

Oct. 19 (Mon) 4-6 PM/ Furman Hall 120

## Constitutional Review Reform on Taiwan & Constitutionalism Prospects on China

### SYLLABUS

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#### I. Constitutional Review as Institution

##### I.1 Definition

= Judicial Review of Constitutionality,  
a judicial organ takes charge of ensuring the **exercise of all state powers** is in conformity with the Constitution

##### I.2 Purposes (why needed?)

###### I.2.1 **To preserve the Supremacy of the Constitution** (*Vorrang der Verfassung*)

§ 171, Constitution (1946)

(I) Laws (statutes) that are in conflict with the Constitution shall be null and void.

(II) When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan.

§ 172:

Administrative rules (regulations) that are in conflict with the Constitution or with laws shall be null and void.

###### I.2.2 **To safeguard the Constitution**

§ 173:

The Constitution shall be interpreted by the Judicial Yuan.

📌 Why reiterate?

**Interpretation No. 585**\_Reasoning:

“The purposes of constitutional interpretation are to ensure the supremacy of the state’s Constitution in the legal hierarchy in a constitutional democracy, and to render binding judgments for the protection of fundamental rights of the people and the **preservation of such fundamental constitutional values as free, democratic constitutional orders.**”

**Table 0**\_Free & Democratic Constitutional Order (Interp. No. 499)

##### I.3 **Centralized** Constitutional Review (集權式違憲審查)

§ 77:

The Judicial Yuan shall be **the highest judicial organ** of the state and shall have charge of civil, criminal, and administrative **litigation**, and over cases concerning disciplinary measures against civil servants.

§ 78:

The Judicial Yuan shall **interpret the Constitution** and shall have the power to **unify the interpretation** of laws (statutes) and administrative

rules (regulations).

**constitutional interpretations** (憲法解釋) v.

**unifying interpretations** (統一解釋)

I.4 **Abstract** Constitutional Review with enumerated jurisdiction

**Q** How shall the Judicial Yuan interpret the Constitution? Shall the Justices interpret the Constitution (as well as statutes and regulations) when necessary in adjudicating cases or controversies?

**Interp. No. 2** (a mysterious misconception?)

I.4.1 Pure Doubts about the Meaning of a Constitutional Provision

(單純憲法疑義)

**Proceedings Act of Grand Justices** (PAGS)\_§§ 5(I)1 & 5(I)3

A central or local government agency, or more than one-third of the Legislators, **when exercising their duties** and applying the Constitution have **doubts (Zweifel)** about the meaning of a constitutional provision, may petition the Justices for a (constitutional) interpretation.

I.4.2 Abstract Norm Review (abstrakte Normenkontrolle)(抽象規範審查)

PAGJ §§ 5(I)1 & 5(I)3

A central or local government agency, or more than one-third of the Legislators, **when exercising their duties** have **doubts** about the constitutionality of the statute or administrative rule to be applied, may petition the Justices for an interpretation.

I.4.3 Specific Norm Review (konkrete Normenkontrolle)(具體規範審查)

PAGJ §§ 5(II) & **Interpretation No. 371**, 572, 590

The Supreme Court, the Supreme Administrative Court, or **a judge opines in good conscience** that a *statute or administrative rule to be applied in a pending decision* is in conflict with the Constitution, may *adjourn* the proceedings and petition for an interpretation thereon.

I.4.4 Disputes between State Organs (= Organstreit?)(機關權限爭議)

PAGJ § 5(I)1

A central or local government agency which, when exercising its constitutional powers has **disputes** with other agencies of a co-equal branch of the government over their functions and duties, may petition for an interpretation

*Cf.* **Interp. No. 520, supra** (abstraction of disputes)

Instead of deciding the dispute over whether the Executive Yuan is empowered to *unilaterally suspend* spending the multiple-years budget for the construction of the 4<sup>th</sup> nuclear power plant, the Justices **elaborated in abstract the dispute settlement mechanisms** within the Constitution.

I.4.5 Court Decision's Norm Control (判決法令違憲疑義)

≠ **Verfassungsbeschwerde** (Constitutional complaint, 憲法訴願)

PAGJ §5(I)2

**An individual, a legal entity, or a political party**, whose *constitutional right* was infringed upon, and who has *exhausted remedies* through legal actions, yet still has **doubts over the constitutionality of the**

**statute or rule relied upon in the court decision** of the last instance may petition for interpretation.

- “Rules” have been broadly interpreted to include:

*Supreme Courts’ Selected Precedents* (判例) ≠ **stare decisis**

Cf. **Interp. No. 153, 154**

**Q** Why have the justices not allowed a **judge** to petition for interpretation over whether a Supreme Courts’ Selected Precedent is in contradiction with the Constitution? (Cf. **Interp. No. 687**)

*Resolutions by Supreme Courts’ Judges on Legal Issues* (決議)

Cf. **Interp. No. 374, 620**

*Interpretive rules made by administrative agencies* (函釋)

Cf. **Interp. No. 173**

- “**Significant Relevance**” Theory (重要關聯性理論) derived from

**Entscheidungserheblichkeit Theorie**

**Interp. No. 445** (with the *event* at issue);

**Interp. No. 535, supra** (with the *court decision* at issue);

**Interp. No. 664** (with the *application of the provision* at issue)

#### I.4.6 Local Ordinances’ Norm Control (地方自治法規疑義)

Local Self-Governance Act §§ 30(V), 43(V), 75(III):

A local government or local assembly may petition for interpretation when it has **doubts** if a **local ordinance, a resolution** made by a local assembly, or an **administrative action** taken by a local government **concerning their self-governance subject-matters** is in dispute with either the Constitution, a Statute, a Legislative Rule (*Rechtsverordnung*) promulgated by a central agency, or an ordinance of a higher local government.

Cf. **Interp. No. 527 & 553**

The central agency may petition for interpretation **only before** it revokes the local ordinances, resolution or administrative decision at issue.

#### I.5 **Concrete** Constitutional Review with Enumerated Jurisdiction

##### I.5.1 Dissolution of Unconstitutional Parties (違憲政黨解散)

§ 5-IV, 1997 Amend.

Besides discharging their duties in accordance with Article 78 of the Constitution, the Grand Justices shall form a Constitutional Court to **adjudicate** matters relating to the **impeachment** of the president or the vice president of the Republic, and the **dissolution** of unconstitutional political parties.

§5-V, 1997 Amend.

A political party shall be considered unconstitutional if its goals or activities endanger the **existence of the Republic of China** or the **free and democratic constitutional order**.

##### I.5.2 Presidential Impeachment Adjudication (總統彈劾審理)

§2-X, 1997 Amend.

Should a motion to impeach the president or the vice president

initiated by the Legislative Yuan and presented to the grand justices of the Judicial Yuan for adjudication be upheld by the Constitutional Court, the impeached person shall forthwith be relieved of his duties.

## I.6 Summary

### I.6.1 Fig 1\_Constitutional Review Jurisdiction in comparison

I.6.2 Interpretations are of general binding (*erga omnes*) effect  
(≠ *inter partes* effect)  
Cf. **Interp. No. 185**

I.6.3 Interpretations are of prospective effect (*ex nunc, pro futuro*),  
except that the individual petitioner may apply for *de novo* trial  
based upon a preferential Interpretation (i.e., retroactive effect, *ex tunc, pro praeterito* effect)  
Cf. **Interp. Nos. 177, 188, 725**

## I.7 Grand Justices

### I.7.1 1946 Constitution

§79(II):

The Judicial Yuan shall have **a certain number** of grand justices to take charge of 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.

### I.7.2 1997 Amend.

§ 5(I):

The Judicial Yuan shall have **15 grand justices**. The 15 grand justices, including a president and a vice president of the Judicial Yuan to be selected from amongst them, shall be **nominated** and, with the **consent** of the Legislative Yuan, appointed by the president of the Republic.

§ 5(II):

Each grand justice shall serve **a term of 8 years**, independent of the order of appointment to office, and **shall not serve a consecutive term**.

§ 5(III):

Since 2003, **terms** of office shall be **staggered**, with **one half (7/8)** replaced **every 4 years**

## II. Overview of the Constitutional Review in Practice

### II.1 Three Phases by Proceedings

III.1.1 Grand Justices Meeting Rules (1948/09/15~1958/07/20)

III.1.2 Act Governing the Proceedings of Grand Justices Meeting (1958/07/21~1993/02/02)

III.1.3 Proceedings Act of the Grand Justices (PAGJ) (1993/02/03~)

### II.2 Two Phases by Venues

II.2.1 On Mainland

Interp. Nos. 1 & No. 2 (1949/01/06)

II.2.2 On Taiwan

Interp. No. 3 (1952/05/21)~No. 732 (2015/09/25)

### II.3 Overview of the Interpretations

- III.3.1 Table 1\_Grand Justices' Cases Overview (1948~2015)
- III.3.2 Table 2\_Grand Justices' Decisions Classification:  
Constitutional v. Unifying Interpretations
- III.3.3 Table 3\_Grand Justices' Constitutional Interpretations Division:  
Separation of Powers v. Human Rights
- III.3.4 Table 4\_Sources of Constitutional Interpretations:  
Organs-petitioned v. Individuals-petitioned
- III.3.5 Table 5\_Sources of Constitutional Interpretations: Organ  
Petitioners Breakdown
- II.4 Prospects for Reform
  - II.4.1 Origin of the issue  
**May the Judicial Yuan (or the Justices) only make interpretations without judging cases/controversies?**
  - II.4.2 Orientation/Reorganization Reform
    - National Judiciary Conference (1935/09/16)(全國司法會議)
    - National Judicial Reform Committee (1994/10)(司法改革委員會)
    - National Judicial Reform Conference (1999/7/6~8)(全國司法改革會議)
 Resolution on “Orientation of Judicial Yuan”:  
**Judicial Yuan shall be reoriented as the Supreme Court deciding all kinds of litigation** 「司法院審判機關化」決議  
 Three-Phases Reorganization Schedule (Judicial Yuan,1999/7/26)
    - **Figure 2\_Status Quo (Multi heads with multi tracks)**  
(多元多軌)
    - **Figure 3\_Phase I (Uni head, multi tracks)**(一元多軌)  
(2003/10/1~2007/12/31)
    - **Figure 4\_Phase II (Uni head, multi tracks)**(一元多軌)  
(2008/1/1~2010/12/31)
    - **Figure 5\_Phase III (Uni head, one track)**(一元單軌)  
(2011/1/1~ )
    - Actually no acts were passed (revised) !
  - II.4.3 Corresponding proceedings reform proposals
    - Constitutional Litigation Act Draft  
(submitted by C. J. Weng on 2006/01/25), not adopted
    - Draft Amendments to Proceeding Act of Grand Justices  
(submitted by C.J. Rai on 2013/01/07), Pending in LY
    - Similarity  
Judicialization (meeting→tribunal; deliberation→trial),  
Codification (of prior relevant Interpretations)
    - Difference  
Judicial Yuan as Constitutional Court to be transitional to be  
Supreme Court v. to be a permanent organ equipped with  
abstract review power (i.e., interpreting the Constitution in  
abstract) only
  - II.4.4 Current bottleneck

Figure 6\_Sharp decline of Interpretation efficiency &  
 Figure 7\_Apparent increase in Interpretation diversity

II.4.5 Prognoses & solutions proposed

P<sub>1</sub> The shift to staggered and non-consecutive terms makes it harder to cultivate tacit understanding among Justices

- S<sub>1-1</sub> Stick to the original staggered term with half (7 or 8) replaced every 4 years.
- S<sub>1-2</sub> Extend the non-consecutive term (from 8) to 12 years, with one half (7/8) replaced every 6 years
- S<sub>1-3</sub> Reduce the total number of Justices (from 15) to 9, with one half (4 or 5) replaced every 6 years

P<sub>2</sub> Reforming the extant proceedings to improve efficiency

- S<sub>2-1</sub> Majority opinion shall be signed by author justice, and the *deliberation en masse* shall be limited to the holding only
- S<sub>2-2</sub> Daily *communications* among Justices outside conference be intensified, including circulating separate opinions in time
- S<sub>2-3</sub> *Staff* be substantially strengthened to enable each Justice to take charge of cases individually
- S<sub>2-4</sub> *Threshold* for decision be lowered from special majority to simple majority
- S<sub>2-5</sub> formulate "rule of seven" among 15 (or "rule of four" among 9) for dismissal decisions

II.4.6 Judicial character and abstract review revisited

- The historical mission of doubt elucidation and idea/value advocacy is largely completed so far, how to decide convincingly hard cases/controversies are challenges ahead in an ever dividing and diversified society 
  - ¶ *Comprehensive and professional visions* are in need for the Justices
  - ¶ *Equal protection of retirement pension* among Justices is required
- Abstract review, in nature, is more akin to legislature than judiciary
  - ¶ Hans Kelsen: Constitutional court (with abstract review power) exercises passive legislative power as if it were the third house of congress
  - ¶ Alec Stone: " [I]n abstract review processes, the *lawmaking function* of these courts is far more important than is *dispute-resolution*. Moreover, the 'dispute' at hand is primarily partisan-political, rather than judicial.
- **Constitutional complaint** (*Verfassungsbeschwerde*) under
  - ¶ *certiori* is the short cut for the transition from abstract review to concrete review

- ¶ *Petition by people* has been the major source for constitutional interpretation
  - ¶ *Constructing loophole-less protection for human rights* is welcomed by the general public
  - ¶ *Current “modified Verfassungsbeschwerde”* is indeed one step away from **constitutional complaint/litigation**
  - Ensuring the judicial branch is the least dangerous one
    - The “case or controversy” requirement is far more reliable than “judicial self-restraint” of the constitutional court with abstract review power
- II.4.7 Judicial Yuan, the highest judicial organ  
 = the Supreme Court primarily for deciding constitutional disputes &  
 unifying promptly major diversities of court rulings to respond to the public expectation for legal certainty

### III. Reflections on the Taiwan Experience

- III.1 The Constitution does matter (sprouting theory)
- Seed is an entity which passes on genes (You reap as you sow )
  - Seed is where to entrust aspiration and hope (Fruitful when external requisites converge)
- III.2 Constitutional review as institution is vital
- Imperfection is better than none
  - Not necessary to be judicial in nature
- III.3 Creative pragmatism to be praised
- President Ma Ying-jeou: Mutual de-recognition of sovereignty, yet mutual non-denigration of governance (互不承認主權、互不否認治權)

### IV. Constitutionalism Prospects on China

- The Constitutional Review on Taiwan is a common heritage
  - The ROC Constitution was enacted on the Mainland in 1946
  - The constitutional review was initiated in 1949 in Nanjing
  - The Taiwan experience is a living alternative for all Chinese
- Chairman Xi: “the nation shall be **ruled by law** and **ruled by constitution**”
  - constitutional review shall precede constitutional reform
  - a constitutional review, not necessarily judicial, shall be initiated as the first step.

### V. Development Strategies in comparison

- Taiwan: from democratization to rule-of-law consolidation
- Mainland: from rule-of-law to democratization