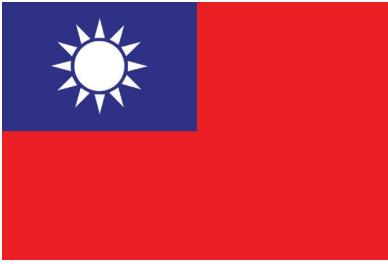


Taiwan



YEN-TU SU

Research Professor
Academia Sinica

JAU-YUAN HWANG

Justice
Constitutional Court, Taiwan

CHIEN-CHIH LIN

Associate Research Professor
Academia Sinica & Associate Professor
National Taiwan University

I. INTRODUCTION

The politics of constitutional reform Taiwan experienced in 2021 was a follow-up to what began in 2020. Constitutional reform was put back on Taiwan's national agenda after President Tsai Ing-wen called on the Legislative Yuan (LY), Taiwan's unicameral parliament, to restart the constitutional amendment process in her second-term inaugural speech. The voting age reform that failed in 2015 was once again considered a top priority, but President Tsai also raised hopes for more to be accomplished this time around. The presidential call for constitutional reform did not go unanswered. By the end of the year 2021, a total of 75 bills of constitutional amendment had been introduced by members of the LY from across the aisle, and the issues addressed ranged from rights to powers. As a first step to launch the legislative process for proposing constitutional amendments, the LY Select Committee on Constitutional Amendments was formed in September 2020. But except for the selection of 5 conveners in May 2021, the Select Committee had remained dormant until January 2022. LY Speaker You Si-kun had long planned to schedule a floor vote on constitutional amendment proposals in late March 2022. The plan was to ensure that, if there will be a constitutional referendum, it could be held in conjunction with the nation-wide local elections scheduled in November 2022. Notwithstanding the multiplicity and complexity of the issues involved, the LY leadership probably saw no need to commence the committee review process sooner than later. In hindsight, the inaction of the Select Committee in 2021 may have foreshadowed the development that only one amendment proposal (on the reform of the voting age and the age of candidacy) managed to pass the LY in March 2022.

Installed in 2005 when the Constitution¹ was lastly amended, Additional Article 12 of the Constitution² stipulates the current constitutional amendment rules in Taiwan. Under these rules, Taiwan has one of the most difficult constitutional amendment processes in the world. Only the LY may propose a constitutional amendment. Upon

initiation by one-fourth of the members of the LY, a bill of constitutional amendment first must pass the LY by a three-fourths vote with a quorum of three-fourths of LY members, and then be ratified in a constitutional referendum held six months after by an absolute majority of the eligible voters. By setting the threshold for the legislative proposal and that for the popular approval significantly higher than normal, the framers of the 2005 amendments may have sought to lay out a road-map for a constitutional reform that is more comprehensive and more legitimate than ever before. The sheer stringency of these constitutional amendment rules has not stopped people from even trying to seek formal constitutional change, but their workability has long been in serious doubt in Taiwan.

Under the parliamentary laws and cameral rules of the LY, all bills of constitutional amendment shall be referred to and reviewed by the Select Committee, the 39 seats of which are distributed proportionally among party caucuses. After the recall of LY Member Chen Po-wei in October 2021, the membership of the Select Committee was slightly changed. It came to have 21 members from the Democratic Progressive Party (DPP) Caucus, 14 members from the Kuomintang (KMT) Caucus, 2 members from the Taiwan People's Party (TPP) Caucus, 1 member from the New Power Party (NPP) Caucus, and 1 independent member. Although the Select Committee stayed dormant throughout 2021, there were significant developments in the politics of constitutional reform that took place somewhere else in Taiwan. Above all, it became much clearer, by the end of 2021, where the two major parties (along with the two minor parties) stood on constitutional reform, and how different their reform proposals were.

The rest of this report is organized as follows. Section II discusses the leading bills of constitutional amendment endorsed respectively by the DPP Caucus and the KMT Caucus as the major developments of constitutional reform in the year 2021 in Taiwan. Section III looks into the emerging ideas that attempt to enlist help from the Taiwan Constitutional Court (TCC) to either sidestep or overcome the daunting obstacles for formal constitutional change. Section IV previews the development of constitutional reform in 2022; it also comments on the different scenarios of changing the constitutional status quo of Taiwan in the near future.

¹ Taiwan's current Constitution was originally adopted in China in 1947, under the then-ruling Republic of China (hereinafter "ROC") Government. Since 1949, this ROC Constitution has been applied in Taiwan only.

² Additional Article 12 of the ROC Constitution provides: "Amendment of the Constitution shall be initiated upon the proposal of one-fourth of the total members of the Legislative Yuan, passed by at least three-fourths of the members present at a meeting attended by at least three-fourths of the total members of the Legislative Yuan, and sanctioned by electors in the free area of the Republic of China at a referendum held upon expiration of a six-month period of public announcement of the proposal, wherein the number of valid votes in favor exceeds one-half of the total number of electors."

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Given the partisan composition of the LY and the supermajority requirement for the legislative proposal of constitutional amendment, securing the bipartisan agreement between the two major parties, *i.e.*, the DPP and the KMT, is crucial to the success of constitutional reform in Taiwan. But, instead of working together in the Select Committee and seeking reform consensus in a bipartisan manner at an early stage of the constitutional amendment process, the DPP and the KMT spent most of the year 2021 in working separately on their own reform proposals. By the end of 2021, both managed to introduce bills of constitutional amendment endorsed by their respective caucuses. In addition to showcasing what they each wanted to achieve or bring to the negotiation table, these caucus bills also highlighted the roles the two caucuses played in the politics of constitutional reform: It was the DPP and the KMT caucuses, not the Select Committee or the extra-parliamentary party leadership, that was behind the wheel.

The ascendance of the two major party caucuses as the lead actors in the making of the respective party platforms on constitutional amendment was a notable turn of events in and of itself. Both the DPP and the KMT, after all, have strong party organizations outside the LY, and many political elites who are not members of the LY do want to have a say in what their parties stand for when it comes to constitutional reform. The need to build intra-party consensus for the entire party is even stronger in the case of the DPP, which has controlled not only the parliament, but also the presidency (and the executive branch), since 2016. Under the leadership of President Tsai, who also serves as the DPP Chairperson, the DPP formed a task force on constitutional reform in March 2021. With members representing different parts of the party and a few experts from outside the party, the task force worked out an all-in-one draft bill of constitutional amendment, which, in turn, was adopted by the DPP Central Executive Committee in October 2021.³ But instead of rubberstamping the draft bill prepared by the party headquarters, the DPP Caucus made a few notable changes to the draft bill before introducing it to the LY in November 2021. These last-minute changes were engineered by the DPP Caucus's long-time Leader Ker Chien-ming, who persuaded the DPP Caucus to override several items the DPP task force adopted over his objections. The fact that the DPP Caucus won such an intra-party turf war revealed not only the political prowess of its leader, but also the hands-off approach President Tsai took in this regard.

The constitutional amendment bill introduced by the DPP Caucus included the following five major proposals: (1) Article 130 of the Constitution be amended to the effect of lowering the voting age from 20 to 18, and the age of candidacy from 23 to 18 except as otherwise provided by law. (2) The Examination Yuan be abolished, and its powers be re-assigned to the Executive Yuan. (3) The Control Yuan be abolished, and its powers to impeach and to audit be re-assigned to the LY; the Auditor General be reorganized as an agency under the LY, and the National Human Rights Commission, which has been affiliated

³ For the interest of disclosure, Yen-tu Su served as an outside member of the DPP Task Force on Constitutional Reform.

with the Control Yuan since 2020, be reorganized as an independent commission under the President. Proposals (2) and (3) were aimed at implementing the long-time DPP constitutional reform agenda that the much complicated and redundant five-power scheme of the central government be transformed into a much simplified three-power scheme that is commonly found in most modern democracies. (4) To shorten the 4-month presidential transition resulting from the increasingly common practice of holding concurrent parliamentary and presidential elections, the term of the sixteenth President and Vice President, which is supposed to end on May 20, 2028, be adjusted to end on February 29, 2028. (5) The constitutional amendment rules as set forth in Additional Article 12 of the Constitution be revised to require that constitutional amendment be proposed by the LY by a two-thirds vote with a quorum of two-thirds members and be ratified by a majority vote in a constitutional referendum provided that the majority of the eligible voters turn out to vote. By lowering both the thresholds for the legislative and the popular approval of constitutional amendment, proposal (5) was designed to make it less onerous and thereby more likely for Taiwan to revise/amend the Constitution in the future.

Soon after the DPP announced its constitutional reform agenda, the KMT probably felt pressured to respond with a competing agenda of its own. In early November 2021, the KMT Chairperson Chu Li-luan paid a visit to the KMT Caucus to seek agreement on the four major proposals for constitutional amendment the party sought to advance this time. With latitude given by the extra-parliamentary party leadership, the KMT Caucus introduced two bills in December 2021, and the final KMT reform package came to include the following five major proposals: (1) To hold the President more accountable to the LY, the President be obligated to deliver an annual state of the nation address to the LY and hear suggestions from LY members every September. In addition, the President be obligated to present report to the LY and subject to interpellation upon issuing emergency decree or at the request of more than one-thirds of the LY members on matters regarding major policies of national security. This proposal was the addition made by the KMT Caucus. (2) A pre-1997 constitutional arrangement be restored to require that the Premier be appointed by the President with the consent of the LY. (3) The rights of political participation be strengthened through (a) lowering the voting age and the age of candidacy to 18, (b) lowering the age requirement for the Presidential candidates from 40 to 35, and (c) creating a constitutional mandate for absentee voting. (4) Enshrine in the Constitution a policy statement on climate change. (5) Enshrine in the Constitution a policy statement on animal welfare.

Aside from the DPP and the KMT, the Taiwan People's Party (TPP) and the New Power Party (NPP) also hold seats in the LY. Though these two minor parties could not introduce bills of constitutional amendment on their own, their party platforms on constitutional reform were made known to the public. Both the TPP and the NPP, for instance, supported the DPP proposals for the voting age reform, the abolition of the Examination Yuan and the Control Yuan, and the lowering of constitutional amendment thresholds. They also advocated for the reform of the parliamentary electoral system and demanded that a few more rights be enumerated in the Constitution.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Founded in 1986 as a movement party for profound constitutional change, the DPP has long been a fierce critic of the ROC Constitution, which was enacted in 1947 in China and still embodies a good deal of Chinese-ness even after it had gone through seven rounds of constitutional amendments during 1992-2005. The DPP's ultimate goal has long been to replace the ROC Constitution with a new Constitution of the people, by the people, and for the people of Taiwan. Under the leadership of President Tsai, however, the contemporary DPP chose to forgo many reform initiatives—such as renaming the ROC as (ROC) Taiwan, redefining the Taiwan-China relations as international relations, and replacing the Additional Articles with a total revision of the original text—that would further clarify the ambiguous constitutional identity of Taiwan under the existing Constitution. Instead, its intra-party deliberation this time around had been focused on, and limited to, issues pertaining to good democratic governance. That being said, the DPP did seek to fulfill its long-time pledge for the abolition of the Examination Yuan and the Control Yuan, and this structural reform proposal entails a clear break with the constitutional legacy of Sun Yat-sen, the founding father of the ROC. A TCC Justice once argued that the five-power scheme constitutes a core element of the ROC Constitution, and that any amendments that attempt to abolish the two Yuans would not be constitutionally permissible.⁴ It is unlikely that the TCC would ever take such a conservative position when applying its unconstitutional constitutional amendment doctrine, but some KMT lawmakers probably would oppose the abolition of these two Yuans on similar grounds.

Eventually, only the proposal that aims to rewrite Article 130 of the Constitution was passed by the LY with overwhelming bipartisan support. Article 130 of the Constitution provides that any citizen who has attained the age of 20 shall have the right of election and any citizen who has attained the age of 23 shall have the right of being elected.⁵ Given that most citizens were illiterate when the Constitution took effect in 1947, these age requirements might be reasonable. Nevertheless, it is no longer suitable in Taiwan with the widespread of public education and the improvement of socioeconomic conditions in the past several decades. Moreover, most democracies around the globe have lowered the voting age to 18. In 2019, for example, the National Assembly of South Korea passed an electoral reform bill lowering the voting age to 18. Before that reform, South Korea was the only OECD member that did not grant voting rights to 18-year-olds.⁶ From this perspective, both of these age requirements are outdated, and this constitutional amendment proposal is long overdue. In fact, a similar proposal had been advanced in 2015 but was aborted because the KMT and the DPP couldn't agree on anything else. Notwithstanding the overwhelming cross-partisan legislative support this time, it remains unclear whether the voting age reform proposal will garner enough votes and be ratified in the 2022 constitutional referendum. In view of this uncertainty, scholars have advanced two arguments, trying to work around the amendment threshold.

⁴ J.Y. Interpretation No. 721 (J. Chen Chun-Sheng, concurring) (2014).

⁵ Article 130 of the ROC Constitution (1947), available at <https://law.judicial.gov.tw/LAWENG//FLAW/dat02.aspx?lsid=FL000001>.

⁶ The Korea Times, 18-year-olds hit the polls for first time in Korea, https://www.koreatimes.co.kr/www/nation/2020/04/356_287952.html.

Firstly, some maintain that the current amendment threshold is too rigid to be constitutional. Therefore, the TCC should nullify the threshold on the ground that it essentially deprives Taiwanese people of the power to revise the constitution. Invalidating a constitutional amendment is not unprecedented in Taiwan. In Interpretation No. 499,⁷ for example, the TCC declared the 1999 constitutional amendments unconstitutional. This threshold was installed by the 2005 constitutional amendment, but some provisions of the 2005 constitutional amendments were once challenged as unconstitutional. Although the TCC upheld the disputed 2005 constitutional amendment in Interpretation No. 721,⁸ three justices questioned its democratic legitimacy on the ground that the voter turnout was incredibly low.⁹ In a similar vein, this argument suggests that the TCC should intervene again and void the amendment threshold. One glaring problem for this argument is that the TCC has upheld the 2005 constitutional amendment in 2014 and is unlikely to overrule its precedent. In addition, even if the TCC would find merit in the too-difficult-to-amend argument, it is questionable whether and how the TCC could bring back to life the 2000 constitutional amendment rules as remedy.

The second argument contends that the voting age could be lowered to 18 by means of legislation. According to this argument, Article 130 aims to *constitutionally* enfranchise citizens who turn 20; it does not intend to prohibit legislators from *statutorily* granting citizens under 20 the right to vote. The Referendum Act, which grants the right of referendum to citizens who are 18 after its revision in 2019,¹⁰ is one example. This argument, however, is dubious because Article 130 of the Constitution does not literally prescribe the minimum age to exercise the right of referendum anyway.

Neither of the two arguments was accepted by the LY, which decided to follow the current constitutional amendment procedure. The fact that only one proposal has been passed is somewhat disappointing because other constitutional issues, such as the amendment threshold and the peculiar five-power central government system, have been widely criticized by constitutional scholars in Taiwan. Unfortunately, those proposals failed to clear the legislature.

IV. LOOKING AHEAD

On March 25, 2022, the legislature approved the voting-age proposal with a 109-0 vote, and the Central Election Commission (CEC) later decided that the referendum is to be held in conjunction with the local elections on November 26. This decision itself was once controversial because in the 2021 referendum, Taiwan voters voted *not* to hold *ordinary* referendums concurrently with national elections, an outcome that was welcomed by the DPP but was opposed by the KMT. The KMT criticized the DPP for flip-flopping on the issue of referendum timing, whereas the DPP retorted that the KMT conflated ordinary referendums with constitutional referendums. The controversy soon subsided,

⁷ J.Y. Interpretation No. 499 (2000).

⁸ J.Y. Interpretation No. 721 (2014).

⁹ At that time, an ad hoc National Assembly was elected to revise the Constitution. But half of the people were unaware of the National Assembly election in 2005 and less than a quarter (23.36 per cent) of the electorate eventually voted in that election.

¹⁰ Article 7 of the Referendum Act provides that “Any citizen of the ROC reaching 18 years of age without the commencement of guardianship shall have the right of referendum unless otherwise provided by the Constitution.”

because many believed that the constitutional referendum would be doomed to fail due to low voter turnout were it held on a separate date.

Given the consensus on the voting age, it is difficult to think of any other constitutional amendment proposal that is more likely to be adopted. If the proposal fails to pass the amendment threshold in November 2022, the outcome may prove that it is next to impossible to amend the Constitution under the current amendment rules. This perception may have two implications on Taiwan's constitutional development. First, Taiwan may rely on judicial review to stimulate informal constitutional change more frequently, because the channel of formal constitutional change has been proved clogged. It follows that the TCC may be freighted with additional burdens and embroiled into more political battles in the future. Alternatively, constitutional reformers may simply give up revising the Constitution through the arduous procedure. Instead, they may radically seek constitutional change through constitution-making. Ironically, the only procedure that both parties will agree for writing a new constitution may be the current amendment procedure, because the Constitution does not prescribe how to replace itself. Furthermore, given the symbolic meaning of constitution-making, this strategy may affect geopolitical stability in East Asia, as China always sees constitution-making in Taiwan as one form of declaring independence.

By contrast, if this proposal is ratified in the referendum, the ratification by itself proves that it is still possible to revise the Constitution within the system despite the high threshold, so long as the issues are popular enough. This may establish a new mode of constitutional reform that focuses on single subject amendment, aiming to revise the Constitution incrementally. Meanwhile, it may render the option of constitution-making less attractive both because of its political risk and because of the availability of constitutional amendments.

V. FURTHER READING

Jau-Yuan Hwang, Ming-Sung Kuo and Hui-Wen Chen, 'Taiwan' in Richard Albert, David Landan, Pietro Faraguna & Simon Drugda (eds), *2020 Global Review of Constitutional Law (I-CONnect-Clough Center 2021)* 299-304.

Jau-Yuan Hwang, 'Taiwan' in Luís Roberto Barroso and Richard Albert (eds), *2020 The International Review of Constitutional Reform (The University of Texas at Austin and the International Forum on the Future of Constitutionalism 2021)* 280-283.

Yen-Tu Su, 'Some Thoughts about the Unconstitutional Constitutional Amendment Doctrine, and Constitutional Dismemberment' in *The Clerk's Office of the Taiwan Constitutional Court (ed), Proceedings of the 2018 International Conference of the Taiwan Constitutional Court: In Celebration of the 70th Anniversary of Constitutional Interpretation (Judicial Yuan 2020)* 267-275.

Yen-Tu Su and Chien-Chih Lin, 'The Constitutional Law and Politics in Taiwan' in David Law, Alex Schwartz and Holning Lau (eds), *Oxford Handbook of Constitutional Law in Asia (OUP forthcoming)*.

Jiunn-rong Yeh, *Constitution of Taiwan: A Contextual Analysis (Hart 2016)*.