place almost daily and the Legislative Yuan was frequently paralyzed due to boycotts by opposition members.

For current purposes, I would like to point out a few events that might have attracted the attention of Grand Justices who regarded themselves as "guardians of the Constitution". Votes won by the ruling KMT party has consistently fallen in recent Legislative Yuan elections from 76% of the total votes cast in 1980 to 73% in 1983, and to 69.87% in 1986 to 57.57% in 1989. Meanwhile, in contrast, the newly established DPP won 28.53% of the total number of votes in 1989.⁽³⁹⁾ Furthermore, various versions of "new constitution" drafts have been proposed in a move for public support, including Wu Fong-shan's draft of a "Basic Law of the Republic of China" on February 9, 1990, and the DPP's draft of a "Democratic Magna Charter" on June 2, 1990. It is thus fair to say that at this time the legitimacy of the ROC Constitution was facing unprecedented challenges.

III.1.2 Pressure from the International Community

In addition to domestic conflicts, international pressures on Taiwan in the late 1980's were another concern that encouraged the country's leaders, including the Grand Justices, to steadily democratize Taiwan.

Since retreating from the Mainland, most international pressure experienced by the ROC has stemmed from the PRC. In fact, since the early 1970s when Taiwan was compelled to depart from the United Nations, the country has faced very tough international conditions. Since then the Communist regime has successfully

(37) According to section 11 of martial law, the commander-in-chief in an area under a state of siege may prohibit assembly, association, parade, and petition activity completely. A ban on any new political party organization had been imposed. Yet affiliation to a party is not requisite for candidates in all elections, opposition forces still had a chance to compete in local elections.

(38) Since November of 1988, the people on Mainland are allowed, with conditions, to visit Taiwan.

(39) In terms of seats in the Legislative Yuan, the KMT controlled a majority, 82% of the total seats in 1983, 81.2% in 1986, and 71.29% (72 of the total 101 seats). The DPP won 20.79% (21) of the 101 seats, while the independents won 7.92% (8 seats) in 1989.

isolated Taiwan in international politics.⁽⁴⁰⁾ Moreover, beginning in the late 1970's the Mainland Chinese Communist government has launched a series of economic reforms. With the success of their economic reforms, the gap between the two sides of the Taiwan Straits has rapidly narrowed. These pressures have simultaneously generated movements within Taiwan, in order to keep ahead of the PRC, to claim independence⁽⁴¹⁾ on one hand, and to push for greater political democratization on the other.

Another major source of pressure on Taiwan arises from the US. Although the US government de-recognized the ROC in 1979 in order to establish full diplomatic ties with the PRC, the US has consistently remained Taiwan's closest ally in the international arena. Continuing criticisms by the US regarding Taiwan's human rights record are not negligible. To name only a few, the *1988 Report on Human Rights Practices* for Taiwan wrote:⁽⁴²⁾

Taiwan's policy, long dominated by the Nationalist Party (KMT) is essentially a one-party authoritarian system, [and] is in a transitional stage to a more pluralistic system . . . Nevertheless, Taiwan's central parliamentary bodies remain constituted under a representational formula which assure continued KMT control.

Again the 1989 Report on Human Rights Practices recorded (U.S. Congress 1991, 356):

Taiwan has taken some significant steps away from its authoritarian political system to adopt a more pluralistic one, [however] the people do not yet have the ability to change their government through democratic means . . . The most important elective bodies at the central level are the Legislative Yuan (the highest law-making body) and the National Assembly, which convenes every six years to elect a President and Vice President. There have been no general elections for those two bodies since 1948.

(40) Before 1971, the ROC maintained diplomatic relationships with more than 60 countries. In 1989 the ROC only had diplomatic relations with 25 countries. Moreover, in recent years the PRC has actively joined various international economic organizations, such as the IMF, the World Bank, and the Asian Development Bank, and has subsequently forced the ROC to choose to either withdraw from such organizations or to change its country's title.

(41) The long-time struggle between the KMT and Chinese Communist Party is limited to which is "the legitimate government of China". Both parties agreed that Taiwan is part of China, which is also the position taken by the U.S. government in the Shanghai Communiqué. Taiwan's Independence Movement would, however, claims that Taiwan should be an independent country, separate from China.

(42) *1988 Report on Human Rights Practices for Taiwan, American Institute in Taiwan Background, BG-89-02* (March 1, 1989), reappeared in *Sino-American Relations, 1988-1989* (Taipei: Institute of American Culture, 1990), p. 335.

III.2 Internal Shifts

III.2.1 Judicial Review on Trial

Various mass demonstrations held in the late 1980s were on the surface against the "millenium congress" as well as the legitimacy of governance. Yet, one should not forget that it is Interpretation No. 31 of four decades ago that created the "millenium congress" and which thereby endorsed authoritarianism. Therefore, the various protests were in fact putting the system of judicial review on trial. The unfortunate fact remains that until mid-1990 when the Council made its Interpretation No. 261, senior members constituted an overwhelming majority (See Table 6). It was unrealistic to expect the National Assembly, which monopolized the power of constitutional amendment,⁽⁴³⁾ to initiate constitutional reform against their own interests. Consequently, it was necessary for President Lee to call for a non-institutional "National Affairs Conference" in the effort to mobilize social forces as momentum for reform. The Chinese proverb "to let the mischief-maker undo the mischief" (解鈴猶須繫鈴人) best illustrates the scenario. The Grand Justices certainly realized the importance of taking immediate action.

III.2.2 Judiciary Consciousness

Like its counterparts in the US and Germany, the deliberation among Grand Justices in Taiwan has been kept confidential. Interaction among Justices is little known to in the outside world. There are, however, indications⁽⁴⁴⁾ showing that the Grand Justices in the 5th Grand Council were comparatively more liberal in terms of political attitudes and also were able to achieve high levels of consensus in their decision-making. It is therefore not surprising to witness that these Grand Justices historically decided, with the backing of the people, to discard its decades old and notorious interpretation, as well as to prove to the public its judicial independence.

(43) See *supra* note 26.

(44) For example, the number of interpretations rendered by the 5th Council totaled 167 and is much higher than those rendered by the previous terms (79, 43, 24, and 53 respectively). In terms of constitution interpretations, those rendered by the 5th Council totaled 149, more than the previous four terms combined (25+8+2+32=67). However, the average percentage of separate opinions (including concurring opinions and dissenting opinions) in the 5th Council is the lowest (42.15%) among all the Council's terms. See Dennis Tang, "Empirical Study on Separate Opinions of the Council of Grand Justices," *The Constitutional Review* 25 (1), p. 56 (Table 9), and the accompanying text (July 1999) for details.

IV. Beyond the Transition

It has been almost a decade since Taiwan's transition from authoritarianism to democracy. Have we learnt something from history? With respect to judicial review, the answer, I am afraid, is "not yet".

IV.1 Judicial Review after 1990

Since 1990, the Grand Justices have enjoyed unprecedented levels of social respect. There are at least three reasons for this high regard. First, recent Grand Justices have worked much harder than their predecessors have. The facts are obvious: 238 of 487 interpretations have been made since 1990. Second, the Act Governing the Hearing of Cases by the Grand Justices of the Judicial Yuan of 1993 expanded the standing for judicial review. Section 5 grants, among others, standing to one-third of the total members of the LY to apply for abstract judicial review.⁽⁴⁵⁾ Third, the KMT party,⁽⁴⁶⁾ with a narrow margin of majority power and loose party discipline in the LY, has tended to elude making hard choices by seeking judicial solutions, in other words, "passing the buck" to the Judiciary, i.e.,

(45) The full text of Section 5 of the Act Governing the Hearing of Cases by the Grand Justices of the Judicial Yuan of 1993 reads as follows:

The application for a constitution interpretation is admissible under one of the following circumstances:

- (1) When an organ of the central government or a local government while performing its duties has *doubts* as to the proper application of the Constitution; or [if an organ of the central government or a local government] has disputes with another organ as to the proper application of the Constitution while performing its duties; or [if an organ of the central government or a local government] while applying statutes or regulations has *doubts* as to whether the applicable statute or regulation involved is in conflict with the Constitution;
- (2) If a natural person, juristic (legal) person, or a political party whose constitutional rights has been infringed upon and who has already instituted a judicial action in accordance with the law, has doubts as to the constitutionality of a law or regulation as applied in the final decision of such a person's case by the court of last resort.
- (3) When more than one-third of the present total members of the Legislative Yuan while performing its duties has *doubts* as to the proper application of the Constitution or as to whether the applicable statute or regulation involved is in conflict with the Constitution.

The Supreme Court or the Administrative Court believing that the applicable statute or regulation involved in a case pending for its judgement is in conflict with the Constitutional may suspend the trial and apply for an interpretation by the Grand Justices.

The Council shall reject the application if it fails to meet the prescriptions of the above two subsections. (*Emphasis added* indicates that I regard these as "abstract judicial review" jurisdictions).

(46) Since 1996 the KMT party has only controlled 85 seats in the LY, 3 seats more than half of the total of 164.

by seeking rulings through the process of *abstract judicial review*.

The abstract judicial review process provides an excellent avenue through which Grand Justices can actively take part in political decision-making, so long as someone with statutory standing brings the issue to their attention. Specifically, pure and simple doubts of constitutionality can be raised at any time without being subject to the requirement of "ripeness" or "mootness." For example, despite Grand Justice Gen Wu's forthright dissenting opinion that the "doubt" at issue had in fact long been resolved,⁽⁴⁷⁾ the Council still rendered Interpretation No. 387 which stipulated that the president of the Executive Yuan (Premier) and all his cabinet members must resign before the first meeting of every re-elected LY.

Furthermore, the "political question" doctrine has been "generalized" and therefore "hollowed out" under abstract judicial review. For example, the Council in Interpretation No. 419 held:

Whether the Vice President can serve as Premier simultaneously is not stipulated expressly in the Constitution. These two posts, in terms of their nature, are not distinctly incompatible. However, should the Presidency become vacant or the President be unable to fulfill the duties of his office, one person simultaneously holding these two posts will obstruct the succession of the Presidency or the acting on behalf of the President as decreed by the Constitution. This is not wholly inconsistent with the original intent of the Constitution for creating two posts (the Vice Presidency and the Premier) and having separate individuals fulfilling these two roles. The finding that resulted in this Interpretation shall be properly handled in accordance with the intent of this Interpretation.

Upon prudently examining Article 57⁽⁴⁸⁾ of the Constitution and the find-

(47) More than one-third of the total members of the 2nd LY applied for an interpretation in March 1993 following their inauguration into office. The cabinet was entirely reshuffled in February 1993. The Council of Grand Justices rendered this interpretation on October 13, 1995, three months before the expiration of the 2nd LY.

(48) Article 57 of the Constitution reads:

The Executive Yuan shall be responsible to the Legislative Yuan in accordance with the following provisions:

1. The Executive Yuan has the duty to present to the Legislative Yuan a statement of its administrative policies and a report on its administration. While the Legislative Yuan is in session, Members of the Legislative Yuan shall have the right to question the Premier as well as the Ministers and Chairmen of the Commissions of the Executive Yuan.
2. If the Legislative Yuan does not concur with any particular major policy of the Executive Yuan, it may by resolution request the Executive Yuan to alter such a policy. With respect to such a resolution, the Executive Yuan may, with the approval of the President of the Republic, ask the Legislative Yuan for reconsideration. If, after reconsideration, two-thirds of the Members of the Legislative Yuan present at the meeting uphold the original resolution, the Premier shall either abide by the same or resign.

ings⁽⁴⁹⁾ leading to this Interpretation, as well as its development following⁽⁵⁰⁾ the Interpretation, one can hardly deny that this is a typical "political question" which "finds a textually demonstrable constitutional commitment on the issue of a coordinate political department."⁽⁵¹⁾ In addition, the last remaining requirement which might prevent the Grand Justices from rendering unnecessary interpretations, i.e., more than one-third of the total members of the LY may apply for interpretation only "when exercising their duties", has been interpreted so loosely that it serves no function at all. For example, Interpretation No. 436 was made in response to "pure and simple doubts" presented by a group of legislators when no bill was pending⁽⁵²⁾ for consideration in the LY at all. On the one hand, one shall be pleased to see the Grand Justices steadily consolidating human rights by greatly limiting the jurisprudence of martial courts. Yet, on the other, one shall also worry about the detailed "instructions/guidance" given by Justices in their interpretations to legislators in regards to revising the Procedures for Martial Courts in the future.

These are merely a few examples that deftly illustrate the potential for the misuse of judicial review when the pendulum begins to swing to the other side of the political spectrum.

IV.2 Who Watches the Watchmen?

Although I wholeheartedly praised Interpretation No. 261 for dismissing the

3. If the Executive Yuan deems a resolution on a statutory, budgetary, or treaty bill passed by the Legislative Yuan difficult to execute, it may, with the approval of the President of the Republic and within ten days after its transmission to the Executive Yuan, request the Legislative Yuan to reconsider the resolution. If after reconsideration, two-thirds of the Members of the Legislative Yuan present at the meeting uphold the original resolution, the Premier shall either abide by the same or resign.

See Dennis Tang, "On the Constitutionality of the Legislative Veto in Section 95 of the Statute Governing the Civil Relationships between the People of the ROC and the PRC: What Does a 'Modified Parliamentary System' Mean?" in Dennis T. Tang, *Separation of Powers Revisited* (1998), p. 271, for an exploration of its constitutional implication.

(49) Premier Lien Chan resigned with his cabinet in early February 1996 when the 3rd LY convened. Mr. Lien was then re-nominated as Premier by President Lee and was approved by the LY in late February 1996. In March 1996 Premier Lien was popularly elected as Vice President and took the oath of office as the Vice President on May 20, 1996, while simultaneously serving as Premier. This led four different groups within the LY to apply for a constitution interpretation in late May and early June.

(50) The Council rendered this Interpretation on December 31, 1996, and the Vice President quit the post of Premier on September 1, 1997.

(51) *Baker v. Carr*, 369 U.S. 186, 217 (1962).

(52) There are numerous interpretations rendered for clarifying the constitutionality issues in a bill pending for consideration in the LY. See, e.g., *Interpretations* No. 365 & 467.

"millenium congress", I would rather have seen the Council not fall into the "trap" and to not have rendered Interpretation No. 31 in the first place. One therefore must ask the following questions: Why did the Council hammer out Interpretation No. 31? Should this thorny issue have instead been solved through political channels? Is it not possible that the Council might make a similar interpretation in the near future?

The Council has been struggling for independence for decades, fighting to be free from restrictions set by legislators. Over time, the threshold for holding statutes unconstitutional has been lowered, and it is even possible that a special majority requirement for constitution interpretation may eventually be abolished.⁽⁵³⁾ While the Council has slowly accumulated a respected record on human rights issues, the political branches (especially the LY) have tended to take advantage of the process of abstract judicial review by eluding controversial political decisions. The Council in Interpretation No. 328 correctly and unambiguously declared that "the demarcation of the original border of the Republic, as mentioned in Article 4 of the Constitution, is a "political question", and therefore is not subject to judicial review. Despite this ruling, the Council has rendered interpretations one after another employing scarce judicial resources dangerously.

Ironically, one of the major concerns that push Civil Law countries to concentrate the power of judicial review into the hands of special courts (centralized judicial review) is the lack of a long-standing tradition for courts to protect human rights. Yet by converging the process of centralized judicial review with *abstract judicial review*, the Council of Grand Justices in Taiwan is gradually becoming a latent superpower.

Given that constitution interpretations rendered by the Council of Grand Justices has far-reaching effects and can only be repealed through either constitutional amendments or its re-interpretation, as in Interpretation No. 261 which repealed Interpretation No. 31, reform of the judicial review system is decidedly needed. Moreover, the credibility and independence of the Council are further compromised by the current legislative practice of seeking abstract judicial reviews, which may easily involve the Judiciary in political conflicts. As a first step towards judicial reform, people should ask themselves: if Grand Justices are guardians of the Constitution, who will then guard these guardians? In my view, the Grand Justices can best guard the Constitution if and only if it remains "the least dangerous branch"!

(53) The Legislative Yuan almost passed amendments to the Act Governing the Hearing of Cases by the Grand Justices of the Judicial Yuan annulling the special majority requirement for constitution interpretations in January 1999.

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司法審查與臺灣威權體制的變遷

湯德宗*

摘要

本文探討司法權在臺灣威權轉型過程中所扮演的角色。「司法審查」(judicial review)，一稱「違憲審查」，係指司法院大法官經由憲法解釋，確保(控制)法律及命令不與憲法抵觸的制度。全文自序論以下，分由四個層次探究問題。

第一節「自比較法觀點論臺灣司法審查制度」，指出臺灣司法審查制度的四大特徵。一為「集中審查」制(centralized judicial review)，即違憲審查權由司法院大法官獨佔。二為「抽象審查」制，即大法官解釋憲法並不限於具體的「案件」或「爭議」，凡「中央或地方機關於其職權上適用憲法發生疑義時，即得聲請司法院解釋；法律及命令與憲法有無抵觸發生疑義時，亦同」。三為「可決門檻區別」制，即大法官作成「憲法解釋」須適用較作成「統一解釋」為高的可決門檻；而憲法解釋中宣告「法律違憲」者，其可決門檻復高於宣告「命令違憲」者之可決門檻。四為「一般拘束力」制，即大法官所為解釋具有嗣後拘束全國各機關及人民之效力，與普通法院裁判僅拘束個案當事人者迥異。上述特徵對於臺灣威權政體的鞏固與變遷，產生了一定的影響。

第二節「司法審查與統治正當性」，回顧臺灣違憲審查之實踐與威權體制之圖騰——「萬年國會」——相終始的歷程。緣民國四十年第一屆立法委員(民國三十七年於大陸選出)任期屆滿前，行政院會議通過，建議總統核可，由總統諮商立法院同意，由第一屆立委暫時繼續行使職權一年。繼於民國四十一年、四十二年兩度循此程序辦理，迄第三度續行職權期限屆滿前，第一屆監察委員任期亦將屆滿，爰由行政院就立監委任期併案聲請大法官解釋。大法官於民國四十三年一月做成釋字第三十一號解釋，謂：「值國家發生重大變故，事實上不能依法辦理次屆選舉時，若聽

任立法監察兩院職權之行使陷於停頓，則顯與憲法樹立五院制度之本旨相違，故在第二屆委員未能依法選出集會與召集以前，自應仍由第一屆立法委員監察委員繼續行使其職權」，為威權統治的正當性提供法律基礎，「萬年國會」即源於茲。迨至民國七十九年，大法官應立法院之聲請，作成釋字第二六一號解釋，始終結「萬年國會」，謂：「民意代表之定期改選，為反映民意，貫徹民主憲政之途徑，而本院釋字第三十一號解釋、憲法第二十八條第二項及動員戡亂時期臨時條款第六項第二款、第三款，既無使第一屆中央民意代表無限期繼續行使職權或變更其任期之意，亦未限制次屆中央民意代表之選舉。為適應當前情勢，第一屆未定期改選之中央民意代表除事實上已不能行使職權或經常不能行使職權者，應即查明解職外，其餘應於中華民國八十年十二月三十一日以前終止行使職權，並由中央政府依憲法之精神、本解釋之意旨及有關法規，適時辦理全國性之次屆中央民意代表選舉，以確保憲政體制之運作」。從此臺灣正式與全球民主化潮流結合。

第三節「威權變遷背後」，嘗試由宏觀取向途徑(macro-oriented approach)與微觀取向途徑(micro-oriented approach)，探索臺灣威權轉型的原因。大體而言，前者重在分析促成變遷的客觀條件；後者強調變遷時刻關鍵人物的策略行爲。前者又可分為國內與國際兩方面。國內方面，臺灣經濟發展成功、教育普及、以及各種定期選舉的結果，國內人心渴望改革，明顯反映於斯時選舉。民主進步黨成立雖僅三年，其在民國七十八年立委選舉之得票率已逼近百分之三十；而執政的國民黨則由先前的百分之七十得票率，滑落至百分之五十七。國際上，美國於一九七九年與中共建交，臺灣外交空前挫敗；中國大陸自七〇年代實施經濟改革以來，兩岸經濟實力的差距日益縮小，更對臺灣構成沈重的政治改革壓力。其次，就變遷時刻的關鍵人物而言，民國七十九年三月社會各界對於「萬年國會」的空前示威，當為促使大法官重新檢討釋字第三十一號解釋的重要原因。而斯時(第五屆)大法官較富自由色彩，彼此相處融洽，合議功能充分發揮，且能感受司法危機等，亦為通過釋字第二六一號解釋，適時瓦解威權法律基礎的重要原因。

第四節「超越威權變遷」，進一步從臺灣威權體制變遷的歷程，對大法官「抽象釋憲」實踐的妥當性提出批判。質言之，大法官作成釋字第二六一號解釋，終結「萬年國會」，固值稱道，然吾人不免懷疑：當年何以作出釋字第三十一號解釋？未來可能重蹈類此覆轍？追根究底，問題在於現制容許大法官對「單純的憲法疑義」作成具有一般拘束力之解釋。此種各國僅見之「抽象違憲審查」制度極易使大法官捲入政治衝突漩渦，且解釋一旦作成極難變更，殊非妥當。按大法官之憲法解釋僅能以

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「修改憲法」或大法官再解釋（所謂「補充解釋」）謀求改正；前者須有特殊多數決，後者恆受「不告不理」之司法被動性拘束，實屬匪易。或謂「大法官乃憲法之守護者」，然孰能有效監督「憲法守護者」？作者爰建議：嚴格限縮大法官「抽象釋憲權」之行使，藉以促使政治部門（行政、立法兩院）以政治途徑（包括循憲法第五十七條進行覆議等），作成政治決定，並對人民負責（政治責任）！