

"The 1946 ROC Constitution and Taiwan's Democratization"

SYLLABUS

Justice Professor Dennis T. C. Tang©

I. Democracy & democratization defined

- I.1 Some indicators of democracy
 - Popular sovereignty (consent by the governed)
 - Separation of powers (horizontal & vertical)
 - Constitutional review (J/R of constitutionality)
 - Civil and political rights
 - Economic freedom & social welfare
- I.2 Democratization defined
 - as an ongoing process, rather than a transition point

II Overview of milestones of democratization on Taiwan

Table of Milestones

II.1 Survival Period (1949~1960)

Composition of the central Representative Bodies (Supp.)

Interpretation No. 31 (Where reelection of the second-term Members of both the Legislative and Control Yuans is *de facto* impossible due to the loss of Mainland China, how to maintain the constitutional structure after the expiration of the first-term Members of both Yuans?)

Q1 What would you do to solve the legitimacy crisis of democratic government, if you were Chiang Kai-shek?

II.2 Authoritarian Period (1960~1987)

Q2 Why would Chiang Kai-shek opt for an authoritarian rule?

II.3 Transition Period (1987~)

Interpretation No. 261 (Should the first-term central representatives be allowed to exercise their powers indefinitely without periodic reelection?)

Q3 Are Interpretation Nos. 261 and 31 similar in some way?

Q4 How did Interpretation No. 261 set Dec. 31, 1991 as the deadline for the first term members to step down?

Q5 Why did Interpretation No. 261 instruct the government to hold the next election of the national representatives with a certain number of **representatives-at-large**?

Q6 What would happen if the Justices did not substantially revise the holding of Interpretation No. 31?

Interpretation No. 499

Q7 Why would Lee Teng-hui mobilize the National Assembly to pass the Constitutional Amendments (Additional Articles) of 1999?

Q8 Are there alternative reasoning available for the Justices to strike down the Amendments?

Q9 How daring were the Justices to declare the Amendments of 1999 unconstitutional, and thus null and void?

Cf. Art. 5, Sec. 1, Sentence 2 of Amendments 2000 & 2005
(retaliatory effects last until now)

III (Other) Contributing factors to democratization on Taiwan

III.1 Social & Economic Development on Taiwan

III.1.1 Taiwan economic miracle: Growth and Equity

III.1.2 Education widespread

III.1.3 Growing middle class with self-confidence and awareness of self-autonomy calling for democracy

III.2 Cultural Tradition

III.2.1 Ruling Orthodoxy (法統)

originated from Confucian orthodoxy (道統)

- Chiang, as advocate for constitutionalism and follower of Sun Yat-sen, may delay, may *not* defy, democracy (Constitution's mandate)

- Having nurtured democracy by promulgating Guidelines for TW Local Self-governance to experiment "petite democracy" since 1950

- Supplemental and additional **CR** election initiated since 1969

- Proportional representatives for Mainland Area and Overseas Compatriot appointed by political parties (Interpretation No. 261)

III.2.2 Confucianism/ Moderatism (中庸之道)

- Minimal enforcement of martial law while maintaining a civil government

- Party affiliation is not required for eligibility of elections

→ Non-partisans (黨外) as a party in reality

III.3 International pressure (mainly from the US)

III.3.1 Human rights criticism (e.g., State Department HR reports)

(Excerpts of Human Rights Reports then to be supplemented)

III.3.2 Mounting criticism due to Kaohsiung Incident (1979) & Henry Liu's Murder (1984)

III.3.3 Way out for international isolation

III.4 Cross-strait competition

Deng Xiaoping's "reform and open policy" (1978~) prompts

Chiang Ching-Kuo's "democratic reform"

III.4.1 1986 substantially lifted ban on forming political parties (by tolerating DPP) (解除黨禁)

III.4.2 1987 lifted martial decree & ban on residents traveling to the Mainland (解嚴, 開放返鄉探親)

III.4.3 1988 lifted ban on establishing newspapers (freedom of expression resumed) (解除報禁)

IV Seeds of democracy embedded in the ROC Constitution

Overview of the Constitution

- IV.1 Institutional constraints on state power (a limited government)
 - IV.1.1 Vertical separation of powers between central & local government
 - IV.1.2 Horizontal separation of powers among 5 branches
 - IV.1.3 Constitutional review as built-in guardian (**nurturer of democracy**)
- IV.2 Bill of rights as **aspiration for democracy**
- IV.3 Fundamental state policies (national development directives) for a social and cultural state
 - IV.3.1 Land reform (peaceful revolution)
§ 143-III,
 - IV.3.2 Social security
§§ 155, 157

V. Temporary Provisions Effective During the Period of Mobilization for Suppressing Communist Rebellion (動員戡亂時期臨時條款) which had **frozen, but not destroyed, the seeds**

- V.1 Forms of constitutional amendments
- V.2 Additional authorization of emergency powers to the President, while leaving the original constitutional structure (modified Parliamentarism) and Bills of Rights (Chap. II of the Constitution) untouched

VI. Constitutional amendments after 1991 **revived the seeds by segregating sovereignty from governance**

- VI.1 Preamble of the Amendments: a divided nation sharing common sovereignty while exercising governance separately
- VI.2 Rights and obligations between the people of Taiwan Area and Mainland Area to be prescribed by law
CA § 10→ Act Governing Relations between the People of the Taiwan Area and the Mainland Area (兩岸人民關係條例)
- VI.3 Overview of the Amendments since 1991
 - Constitutional Amendments of 1991 supplemented 10 additional articles to overcome the legitimacy crisis of democracy
 - Constitutional Amendments of 1992 further supplemented 8 additional articles to presage popular election of the President, restore popular election of the Governor of Taiwan Province, and to abolish the indirect election of the Control Yuan
 - Constitutional Amendments of 1994 **reenacted** 10 additional articles to announce the 1st popular election of the president to be held in 1996, and set up a speaker for the National Assembly
 - Constitutional Amendments of 1997 reenacted 11 additional articles to authorize the President to appoint and remove the Premier and to abolish the Taiwan Province as self-governing legal entity
 - Constitutional Amendments of 1999 reenacted 11 additional articles to

transform the National Assembly to be entirely composed of party representatives allocated among parties in proportion to the votes received by each in the last election of the Legislative Yuan

Constitutional Amendments of 2000 reenacted 11 additional articles to Further transform the National Assembly to be a mission-oriented college of electorate with a maximum session of one month

Constitutional Amendments of 2005 reenacted 11 additional articles to Transfer substantially all powers of National Assembly to the people as a whole, to cut down the seats of Legislative Yuan (from 225 to 113), to set forth the Single Electoral Constituency with Two Votes System for its elections and a 5% threshold for political parties to participate in the allocation of party representatives seats.

Cf. [Interpretation No. 721 & Concurring in Part and Dissenting in Part Opinion \(by J. Tang\)](#)