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Development of Constitutional Law and Human Rights in Taiwan Facing the New Century

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PREFACE

The evolution of the market-oriented economy and the increase in cross-border transactions have brought an urgent need for research and comparisons of judicial systems and the role of law in the development of Asian countries. The Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) has conducted a three-year project titled “Economic Cooperation and Legal Systems.”

In the first year (FY 2000), we established two domestic research committees: Committee on “Law and Development in Economic and Social Development” and Committee on “Judicial Systems in Asia.” The former has focused on the role of law in social and economic development and sought to establish a legal theoretical framework therefore. Studies conducted by member researchers have focused on the relationship between the law and marketization, development assistance, trade and investment liberalization, the environment, labor, and consumer issues. The latter committee has conducted research on judicial systems and the ongoing reform process of these systems in Asian countries, with the aim of further analyzing their dispute resolution processes.

In the second year (FY 2001), we established two research committees: the Committee on “Law and Political Development in Asia” and the Committee on “Dispute Resolution Process in Asia”. The former committee focused on legal and institutional reforms following democratic movements in several Asian countries. The democratic movements in the 1980’s resulted in the reforms of political and administrative system to ensure the transparency and accountability of the political and administrative process, human rights protection, and the participation of people to those processes. The latter committee conducted a comparative study on availability of the court system and out-of-court systems (namely Alternative Dispute Resolutions), with the purpose of determining underlying problems in the courts. As social and economic conditions drastically change, Asian countries face challenges to establish systems for fairly and effectively resolving the variety of disputes that arise increasingly in our societies.

This year (FY 2002), based on the achievements of the previous years, we carefully reorganized our findings and held a workshop entitled “Law, Development and Socio-Economic Change in Asia” with our joint research counterparts to develop our final outcome of the project. Also, we extended the scope of our joint research and

added some new countries and topics. This publication, titled *IDE Asian Law Series*, is the outcome of latter research conducted by the respective counterparts (Please see the list of publications attached at the end of this volume). The final outcome of the project will be published separately in another series.

We believe that this work is unprecedented in its scope, and we hope that this publication will make a contribution as research material and for the further understanding of the legal issues we share.

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Institute of Developing Economies

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Chapter I

Introduction

1.1. Introduction

The main purpose of this report is to analyze the development of constitutional law and human rights in the post-WWII Taiwan, paying special attention to the changes around the turn of century. In this Chapter, we will first provide a brief review of the historical background, followed by an analytic framework. Then in Chapter II we will analyze the democratization and constitutional amendment process from 1991 to 2000, focusing on the changes in the governmental framework. In Chapter III, we will proceed to discuss the role of judicial review (the Council of Grand Justices) in Taiwan's political transition and constitutional changes. Finally, we will review the liberalization process and the development of human rights since the early 1980s, while keeping an eye on the most recent development after 2000.

1.2. Historical Background

Before further exploring Taiwan's constitutional development, we must first look back to the history and look into the general structure and operational process of constitutional order in practice.

Taiwan's' constitutional history has been written along two lines of story: immigrant society and alien rulers. For Taiwan's inhabitants, the constitutional history of Taiwan has been one of competition and cooperation between the aborigines and immigrants, and among the various groups of immigrants. This part of history dictates the inevitable and enduring tension between the government and the governed.

1.2.1. Pre-1945 Constitutionalism

The development of constitutionalism in Taiwan before the end of World War II could be divided into two stages: early settlement and Japanese colonization. Four

identifiable regimes established in Taiwan during this period: Dutch East India Company, Chinese Cheng Kingdom, Chinese Ching Dynasty and Imperial Japan colonial government.¹

1.2.1.1. Early Settlement (Before 1895)

Before the 17th century, Taiwan was largely inhabited by Taiwanese aborigines, ethnically, linguistically and culturally a subfamily of the Austronesian or Malay-Polynesian peoples. Nevertheless, since hundreds or even thousands of years ago, Taiwan has been occasionally visited by Chinese or Japanese fishermen, sailors, pirates and outlaws. Nowadays, the majority of Taiwan inhabitants consist of Chinese migrants and their descendants. Chinese migrants came mainly after the late sixteenth century. However, it was the Dutch that established Taiwan's first modern political authority, the Dutch East India Company, as a colonial government in 1624.²

Though the Dutch effectively colonized the western plain of Taiwan from 1624 to 1662, their administration did not contribute very much to the introduction of modern, westernized legal or constitutional system into Taiwan.³ From 1662 to 1683, Taiwan was occupied by an exiled Ming Chinese general, Koxinga or Cheng Ch'eng-kung, who established his kingdom on Taiwan to continue resistance against

¹ For a more detailed discussion of this topic, *see generally* Jau-Yuan Hwang, Constitution Change and Political Transition in Taiwan since 1986—The Role of Legal Institutions 11-77 (unpublished S.J.D. dissertation, Harvard Law School, 1995); Jau-Yuan Hwang & Jiunn-rong Yet, *Taiwan*, in CHERYL SAUNDERS & GRAHAM HASSALL eds., ASIA-PACIFIC CONSTITUTIONAL YEARBOOK 1995, Carlton, Australia: Centre for Comparative Constitutional Studies, University of Melbourne, at 279-314 (1997); Tay-sheng Wang, Legal Reform in Taiwan under Japanese Colonial Rule (1895-1945): The Reception of Western Law, Ph. D. dissertation, U. of Washington (1992); University of Washington Press (1999).

² *See generally* John K. Fairbank, *China: A New History* 337 (1992).

³ *See* Wang, *supra* note 1, at 27-36.

the Manchu forces (then and later Ching Dynasty of China). Recognized as an independent kingdom by Europeans, the Cheng Kingdom effectively transformed Taiwan from a former Dutch plantation colony to a Han Chinese settlement colony. Just freed from the Dutch mercantilist colonialism, Taiwan was soon brought under a traditional Chinese feudal administration. Although Cheng Kingdom adopted many Dutch legacies, such as crown fields, taxation and local chief administration, the Cheng rule however marked the beginning of sinicization of Taiwan and its legal system.⁴

After defeating Cheng Kingdom in 1682, Ching China became the first-ever-in-history Chinese government to govern both China and Taiwan simultaneously. It was Ching government that first applied the traditional imperial Chinese legal system to Taiwan. During the loose but discriminatory rule by Ching China from 1682 to 1895, Taiwan gradually developed into a society of traditional Han Chinese culture, but with politically untamed and economically vigorous frontier settlement.⁵ Except for its last ten years (1886-1895) of rule on Taiwan, Ching China did virtually very little but to prevent or suppress any local rebellions or uprisings.⁶ Even during the last ten years, Ching's modernization project in Taiwan did not extend to modernization, *i.e.*, Westernization, of its legal system.⁷ The introduction of modern, Western legal system into Taiwan did not occur until 1895, when Japan seized Taiwan as its first colony.

⁴ *See Id.* at 36-41.

⁵ *See Id.* at 41-65.

⁶ The Ching China established a prefecture on Taiwan under Fukien Province in 1685. Not until 1885 did Taiwan formally become a province of China. *See Fairbank, supra* note 2, at 337.

⁷ *See Wang, supra* note 1, at 62-63.

1.2.1.2. Japanese Colonization (1895 to 1945)

The first written constitution ever applied to Taiwan was the Meiji Constitution of Japan, promulgated in 1889. However, this constitution as applied to Taiwan was really in a nominal sense. Even the Meiji Constitution itself was not a democratic constitution at all. Though legally a part of Japan from 1895 to 1945, Taiwan as a colony was further excluded from the "constitutional rule" in the nominal sense under the Japanese monarchy. For example, Japanese Emperor delegated most of his powers, including legislative and executive powers, to the then Taiwan Governor alone. There was no representative body of any level in Taiwan, not to mention holding of democratic elections. Judicial review of unconstitutional laws and regulations did not exist at all, either in Japan. Individual rights and liberties were rigidly constrained and suppressed by the colonial military first and state police later. It should be too luxurious to call such a colonial rule a "constitutional government" from today's perspective.

Nevertheless, it was only until the late days of Japanese colonial rule did Taiwan and its local elite for the first time perceive the modern concept of legality and a very vague sense of procedural justice, human rights, election, democracy, procedural justice, modern court system, lawyering, etc.

1.2.2. From 1945 to the mid-1980's: The ROC Government on Taiwan

The post-WWII constitutional development of Taiwan has been unique in a couple of ways. First of all, its written constitution was imposed from outside (*i.e.* China) but later gained its own legitimacy locally in Taiwan. Secondly, Taiwan's constitutional transformation has been an accumulated process of incremental changes. Since 1991 Taiwan had gone through six constitutional amendments without making a new constitution in a formal sense. Meanwhile, many significant changes, particularly on human rights issues, were brought about by a variety of forces, including the

judicial decisions and political actions, rather than by formal constitutional revisions. Thirdly, Taiwan democratization has been moving on without an established national identity. On the contrary, Taiwan is still in quest of its own national identity amidst the international isolation and Chinese military threats. In this regard, the national identity issue remains one of the main obstacles lying in the way of Taiwan's moving toward democratic consolidation.

1.2.2.1. Whose Constitution?

The current Constitution of Taiwan did not originate from Taiwan. Instead, it was promulgated in China in 1947 and imposed on Taiwan since then. As a result of Japanese defeat in August 1945, China, then governed by the Republic of China ("ROC") government, took over Taiwan on behalf of the Allied, pursuant to an order issued by General Douglas MacArthur. Two months later, China unilaterally proclaimed Taiwan a province. The decolonization of Taiwan after the World War II did not give Taiwanese any chance to re-construct their constitutional system by themselves. Instead, Taiwan was once again transferred from one power to another through a wholesale transaction agreed among foreign powers.

When China began writing its new constitution, which took effect in December 1947, Taiwan was intentionally excluded from the constitutional rule. It was not until outbreak of the 228 incident⁸ that China changed its mind to allow Taiwan a primitive degree of constitutional rule.

In 1949, the exiled ROC government took refuge on Taiwan, but claiming to continue representing China including Taiwan, Tibet and even Mongolia. It chose to

⁸ *See generally* George Kerr, *Formosa Betrayed* (1965); Mendel, *The Politics of Formosan Nationalism* (1970); Lai, Myers & Wou, *A Tragic Beginning: The Taiwan Uprising of February 28, 1947* (1991).

hold on to the 1947 Constitution in order to support its self-claimed legitimacy. As a result, the 1947 Constitution, designed for China, has since imposed on Taiwan regardless the compatibility problems.

1.2.2.2. Representation Crisis and the Role of the Judiciary

Transplanting the 1947 ROC Constitution from China to Taiwan did not bring democracy to Taiwan. In fact, Taiwan did not hold its first genuine general election until the end of 1991.

The Nationalist ROC government has maintained its claim over China, but acknowledges the fact that a China-wide general election is anything but possible. This position poses dual problems for the government: on one hand, the ROC government needs to justify its claim over China, whose people are no longer able or even willing to elect their representatives for the ROC government on Taiwan; on the other, the ROC government also needs to convince people in Taiwan that the representative structure in the government can appropriately reflect their interests. In the eyes of many native Taiwanese, the Nationalist ROC government is a foreign regime, for lack of local legitimacy.⁹ For the people in China, the Nationalist ROC government is a rebelling regime in exile. Accordingly, since its fleeing to Taiwan in 1949, the Nationalist ROC government has faced a crisis of legitimacy.

In the years following 1949, the ROC government responded to this crisis in two ways. Firstly, it vowed to return to China and to accomplish national unification. Accordingly, time would heal all the embarrassing problems. Secondly, it spared no time in consolidating its powers by imposing martial law rule and other means of

⁹ From the international law perspective, the territorial title of Taiwan, arguably, has remained undetermined after the 1952 San Francisco Peace Treaty, subject to self-determination by all residents in Taiwan. *See e.g.* Lung-chu Chen & W.M. Reisman, Who Owns Taiwan?: A Search for International Title, 81 Yale Law Journal 599 (1972).

political control that penetrated into all levels of the government and all sectors of the society.

As time passed by, the goal of national unification and repressing rule could no longer solve the political crisis. To survive the crisis, the ROC government had to enhance its legitimacy by other means. Max Weber has pinpointed the necessity of legitimacy for domination:

Custom, personal advantage, purely effectual or ideal motives of solidarity do not form a sufficiently reliable basis for a given domination. In addition there is normally a further element, the belief in legitimacy.¹⁰

True, legitimacy is a must for any given governance. But how to define the meaning of legitimacy remains open in the eyes of the Nationalists. Legitimacy further requires a level of commitment from various dimensions as Juan Linz put it:

Democratic legitimacy, ... requires adherence to the rules of the game by both a majority of the voting citizens and those in positions of authority, as well as trust on the part of the citizenry in the government's commitment to uphold them.¹¹

Can a regime claim its legitimacy when the representatives are not subject to periodic and regular reelection at all? In order to solve the legitimacy problem, the ROC government should have launched a constitutional revision. Not surprisingly, things did not happen in this way. The Nationalist ROC government believed that, after retaking Chinese Mainland, it would bring the text of the original 1947 ROC Constitution, intact, back to China. Partly, it used this absurd claim as a *prima facie* evidence to support its claim over the Chinese Mainland. Accordingly, it continuously insisted that the text of the 1947 ROC Constitution never be changed. However, it

¹⁰ Max Weber, *Economy and Society* 213 (Guenther Roth & Claus Wittich eds, 1968).

¹¹ Juan Linz, *Crisis, Breakdown, and Reequilibration*, in Juan Linz & Alfred Stepan eds., *The Breakdown of Democratic Regimes* 17 (1978).

order to cope with the needs of actual control over Taiwan, it chose to promulgate a separate package of laws called “Temporary Provisions Effective During the Period of National Mobilization for the Suppressing of the Communist Rebellion,” which in fact amended the ROC Constitution to a large extent. Meanwhile, the ROC government resorted to the judiciary for adding its own constitutional legitimacy.

Against the backdrop of the no-revision policy, the judiciary was called upon to solve the political crisis of the ROC government. In responding to this political invitation, the Council of Grand Justices, the equivalent of constitutional court in Taiwan, rendered a constitutional interpretation endorsing the position that the representatives elected in China in 1948 should remain in power until reelection was possible (Interpretation No. 31).¹² However, the Council did not provide sufficient rationales for the ruling and there was no dissenting opinion. Consequently, all the representatives elected in China continued to exercise their authority and duty indefinitely as long as reelection remained impossible.

The wisdom of this judicial intervention has been controversial. In facing the representational crisis, a decision had to be made so that the government could continue to function. Knowing the inherent political risk, however, the Nationalist ROC government decided to strengthen its position through the hands of the judiciary. This practice, in the eyes of Juan Linz, has been common for a regime confronting political crisis. He drew attention to:

... the effort to remove highly conflictive issues from the arena of partisan politics by transforming them into legal or technical questions. The aim is to gain time, since legal solutions are notoriously slow. Typically, questions of constitutionality are raised about certain laws and decisions,

¹² Judicial Yuan Interpretation No. 31 of January 29, 1954. For the English translation of this Interpretation, see <http://www.judicial.gov.tw/j4e/doc/31.doc>

and issues are referred to constitutional courts. The legitimacy of having judicial bodies make what are essentially political decisions in a democracy is always doubtful, and in countries where judicial bodies have been established only recently, their judgment is even less likely to be considered binding. ... The result is a lessening of the authenticity of democratic institutions, particularly the power and responsibility of parliament.¹³

Linz is not quite right, however, when he describes the practice as an effort to gain time. The Council rendered its decision swiftly in conformity with the political climate. Once again, the fragility of the judiciary in reacting to political invitation was evident. In hindsight, one can easily draw the conclusion that the Council suffered a serious blow that posed tremendous damage to its own reputation and hence to its function of channeling constitutional changes in a period of political transformation.

The refusal to revise the constitution coupled with representational manipulation posed a serious threat to constitutionalism in Taiwan. The impact of this practice could be summarized as follows:

(1) The national representatives of the Legislative Yuan, Control Yuan, and National Assembly were not subject to reelection or recall. Consequently, all the three national representatives become tenured posts.

(2) The President could serve as many terms as he so desires, as long as the National Assembly continues to vote for him.

(3) The representation of Taiwan residents in the national government was diluted or even suppressed by the presence of representatives elected in China.

Indeed, this practice posed a great challenge to the core meaning of democratic representation. True, there is some room in the definition of representation, given historical, theoretical and practical complications in democratic institutions and

¹³ Linz, *supra* note 11, at 69.

processes. As Nelson Polsby observes:

Only for legislatures in open, specialized regimes is representation a problem. ... For open and specialized regimes, however, there is a problem of finding a formula that adequately related 'openness' to "specialization." ... This dilemma is reflected in two complementary strands in theories of representation. One of these defines representation as action by an agent as if the agent were the people represented in all relevant respects. The other proposes a rule of representation which states that a representative acts for those represented and in their behalf. Under one theory the task of the representatives is solely to ascertain the wishes of the represented; under the other the task is to act in accord with the representative's own view of the best interests of the represented.¹⁴

Having touched upon these complications in the meaning of representation, Polsby finds accountability to be a good substitute:

One popular alternative substitute for the idea of representation [is] the idea of subsequent accountability. A legislature is accountable insofar as its members are subject to frequent, fair, contested elections and hence can be turned out of office if they displease the represented.¹⁵

Accountability is regarded as a key concept of modern constitutionalism. Frequent, fair, and contested elections, in the eyes of Polsby, constitute a key element of accountability. The built-in reelection pressure in modern representative democracy is regarded as a key driving force for legislature's active responsiveness to their constituency, as David Mayhew elaborates.¹⁶ A system of tenured representatives coupled with an iron policy of no constitutional revision amount to the erosion of constitutionalism. It is fair to say that this representational manipulation exceeding any acceptable limit was a major setback to the development of constitutionalism in

¹⁴ Nelson Polsby, *Legislatures*, in Fred Greenstein & Nelson Polsby eds, *Governmental Institution and Process* 298 (1975).

¹⁵ *Id.* at 299.

¹⁶ David Mayhew, *Congress: The Electoral Connection* (1974).

Taiwan before the mid-1980s. It reflected the political expediency that has considerably harmed the development of constitutional democracy on the island. How to improve the functional representation in Taiwan was thus a political issue at the very top of the national agenda.

1.2.2.3. Temporary Provisions, Emergency Rules and Authoritarian Regime

Despite the compatibility problem, the externally imposed Constitution contains constitutionalism that finds no boundary: separation of powers, limited government, accountability, protection of fundamental rights, etc. The irony was that the Nationalist ROC government did not intend to implement the Constitution while holding on to its formal legality.

If suspension of the national legislative elections effectively insulated the ROC government from democratic and indigenous competition, it was the Temporary Provisions¹⁷ that built up the institutional backbone of the ROC government's authoritarian rule on Taiwan. In addition, imposition of martial law decree in 1949 further added up to the bankruptcy of constitutionalism.

Less than six months after the 1947 ROC Constitution took effect, the ROC government asked the National Assembly to adopt the Temporary Provisions in May 1948. Originally, the Temporary Provisions were designed to tackle the civil war between the ROC government and the rebelling Chinese Communist Party. Initially, the Temporary Provisions aimed to expand the President's emergency power for the sake of civil war. However, after the ROC government fled to Taiwan, the Temporary

¹⁷ Temporary Provisions Effective During the Period of Mobilization and Suppression of the Communist Rebellion (1948, as amended 1960, 1966, 1972; repealed 1991) (hereinafter "Temporary Provisions"). Temporary Provisions were adopted by the National Assembly on April 18, 1948 and promulgated by the ROC government on May 10, 1948. Later on they were amended by the National Assembly four times.

Provisions, under the maneuver of the ruling KMT, were amended four times to serve the arbitrary needs of Chiang Kai-shek and his regime. On the book, the ROC government kept the 1947 Constitution as a democratic facade. In practice, the ROC government has made good use of the Temporary Provisions to transform itself into a dictatorial regime, dominated by an all-powerful President. It is noteworthy that, under the Temporary Provisions, there were virtually no checks-and-balances on the presidential powers. The Temporary Provisions made the ROC President, usually also chairman of the KMT, effectively an emperor with unconstrained powers. Under the Temporary Provisions, the ROC President could be re-elected again and again without any term limit. He could exercise extensive emergency powers, without being subject to effective legislative control. A National Security Council was established under the direct leadership of the President, whose members included all governmental positions of importance, such as Vice President, Premier, major cabinet members, heads of the Legislative, Judicial, Control and Examination Yuans, and even the Secretary General of the National Assembly. Via the National Security Council, the President could exercise significant decision-making powers in the name of "national security," which in term extended virtually to anything under the government command. The President was even authorized to issue decrees in the place of statutes, providing for re-organization of government administration and for electing Additional Members to the three national legislative bodies.¹⁸ The Temporary Provisions indeed made possible the ROC President's becoming a lifetime dictator, on the book and in practice.

1.2.2.4. Martial Law Rule and Suppression of Human Rights

Although the 1947 ROC Constitution does contain a detailed list of bill of rights,

¹⁸ See generally Hwang, *supra* note 1, at 33-44.

such rights were hardly taken seriously by the ROC government. Above all, the martial law was the license for abuse. The martial law decree went into effect in Taiwan on May 20, 1949; even before the ROC government was overthrown in China. Until its lifting in July 1987, the 38-year-long martial law rule did intrude into many, if not all, aspects of civilian lives. In essence, the martial law rule triggered three major consequences: (1) military intrusion into administrative and judicial matters, (2) military trial of civilians and brutal punishment of political offenses, and (3) comprehensive state surveillance and infringement of individual rights (*e.g.*, freedoms of speech, assembly, association and movement).¹⁹

1.3. Overview of the Political and Constitutional Changes since the mid-1980's: An Analytic Framework

1.3.1. Major Issues for Constitutional Changes

It was against such a historical and political background that Taiwan started its constitutional reform, beginning from the mid-1980s. In a nutshell, Taiwan faced the following major constitutional issues for reform:

- (1) electoral reform to transform the power base and legitimacy of the ROC government on Taiwan (from an authoritarian and alien regime to a democratic and indigenous one);
- (2) constitutional reform on government structure to institute a limited government in accordance with the principle of separation of powers;
- (3) liberal reform on effective implementation of the bill of rights; and
- (4) transformation of the emigrant ROC government into an indigenous regime, and constitutional redefinition of Taiwan-China relations.

From the legal perspective, the institutional barriers to be overcome included: (1)

¹⁹ *See id.* at 17-30.

the judicial decision (namely the Interpretation No. 31) and Temporary Provisions suspending the general elections, (2) the existing government structure framed under the Temporary Provisions and the 1947 ROC Constitution, and (3) the long-imposed martial law rule.

1.3.2. Piecemeal and Incremental Approach

Had Taiwan's constitutional changes taken on a revolutionary approach, all the institutional barriers abovementioned would have been swept away overnight. Nevertheless, Taiwan's transition has been conducted and, to a great degree, controlled by the ruling regime. In order to maintain its self-claimed legality and legitimacy, the ROC government managed to reform itself through the existing institutional channels. In other words, the reform strategy of the ROC government has been to create new legitimacy for itself without sacrificing its formal legality. It should not be surprising that the ROC government intentionally resorted to various "legal" means to accomplish its constitutional change, and kept resisting the idea of writing a brand new constitution for Taiwan. In terms of time, Taiwan's democratization and constitutional changes have undergone more than a decade since the late 1980s.

1.3.3. Legal Means

In terms of the legal means employed, Taiwan's constitutional changes have involved the following three major mechanisms: constitutional revision, judicial decisions and legislative reform. The ROC government employed different legal means to deal with different issues. For example, abolishing the Temporary Provisions required constitutional revision. Constitutional revision was also needed for reforming the government structure. In solving the general election issue, the ROC government once again resorted to the Council of Grand Justices for its constitutional interpretation, which paved way for further legislative changes. As far as the

individual rights are concerned, lifting of the martial law rule was mainly a political decision, which inevitably necessitated many regulatory reforms. Meanwhile, increasing judicial activism in declaring laws or regulations unconstitutional has proved to be a significant mechanism in protecting individual rights.

1.3.4. Changing Forces

Analyzed by the dynamics, Taiwan's constitutional changes involved three major changing forces: liberalization (concerning relaxation of state control over individual rights), democratization (involving electoral and government structure's reform) and Taiwanization (referring to transformation of the emigrant ROC government and redefinition of Taiwan-China relations). It has been these three forces, interacting with each other, which dictated the internal dynamics of constitutional changes in Taiwan.

1.3.5. Stages of Change

Taiwan's constitutional changes have been a process of incremental and piecemeal transition, rather than a dramatic or overnight shift. The entire process of constitutional changes could be roughly divided into several stages. Through a dynamic process of strategic interaction between the opposition and government, different issues were separately pinpointed and solved, to a new balance of interests of all major power players concerned. Although considerably outlined by the government, the entire process of constitutional changes has no doubt been forcefully pushed, challenged and influenced by the opposition. Through the entire process, all major reform issues were, with no exception, first campaigned by the opposition and later responded by the government. Very often, such interaction resulted in halfway compromises, far from satisfaction.

Generally speaking, Taiwan's constitutional changes thus far could be divided into three major stages: at the first stage from the mid-1980s to 1990, the spirit of liberalization triumphed. From 1990 to 1996, both democratization and Taiwanization

interchangingly dominated the stage, while liberalization continued. After the first direct presidential election in March 1996, democratic reform was roughly completed and yet to be consolidated. At this new stage, Taiwan appears to be much more confident in challenging its diplomatic isolation and seeking a new standing internationally. While at the same time, Taiwan has faced serious internal challenges in trying to consolidate its newly born democracy.

Measured by the reform subjects, Taiwan started its constitutional change with an emerging liberalization movement from within the society to diminish the state control, followed by democratization to transform the power base and internal legitimacy of the ROC government. At the present stage, Taiwan finally launches a careful attempt to affirm its own state identity and external legitimacy in the world.

1.3.5.1. The Pre-1990 Stage: Liberalization

The call for constitutional reform in Taiwan finally triumphed in the air in the mid-1980s. After many years of protests and demonstrations, the opposition formed a new political party in September 1986. This history-breaking event led to lifting of martial law rule in the following July. At this stage, formation of the first opposition party, Democratic Progressive Party ("DPP") and lifting of martial law rule highlighted the relaxation of state suppression of individual rights and liberties. As the 1947 ROC Constitution already provided for a bill of rights, the legitimacy of the Constitution itself was not directly challenged. Accordingly, liberalization reform at this stage only involved necessary legislative and executive actions, or court decisions, when appropriate or needed.

1.3.5.2. The 1990-1996 Stage: Democratization and Taiwanization

Liberalization reform accumulated to directly challenge the legitimacy of the ROC government, particularly the aging and inefficient national legislatures. From the perspective of individual rights, this part of change--electoral reform--could also be

deemed as realization of individual's right to vote. In Taiwan's case, it came to no surprise that the opposition chose the issue of re-election of national legislatures as their democratic breaking point. After years of protests and negotiations, the ROC government finally appealed to the Council of Grand Justices again for solution. Exactly contrary to the case in 1954, the Council this time was asked to rule that re-election was necessary and promised by the Constitution. Citing changing circumstances as the main rationale, the Council in June 1990 handed down its re-interpretation of the aged Interpretation No. 31 and honored the necessity and legitimacy of re-electing the three national legislative bodies (Interpretation No. 261).²⁰ It mandated that all the senior members "retire" by the end of 1991 and re-election be held by the same deadline. In April 1991, the National Assembly wrote this judicial ruling into constitutional amendments. Thus, beginning from December 1991, the ROC government started holding genuine elections on a regular basis, firstly the National Assembly election in December 1991, followed by the Legislative Yuan election the next December.

Electoral reform did not confine itself within the legislative branch. It extended to the executive branch as well. In December 1994, Taiwan held its first direct election of Provincial Governor and two Municipal Mayors (Taipei and Kaohsiung). The first popular presidential election was finally held in March 1996. These direct elections for the executives were made possible through constitutional revisions in 1992 and 1994, respectively. In fact, the issue of direct presidential elections was the focus of constitutional debate during the 1992-94 constitutional amending process.

On constitutional revision, the National Assembly abolished the Temporary

²⁰ Judicial Yuan Interpretation No. 261 of June 21, 1990. For the English translation of this Interpretation, see <http://www.judicial.gov.tw/j4e/doc/261.doc>

Provisions first in April 1991, and enacted a new set of constitutional amendments (called "Additional Articles"). The first ten-article Additional Articles were amended again with eight more articles added in 1992. In 1994, all of the eighteen Additional Articles were amended again and become a new set of ten-article Additional Articles.

The 1991-94 constitutional amendments focused on the reorganization of government structure, among others. Upon promulgation of the 1991 Additional Articles to the Constitution, the President also terminated the so-called "Period of Mobilization and Suppression of Communist Rebellion," and formally ended the state of national emergency. In addition, the 1991 Additional Articles re-instituted the term limit for presidency, restricted the President's emergency power, and attempted to reduce the untamed presidential powers under the Temporary Provisions.

The 1992 and 1994 Additional Articles went further to reform the government structure. On the vertical separation of powers, they formally institutionalized the local self-government by mandating direct election of provincial governor and municipal mayors. On the horizontal separation of powers, these amendments transformed the dictatorial presidential system under the Temporary Provisions into a semi-presidential (or dual-executive) system, to be further revised in the 1997 constitutional amendments. Most of constitutional changes involving government structure were apparently accomplished through constitutional revisions, supplemented by legislative and regulatory changes.

Redefinition of Taiwan-China relations also came across at this stage. Termination of the state of emergency in April 1991 also had its external implication. By doing so, Taiwan indicated its intention to make peace with China and wrote it into constitution. Later Taiwan set up a special governmental department to handle its relations with China, promulgated a special statute governing cross-straits relations, and gradually re-defined "China" to be a foreign state within Taiwan's own legal

system. Since 1993, under the pressure by the DPP and society, the ROC government began to carefully push for its own membership in the U.N, WHO and other intergovernmental organizations. Meanwhile, the ROC government went further to declare its intention to cease competition with the PRC government for “Chinese representation,” and called for peaceful co-existence of two states as two separate “international legal entities.” By and large, Taiwan has regarded China as a “special” foreign state, even though the government has still been playing games on the words.²¹

1.3.5.3. The post-1996 Stage: Democratic Consolidation and Further Taiwanization

In March 1996, Taiwan held its first-ever direct presidential election. In a formal sense, we may conclude that Taiwan had completed its democratization in 1996, as the people of Taiwan have elected both the executive and legislative branches. However, Taiwan’s democracy is yet to be consolidated. Since 1997, there have been three times of constitutional revisions. In 1997, the National Assembly amended the Additional Articles again to further establish the semi-presidential system in Taiwan and freeze the Taiwan Provincial Government as such. In 1999, the National Assembly tried to transform itself into a more legitimate institution by extending its own term of office and changing the electoral method. However, the Council of Grand Justices in its Interpretation No. 499 declared the 1999 Additional Articles

²¹ Over years, the Taiwanese government has used different terms to describe its relations with China, ranging from “One Country, Two Governments,” “One Country, Two Political Entities,” to “Two International Legal Persons.” In July 1999, the former President Lee Teng-Hui openly claimed that the relations between Taiwan and China are “Special State-to-State Relations.” In August 2002, the incumbent President Chen Shui-Bian declared that there has been “One Country on Each Side of the Strait.”

unconstitutional and void. As a result, the National Assembly convened again in April 2000 and adopted another set of constitutional amendments. After the 2000 constitutional amendments, the once-powerful National Assembly faded away from the political stage of Taiwan and is now replaced by the Legislative Yuan. Along with this line of development has been the first ever government alternation or regime change after the 2000 presidential election, with the DPP replacing the KMT to become the ruling party of Taiwan. We will discuss this in more details in the next Chapter.

Chapter II

Democratization of the Government Structure

In this Chapter, we will first analyze Taiwan's government structure under the 1947 Constitution. Then we will proceed to review the different stages of constitutional changes, focusing on the six sets of constitutional amendments from 1991 to 2000.

2.1. Introduction: Institutional Tests of Democratization

Political scientists have used the "selection of a government through an open, competitive, fully participatory, fairly administered election" as the principal institutional criterion of democratization.²² This test entails opening up of government posts, executive or legislative, for elections. However, even if we accept the test of "electoral competition" as the appropriate test of democratization, a democracy of this nature is still far from secured or consolidated. To consolidate a democracy, a state needs further institutional stability. Along with this line, we may predict that, once an authoritarian regime passes the primary test of democratization, inevitably will it face at least two major institutional issues in crafting a new democracy: (1) choice of an electoral system and (2) design of the executive-legislative relations.²³

²² Samuel Huntington, *How Countries Democratize*, 106 *Political Science Quarterly* 579, 582 (1991-92).

²³ See, e.g., Arend Lijphart, *Parliamentary versus Presidential Government* (1992); Matthew Soberg Shugart & John M. Carey, *Presidents and Assemblies* (1992). Here I avoid the use of the term, *separation of powers*, for two main reasons: (1) In a parliamentary system, the executive and legislative powers are fused rather than separated; and (2) An independent judiciary power seems to have become a common institution in modern constitutions. The issue regarding judicial power is rather on how to protect its

The former issue involves design of the electoral system in a given state, such as districting, choice between the proportional representation and plurality vote (*i.e.* one-seat district-based plurality vote). The second issue is a choice of regime type (*i.e.* parliamentary, presidential or semi-presidential). It concerns the division of powers within the government itself for the purposes of protecting the liberties of the people and ensuring an efficient government. On the vertical dimension, there is another important issue regarding the division of powers: central-local relations--a choice between the federal and unitary system.²⁴

In the following sections, we will use the first test of “selecting government through an election” as the institutional test of *ignition* of democratization, and the last three criteria (electoral system, executive-legislative relations and central-local relations) as the institutional tests of *consolidation* of democratization.²⁵

2.2. Taiwan’s Government Structure under the 1947 Constitution

2.2.1. Sun Yat-sen's Theory and the National Assembly

The ROC government has a peculiar framework as provided under the 1947 Constitution. In fact, the 1947 Constitution adopted the theory of Dr. Sun Yat-sen, founding father of the ROC in 1912, which separated the central government into five branches plus a National Assembly and the Presidency. Dr. Sun called the citizen's

independence and autonomy.

²⁴ The issue of central-local relations involves the *vertical* division of powers, and the choice of regime type involves the *horizontal* division of powers. For this reason, we may rephrase this institutional choice as one of *division of powers within the government*.

²⁵ We may recall a famous claim by the French in 1791: "Any society in which the guarantee of the rights is not secured, or the separation of powers not determined, has no constitution at all. "Declaration of The Rights of Man and Citizen of 1791, art. 16, reprinted in Albert P. Blaustein & Jay A. Sigler, *Constitutions That Made History* 85 (1988).

right to vote, to recall, to initiative and to referendum altogether as "political powers," as distinguished from the powers exercised by the government, which he called "administrative powers." Under Sun's theory, the so-called "political powers" of the people shall be entrusted to a National Assembly, whose members are to be elected by the people. The National Assembly is considered the highest political organ of the state, similar to the Supreme Soviet in the former U.S.S.R. All the government branches are to be supervised by the National Assembly.

Apparently, Sun misunderstood the nature of the citizens' right to vote and others. Such rights have to be directly exercised by the people themselves so that they could be called as the "rights of the people." Once they are entrusted to and exercised by a representative institution, these functions could no longer be deemed as individual rights and would have no difference with the governmental powers. In this sense, the National Assembly is exactly part of the government, no more and no less than any other government branches. We found the distinction made by Sun between so-called "political powers" and "administrative powers" ill grounded and not convincing at all. In fact, the National Assembly was indeed a replica of the Supreme Soviet of the former U.S.S.R. Dr. Sun obviously mixed up the ideas of the western representative democracy and the Soviet "Democratic Centralism" to create his own idea of "National Assembly."

Owing to insistence by the KMT, the 1947 Constitution established the National Assembly but reduced its importance. Under the 1947 Constitution, the National Assembly was empowered to amend the Constitution, to elect and recall both the President and Vice President, and to vote on the bills of initiative and referendum. However, since 1947, the National Assembly has never exercised the powers of initiative and referendum. In practice, the actual functions of the National Assembly had been limited to electing the President and amending the Constitution. Taking all

things considered, we should agree with the Interpretation No. 76 issued by the Council of Grand Justices in the sense that the National Assembly was merely one of the three national representative bodies and not a so-called "organ of political powers" under Sun's theory.

The functions and status of the National Assembly did not change very much during the period of 1947-1990. However, the 1991-94 constitutional revisions has transformed the National Assembly into something even farther away from Sun's original idea. In 1994, the National Assembly amended the Additional Articles to allow the direct presidential election. In exchange for its loss of the most important power to elect the President, the National Assembly gave itself the power to confirm the nominees for heads and members of the Judicial, Control and Examination Yuans, as well as all the Grand Justices. This amendment pushed the National Assembly further towards becoming the second house of parliament or even the second parliament. The 1994 constitutional revision also gave rise to another debate over whether to convert the National Assembly into an upper house of the legislative branch, or, as many more strongly argued, whether to abolish the National Assembly. Finally, in 2000, the National Assembly was reduced to be an *ad hoc* institution of symbolic significance. We will discuss this later in the Chapter.

2.2.2. Head of State and the President

The 1947 Constitution provides that the head of state shall be a President. Before 1996, the President was elected by the National Assembly. As a result of the 1994 revision, Taiwan held its first ever popular, direct presidential election in March 1996.

The powers and status of the President under the Constitution has long been a subject of debate. Some argues that the 1947 Constitution itself places the President in a position similar to the head of state under a parliamentary system. However, the 1947 Constitution also gives the President substantial powers that are not merely

symbolic. For example, the Constitution provides that the President could issue emergency decrees, subject to resolutions by the Executive Yuan and legislative approval or affirmation. The President is also entrusted to mediate the disputes among different government branches (Yuans). Above all, the President has to decide whether to approve the Executive Yuan's proposal to veto a bill of legislation or budget passed by the Legislative Yuan. In short, the Constitution itself does not give a clear picture about the exact status of the President.

In practice, the debate over the presidential powers was further complicated by the Temporary Provisions and the ruling KMT's being a quasi-Leninist party. The Temporary Provisions expanded the presidential powers at the expense of the Executive Yuan. In addition, the chairman of the KMT has always been the President, wielding almost unlimited powers in real politics, with only one exception lasting for about two years.²⁶ All of these added up to make the ROC President wield even more real powers in practice than the U.S. Presidents. During the 1991-97 constitutional revisions, the dictatorial powers of the President under the Temporary Provisions were significantly reduced. However, the new revisions still gave the President certain powers to decide those policies involving national security, to nominate many high-ranking government officials (including the Premier) without counter-signatures by the Premier and to issue emergency decrees. In particular, after the direct presidential election in 1996 and the 1997 constitutional revision, it is quite obvious that the current ROC government has been a "dual-executive" or semi-presidential system, rather than any type of parliamentary system.

²⁶ When Chiang Kai-shek died in 1975, his son, Chiang Chin-Up succeeded to become the new Chairman of the KMT, while Mr. Yen China-Kan, then Vice President, succeeded to the presidency. Chiang Ching-Kuo did not become President until 1978.

2.2.3. Five Powers (Yuans) System

Another peculiar design of the 1947 Constitution is the separation of the central government into five branches or five powers. It is again the theory of Dr. Sun. Sun believed that the Western concept of separation of powers was not efficient enough. He distinguished the so-called examination power from the executive power, and the control power from the legislative power. By adding the examination and control powers to the traditional three powers, he created five different and equal branches to exercise these five powers. In the 1947 Constitution, each of the five branches is called Yuan in Chinese.

2.2.3.1. Executive Yuan

Under the 1947 Constitution, the Executive Yuan is the highest executive organ of the state (Article 53), headed by a Premier. The Premier is appointed by the President with the consent of the Legislative Yuan (Article 55). All of the cabinet members are to be appointed by the President, upon the recommendation of the Premier (Article 56). The executive powers, excluding the examination power, are vested in the Executive Yuan. In particular, each law and ordinance promulgated by the President has to be counter-signed by the Premier (Article 37). However, the Executive Yuan is held responsible to the Legislative Yuan for all its policies and proposed bills under the 1947 Constitution (Article 57). To this extent, the Executive Yuan looks somewhat like a cabinet in a parliamentary system.

Nevertheless, the 1947 Constitution does not give the Premier the power to dissolve the Legislative Yuan, nor does it allow the Legislative Yuan to cast a vote of no confidence. Instead, the 1947 Constitution adopts a quasi-veto mechanism similar to the veto system in the U.S. With the approval by the President, the Executive Yuan may ask the Legislative Yuan to reconsider (veto) its resolutions on important policies and statutory, budgetary or treaty bills, while the Legislative Yuan may override the

veto by a two-thirds majority (Article 57). In this case, the Premier has to either accept the new resolution or resign. Under this quasi-veto mechanism, the Executive Yuan may check and balance the decisions made by the majority of the Legislative Yuan with the support of one plus one-third of the Legislators. This mechanism apparently runs squarely against the first principle in any parliamentary system, which mandates “majority rules.”

Given the complicated and ambiguous relations between the President, Executive and Legislative Yuans, there have been fierce debates about the type of regime dated back to the birth of the 1947 Constitution. After the 1991-97 constitutional revisions, this issue has become even more complicated. The 1994 Additional Articles exempted from the requirement of counter-signature by the Premier the President's decrees to nominate the heads and members of the Judicial, Control and Examination Yuans as well as all the Grand Justices. The current Additional Articles also gave the President a vague but extensive decision-making power on matters regarding national security. In addition, the President was allowed to appoint the Premier without the consent of the Legislative Yuan after the 1997 constitutional revision. Plus the emergency power, it is clear that the President of Taiwan does share certain executive powers with the Premier under the Additional Articles. All of these reinforce many people's doubt about whether the Executive Yuan is still the sole, highest executive organ of the state.

2.2.3.4. Legislative Yuan

The Legislative Yuan is the highest legislative organ of the state. Its members are directly elected by the people. The Legislators are to be elected from various multiple-seats districts every three years (Articles 64 & 65) or chosen from the party-lists based on the proportional representation system (Additional Article 3). The powers of the Legislative Yuan are to decide on bills of laws, budget, treaty, declaring

war and other important matters (Article 63). Under the 1947 Constitution, the legislative powers are shared by three organs, the Legislative and Control Yuans, and the National Assembly. In principle, most of the legislative powers, except for the power to amend the Constitution, impeachment, censure and auditing, are vested in the Legislative Yuan. Above all, before 1997 the Legislative Yuan had the power to confirm the nomination of the Premier. As the Executive Yuan is held responsible to the Legislative Yuan, the Premier is obligated to attend the floor meetings of the Legislative Yuan and answer questions asked by the Legislators. In this sense, the Legislative Yuan is more like a parliament in the parliamentary system than a congress in the presidential system.

From the very beginning, the Legislative Yuan has been not the only organ wielding legislative powers. As will be further discussed below, the 1992-4 constitutional revisions once transferred many powers originally belonging to the Control Yuan to the National Assembly, while the powers of the Legislative Yuan remain about the same. Before 2000, many delegates to the National Assembly were eager to promote the idea of bicameralism and proposed to convert the National Assembly into the second house of a new parliament. On the other hand, some proposed a compromise to merge these two representative bodies into a one-house congress. Finally in April 2000, the National Assembly was reduced to be an institution of symbol, due to many complex factors. And the Legislative Yuan has become the only national representative body with real and comprehensive legislative powers. We will discuss this later in the Chapter.

2.2.3.5. Judicial Yuan

The Judicial Yuan is another strange organ in the 1947 Constitution. The Constitution provides that the Judicial Yuan shall be the highest judicial organ of the state (Article 77). However, in practice, the Judicial Yuan itself does not perform any

ad judicatory function on any case, except for constitutional interpretations done by the Grand Justices. The head of the Judicial Yuan has always been a political appointment and very often a non-lawyer. The Judicial Yuan itself is more an administrative organ in charge of court administration and appointment of judicial personnel than a full-fledged court. There has been a debate on the status and functions of the Judicial Yuan, focusing on whether to transform it into a real court, responsible for adjudication of actual cases, including civil, criminal, administrative or even constitutional cases.

Taiwan's court system is divided into two major tracks: Ordinary (Civil and Criminal) Court and Administrative Court. In addition, there are two special judicial institutions: the Commission on Discipline of Public Functionaries and the Council of Grand Justices. The Ordinary Court has three instances: District Court, Appellate Court and Supreme Court. Despite a contrary judicial interpretation made by the Council of Grand Justices in 1960 (Interpretation No. 86), both the district courts and appellate courts were placed under the administrative supervision of the Ministry of Justice, which in terms was under the Executive Yuan, until 1979. Only after 1979 had all of the three instances of Ordinary Courts been placed under the supervision of the Judicial Yuan. The Supreme Administrative Court is a recent product, established in 2000 and acting as the final instance of administrative law cases. Under it, there are four High Administrative Courts around Taiwan. The Commission on Discipline of Public Functionaries is the only legal institution that has jurisdiction in this regard. In early 1996, the Council of Grand Justices handed down the Interpretation No. 396, mandating this Commission should be transformed into a court.²⁷

The Council of Grand Justices is Taiwan's equivalent of constitutional court. It

²⁷ Judicial Yuan Interpretation No. 396 of February 2, 1996.

consists of seventeen Grand Justices, appointed by the President with the consent of the Legislative Yuan now.²⁸ This Council is responsible for deciding constitutional cases and unifying interpretation of laws and regulations in case of any dispute or inconsistency between two government branches. Its function as guardian of the Constitution will be further discussed below.

2.2.3.6. Examination Yuan

Both the Examination and Control Yuans have been part of the unique story about the 1947 Constitution. Dr. Sun promoted these two institutions to demonstrate his creativity. However, the past practice clearly proved he was wrong, not to mention his theoretical defects. Under the 1947 Constitution, the Examination Yuan is the highest examination organ of the state, in charge of examination, employment, service rating, salaries, promotion, transfer, retirement, etc. (Article 83). Therefore the Examination Yuan is not only responsible for holding civil service examinations but all the personnel administration. Originally, the members of the Examination were to be appointed by the President with the consent of the Control Yuan (Article 84). After the 1992 Additional Articles, these members were to be confirmed by the National Assembly. In 2000, the new Additional Articles transferred the confirmation power from the National Assembly to the Legislative Yuan.

Though many agree the civil service examinations shall be held independently from political intervention, very few would further agree that the powers of examination policy and personnel administration should or could be separated from the executive power in general, and attributed to another government branch, equal to

²⁸ Before the 1994 Additional Articles, appointments of the Grand Justices were to be approved by the Control Yuan. From 1994 to 2000, it was the National Assembly that has the power to confirm the nomination of the Grand Justices.

the executive branch. In fact, an independent committee under the Executive branch would be sufficient for carrying out all the functions envisioned by Dr. Sun. That was exactly what happened in practice after the 1947 Constitution took effect. In 1967, the Temporary Provisions authorized the President to establish the Central Personnel Administration under the Executive Yuan. Since then, a lion share of the powers regarding personnel administration was transferred to this Administration. As a result, the Examination Yuan was limited to taking charge of national examinations mainly. Though the Temporary Provisions were abolished in 1991, the ROC government still maintained the Central Personnel Administration up to now. In 1994, the Additional Articles went further to limit the powers of the Examination Yuan to matters concerning examinations, registration, tenure, death pecuniary and retirement of civil service. As to the matters regarding appointment, discharge, service rating, salaries, promotion and transfer, and commendation, the Examination Yuan is only responsible for drafting legislation and issuing regulations concerned. Implementation and enforcement of such polices are now vested in the Central Personnel Administration.

2.2.3.7. Control Yuan

Like the Examination Yuan, the Control Yuan is one of the twin tumors appended to the central government of Taiwan. In the 1947 Constitution, the Control Yuan was designed to exercise the powers of consent, impeachment, censure and auditing (Article 90). In order to carry out its various functions, the Control Yuan could also exercise the power of investigation, too. Accordingly, the Control Yuan used to be a representative body, whose members were to be elected by the provincial assemblies (Article 91). As far as the powers of the Control Yuan are concerned, it is really unlikely to expect an impeachment power, separated from the legislative and budgetary powers, could effectively check and balance the executive or judicial branches. Above all, the Control Yuan alone cannot deliberate and decide on its

impeachment charges. If the President or Vice President is impeached, it is up to the National Assembly to recall him or her. If any other government official, such as the Premier, is impeached, the Control Yuan has to ask the Commission on Discipline of Public Functionaries to decide on such impeachment charges (Article 98-100).

In 1992, the Additional Articles made a dramatic change in the status and powers of the Control Yuan. Under the new constitutional revisions, the members of the Control Yuan are no longer elected by the people. Instead, they are to be appointed by the President with the consent of the National Assembly.²⁹ Consequently, the Control Yuan is no longer a national representative body. Its confirmation power was first transferred to the National Assembly in 1992, and then to the Legislative Yuan after the 2000 constitutional revision. However, the Control Yuan still wields the powers of impeachment, auditing and investigation (Interpretation No. 325). As a result, the Control Yuan is now regarded as a "quasi-judicial" organ, emphasizing its impeachment (quasi-prosecutorial) function.³⁰ Constitutionally, it is really strange to allow a non-legislative organ to exercise the impeachment and investigative power, which in any case should be part of the legislative power.

As a result of the 1991-2000 constitutional revisions, the original five-power government of Taiwan has obviously been transformed into a system of three-big-plus-two-small powers (Yuans).

²⁹ After the 2000 constitutional revision, the members of the Control Yuan are to be confirmed by the Legislative Yuan.

³⁰ It should be a mistake to call the present Control Yuan a "quasi-judicial" organ. Since the impeachment made by the Control Yuan is more like the criminal charge initiated by the prosecutors, it would be more appropriate to call the Control Yuan a "quasi-prosecutorial" organ.

2.2.4. Judicial Review

Judicial review does exist under the 1947 Constitution, but in a peculiar form. The 1947 Constitution vested the power to review unconstitutional laws and regulations in the Judicial Yuan. In practice, it has been the Council of Grand Justices that exercises the judicial review power. However, the Council of Grand Justices is not a court itself, nor is it obligated to hold any public hearings before deciding. The Council proceeds like a committee, usually conducting closed-door secret meetings. It only issues opinions (called "Interpretations") on abstract legal questions ("abstract review"). Its jurisdiction extends to all issues involving interpretation of the Constitution, conflicts in constitutional interpretation among different government branches, and review of constitutionality of laws, regulations or court precedents applicable to a case. However, it cannot adjudicate any real case. All the cases must be presented to the Council in a format of abstract legal issues. In this sense, the Council functions much like a constitutional lawyer for the government.

Petitions to the Council of Grand Justices could be filed either by the government or the private. Only the highest organ of the state, such as the five Yuans or the local governments could file the petition. The private may file petitions only after they have exhausted all the legal remedies. In recent years, cases filed via the latter process have amounted to nearly 90% of the total cases received by the Council yearly. This phenomenon, on one hand, demonstrates the increasing judicial activism in protecting individual rights. On the other hand, it also arouses suspicion by ordinary courts that the Council is acting like the fourth instance of court, a Super-Supreme Court above the Supreme Court and Supreme Administrative Court.

In addition to judicial review, the Council of Grand Justices has another important function: to unify conflicting opinions on laws and regulations among different government branches. In this regard, the Council is indeed on the slipping

slope of becoming a court of the fourth instance above the ordinary courts, as many criticized. For this reason, the Council in recent years has intentionally refrained from issuing the said “unifying interpretations” and focused on its judicial review function.

2.2.5. Local Government

The local government as provided in the 1947 Constitution is basically a unitary system with some colors of federalism. As the 1947 Constitution was written for a huge continental state, China, and not for a small island state, Taiwan, many of its original designs seem unfit for the present and future Taiwan.

First of all, the 1947 Constitution provides for three-tier governments: national, provincial and county (Hsien) governments. Plus one more tier of township under the Hsien in practice, there are altogether four tiers of administration in Taiwan. In terms of efficiency, such a complicated, tier-upon-tier structure has been in many ways a waste of time, manpower and resources. Above all, since the territorial jurisdiction of Taiwan Province and that of the central government highly overlaps with each other (over 90%), many have cast serious doubts on the legitimacy of Taiwan Provincial Government's continuous existence.

Given its unitary fundamentals, the 1947 Constitution does contain many federal elements in terms of division of powers between the central and local governments. Like many federal constitutions, the 1947 Constitution guarantees the local self-government. Both provinces and Hsiens are allowed to adopt their own "Self-Government Charter," an equivalent of local constitution, through a convention process. Besides, the 1947 Constitution provides certain legislative and executive functions be exercised mainly by either provincial or Hsien governments, respectively. Nevertheless, the local governments could exercise no judicial powers. All the judicial powers belong to the central government. Further, none of the local laws or regulations may violate the Constitution, national laws or regulations, unless they are

within the jurisdiction reserved for the local governments by the Constitution.

Although the 1947 Constitution expressly guarantees the local self-government, it was not fully implemented until 1994. From 1949 to early 1990s, the ROC government not only suspended the national legislative elections but also the local elections, particularly that of provincial governor. In practice, Taiwan began holding limited local elections since early 1950s. As far as city and county executives and councilmen were concerned, their elections were held pursuant to an administrative order, which could have been canceled or changed at any time by the Executive Yuan. At the provincial level, only the Provincial Assembly was subject to regular elections since the 1950s. It was in fact part of the strategy of the ROC/KMT government to foster its alien and minority rule on Taiwan. While the ROC government did open up the local governments for electoral competition, it nevertheless excluded the Taiwanese elite from participating in the national politics. It was only until 1992 that did the National Assembly amend the Additional Articles to mandate direct, popular elections of both executive heads and councilmen at the provincial and Hsien governments. Then the Legislative Yuan passed the enabling laws to implement such elections. Accordingly, the first direct election of Taiwan Provincial Governor as well as mayor elections of Taipei and Kaoshiung Municipalities were held in December 1994. Thereafter, local self-government in Taiwan was finally constitutionalized in practice.

2.3. Major Democratization Issues and Proposals

2.3.1. Major Issues

From the late 1980s to 2000, Taiwan's democratization has involved the following major institutional issues: (1) re-election of the national legislature, *i.e.*, the National Assembly, Legislative Yuan and Control Yuan, (2) the method of presidential

elections: from indirect to direct popular election, (3) the executive-legislative relations: choice among the presidential, parliamentary and semi-presidential systems, (4) re-organization of the legislative branch: status of the National Assembly and its relations with the Legislative Yuan, (5) judicial review: choice between a centralized and decentralized systems, (6) choice between five-power or three-power government, *i.e.*, the status of the Examination Yuan and Control Yuan, and (7) the central-local relations: implementation of local self-government. Clearly, the first two issues belong to the first institutional test for ignition of democratization.³¹ The remaining issues involve the choice of regime type and division of powers, vertically and horizontally. Among the above issues, the first two election issues actually dominated the reform process throughout 1994. Before June 1990, the focus of debate was on the re-election of the national legislature. After this issue was settled, the fire of debate soon spread to the issue concerning the method of presidential elections.

Since 1986, debate on the issue of re-election of the national legislature has centered on the pace of reform. As will be discussed below, this issue was resolved by an Interpretation of the Council of Grand Justices in June 1990 and the enactment of new constitutional amendments in 1991. In December 1991, the government held the first general election for the National Assembly and then in December 1992 for the Legislative Yuan. Thereafter the ROC government established its democratic legitimacy on Taiwan for the first time since its takeover in 1945.

³¹ In Taiwan, change in the method of presidential elections is also an issue of ignition of democratization, because the President has possessed real powers either under the TP or Additional Articles. For example, the former President Lee Teng-hui was first elected by the pre-reform National Assembly in March 1990. He was once attacked for lacking political legitimacy as compared to the post-reform national legislature after 1992. It was only until President Lee won a landslide victory in the March 1996 presidential election, did Lee's legitimacy and mandates become consolidated.

Soon after the issue of re-election of the national legislature was settled, the DPP moved on to raise the issue of direct presidential elections³² in an attempt to create political momentum before the National Affairs Conference (NAC) in June-July 1990. Considering its implications for direct democracy and Taiwanization,³³ direct presidential elections has triggered the following institutional impact on the constitution: (1) If the President is elected by a popular vote, the National Assembly would lose its most important power under the constitution.³⁴ In this case, the argument that the institution of the National Assembly should be abolished would become more pervasive.³⁵ (2) A directly elected President would trigger an institutional change in executive-legislative relations that in turn would lead to massive changes in government structure.³⁶ Politically, what the DPP had in mind was the inspiring precedent of the Philippines in 1986. For an opposition party, a direct presidential election is very often the shortest path to the throne of power. Since the DPP first raised this issue at the National Affairs Conference in June 1990, it has

³² Under Article 27, Section 1, Item 1 of 1947 ROC Constitution, the ROC President is to be elected by the National Assembly.

³³ As the population of native Taiwanese accounts for about 85% of total population in Taiwan, direct presidential elections would probably ensure the native Taiwanese's hold to this position.

³⁴ The remaining powers of the National Assembly included those (1) to recall the President and Vice President, (2) to revise the constitution, (3) to vote by referendum on bills of constitutional amendments proposed by the Legislative Yuan, and (4) to change the state territory by resolutions. 1947 ROC Const. Art. 4 & Art. 27, Section 1. All the powers above were rarely exercised. Politically and constitutionally, electing the President and Vice President was the most significant power of the National Assembly.

³⁵ The DPP has long advocating abolition of the National Assembly as such.

³⁶ The DPP and many constitutional scholars have long advocating adoption of three-power system to replace the five-power one under the 1947 ROC Constitution. Also, the DPP has been promoting a massive reform of the entire government structure.

become the DPP's leading campaign platform regarding constitutional reform in early 1990s. All the DPP's other reform proposals were related to this issue.

Both the re-election of the national legislature and change in the method of electing the President required changes in the constitutional text. Consequently, the debate on reform agenda went further to include the choice between revisions and re-writing of the ROC Constitution.

2.3.2. Proposals on Major Democratization Issues

In early 1990s, there have been quite a number of reform proposals made by the opposition, academics³⁷ and social organizations, besides the government's package. The DPP alone has proposed two different draft constitutions before 1994. The first one, *Min-chu-ta-hsien-chang (Democratic Magna Carta)*,³⁸ was published on June 20, 1990, several days before the National Affairs Conference. Obviously, it was released in time as a whole package of party proposals for the purpose of the National Affairs Conference. The major differences between the DMC and the 1947 ROC Constitution³⁹ can be summarized as follows:

(1) The DMC was written as a new Constitution to replace the 1947 ROC Constitution completely,⁴⁰ though it did not bear the title of *Constitution*. It

³⁷ Many proposals made by the academics were valuable in terms of their insights or creativity. See, e.g., Tzu-yi Lin, Tzung-li Hsu & Jiunn-rong Yeh, Proposal for Constitutional Reform (1992); National Policy Research Center, Reform Bill for the ROC Constitution (June 23, 1990). For other proposals, see, e.g., 151 Newsletter of the Taipei Bar Association 1-18, 29-41 (Apr. 5, 1992); 152 Newsletter of the Taipei Bar Association 18-26 (May 5, 1992).

³⁸ For the Chinese text of *Min-chu-ta-hsien-chang (Democratic Magna Carta)* (hereinafter "DMC"), see YUNG-KUANG KAO, HSIU-HSIEN SHOU-TS'E (CONSTITUTIONAL REVISION HANDBOOK) 3-4 (1991), at 93-106.

³⁹ When this draft was released, the KMT has not yet a comprehensive proposal for constitutional revision. I, therefore, use the 1947 ROC Constitution for comparison.

⁴⁰ The Premise of DMC said its purpose was to abolish the TP and freeze the 1947 ROC

consciously avoided use of the term *Constitution* in the hope of minimizing the sentimental opposition against any attempt to write a new constitution.⁴¹

(2) On government structure, the DMC proposed a framework of three-power government, divided into the executive, legislative and judicial branches. The executive power was shared by the President, directly elected by a popular vote,⁴² and the Premier of the Executive Yuan, appointed by the President. (DMC art. 60) Congress shall exercise the legislative powers, and the courts the judicial power. The executive-legislative relations under DMC were quite vague, somehow similar to the actual operation of the ROC government after the 1991 constitution revision. Under the DMC, the President shall chair the cabinet meeting of the Executive Yuan (art. 39), but many of his orders on domestic affairs were to be counter-signed by the Premier and ministers concerned (art. 50). The President possessed emergency powers (art. 47), power to dissolve the Congress (art. 40), power on defense affairs as commander-in-chief (art. 42), power to submit certain congressional bills for national referendum (art. 48) and power to appoint the Premier and ministers (art. 60). However, the President was not held responsible to the Congress. The Executive Yuan was responsible to Congress for daily operation of government policies including examination and personnel affairs. Congress may veto the bills or policies introduced by the Executive Yuan and cast a vote of no confidence. The judicial branch consisted of a Constitutional Court, Administrative Court, and ordinary courts. The details were

Constitution.

⁴¹ On Taiwan-China relations, the DMC implicitly regarded the PRC/China as a separate state by calling for reciprocal respect for each other's sovereignty. The DMC regarded Taiwan as an existing *de jure* state and did not call for self-determination. It did so without touching the sensitive issue of changing state title.

⁴² DMC art. 53.

left for statutory specification. The overall government structure looked somewhat similar to the French semi-presidential system after 1962.⁴³

Nevertheless, the DMC was a short-lived political document. Strategically, the DPP participants and its friends at the National Affairs Conference chose the issue of direct presidential elections as their prime target. After reaching a vague compromise with its KMT counterparts, the DPP soon advanced to campaign for earlier implementation of the direct presidential election. Not long after the National Affairs Conference, the DMC was even forgotten by the DPP itself. Just one year later, the DPP proposed another draft constitution, *T'ai-wan hsien-fa ts'ao-an* (*Draft Constitution of Taiwan*), as its new proposal.⁴⁴

2.4. Six Constitutional Revisions From 1991 to 2000

Taiwan's democratic reform began in the year of 1990, when the Council of Grand Justices ruled that the three national legislative bodies be re-elected by the end of 1991. At the heart of the reform process were a series of constitutional revisions. From April 1991 to April 2000, the ROC Constitution has gone through six times of revisions. All of the six constitutional revisions were conducted by the National

⁴³ On the French semi-presidential system, *see* generally Maurice Duverger, *A New political System Model: Semi-Presidential Government*, 8 *European Journal of Political Research* 165 (1980). Duverger defined a semi-presidential system as a government that has the following three characteristics: (1) Its president is elected by a popular vote, (2) The president possesses quite considerable powers and (3) The prime minister and its cabinet possess executive powers, and they can be removed only if the parliament so wants.

⁴⁴ This draft was first proposed and adopted by an unofficial "People's Constitutional Convention," consisting of 130 delegates, on August 25-26, 1991. On August 28, 1991, the Central Standing Committee of the DPP formally adopted this draft as the party platform for the upcoming December 1991 National Assembly election. Thereafter, the DPP's position on constitutional reform has been based on this draft, with some modifications.

Assembly alone, which had been overwhelmingly dominated by KMT representatives, particularly before 1997.

In April 1991, the National Assembly first abolished the Temporary Provisions (TP) and added ten new amendments, called Additional Articles 1-10, to the 1947 ROC Constitution. In May 1992, the National Assembly passed another eight Additional Articles 11-18. In July 1994, it adopted a new set of ten Additional Articles, which replaced the said 18 Additional Articles altogether.⁴⁵ In 1997, the National Assembly revised the Constitution again and reduced the whole set of Additional Articles to 11 articles. In 1999 and 2000, the National Assembly amended the Constitution based on the 1997 Additional Articles.

2.4.1. 1991 Constitutional Revision

As regards to the government structure, the 1991 constitutional revision made the following changes:

2.4.1.1. Abolition of Temporary Provisions and Termination of the Period of MSCR

After the student demonstration in March 1990 and the NAC in June-July, the government (KMT) and the opposition (DPP) finally reached two tacit agreements on constitutional reform: the TP should be abolished as soon as possible, and the Period of Mobilization and Suppression of Communist Rebellion (Period of MSCR) be terminated accordingly. On May 1, 1991, the then President Lee Teng-Hui promulgated the 1991 Additional Articles 1-10, which replaced the TP. At the same

⁴⁵ Many of the ten Additional Articles passed in 1994 were copied from the amendments passed in 1991 or 1992. They were simply renumbered and consolidated. In order to avoid any possible confusion, I will use the following citation format to refer to each Additional Article from 1991 to 1994: "1991 ROC Const. Additional Art. xx," "1992 ROC Const. Additional Art. xx" and "1994 ROC Const. Additional Art. xx."

time he announced the Period of MSCR would be terminated within one year. Such a move had multi-fold consequences. Internationally, it signaled Taiwan's unilateral ending of the state of war with the PRC/China. By so doing, the ROC/KMT government formally renounced the use of force to achieve the goal of unification with China. Domestically, it ended the state of emergency and brought the state back to a normal situation. All the laws and regulations enacted during the Period of MSCR, unless revised, were due to expire on July 31, 1992,⁴⁶ about fifteen months later. As to democratic reform, its direct consequence was the reduction of emergency power possessed by the President under the TP.

2.4.1.2. Re-Election of the Three National Legislative Bodies

The largest constitutional change mandated in the 1991 constitutional revision was the electoral reform of the three national legislative bodies. After Interpretation No. 261 of the Council of Grand Justices paved the way for compulsory retirement of all life members by the end of 1991, the next step was to provide a new constitutional arrangement for holding general elections. The 1991 Additional Articles 1-5 provided for re-election of all the members of the Second National Assembly, Legislative Yuan and Control Yuan.⁴⁷ The core of reform was as follows:

⁴⁶ 1991 ROC Const. Additional Art. 8.

⁴⁷ In fact, re-election of the members of the Second Control Yuan never took place. Before such an election was due to be held by the end of January 1993, in May 1992, the National Assembly passed the 1992 ROC Constitutional Additional Articles 11-18, which altered the status of the Control Yuan from being a representative body to a "quasi-judicial" organ. Consequently, the members of the Control Yuan were no longer subject to (indirect) elections as provided in the ROC Constitution article 91 and 1991 ROC Constitutional Additional Arts. 3 & 4. Instead, they became government officials, nominated by the President and subject to approval by the National Assembly. 1992 ROC Const. Additional Art. 15 (=1994 ROC Const. Additional Art. 6). After 2000, the nominations of the Member of the Control Yuan are to be confirmed by the Legislative

(1) The members of these legislative bodies are divided into three different categories: district-based representatives, representatives of overseas nationals and representatives-at-large representing the entire country.⁴⁸

(2) The first category of representatives is elected directly by a popular vote. Only the residing citizens of the ROC/Taiwan are entitled to vote and elect such representatives.⁴⁹

(3) Both the representatives of overseas nationals and representatives-at-large are to be elected by way of party-list proportional representation (PR).⁵⁰ The party-list proportional electoral system was introduced into Taiwan for the first time in history.⁵¹

Yuan. 2000 ROC Const. Additional Art. 7, Section 2.

⁴⁸ The third category of representatives-at-large was a requirement by Interpretation No. 261 of the Council of Grand Justices. Its original intent as planned by the KMT government was to dilute the Taiwanization effect as a result of re-election of the national legislature. At first, some hardliners within the KMT once proposed to call the representatives-at-large as “Mainland Representatives.” However, such an idea was defeated for lack of legitimacy.

⁴⁹ There is no “absentee vote” system in Taiwan. Each eligible voter had to reside in his or her household district for at least six months. In July 1994, the minimal residency requirement was reduced to four months. Law Governing Election and Recall of the Public Offices (hereinafter “Election Law”) §15, Paragraph 1.

⁵⁰ Allocation of these seats is based on the ratio of total votes received by each political party. For the formula of allocating these seats, *see* Election Law § 65 Paragraph 3. For a comparative study of the proportional representation system, *see, e.g.*, Larry Diamond & Marc F. Plattner *The Global Resurgence of Democracy* 146-190 (1993); Bernard Grofman & Arend Lijphart, *Electoral Laws and Their Political Consequences* 113-179 (1986); Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* 150-168 (1984).

⁵¹ It was also an enhancement of the status of political parties under the ROC Constitution, because they are the only political associations allowed to nominate candidates for both categories of members-at-large and overseas representatives. Under the one-vote system,

(4) Election of both representatives of overseas nationals and representatives-at-large is based on the election outcome of the first category--district-based members.⁵²

The immediate effects of the above changes were twofold: democratization and Taiwanization of the national legislature. Under this constitutional amendment, all three categories of representatives are to be elected by the Taiwanese constituencies only. Legally and politically, they are completely Taiwan-elected and Taiwan-based representatives. They do represent, and only represent, the constituencies of the ROC/Taiwan, and no longer represent (even claim to represent) China in any sense. This change marked a milestone for Taiwanization of the national legislative bodies in the ROC/Taiwan. It was a watershed for democratic reform, too.

2.4.1.3. Reform of the Presidency

(1) Term Limit on Office of the President and Vice President

One of the major effects of abolishing the TP was that both offices of President and Vice President were again subject to the two-term limit as provided in Article 47 of the ROC Constitution. This removed the possibility of a life president like Chiang Kai-shek.

(2) Emergency Powers of the President

votes cast for independent candidates would be ignored in deciding the seats of representatives-at-large and overseas representatives.

⁵² In most countries where the PR system is adopted, they usually allow the voters to cast two separate ballots: one for the district candidates and the other for the political party. This is the so-called "two-votes" system. In Taiwan, the ROC/KMT government adopted a strange "one-vote" system to prevent the voters from casting their votes for one KMT candidate and the DPP at the same time. For criticism of this one-vote system, *see, e.g.*, Chung Y. Hsu & Parris Chang, *The 1991 National Assembly Election in Taiwan* 37-38 (1992); Shelley Rigger, *The Impact of Institutional Reform on Electoral Behavior in Taiwan* 18-19 (unpublished manuscript, 1994).

Article 1 of the TP allowed the President to initiate emergency decrees without being subject to the procedural restrictions prescribed in Articles 39 or 43 of the ROC Constitution.⁵³ The 1991 Additional Article 7 still reserved such emergency powers for the President while imposing certain procedural restrictions. Likewise, the President still needs a resolution by the Executive Yuan Council in order to take necessary emergency measures. However, such measures are to be presented to the Legislative Yuan for approval. If the Legislative Yuan withholds its approval, such measures are deemed to become invalid immediately. Under this new constitutional arrangement, the President possesses the power to initiate emergency measures, when he deems necessary. The Executive Yuan is to formulate the President's decision and turn it into a concrete policy or enforceable program. The Legislative Yuan is to confirm or revoke the President's initiative. This emergency power is shared among these three offices.

(3) Constitutionalization of Three Extra-Constitutional Institutions

The TP granted the President tremendous powers on policy-making beyond any institutional checks. Under the TP, the President established the National Security Council (NSC) and National Security Bureau. Through the NSC, the President acquired a significant portion of decision-making power institutionally. The Premier was placed under the President as his subordinate, rather than the highest executive post of the state as prescribed in the Article 53 of the ROC Constitution. In addition, the President was also authorized to "make adjustments in the administrative and personal organs of the central government, as well as their organizations" (Article 5 of the TP). On the basis of this provision, the President ordered establishment of the

⁵³ Article 39 of the ROC Constitution provides for the power to declare martial law decrees and Article 43 the power to issue emergency orders.

Personnel Affairs Bureau (PAB) under the Executive Yuan.⁵⁴ This PAB has been responsible for all the civil service at both national and local government levels. It really took away a lion's share of the authorities delegated to the Examination Yuan by the Constitution.

The 1991 constitutional revision did not abolish these three extra-constitutional institutions created by the TP. Instead, it formally constitutionalized them provided that their organic regulations were to be replaced by laws before December 31, 1993.⁵⁵ The 1991 Additional Article 9, § 1 expressly reaffirmed the President's power to "decide major policy guidelines concerning national security" by "establishing the National Security Council and its subsidiary organ, National Security Bureau." With a slight change, the power to set up the PAB was switched from the President to the Executive Yuan.⁵⁶

2.4.1.4. Transitional Arrangements

The 1991 constitutional revision made the following two transitional arrangements:

⁵⁴ Hsin-cheng-yuan jen-shih hsin-cheng-chu chu-chih chang-ch'eng (Organization Rules of the Personnel Affairs Bureau of the Executive Yuan), Jul. 27, 1967.

⁵⁵ 1991 ROC Const. Additional Art. 9. Before 1991, all these three institutions were created by the Presidential decrees under the TP, rather than by the laws passed by the Legislative Yuan.

⁵⁶ 1991 ROC Const. Additional Art. 9, § 2. As the 1991 constitutional revision was carried out by the pre-reform National Assembly, the KMT was able to pass the whole package of its proposal without encountering much difficulty. The only compromise made by the KMT was the legislation deadline for these three institutions. The KMT made this compromise as a perfunctory gesture to the demands of the DPP, which walked out of assembly and waged a massive street demonstration during the session of the National Assembly on April 19, 1991. *See, e.g.*, Christian Science Monitor, April 22, 1991, at 4; Economist, April 20, 1991, at 34; Financial Times, April 19, 1991, § 1, p. 4.

(1) Special Term of and Mandate for the Second National Assembly

The term of the National Assemblymen was six years under the ROC Constitution (Article 28, Paragraph 1). The 1991 Additional Article 5, Paragraph 1 provided a special term for the second National Assembly: a little more than four years.⁵⁷ This special office term was created for the second National Assembly along with a special constitutional mandate: further constitutional revisions. Constitutionally, the National Assembly is the only institution that wields the ultimate authority to revise the constitution.⁵⁸ The 1991 Additional Article 6 expressly prescribed that the President shall convoke an extraordinary session of the Second National Assembly within three months after the election of the Second National Assembly, *i.e.*, by March 18, 1992, to amend the constitution. Under this Article, further constitutional revisions became a constitutional mandate and obligation for the National Assembly to fulfill.⁵⁹

(2) Mandate for Legislative Reform

Article 8 of the 1991 Additional Articles required that all the laws applicable only during the Period of MSCR should be revised before July 31, 1992. After that

⁵⁷ 1991 ROC Const. Additional Art. 5, Section 1 provided that the term of the Second National Assembly shall begin from January 1, 1992, and end as soon as the third National Assembly is convened in 1996 by the President according to Article 29 of the ROC Constitution. The Third National Assembly election was held in March 1996, at the same as the first direct presidential election.

⁵⁸ Under the ROC Constitution Article 27, Section 1, Item 3 and Article 174, all the constitutional amendments are to be passed and adopted by the National Assembly. The Legislative Yuan only has the power to initiate a constitutional amendment proposal subject to approval by the National Assembly (Art. 174, Section 2).

⁵⁹ As the 1991 constitutional revision was done by the pre-reform National Assembly, the ROC/KMT government intentionally scaled down the scope of 1991 constitutional revision to avoid any public antagonists.

time, all such unrevised laws would become invalid.

2.4.1.5. Comments on the 1991 Constitutional Revision

As to democratization, the 1991 constitutional revision ended the state of emergency and brought the state back to a normal civilian rule.⁶⁰ It also initiated the democratization process by opening up the government for electoral participation. As to other institutional designs for a new democracy, the 1991 constitutional revision did not go very far. It reduced the once all-powerful presidency to a less powerful status. However, the institutional relations between the President and the Premier remained obscure and floating, highly contingent on their personal friendship, ideological convergence, etc. The major effect of the above changes on the executive-legislative relations was that Taiwan was finally pulled back from a dictatorial presidential system but stayed at a mixed and confusing juncture, which was somewhere between a presidential and parliamentary system.

2.4.2. 1992 Constitutional Revision

The 1992 constitutional revision was proclaimed by the KMT government as "the second-stage and substantive" constitutional revision. It triggered many significant changes in government institutions, surrounding the issue of direct presidential elections.

2.4.2.1. Election Reform: Method of the Presidential Election and other Changes

(1) Change in the Method of Presidential Elections

Since 1947, the ROC President has been elected by the National Assembly. At the National Affairs Conference of 1990, both the KMT and DPP had already come

⁶⁰ Another important aspect of the 1991 constitutional revision was that it initiated a new "two-Chinas" policy on Taiwan-China relations.

close to agreeing that the President shall be elected by the entire constituencies, while stopping short of stating that it shall be a "direct, popular election." Later, the fire of debate spread into the internal power circle of the KMT as the KMT itself became divided into two camps on the issue: one for direct elections and the other for "delegated direct election." The second camp supported transformation of the National Assembly into an Electoral College.⁶¹ The KMT remained divided on this issue even after the 1992 constitutional revision was finished, though the camp for direct elections had gradually gained the upper hand.⁶² Therefore the 1992 Additional Article 12 only provided:

"Effective from the 1996 election for the ninth-term President and Vice President, both the President and Vice President shall be elected by the entire electorate in the free area of the ROC.

The electoral method for the aforementioned election shall be formulated in the Additional Articles to the Constitution at an extraordinary session of the National Assembly to be convoked by the President before May 20, 1995."...

A final solution to this issue then had to wait for two years until the third-phase constitutional revision in 1994. Nevertheless, the 1992 Additional Article 12 already mandated a change in the method of the presidential elections by May 20, 1995. That meant that the the-existing indirect presidential election by the National Assembly had

⁶¹ In fact, the comparison between the transformed National Assembly under the model of "delegated direct election" and the US Electoral College is indeed misleading. The U.S. Electoral College is an *ad hoc* assembly, which meets only to cast the votes. After voting, it is dismissed. The National Assembly still has other powers, *e.g.*, amending the constitution, and is an instituted constitutional organ.

⁶² For a brief analysis of the debate within the KMT on this issue, *see* BING-NAN LEE, HSIEN-CHENG KAI-KE YU KUO-MIN TA-HUI (CONSTITUTIONAL REFORM AND NATIONAL ASSEMBLY) 58-61 (1994).

to be changed. This was an obligation.⁶³ This obligation started the train of presidential election system towards the direction of direct, popular elections, while it did not announce where to stop.⁶⁴

(2) Term of Office

A related change regarding the presidency was its term of office. The term of President was set for six years in the ROC Constitution (Article 47). The 1992 Additional Article 12 Paragraph 3 shortened that to four years. This change was initiated as part of a reform package regarding the terms of all the elected offices at the national level: President, Vice President, Legislators, and National Assembly Delegates. Its purpose was to reduce the frequency of national elections.⁶⁵ The term of President, Vice President, and National Assemblypersons was shortened from six to four years (1992 Additional Articles 11 § 4 & 12 § 3). However, the National Assembly refused to extend the term of the Legislators from three to four years due to a personal fight and institutional tension between these two national representative

⁶³ See accord Yung-Chi'n Su, Tsou-hsiang hsien-cheng shih-tai (Moving Towards Constitutionalism) 390-393 (1994). But see Nigel Nien-chu Lee, Hsien-fa tseng-hsiu t'iao-wen ti-12-t'iao ti-1-hsiang, ti-2-hsiang chih hsing-chih yu chieh-shih (Nature and Interpretation of the Constitutional Additional Article 12 Sections 1 and 2), 7 Chung-shan she-hui k'e-hsueh chi-t'an (Journal of Sunology) 25-34 (Jun. 1992) (arguing that Art. 12 Section 1 was only a policy guideline and not a constitutional mandate for changing the method of presidential elections).

⁶⁴ In comparative constitutional law, this article seemed quite unusual in that it was a "sunrise clause." It required a change in the future and set a deadline for making that change, while leaving vacuum an important constitutional institution--method of presidential elections.

⁶⁵ The new terms for the President, National Assembly and Legislative Yuan were planned as four years. Had this reform package been passed, the elections for the President, Vice President, National Assemblypersons and Legislators would be held at the same time every four years.

bodies.⁶⁶ This was the only "No" position taken by the National Assembly in response to the KMT in the 1992 constitutional revision.⁶⁷

2.4.2.2. Changes in Government Institutions--Separation of Powers

(1) National Assembly: Expansion of Powers

The real power winner of the 1992 constitutional revision was the National Assembly. Under the 1947 ROC Constitution, the National Assembly had only limited powers. Originally, the framers intended it mainly as a machine for presidential elections, similar to but more than the U.S. Electoral College. Two of its most distinguished powers were to elect the President (every six years) and to amend the constitution (supposedly not often at all). It had no say on the operation of the government, nor did it have any legislative or budgetary powers. Its *raison d'etre* was to serve the needs, both symbolic and practical, of the representative democracy for China, given China's size, population and political culture.⁶⁸

⁶⁶ The personal fight originated from a KMT legislator's commenting on the whole National Assembly and condemning one KMT representative as "trash." In return, the cursed KMT representative denounced his opponent as "cockroach." This quarrel led to more verbal fights. Institutionally, many in the Legislative Yuan have been blaming the National Assembly for abusing its powers and feared that the National Assembly might emerge to be a powerful national legislative body at its expense. *See generally* Lee, *supra* note 41, at 21-22.

⁶⁷ The KMT proposed nine amendments to be added to the ten Additional Articles of 1991. Only this article involving the Legislative Yuan was rejected. That was why the 1992 ROC Const. Additional Articles contained 18 articles altogether.

⁶⁸ National Assembly was also an ideological legacy of Dr. Sun Yet-San. As influenced by the idea and institution of the Supreme Soviet practiced in the former U.S.S.R. in the 1920s, Sun believed that the institution of National Assembly as such was a better choice than either the British Parliament or the U.S. Congress. His fantasy went further to imagine National Assembly as a perfect agent of direct democracy and advocated that the National Assembly should have the *rights* to vote, recall, initiative and referendum. The flaws in Sun's theories have been so obvious: if the people's rights to political participation are to be

In the 1992 Additional Articles, the booty captured by the National Assembly included:

a. Confirmation Power

The 1992 Additional Article 11, Paragraph 1 provided that the following personnel were to be nominated by the President, subject to confirmation by the National Assembly:

(a) The president and vice president of the Judicial Yuan,⁶⁹ as well as all the Grand Justices,

(b) The president and vice president of the Examination Yuan and all its members, and

(c) The total 29 members of the Control Yuan, including its president and vice president.

Before the 1992 constitutional revision, those personnel from both the Judicial Yuan and Examination Yuan were nominated by the President subject to confirmation by the Control Yuan, which acted as one of the three national legislative bodies (ROC Constitution Articles 79 & 84).⁷⁰ The members of the Control Yuan were to be elected by provincial assemblies and municipal councils. Obviously, expansion of the National Assembly's power was done at the expense of the Control Yuan. This change

exercised by an elected body, how could it be a "direct democracy"? In fact, the National Assembly has been a duplicate of the Supreme Soviet under the theory of "Democratic Centralism."

⁶⁹ Both offices of the president and vice president of the Judicial Yuan are political appointments that have been held by politicians rather than lawyers. They are not Grand Justices, but the president sits as chairman, with no vote on constitutional interpretations, at the meetings of the Grand Justices.

⁷⁰ For change in organization and composition of the Control Yuan, see below.

gave the National Assembly a real power with teeth.⁷¹

b. Annual Meetings

Before 1992, the National Assembly was supposed to meet regularly only once every six years in order to elect the President and Vice President, except when convened to amend the constitution at an extraordinary meeting. The 1992 Additional Article 11, Paragraph 3, Item 2 enabled and required the National Assembly to be convened by the President at least once annually, if the National Assembly had not convened for over a year. This new provision paved the way for the National Assembly to transform itself from an "*ad hoc*" institution to a regular governmental institution.

c. Advisory Power to the President

Before 1992, the National Assembly had no say at all in the government decision-making process. It could not even raise any questions about policy or legislation.⁷² The 1992 Additional Article 11, § 3, Item 1 further expanded the powers

⁷¹ Though, confirmation power is a passive power in that the National Assembly can only either reject or approve the nominations by the President and cannot put its own candidates onto those posts.

⁷² The National Assembly' powers to vote on the bills of initiative and referendum were handicapped by the ROC Constitution article 27, Section 2, which provided that: "With regard to the rights of initiative and referendum, except as provided in Items 3 and 4 of the preceding section, the National Assembly shall make regulations pertaining thereto and put into effect, after the above-mentioned two political rights shall have been exercised in more than one half of the *hsiens* (counties) and municipalities of the whole country." This procedural restriction was later relaxed in Article 8 of the Temporary Provisions in 1966: "During the Period of Mobilization and Suppression of Communist Rebellion, the President may, when he deems necessary, convoke an extraordinary session of the National Assembly to discuss initiative or referendum measures." Later, the National Assembly passed a special regulation on the procedures of exercising these two *rights*. Kuo-min ta-hui chuang-chih fu-chueh liang-ch'uan hsin-shih pan-fa (Act on

of the National Assembly by giving it an advisory power to the President. The said clause provided that "*when the National Assembly convenes, it may hear a report on the state of the nation by the President, discuss national affairs and offer its advice to the President.*" Under this clause, the President may be invited to deliver a speech before the National Assembly annually. Furthermore, the National Assembly representatives may discuss and exchange their opinions on national affairs in a general and free style, question the President if they like and offer their suggestions, advice or criticism to the President. The President, however, is not obligated to answer any questions raised by these deputies, nor is he constitutionally or legally obligated to follow any advice he receives.

(2) Adjustment of the Five-Power Government Structure

Whether to change the five-power government structure has been one of the focuses of constitutional revision. Throughout the reform process, the ROC/KMT government has been insisting on maintaining the existing five-power and five-branch government structure in order to minimize the scope of change. However, the 1992 constitutional revision effectively transformed the five-equal-powers into a system of three-big-and-two-small-powers government. Both the Control Yuan and Examination Yuan were transformed into a less powerful status.

a. Re-Characterization of the Control Yuan

Before the 1992 constitutional revision, the Control Yuan had been one of the

Exercise of the Two Rights of Initiative and Referendum by the National Assembly), Aug. 8, 1966. In practice, the National Assembly never exercised its powers of either initiative or referendum. In 1991, Article 8 of the Temporary Provisions was abolished together with other articles. It was not re-adopted into the Additional Articles later. The original restriction as set in Article 27, § 2 of the ROC Constitution was therefore re-enforced until 2000.

three legislative bodies. It had four major powers: consent, impeachment, censure and auditing.⁷³ Its members were elected indirectly by the provincial assemblies and municipal councils.⁷⁴ In 1992, the Control Yuan was re-defined as a quasi-judicial organ and no longer a representative body. Its consent power was transferred to the National Assembly.⁷⁵ The idea was to transform the Control Yuan into an Ombudsman-like constitutional institution in charge of investigating the dereliction of duties or violation of laws by government officials. As a result, the number of its members was fixed at 29. All its members were no longer subject to indirect elections by the local congresses. Instead, they were to be nominated by the President and confirmed by the National Assembly.⁷⁶ Since then, the Control Yuan has no longer been a national legislative body.⁷⁷ The procedural requirements for initiating an impeachment also became more complicated and harder.⁷⁸ This was part of a package

⁷³ 1947 ROC Const. Art. 90.

⁷⁴ The 1991 ROC Const. Additional Art. 3 & Art. 5, § 3 provided for re-election of the Second Control Yuan by January 31, 1993. As a result of the 1992 constitutional revision, the election for the Second Control Yuan never took place.

⁷⁵ 1992 ROC Const. Additional Art. 11, § 1 & Art. 15 § 1.

⁷⁶ 1992 ROC Const. Additional Art. 15, § 2.

⁷⁷ See Judicial Yuan Interpretation No. 325 of Jul. 23, 1993 (holding that the Control Yuan is no longer a national representative body). Therefore the members of the Control Yuan also lost their immunity privileges under the speech or debate clause (1947 ROC Const. art. 101) and privileges against arrests or detainment without permission of the Control Yuan except in case of *flagrante delicto* (1947 ROC Const. art. 102). 1992 ROC Const. Additional Art. 15, § 7. However, the said Interpretation held that the Control Yuan still possessed the same powers of auditing, impeachment, censure and investigation as it did before 1992, despite change in its status.

⁷⁸ To impeach either the President or Vice President, the Control Yuan now needs a proposal by more than one half of all its members, which is to be passed by more than two-thirds of all such members. Then its impeachment motion will be submitted to the National Assembly for approval. 1992 ROC Const. Additional Art. 15, § 5. Under Article 100 of the

reform, which expanded the powers of the President and the National Assembly at the expense of the Control Yuan.

b. Diminishment of the Examination Yuan

The institution of the Examination Yuan was another legacy of Dr. Sun Yet-san, adopted and modified from the Chinese tradition. His original idea was to institute an effective and independent civil service, free from political spoilage or patronage. The KMT wrote his idea into the 1947 ROC Constitution by establishing a separate Examination Yuan. Before soon even the believers of Dr. Sun found out the practical difficulty of implementing his ideas: How could an executive branch function well without any control over the employment, supervision, promotion, or transfer of its employees? As early as 1966, the ROC government had to set up an extra-constitutional institution of Personnel Affairs Bureau (PAB) under the Executive Yuan, which took away much of the powers of the Examination Yuan.⁷⁹ After the 1991 Additional Articles further constitutionalized the PAB, a change in the status and powers of the Examination Yuan seemed inevitable. The 1992 constitutional revision continued this trend and deprived the Examination Yuan of the following powers: *enforcement* of the laws governing employment, discharge, performance evaluation (merits), scale of salaries, promotion, transfer, commendation and award for civil

1947 ROC Constitution, the number for proposing such an impeachment motion used to be just one-fourth of the whole body of the Control Yuan, to be passed by a simple majority. As to impeachment of other public functionaries, the Control Yuan now needs at least two member's proposal, to be passed by a committee of no less than nine members. 1992 ROC Const. Additional Art. 15, § 3 & 4. Before 1992, any member could initiate such an impeachment. 1947 ROC Const. arts. 98 & 99.

⁷⁹ Temporary Provisions art. 5 of Mar. 19, 1966, as amended Mar. 23, 1972. The PAB was formally established by a presidential decree according to the said article on September 16, 1967.

servants. As a result, the Examination Yuan only retained powers on (1) all examination-related matters, (2) all matters related to qualification screening, security of tenure, pecuniary aid in case of death and retirement of civil servants, and (3) *drafting* of the laws governing the said powers already transferred to the PAB.⁸⁰ Such a change practically eliminated the Examination Yuan's control over the civil servants in service, and reduced it to an institution similar to an independent "Civil Service Exams Commission."⁸¹

As both the Control Yuan and Examination Yuan were reduced to two institutions whose powers were politically and constitutionally weaker than the other three branches, the old five-power government has therefore been transformed to a three-big-and-two-small-powers government.⁸² The ROC government now only keeps

⁸⁰ 1992 ROC Const. Additional Art. 14 § 1. It is quite confusing that how drafting and enforcement of the laws governing the said powers transferred to the PAB could be separated this way and still function well.

⁸¹ Other changes regarding the Examination Yuan included: (1) the president, vice president and members of the Examination Yuan are no longer approved by the Control Yuan. They were to be confirmed by the National Assembly, like all the Grand Justices. 1992 ROC Const. Additional Art. 14, § 2 and (2) Abolition of the Provincial Quota System in civil service exams as provided in 1947 ROC Const. Art. 85. 1992 ROC Const. Additional Art. 14, § 3. Under the ROC Constitution, the civil service exams were to be held at each province with different quota for each province. This system has been impractical since the ROC government has only ruled one Taiwan Province and two offshore islands under the old Fukien Province according to the 1947 ROC Const. However, the quota system produced a huge disproportionate impact on the civil service exams, in favor of the mainlanders and their descendants. The pass rate of the mainlander examinees could be as high as 186 times that of the native Taiwanese examinees. *See* Cheng-huan Wang, *T'ai-wan te cheng-chih chuan-hsing yu fan-tui yun-tung (Taiwan's Political Transition and Opposition Movement)* 2(1) T'AI-WAN HSE-HUI YEN-CHIU CHI-K'AN (TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES) 71, 87.

⁸² In Interpretation No. 325, the Council of Grand Justices maintained that the ROC government was still a government of five-powers and five-branches, formally. This

a symbolic form of having "five" branches that has lost its substance in terms of separation of powers.

(3) Changes in the Judicial Branch

There has been no significant change in the judicial branch. The debate on desirability of a decentralized judicial review system like the U.S. one remained intellectually inspiring but not politically significant.⁸³ Within the judicial system, the influence of the traditional civil law system is still prevalent, which favors a centralized judicial review system exercised by a constitutional court. Throughout the reform process, the judicial branch has never been a hot topic of debate.⁸⁴ The only changes in the judicial branch were:⁸⁵ (1) The president, vice president and all the

Interpretation also held that the Legislative Yuan exercise a limited power of investigation to demand original documents from other government branches, subject to the same restrictions as applied to its exercise of the legislative power.

⁸³ Many U.S. trained lawyers advocated a U.S. style judicial review system, but they were not able to create or seize political momentum. *See, e.g.*, TZU-YI LIN, TZUNG-LI HSU & JIUNN-RONG YEH, HSIEN-KAI CHIEN-YEN (PROPOSAL FOR CONSTITUTIONAL REFORM) (1992). This issue will be further discussed in next Chapter.

⁸⁴ *See generally* Lee, *supra* note 41, at 197-212. About one half (572) of the sitting judges in Taiwan once petitioned to the National Assembly to write the following three matters into the amendments: (1) Judicial autonomy: Administration of the courts shall be decided and managed by the entire body of judges at each court; (2) Independent judicial budget: The annual budgetary bill for the judicial branch shall be prepared by the Judicial Yuan itself, instead of the Executive Yuan; and (3) The president and vice president of the Judicial Yuan shall not be political appointments but elected from among the Grand Justices. Lien-he wan-pao (United Evening News), May 25, 1994, at 1 & 3. All these proposals failed.

⁸⁵ The reasons that there were so few reforms done regarding the judicial branch included: (1) The KMT government has always been trying to minimize the scope of reform; (2) In its opinions, many judicial reforms could be achieved through legislative reform; and (3) Even the opposition has not been serious about judicial reform. *See* Lee, *supra* note 41, at 210.

Grand Justices were to be nominated by the President and confirmed by the National Assembly, instead of by the Control Yuan (1992 Additional Article 13, § 1); and (2) A special Constitutional Tribunal, composed of all the Grand Justices, was established to adjudicate cases involving dissolution of unconstitutional political parties.⁸⁶

The real, positive change was brought about by the legislative reform and the decisions of the judicial branch itself. In 1993, the Legislative Yuan revised the "*Law of the Council of Grand Justices of the Judicial Yuan*"⁸⁷ and made the following changes:

a. *Who can apply for interpretations?*

Before 1993, both the national and local governments, including each branch of the national government, may petition to the Grand Justices if they have doubts or disputes with other government institutions about exercise of their constitutional authorities, or suspect a law or regulation is unconstitutional.⁸⁸ After 1993, the new

⁸⁶ This is the only adjudicative function and jurisdiction of the Grand Justices. 1992 ROC Const. Additional Art. 13, § 2. Under the 1992 ROC Const. Additional Art. 13, § 3, "a political party shall be unconstitutional if its goals or activities jeopardize the existence of the Republic of China or free, democratic constitutional order." This provision was modeled after article 21, § 2 of German Basic Law (*Grundgesetz*), which reads "Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality." Taiwanese version of such a system originally was aimed at the independence speech or activities of the DPP. It was the *constitutionalization* of the three conditions as set first by CCK and then incorporated into the National Security Law and other laws.

⁸⁷ The title of this law was changed to "Law on Adjudication of Cases by the Council of Grand Justices of the Judicial Yuan."

⁸⁸ In this capacity, the Council of Grand Justices acts like a legal counsel to the government. No real case or controversy is required and no adversaries, either. Such a function is similar to the "abstract judicial review" function as exercised by the Federal Constitutional Court

law now further allows (a) more than one-third of the total members of the Legislative Yuan,⁸⁹ and (b) the Supreme Court and Administrative Court⁹⁰ to file a petition. Besides, under the old law, any citizens may petition for interpretations if they have exhausted all judicial remedies and still suspect the laws or regulations applied by the courts unconstitutional.⁹¹ The 1993 new law further allowed legal entities (*e.g.*, corporations) and political parties to apply in the same capacity as the said citizens.⁹²

b. *How* are Interpretations made?

In the past, the Council of Grand Justices needed a super-majority of more than three-fourths of Grand Justices present and concurrent in order to pass any Interpretation on a constitutional case.⁹³ This procedural restriction posed a severe

of Germany. *See* Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 15 (1989).

⁸⁹ Law on Adjudication of Cases by the Council of Grand Justices of the Judicial Yuan, Feb. 3, 1993, § 5, cl. 1 (3) (hereinafter "Council Law of 1993"). This new provision was modeled after German Basic Law article 93, § 1, clause 2. (allowing one-third of the *Bundestag* members to bring a case or controversy before the Federal Constitutional Court). This provision may have the effect of *constitutionalizing* many potential political issues. Also, it may induce the opposition party to pursue justice through the judicial means by bringing a test case before the Council of Grand Justices.

⁹⁰ Council Law of 1993, § 5, cl. 2. This is another example of German law's legacy. Federal Constitutional Court Act § 63-67 (Germany). It is called "Concrete judicial review" in Germany. *See* Kommers, *supra* note 74, at 14-15. On January 20, 1995, the Council of Grand Justices made its Interpretation No. 371, which allowed each judge at each level of courts to apply for an interpretation if he or she suspected the laws or regulations in dispute inconsistent with the Constitution. This Interpretation made the Taiwan's judicial review system look more like a German baby.

⁹¹ Law of the Council of Grand Justices of the Judicial Yuan, Jul. 21, 1958, § 4, cl. 1 (hereinafter "Council Law of 1958").

⁹² Council Law of 1993, § 5, cl. 1 (2).

⁹³ *Ssu-fa-yuan chu-chih-fa* (Organic Law of the Judicial Yuan), Mar. 31, 1947, as amended Jun. 24, 1948, Dec. 13, 1957, Jun. 29, 1980, § 6; Council Law of 1958, § 13, para. 1.

constraint on the Council of Grand Justices to function normally, not to mention its political impotence.⁹⁴ Under the 1993 new law, the super-majority requirement was relaxed to two-thirds.⁹⁵ Since then, the Council of Grand Justices has produced more constitutional interpretations than ever.⁹⁶

The legislative reform in 1993 has given the Council of Grand Justices a freer hand in performing its constitutional duty as guardian of the constitution.

2.4.2.3. Changes in Government Institutions--Central-Local Relations

Before reform, the problems with the central-local relations included: (1) implementation of local self-government according to the Constitution,⁹⁷ (2)

⁹⁴ See, e.g., Lawrence Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 AM. J. COMP. L. 509, 522 (1991); Mendel, *Judicial Power & Illusion: The Republic of China's Council of Grand Justices and Constitutional Interpretation*, 2(1) PACIFIC RIM L. & POL'Y J. 157, 174-75 (Win. 1993).

⁹⁵ The said third-fourths requirement was deleted from the *Organic Law of the Judicial Yuan*. The new quorum of two-thirds is now provided in Council Law of 1993, § 14.

⁹⁶ From 1948 to September 1985, the Council of Grand Justices had made only 199 Interpretations. Of them, only 67 were constitutional interpretations (less than two constitutional interpretations per year). The other 132 were unity interpretations, which required only a simple majority of the Grand Justices to pass an Interpretation. Council Law of 1958, § 13, para. 2. From October 1985 to February 1993, before the said restriction was relaxed, there were 113 Interpretations. Of them, there were 99 constitutional interpretations made during 88 months (about one constitutional Interpretation per month). From February 1993 to October 1994, under the new law, the Council made 54 Interpretations, of which 50 were constitutional interpretations (about 2.5 Interpretations per month). The negative impact of such procedural restrictions was apparent. Please see the next Chapter for more detailed discussion on the Council of Grand Justices.

⁹⁷ It included two issues: (1) direct elections of Taiwan Governor and (2) legislation of local elections and local self-government. Under article 113, § 1, clause 2 of the 1947 ROC Constitution, the Governor shall be elected by a popular vote. Since 1947, such elections were never held. In addition, all the local elections held since 1950 were done under

simplification of the government levels and (3) redistribution of powers between the national and local governments.⁹⁸ The first problem was a result of non-enforcement

authorization of the national government--Executive Yuan. In theory, the national government may have cancelled the local elections whenever it wanted. Such a practice and all such administrative regulations were even declared constitutional by the Council of Grand Justices in 1990. Interpretation No. 259 of the Council of Grand Justices, Apr. 13, 1990 (holding that the administrative regulations governing local self-government in the special municipalities were valid but urging the Legislative Yuan to pass a new law to regulate it). As to the distribution of powers between the national and local governments, the national government has controlled tightly the personnel, finance, police, education and practically all other matters. Constitutionally, there was no local self-government at all. For example, article 109, § 7 and article 110, § 6 of the 1947 ROC Constitution provide that both province and county may adopt their own tax regulations to collect local taxes. A national law provided that such local laws on local taxes must be authorized by a *General Act of Local Taxes*, passed by the Legislative Yuan. Until 1991, there had been no such enabling law enacted by the Legislative Yuan. Therefore all the taxes have been decided, imposed, and distributed by the national government alone. The Council of Grand Justices held the entire practice constitutional. Interpretation No. 277 of the Council of Grand Justices, Mar. 22, 1991 (holding the above practice constitutional but urging the Legislative Yuan to pass the law and make a fair distribution of tax revenues between the national and local governments).

⁹⁸ There are four levels of administration in Taiwan: national, provincial, city/county and town. The desirability of both province and town as autonomous local government under the constitution, if implemented, has long been doubted. Given the size of Taiwan and the socioeconomic changes during the past fifty years, division of powers between the national and local governments deserves a re-evaluation today. For example, all the national, provincial and county governments share the powers on education, public health, police, and etc. 1947 ROC Const. art. 108, § 1, cls. 4, 17 & 18, art. 109, § 1, cls. 1 & 10 and art. 110, § 1, cls. 1 & 9. How these powers should be divided in practice would pose a thorny question for the Legislative Yuan (1947 ROC Const. art. 111). In addition, should the local governments be granted certain exclusive powers to reinforce their self-government? Or, should the constitution give the national government more powers to make it stronger and more efficient, given the size and needs of Taiwan, as compared to a large country like the U.S. or China?

of the constitution, while the latter two were caused by the developmental gap between the constitution and the society--transplant of the ROC Constitution from China to Taiwan and the later development. In 1992, the Constitution was amended to the following effects:

(1) On implementation of local self-government, the 1992 Additional Articles provided for a *legalized* local self-government, which was to be regulated by a special statute passed by the Legislative Yuan.⁹⁹ This law shall provide that (a) governor and county executives should be elected directly by a popular vote; (b) Provincial Assembly and county councils should be elected by a popular vote. Both institutions are to exercise the local legislative powers, respectively; (c) the relations between the province and counties shall be regulated by this special statute; and (d) self-government of province shall be supervised by the Executive Yuan and the counties by the provincial government. Based on this amendment, the Legislative

⁹⁹ Under the 1947 ROC Constitution, the Legislative Yuan shall and can only adopt a law that provides for a general guideline for local self-government, *Sheng-hsien tzu-chih t'ung-tse (General Act for Self-Government of Provinces and Counties)*. 1947 ROC Const. art. 108, § 1, cl. 1. Then each province and county have to convene their Constitutional Convention, respectively, to draft a Provincial or County Self-Government Act as their fundamental law--constitution. The details of local self-government are reserved for local legislation and may vary from province to province. The 1992 ROC Constitution Additional Articles by-passed such constitutional requirements and place the local self-government in Taiwan under the legislative control of the national government. By so doing, it avoided the constitution-making process at each province or county as mandated by the 1947 ROC Constitution. A constitution-making process, even if it were carried out at the level of Taiwan province or county only, could have produced a snowballing effect on the national constitutional institutions. Before 1992, the ROC government once attempted to adopt a special law applicable to Taiwan only for the purpose of local self-government. The Council of Grand Justices declared this attempt as lacking constitutional authority. Judicial Yuan Interpretation No. 260 of April. 19, 1990.

Yuan in July 1994 passed *Sheng-hsien tzu-chih fa (Act for Self-Government of Province and Counties)*.¹⁰⁰ Based on the new laws, in December 1994 the ROC government held the first direct elections for Taiwan Governor and for both mayors of Taipei and Kaohsiung cities, respectively.¹⁰¹

(2) On simplification of government levels and redistribution of powers between the national and local governments, the 1992 Additional Articles delegated both matters to the Legislative Yuan. In turn, the Legislative Yuan simply maintained the existing institutions as provided in the 1947 ROC Constitution or practiced in Taiwan during the past forty years.¹⁰²

Briefly, the 1992 Additional Articles maintained and strengthened the unitary nature of local self-government by placing it under a special national legislation. Reform did introduce direct, popular elections for Governor and two municipality mayors. Beyond this, it simply *legalized* the past practice by passing a new law to replace the old administrative regulations.

¹⁰⁰ The Legislative Yuan also passed another special statute for two special municipalities, Taipei and Kaohsiung Cities. *Chih-hsia-shih tzu-chih fa (Act for Self-Government of Special Municipalities)*, July 29, 1994. These two acts are basically the same in terms of the institutional framework for local self-government.

¹⁰¹ In the 1997 Additional Articles, the elections of Taiwan Governor and Provincial Assemblymen were suspended for good. The Legislative Yuan therefore passed a new law, “Local Autonomy Act,” to replace both “Act for Self-Government of Province and Counties” and the “Act for Self-Government of Special Municipalities.”

¹⁰² In fact, the Legislative Yuan even set forth restrictions not provided in the 1947 ROC Constitution. For example, one deputy Governor or mayor and four chief officers in charge of auditing, personnel, police and government ethics are to be appointed according to proper national laws, which provide for specific qualifications. These requirements are written to restrict the power of the directly elected Governor and Mayors. *Act for Self-Government of Province and Counties* § 35, cl. 3. *Act for Self-Government of Special Municipalities* § 30, cl. 3.

2.4.4. 1994 Constitutional Revision: Direct Presidential Election

The 1992 constitutional revision left unresolved the question of presidential elections. Two years later, another extraordinary session of the National Assembly was convened to revise the constitution again, mainly to settle this issue. In addition, the 1994 constitutional revision also revised the last two amendments of 1991 (articles 1-10) and 1992 (articles 11-18). All transitional arrangements (*e.g.*, mandatory expiration of emergency laws by July 1992) were deleted and all the amendments, new or old, were reorganized and renumbered. As a result, the 1994 constitutional revision produced ten amendments to replace the 18 amendments as adopted in 1991 and 1992. On substantive matters, the 1994 constitutional revision made the following changes:

2.4.4.1. Change in Election System: Direct Presidential Elections

As stipulated in the 1992 Additional Article 12, § 1, beginning from the ninth-term presidential election in 1996, both the President and Vice President shall be elected by the entire electorate in Taiwan. It mandated a change in the method of presidential elections. As this amendment's legislative history revealed, the controversy centered on whether the President should be elected by the Taiwanese themselves through a popular vote or by the National Assembly acting as an electoral college. The final solution became clear after the 1992 Legislators elections, where most candidates (KMT or DPP) and voters overwhelmingly advocated or supported a direct, popular presidential election.¹⁰³ As a result, the National Assembly

¹⁰³ Another factor was that a large portion of the main opponents of direct presidential elections within the KMT was swept out after 1993. The non-mainstream faction (mainlanders-conservatives coalition) of the KMT was forced out of power within the KMT after their chief leader, and then the first native Taiwanese Premier, Lien Chan, replaced Premier Hau Pei-Tsun in early 1993. *New York Times*, Feb. 11, 1993, at A11.

encountered fewer troubles in changing the method of presidential elections. The 1994 Additional Article 2, § 1 provides for a new presidential election method as follows:¹⁰⁴

(1) Election Method: Direct, Popular Election

Beginning from the ninth-term presidential election in 1996, both the President and Vice President shall be elected "*directly*" (*emphasis added*) by the entire electorate in the free area of the ROC.¹⁰⁵

Before the convention of the 1994 constitutional amendment, the camp in favor of direct presidential elections had already dominated the National Assembly.

¹⁰⁴ Besides the change in method of electing the President, the 1994 Additional Articles also provided for a new recall system. Under the 1994 Additional Article 2, § 9, the President and Vice President may be recalled by a motion proposed by one-fourth of the total members of the National Assembly, approved by more than two-thirds of its members, and passed by a majority of votes cast by more than one half of all the eligible voters in Taiwan. It seems odd that the motion to recall the President can only be proposed by the National Assembly, given that the President is to be elected by a popular vote. In fact, such a system of recall sounds ideal but unrealistic in practice. For a detailed discussion of the recall device and its experiences in the U.S. (at the state level), see Thomas E. Cronin, *Direct Democracy* 125-156 (1989).

¹⁰⁵ This change triggered a two-fold consequence: democratization and Taiwanization. By opening up the office of the President for direct and popular elections, Taiwan crossed a significant threshold of democratization. The scheduled 1996 presidential election will open the last major government office of significance for electoral competition and give Taiwanese a new right to political participation. By subjecting the presidency to popular elections instead of indirect elections by the National Assembly, it will undoubtedly enhance the accountability of the President towards the general public and institutionalize a regular political check from the bottom up on the President. Particularly, after the 1991-94 constitutional revisions, the President now possesses substantial powers, which are not subject to effective checks and balances. Institution of popular presidential elections becomes the only democratic check on the ROC President now. As far as Taiwanization is concerned, on one hand, direct elections of the President will probably ensure the native Taiwanese' hold to this office, given that the population of native

(2) Plurality Vote

A second issue regarding the presidential election reform concerned the choice between a plurality vote and a majority vote with a possible run-off election. The 1994 Additional Article 2, § 1 adopts the system of a simply plurality vote.¹⁰⁶

2.4.4.2. Changes in Government Institutions

(1) Further Expansion of the Presidential Powers¹⁰⁷

The 1994 Additional Articles gave the President an independent nomination power on all the non-elected offices at the national government, and removes the counter-signature power by the Premier on such presidential nominations.

Under Article 37 of the ROC constitution, any laws promulgated or orders issued by the President required the counter-signatures of the Premier or the concerned ministers of the Executive Yuan. This article highlighted the status of the Executive Yuan as the highest administrative organ of the state, and the parliamentary character of the 1947 ROC Constitution.¹⁰⁸ The 1994 Additional Article 2, § 2 exempted from

Taiwanese accounts for about 85% of the total population of Taiwan. It will be the first time in Taiwan's history that Taiwanese have a chance to choose their own state leader. On the other hand, direct elections of the President will further diminish the ROC government's emotional attachment to China. For the ROC/KMT regime, a President elected directly by the Taiwanese electorate will conclude the last chapter of transformation of the ROC/KMT government from an emigrant to indigenous regime, at a formal sense.

¹⁰⁶ Among those countries whose president is elected by a popular vote, France adopts the majority vote system (with a run-off). South Korea, the Philippines and most of such countries adopt the plurality vote system.

¹⁰⁷ I am saying the presidential powers are expanded in the sense that the 1994 Additional Articles gave the President more powers than the 1947 ROC Constitution did.

¹⁰⁸ Though, the government system under the 1947 ROC Constitution did not fit all the elements of a parliamentary system. For example, the Legislative Yuan cannot cast a vote of no confidence to remove the Premier. The Premier cannot call for dissolution of the

the counter-signature of the Premier all the presidential orders that nominate or remove those personnel who should be confirmed by either the National Assembly or Legislative Yuan under the said article 37 of the Constitution. Such personnel include the Premier himself, Auditor General (both to be confirmed by the Legislative Yuan), president and vice president of the Judicial Yuan, Grand Justices, president, vice president and members of both the Control and Examination Yuans (to be confirmed by the National Assembly then). This change gives the President an independent power to choose any candidate as Premier. Furthermore, the President now can also remove the incumbent Premier at will whenever he considers necessary, even though the appointment of a new Premier is still subject to confirmation by the Legislative Yuan.¹⁰⁹ Though the President is not directly in charge of cabinet meetings and policy-making of the Executive Yuan institutionally, the stake of the office of Premier as well as of the entire cabinet is really in the hands of the President.¹¹⁰

Legislative Yuan. On the contrary, article 57 provides for a weak form of executive-veto and legislative-override similar to the U.S. system. Also, the President's role in nominating the Premier, the president and all Grand Justices of the Judicial Yuan, and the president of Examination Yuan and its members are somewhat dubious. The practice, in fact, indicated an opposite interpretation--presidential system, under the party domination of the KMT.

¹⁰⁹ The 1994 Additional Article 2, § 3 provided that the presidential decree to remove the Premier can only take effect when a new Premier is confirmed by the Legislative Yuan. This provision is modeled after the so-called "constructive vote of no confidence" as provided in article 67, § 1 of German Basic Law, which reads: "The Bundestag can express its lack of confidence in the Federal Chancellor only by electing a successor with the majority of its members and by requesting the Federal President to dismiss the Federal Chancellor"... The purpose is to avoid a possible government vacuum if the candidate nominated by the President is defeated by the Legislative Yuan. However, this provision was never used and soon repealed in 1997.

¹¹⁰ With this independent nomination power, Taiwan's current system would not fit all the three elements of the semi-presidential system as defined by Professor Duverger.

The 1994 Additional Article 2, § 2 also gave the President the power to nominate the heads of the Judicial, Control and Examination Yuans, as well as other members in these three government branches (including all the Grand Justices). All such nominations are also exempted from the requirement of counter-signature by the Premier. If the Presidential nomination power of the Premier indicates a lion's share of executive power for President, the nomination power of the other personnel further gives the President the power of checks-and-balances on those government branches (especially on the judicial branch).

(2) Transformation of the National Assembly

In the 1992 constitutional revision, the National Assembly acquired several material powers, including confirmation power over some government nominations. After the 1994 constitutional revision, the National Assembly lost its power to elect and recall the President and Vice President. In exchange, it acquired the following new status or powers: (1) an institutionalized speaker and (2) legislative power over procedural matters related to exercise of its own powers. Before 1994, the National Assembly had no instituted speaker at all. Each time it convened, it elected up to 85 members from among all its members to form an *ad hoc* "Chairmen Committee" to chair its meetings on a rotated basis. Its rules of procedure were to be regulated by a law passed the Legislative Yuan.¹¹¹ These two minor changes only confirmed transformation of the National Assembly towards a full-fledged legislative body.¹¹²

Duverger, *supra* note 22. According to Duverger's definition, the President shall have no independent power to remove the Premier. The office of the Premier is up to the parliament.

¹¹¹ 1947 ROC Const. art. 34. In fact, the Legislative Yuan delegated this power to the National Assembly itself via the *Organic Law of the National Assembly*, § 13, which was passed by the Legislative Yuan.

¹¹² A new article was added to restrain the increase of pay to the representatives of both the

2.4.5. The 1997 Constitutional Revision: Transition to a Semi-Presidential System

2.4.5.1. The 1996 Presidential and National Assembly Elections

In March 1996, Taiwan held its first ever direct, popular presidential election. Lee Teng-Hui, the KMT-nominated incumbent, won the presidency by a landslide 54% of popular votes.¹¹³ However, the KMT, for the first time in history, failed to secure the three-fourths supermajority of seat share at the National Assembly, which is needed for adopting any constitutional amendment. As a result, soon after Lee took office, he initiated a series of talks among the then three major political parties, leading to the National Development Conference in December 1996.

2.4.5.2. The National Development Conference in December 1996

From December 23rd to 28th 1996, all the three major political parties (KMT, DPP, and New Party) participated in the National Development Conference. During this Conference, both the KMT and DPP seemed to develop a friendly working relation. The two parties finally reached consensus on many critical issues, including transition to a semi-presidential system, transformation of the autonomous Taiwan Provincial Government into a cabinet-level department under the Central Government, and suspension of five different levels of elections.¹¹⁴ As a result, the New Party finally

National Assembly and Legislative Yuan. 1994 ROC Const. Additional Article 7 reads: "The pay and remuneration of the members of the National Assembly and Legislative Yuan shall be regulated by law. Except for the annual adjustment for all government offices, any such law as increasing the pay and remuneration of the said two institutions only shall not go into effect until their next term." This was the Taiwanese version of U.S. Constitutional Amendment XXVII.

¹¹³ There were four "teams" running for the 1996 presidential elections. The DPP-nominated Peng Ming-Min/Frank Hsieh received a second highest vote of 23.9%, followed by Lin Yang-Kang/Hau Pao-Tsun 15% and Chen Lu-An/Wang Ching-Fung 11%.

¹¹⁴ These five elections are elections of the Taiwan Governor, members of the Taiwan Provincial Assembly, Town Executives, Town Councilpersons and Village Executives.

boycotted the Conference. However, the KMT and DPP were still able to iron out the difficulties and reach significant agreements. To many's surprise, James Soong, the then incumbent Governor of Taiwan Province and a close affiliate to the President Lee, initiated a high profile attack at the consensus regarding the suspension of the Taiwan Provincial Government. Soong's resentment continued to accumulate and finally led to his breakaway from the KMT before the 1996 presidential election.

2.4.5.3. The 1997 Constitutional Amendments and Semi-Presidential System

In July 1997, the National Assembly adopted a new set of Additional Articles, mainly based upon the agreements reached between the KMT and DPP at the National Development Conference. Either on the face or in effect, the 1997 Additional Articles brought about the largest ever changes in the government framework, vertically and horizontally. The 1997 constitutional revision formally established a semi-presidential system in Taiwan.

Article 3 of the 1997 Additional Articles allowed the President to appoint the Premier without being subject to the confirmation by the Legislative Yuan. In balance, Article 4, Paragraph 2, Item 3 gave the Legislative Yuan the power to vote on a bill of no confidence on the Premiership and its entire cabinet. If such a bill of no confidence I supported by a majority of the total members, then the President may either choose to dissolve the Legislative Yuan or appoint another Premier.¹¹⁵ Though such a change,

¹¹⁵ Article 4, Section 2, Item 3 of the 1997 Additional Articles provides "3. With the signatures of more than one-third of the total number of Legislative Yuan members, the Legislative Yuan may propose a no-confidence vote against the president of the Executive Yuan. Seventy-two hours after the no-confidence motion is made, an open-ballot vote shall be taken within 48 hours. Should more than one-half of the total number of Legislative Yuan members approve the motion, the president of the Executive Yuan shall tender his resignation within ten days, and at the same time may request that the president dissolve the Legislative Yuan. Should the no-confidence motion fail, the Legislative Yuan may not

arguably, has given the President a full power and discretion to appoint a Premier, the latter is subject to *post hoc* removal at will by the Legislative Yuan.¹¹⁶

Article 4 further reduced, from two-thirds of the present members to a simple majority of the total members, the threshold for the Legislative Yuan to override the veto by the Executive Yuan, as approved by President.¹¹⁷ At the same time, the 1997 Additional Articles deleted the Article 57 Item 2 of the 1947 Constitution¹¹⁸ and

initiate another no-confidence motion against the same president of the Executive Yuan within one year.”

¹¹⁶ The opinions of the politicians and scholars are divided on the issue of whether the President wields the full power and discretion to appoint any Premier he or she prefers. *See, e.g.,* Jau-Yuan Hwang, *Comments on the Executive-Legislative Relations of Taiwan's Central Government After the 1997 Constitutional Revision*, 27 NTU LAW JOURNAL 183-216 (1998) (in Chinese).

¹¹⁷ Article 57, Item 3 of the 1947 Constitution provides that “3. If the Executive Yuan deems a resolution on a statutory, budgetary, or treaty bill passed by the Legislative Yuan difficult of execution, 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 said resolution. If after reconsideration, two-thirds of the Members of the Legislative Yuan present at the meeting uphold the original resolution, the President of the Executive Yuan shall either abide by the same or resign from office.” The said Article 57, Item 3 was replaced by Article 3, Section 2, Item 2 of the 1997 Additional Articles, which provides “2. Should the Executive Yuan deem a statutory, budgetary, or treaty bill passed by the Legislative Yuan difficult to execute, the Executive Yuan may, with the approval of the president of the Republic and within ten days of the bill's submission to the Executive Yuan, request the Legislative Yuan to reconsider the bill. The Legislative Yuan shall reach a resolution on the returned bill within 15 days Yuan be in recess, it shall convene of its own accord within seven days and reach a resolution within 15 days after the session begins. Should the Legislative Yuan not reach a resolution within the said period of time, the original bill shall become invalid. Should more than one-half of the total number of Legislative Yuan members uphold the original bill, the president of the Executive Yuan shall immediately accept the said bill.”

¹¹⁸ Article 57 Item 2 of the 1947 Constitution provides “2. If the Legislative Yuan does not concur in any important policy of the Executive Yuan, it may, by resolution, request the

therefore narrowed the application scope of the veto. The reason for such deletion should be aiming at limiting the power of the Legislative Yuan to intervene, in the form of “resolution” and without passing a formal bill/act, in the important policy decisions made by the Executive Yuan.

As a result, the 1997 Additional Articles formally established a semi-presidential system¹¹⁹ in Taiwan: There is a popularly elected President wielding certain and important powers, including the power to form the government (Executive Yuan), the power to dissolve the legislative branch and decision-making powers on matters involving national security. But the Premier is still responsible for the daily operation of executive branch. It is clearly a dual-executive system. While the Premier is to be appointed by the President at his/her political discretion, the Premier is responsible to the Legislative Yuan and could be removed at will by the latter. Upon any successful vote of no confidence, the President may choose to disband the Legislative Yuan.¹²⁰

Executive Yuan to alter such a policy. With respect to such resolution, the Executive Yuan may, with the approval of the President of the Republic, request 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 President of the Executive Yuan shall either abide by the same or resign from office;”

¹¹⁹ For discussion and criteria of semi-presidential or other hybrid systems, *see* Duverger, *supra* note 22.

¹²⁰ This is a big difference between Taiwanese and French model of semi-presidential system. In France, the President may dissolve the National Assembly (Parliament) at will and at any time, after or before the vote of no confidence on the Premier. The Taiwanese President can, however, disband the Legislative Yuan only after the latter passes a vote of no confidence. Such rigid restriction thus prevents the Taiwanese President from actively breaking the deadlock between the executive and legislative branches, whenever occurring. The enduring deadlock facing President Chen Shui-bian and his Premiers after the 2000 presidential election is surely a phenomenon partially attributable to this institutional design.

Predictably, the Premier and its cabinet would easily fall victim of the power struggles between the President and the Legislative Yuan. It should be fair to conclude that the 1997 Additional Articles enhanced the powers of both the President and Legislative Yuan at the great expense of Premier and the Executive Yuan as a whole.

2.4.6. The 1999-2000 Constitutional Revisions: End of the National Assembly

Since the beginning, the National Assembly has been one of the most salient features of Taiwanese government. Over years, the National Assembly also evolved into the most notorious organ of the central government, mainly for its abusing the amending power. As stated above, the National Assembly has acquired a substantial number of powers at the expense of Control Yuan and even the Legislative Yuan during the 1991-94 constitutional amending process. Yet, the National Assembly has been trying to further expand its powers in the hope of transforming itself into a real house of power: the other house of a bicameral parliament in Taiwan. Nevertheless, the general public does not trust the National Assembly at all. The opposition DPP has long campaigned for abolishing this institution or merging it into the Legislative Yuan.

As the political climate gradually turned against the continuous existence of the National Assembly as such, the National Assembly finally responded to this public concern in the summer of 1999. In August-September 1999, the National Assembly convened to amend the constitution again. After several rounds of negotiations among the political parties, the National Assembly, in early September, passed another set of amendments. In this set of Amendments, the National Assembly aimed to terminate its own institutional life ten years later by changing the mode of its election into a PR-based election and reducing the total number of the National Assembly from 300 (the 4th term) to 150 (from the 5th term on). In balance, the National Assembly extended its own term (for the 3rd term) by two more years. This time, the National

Assembly finally agreed to extend the term of the Legislators from three to four years, partly, in order to match the four-year term of the President. In so doing, the National Assembly simultaneously extended the term of the incumbent (4th term) Legislators for five more months (from January 31 to June 30 of 2002). Consequently, the election of the next (4th) term National Assembly will be held together with the election of the 5th term Legislators in March 2002.¹²¹

Although the 1999 Additional Articles did not intend to abolish the National Assembly as such, they did try to “freeze” or “suspend” the actual operation of the National Assembly election. First of all, there will no longer be any member representing any electoral district and elected by the citizens directly. All of the Delegates will be elected via the “proportional representation” mechanism, to be decided entirely and exclusively based on the name lists proposed by the political parties (including the *ad hoc* coalition of independent candidates). Therefore, Article 1, Paragraphs 1 and 2 of the 1999 Additional Articles provided that, beginning from the 4th term, there will be no “independent” election of the National Assembly. Instead, the Delegates to the National Assembly will be “elected” entirely based upon the electoral outcome of the Legislators election. That is, all the political parties will simultaneously receive their “bonus” seat shares at the National Assembly, in accordance with their vote shares in the Legislators election. Under this formula, the voters will need only to vote for the Legislators, and the outcome of the Legislators election will automatically decide the seat shares of the National Assembly. Thus, there will be no more independent election for the National Assembly, whose existence will be wholly dependent on the Legislative Yuan election.

¹²¹ 1999 ROC Const. Additional Arts. 1 & 4 (declared unconstitutional and void by the Judicial Yuan in its Interpretation No. 499 of March 24, 2000).

The purpose of the 1999 Additional Articles was to reduce the political influence of the National Assembly by subjecting it to the Legislators election and depriving the member of National Assembly of their own constituencies and legitimacy. Such a design was evidently a compromise to the ultimate goal of abolishing the National Assembly as such. However, the extension of the terms of both the Delegates to the National Assembly and Legislators angered an overwhelming majority of the citizens, and seriously weaken the legitimacy of the 1999 Additional Articles.¹²²

Soon after the adoption of the 1999 Additional Articles, many Legislators from all major political parties, owing to political pressure from the general public, petitioned to the Judicial Yuan for constitutional interpretation, seeking to void the said Amendments. One week after the 2000 presidential election, the Council of Grand Justices rendered Interpretation No 499, declaring the 1999 Additional Articles unconstitutional and null and void immediately.¹²³ This Interpretation has been the first and only judicial decision that formally declared any constitutional amendment “unconstitutional.”

Interpretation No. 499 clearly marked the peak of the judicial power in Taiwan. It also indicated a new era was dawning. On March 18, 2000, Taiwanese people elected Mr. Chen Shui-Bian of the DPP to be the new President, and brought the then-ruling KMT to step down. Facing such a historic moment, the DPP and KMT chose to cooperate with each other again and adopted the 2000 Additional Articles.¹²⁴ Along

¹²² In addition, the National Assembly intentionally chose to adopt the 1999 Additional Articles by the method of “secret votes,” contrary to its own practice during the past the fifty years and violative of its own rules of procedure. This procedural flaw also aroused many’s suspicion of the legitimacy of the 1999 Additional Articles.

¹²³ Judicial Yuan Interpretation No 499 of March 24, 2000. For the English translation of this Interpretation, *see* <http://www.judicial.gov.tw/j4e/doc/499.doc>

¹²⁴ One of the political motivations behind the 2000 Amendments was to prevent James Soong

with the spirit of the 1999 Additional Articles, the 2000 Amendments eventually “freeze” the election of the National Assembly by transforming the latter into an *ad hoc* institution with limited powers.

Under the 2000 Additional Articles, the powers of the National Assembly are reduced and limited to three specific items: (1) To vote, in accordance with Article 27, Paragraph 1, Item 4 and Article 174, Item 2 of the Constitution, on Legislative Yuan proposals to amend the Constitution; (2) To vote, in accordance with Article 4, Paragraph 5 of the Additional Articles, on Legislative Yuan proposals to alter the national territory; and (3) To decide, in accordance with Article 2, Paragraph 10 of the Additional Articles, on a bill for the impeachment of the President or the Vice President initiated by the Legislative Yuan.

As a result, the National Assembly will no longer dominate the constitutional amending process in the future. Instead, any constitutional amendments must be proposed by the Legislative Yuan first, and then be presented to the National Assembly for referendum. In this case, we may predict that in the future any attempt to revise the Constitution would be highly difficult.

Furthermore, the election of National Assembly will be held only if there is any of the aforementioned amendment, proposal or bill initiated by the Legislative Yuan. And the delegates to National Assembly will be still chosen from the name-lists proposed by the political parties, based on a proportional representation system. However, the National Assembly will maintain its own election, though no longer a

and his then-newly formed Party, People First Party, from participating in the National Assembly election, and becoming the second largest party (next only to the DPP) in the National Assembly. So the then-fragile KMT soon agreed to adopt the 2000 Additional Articles in order to suspend the coming election of the 4th term National Assembly, which was mandated by the Interpretation No. 499.

regular and periodic one. Once elected, the Delegates to the National Assembly will convene and remain in session for no more than one month.¹²⁵ As a result, the National Assembly would look similar to the Electoral College in the presidential election of the U.S.

While the 1997 Additional Articles formally established the semi-presidential and dual-executive system in Taiwan, the 2000 Additional Articles successfully reduced the once-omnipotent National Assembly to become an institution of symbolic and ad hoc nature. And the Legislative Yuan has become the most dominant and powerful legislative house within the once-tripartite legislative branch.

2.5. The Presidential Elections of 1996 and 2000

Along with the abovementioned constitutional amending process, the political landscape of Taiwan has also undergone dramatic changes. As stated above, the first ever re-election of the National Assembly was held in December 1991. One year later, all the members of the Legislative Yuan were elected in Taiwan. Since then, the legislative branch has been completely Taiwanized. In 1996, Taiwan further held its first ever direct, popular presidential election, in spite of the military threat by China. In a formal sense, it is safe to conclude that the 1996 presidential election completed the final stage of Taiwan's democratization process, particularly for the government structure.

However, Taiwan's new democracy has yet to be consolidated. It was only until the year of 2000 then did the first-ever peaceful regime change or government alternation come to realize in Taiwan. In March 2000, the opposition candidate Chen Shui-Bian won the presidential election and formed a DPP-led government in May 2000. If the 1996 presidential election completed the democratization process of

¹²⁵ 2000 ROC Const. Additional Art. 1 (April 25, 2000).

Taiwan, then the 2000 presidential election will be remembered as the first major and positive step toward consolidation of democracy in Taiwan. Nevertheless, when the consolidation process will come to be secured remains to be watched.

2.6. Conclusion

Many factors will dictate the consolidation process of democracy in Taiwan. As many know well, Taiwan's democratization has been moving forward without first forming a solid consensus on its national identity. And the Chinese military threat remains the biggest force to destroy Taiwan's democracy.

Besides the external factors, Taiwan's democracy has its institutional deficits deeply rooted in its constitutional framework of government. As discussed above, the 1997 Additional Articles established a semi-presidential system in Taiwan. Although the framers of the 1997 Additional Articles did envision a form of co-habitation government as what occurred in France from 1986-88 and 1993-95, a "divided government" of this nature has not yet come into practice. Before the March 2000 presidential election, the KMT kept a secured hold of both the executive and legislative branches. Even after the 2000 presidential election, Chen insisted on forming his "minority governments" against the will of the super-majority in the Legislative Yuan, which was still under the firm control of the KMT and its allies. Given the fact that the ruling DPP has yet to secure a stable majority in the Legislative Yuan, the President's power to appoint the Premier and forming the government has been under constant challenges by the KMT-led opposition coalition. Consequently, Chen's governments have faced serious boycotts in the Legislative Yuan. The controversies arising from suspension of the fourth nuclear power plant from October 2000 to January 2001 was one of the most obvious examples.

In and of its nature, the semi-presidential system is considered a type of regime

that is much more unstable and more dependent on the will of politicians (particularly the President), than both the parliamentary and presidential systems. In Taiwan's case, though the president had the exclusive power to appoint the Premier, the latter is subject to the vote of no confidence by the Legislative Yuan. Therefore, if a Taiwanese President faces a hostile majority in the Legislative Yuan, he and his appointed Premier will very likely be boycotted. On the contrary, the President lacks the necessary powers to break the deadlock between the executive and legislative branches, as what occurred from May 2000 to December 2001. On the other hand, if there is no stable majority in the Legislative Yuan, then the chaotic Legislative Yuan will very likely paralyze the executive branch as well.

Taking all things considered, we may safely conclude that, though Taiwan's democratization has completed, it is yet to be consolidated.

Chapter III

Judicial Development in Taiwan

3.1. The Architecture of Judicial System

The Constitution establishes that the Judicial Yuan is the highest judicial organ in charge of civil, criminal and administrative litigations, disciplinary decisions concerning public officials, as well as constitutional interpretations.¹²⁶ Since its inception, however, the Judicial Yuan has not exercised directly all of its judicial capacities except the interpretative powers. For decades, the Judicial Yuan has served as a supervisory body responsible for judicial administration with the exception of the Council of Grand Justices.

The heads of the Judicial Yuan, the President and Vice President, are appointed by President and consented by the National Assembly.¹²⁷ A number of departments and offices are established in charge of judicial administration, personnel managements, the promulgation of rules and regulations concerning judicial procedures, and the drafts of procedural laws.

These departments include: 1) Civil Department: mainly in charge of administration and management concerning civil litigation and procedures; 2) Criminal Department: mainly in charge of administration and management regarding criminal litigation and procedures; 3) the Department of Administrative Litigation and Public Discipline: mainly in charge of administration and management regarding administrative litigation and discipline procedures; 4) the Department of Judicial

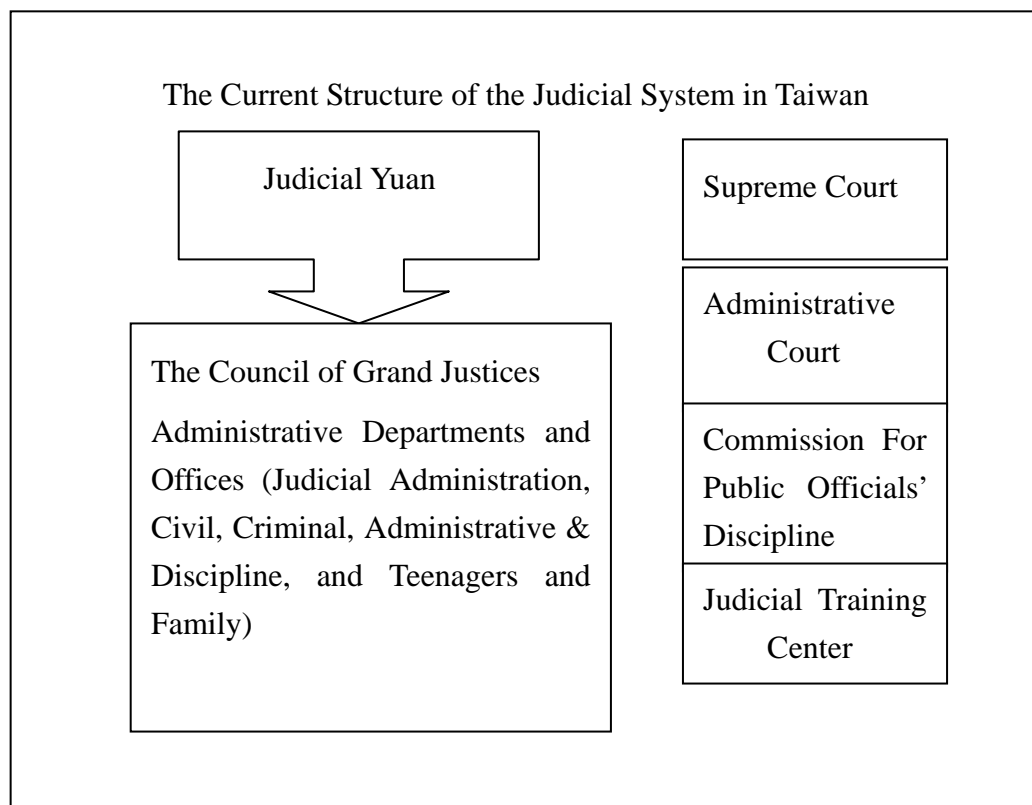
¹²⁶ See Article 77 of the ROC Constitution.

¹²⁷ Starting 2003, however, President and Vice President of the Judicial Yuan will be consented by the Legislative Yuan, as the Constitutional Revision of 2000 suspended the National Assembly and its power to consent was transferred to the Legislative Yuan.

Administration: mainly in charge of administration and management concerning judicial systems, courts organization and the research of proposed judicial rules and regulations; 5) the Department of Teenagers and Family Affairs: mainly in charge of administration and management concerning special procedures and laws relating to teenagers and family affairs.

Outside the Judicial Yuan, it has been the Supreme Court responsible for civil and criminal cases, under which two levels of lower courts are established, the Supreme Administrative Court for administrative litigations, and the Public Commission for disciplinary decisions. Thus, the present arrangement of judicial institutions is not entirely consistent with the original command of the Constitution, requiring the Judicial Yuan as an integrative, highest judicial branch.

The existing structure of the Judicial Yuan may be illustrated in the following picture:



Against this background, the reform efforts to incorporate separate judicial

organs into the same roof of the Judicial Yuan have been undertaken recently. The details, according to which the Judicial Yuan will be remodeled, remain unresolved and require further consensus reached by the legal community. The key question is whether the Judicial Yuan will have separate tribunals, and if so, multiple or dual. A new Judicial Yuan with multiple tribunals in charge of civil, criminal and administrative litigations, disciplinary decisions and constitutional interpretations will be close to the existing system, thus facing fewer objections by entrenched interests. Yet, this rather conservative approach will create an over-sized judicial branch, leaving its institutional efficiency in doubt. An opposite plan will be granting the Judicial Yuan all kinds of jurisdictions without any specialized divisions among them. The new Judicial Yuan will mirror the U.S. Supreme Court and this mirroring, as some are convinced, was intended by the framers. Since this proposal is aggressive, it has been under serious attack and one important suspicion is its feasibility: whether it is feasible for the fifteen Grand Justices in the Judicial Yuan, who at present exercise only the interpretative powers,¹²⁸ to fulfill all judicial responsibilities, and whether it is possible to decrease the number of cases for appellate review, let alone other costs. In the middle ground stands a moderate proposal, in which a dual system will remain in the Judicial Yuan, one constitutional tribunal, the other for other jurisdictions. This proposal seeks to preserve a specialized tribunal especially for constitutional review, as it is believed that based upon the European experiences, a separate constitutional court from the ordinary ones is pivotal to the vibrant exercise of constitutional review. Despite its modesty, this proposal encounters similar criticism regarding the feasibility and whether a particular promotion of constitutional review is consistent

¹²⁸ See Article 78 of the ROC Constitution, Article 5 of the Additional Articles of the ROC Constitution.

with the Constitution.

Which proposal to choose is still to be determined, but when to choose has nevertheless been settled. In the Judicial Reform Conference of 1999, the consensus was reached that the remodeling of the Judicial Yuan must be completed by September of 2003. This deadline was also reaffirmed in a recent constitutional interpretation, in which the inconsistency between the existing judicial institutional arrangements and the original constitutional provisions was condemned.¹²⁹ In addition, the government has announced for several times that the judicial reform is on its high agenda and must be carried out in accordance with relevant constitutional demands. Despite the uncertain scale of reform, it is foreseeable that some measure of judicial remodeling will set forth in the fall of 2003.

3.2. Interpretative Powers and Constitutional Review by the Council of Grand Justices

The 1946 ROC Constitution specifies that the Judicial Yuan shall be responsible for constitutional interpretations as well as unified interpretations of laws and regulations. To carry out this constitutional mandate, the Council of Grand Justices was established as early as 1948 and has functioned since. Besides interpretative powers and judicial review, Grand Justices under the mandate of the 1992 constitutional revision also form a Constitutional Court to adjudicate cases concerning the dissolution of political parties.

3.2.1. The Composition of the Council of Grand Justices

According to the current constitutional provisions and relevant laws, the Judicial Yuan shall have a number of Grand Justices with a renewable term of nine years appointed by the President with the consent of the National Assembly. Since 1948,

¹²⁹ See Interpretation No. 530 of the Grand Justices.

there have been six Councils. The current sixth Council of Grand Justices whose tenure began in 1994 will leave the office by September of 2002.

Effective from September of 2003, as the result of the 1997 constitutional revision, the Judicial Yuan will have only fifteen Grand Justices (including the President and Vice-President of the Judicial Yuan to be selected among them) appointed by the President with the consent of the Legislative Yuan. More importantly, the tenure of Grand Justices will be non-renewable and reduced to only eight years and shall not be renewed. In addition, in order to rejuvenate the Council more frequently, eight Grand Justices including President and Vice President of the Judicial Yuan appointed in September 2003 shall have a shorter term of four years so that half of the Grand Justices will be replaced every four years since.¹³⁰

The Council of Grand Justices: Its Numbers and Tenure			
	Number	Tenure	Renewable
Before Sep. 2003 (1 st ~ 6 th Councils)	No More Than Seventeen	Nine Years	Yes
After Sep. 2003	Fifteen	Eight Years	No

The qualifications for Grand Justices have been prescribed in the Organic Law of the Judicial Yuan since the Council's establishment of 1948. Grand Justices shall have one of the following qualifications:

1. Having Served, with distinguished record, as a justice of the Supreme Court for ten years or more;
2. Having Served, with distinguished contributions, as a member of the Legislative Yuan for nine years or more;
3. Having been a professor of a major law subject at a university for ten years or

¹³⁰ See Article 5 of the Additional Articles of the ROC Constitution.

more with distinguished publications;

4. Having been a judge of the International Court of Justices, or having published an eminent work on public or comparative laws; or
5. Being a person with prominent reputations for legal research and political experiences.

Thus far, throughout the sixth Councils, most Grand Justices come from courts and universities. Almost all of the Grand Justices have had a law degree and on average, one third of them have a Ph.D. degree in law from abroad. The prominent academic record of the Council Grand Justices have attributed to its judicial performances.

3.2.2. The Jurisdiction of the Council of Grand Justices

Basically, the Council of Grand Justices have been in charge of constitutional review, unified legal interpretations and the dissolution of unconstitutional political parties.

3.2.2.1. Centralized Constitutional Review

The Constitution specifies that laws and rules in conflict with the Constitution shall be null and void. When doubts arise about whether laws and rules are in conflict with the Constitution, requests for interpretation shall be made exclusively to the Judicial Yuan, namely, the Council of Grand Justices. According to the current relevant laws, constitutional review by Grand Justices comes from three sources: institutional conflict, constitutional review in abstract, and concrete constitutional complaint.¹³¹

¹³¹ The major law that governs the work of the Council of Grand Justices is the Law Regarding Grand Justices' Adjudication enacted in 1993.

(1) Institutional Conflict

The Council has been delegated with the power to resolve institutional conflicts between various branches of the national government or between national and local governments. Government agencies may petition for constitutional interpretations if they, while executing their powers, have disputes with another agencies in the application of the Constitution. Since 1993, one third of the legislators have been able to petition to the Council of Grand Justices directly. It was a huge step towards the protection of political minorities in the legislature and the number of constitutional petitions by legislators has since increased rapidly.

(2) Abstract Constitutional Review

Most of the constitutional cases before the Council of Grand Justices are about abstract constitutional review including the interpretation of constitutional provisions and, most importantly, the review of constitutionality of concerned laws and regulations. The requests for constitutional review may come from two major avenues: 1) government agencies, including one third of legislators and courts, 2) individuals and political parties.

In the first category, government agencies including local governments, courts and one third of the legislators may petition to the Council of Grand Justices if they have doubts in the application of the Constitution or have suspicions about the constitutionality of concerned laws and rules.

The second category is about constitutional review requested by individuals or political parties. These requests, unlike the first category by government agencies, cannot be made directly without prior proceedings. Before individuals petition to the Council of Grand Justice to review the constitutionality of concerned laws and regulations resulting in the infringements of their protected rights, they must exhaust legal remedies and procedures. Also, because of the abstract nature of constitutional

review, the Council of Grand Justices cannot review facts in individual cases, nor can it render any direct remedies. What the Council is authorized to examine in these individual petitions is merely the constitutionality of the challenged laws and rules.

(3) Concrete Constitutional Complaint

While the current constitutional provisions and laws have not specified the availability of concrete constitutional complaint, one constitutional interpretation rendered by the Council of Grand Justices, Interpretation No. 371, has opened this avenue since 1994. To guarantee the protection of constitutional rights, the Council of Grand Justices has permitted individual judges to file constitutional petitions if they are convinced that the laws and rules they must apply in concrete cases are inconsistent with the Constitution. Before making such a petition, judges must suspend the proceedings and will not reopen it until receiving the constitutional interpretations by the Council.

3.2.2.2. Unified Legal Interpretations

The Constitution delegates the power to unify the interpretations of laws and rules to the Grand Justices of the Judicial Yuan. The requests for unified legal interpretations may come from two resources: 1) government agencies, including courts, 2) individuals and political parties.

The first category has been the major source of Grand Justices' unified legal interpretations. If government agencies, while executing their duties, have found that their interpretations of concerned laws and regulations are in conflict with other agencies' interpretations, they may file the requests to the Council for unified legal interpretations. It is not applicable, however, if the interpretations made by certain agencies must be binding to their subordinated agencies.

Since 1993, the second category, individual request for unified legal interpretation, has been added. Individual may petition to the Council for unified legal

interpretations if they find that the interpretations and applications of the law and rules in their final proceedings are inconsistent with those of other cases concerning the same laws and rules, and such differences amount to the infringement of their constitutionally protected rights.

While the expansion of unified legal interpretations to individual cases has facilitated the protection of constitutional rights, the certainty of legal interpretations and applications in concrete cases is nevertheless hampered. To strike a balance, individual petition for unified legal interpretations may not be granted unless it is brought to the Council of Grand Justices no later than three months after their cases become final.¹³²

3.2.2.3. Dissolution of Political Parties

The Constitution prescribes that a political party shall be declared as unconstitutional if its purpose or its activities endanger the existence of the state or democratic constitutional order. The power to declare political parties unconstitutional and further dissolve them is granted the Constitutional Court formed by Grand Justices.¹³³

The Constitutional Court shall conduct oral proceedings with the presence of three-fourths or more of the total number of the Grand Justices. A judgment to dissolve a political party may be rendered only with the concurrence of two-thirds of the Grand Justices present at the oral arguments. If the concurrence is not reached, a judgment of non-dissolution shall therefore be entered.

3.2.3. The Adjudicative Procedures of the Council of Grand Justices

After a petition enters into the Council, a panel consisting of three Grand Justices

¹³² See Article 7 of the Law Regarding Grand Justices' Adjudication of 1993.

¹³³ See Article 5 of the Additional Articles of the ROC Constitution.

will render the initial review. This panel will either dismiss the case if it fails to meet procedural requirements or draft substantive opinions on its merits. The suggestion of either dismissal or granting review, in the name of the said panel, is then submitted to the regular session of the Council of Grand Justices for further discussion. Grand Justices meet three times per week on Wednesday, Thursday and Friday, and plenary sessions are held every other Friday morning, in which interpretations are voted and announced. Currently, President of the Judicial Yuan, who is not Grand Justice, presides over the plenary sessions without the power to case votes.

According to the Grand Justices' Adjudication Law, constitutional interpretations shall be made with the concurrence of two-thirds of the Grand Justices present at the meeting having a quorum of two-thirds of the total number of the Grand Justices. If it is about the unconstitutionality of concerned rules and regulations or the unification of legal interpretations, the quorum is lessened to the concurrence of more than one half of the Grand Justices present at the meeting having a quorum of more than one half of the total number of the Grand Justices. Dissenting or concurring justices have been permitted to issue separate opinions published together with the majority's interpretations.

The Quorum of Decisions By the Council of Grand Justices				
	Constitutional Interpretations/ Unconstitutional Ruling of Laws	Unconstitutional Ruling of Regulations	Unified Legal Interpretations	Dissolution of Unconstitutional Political Parties
Meeting Quorum	Two-Thirds	One-Half	One-Half	Three-Fourth
Decision Quorum	Two-Thirds	One-Half	One-Half	Two-Thirds

Most of the time, the Council of Grand Justices consider and deliberate cases without opening any oral arguments. Grand Justices may, however, upon request or ex officio, summon the petitioners, their counselors, interested parties concerned or government agencies concerned to present their opinions or conduct investigations. Since the enactment of the 1993 Law Regarding Grand Justices' Adjudication Law, oral arguments may be held in the constitutional courtroom, whenever Grand Justices find necessary.

The first oral argument took place on December 23, 1993, with respect to Interpretation No. 334, in which the Executive and Legislative branches conflicted over whether government funds exceeded the statutory limits.¹³⁴ The Council has since continued to hold numerous oral arguments concerning cases of constitutional significance. For example, Interpretation No. 391 involving a dispute as to whether prosecutors, but not judges, may retain the power to detain suspects,¹³⁵ or Interpretation No. 419 involving whether the Vice President may concurrently hold the office of the Premier.¹³⁶

3.2.4. The Binding Effect of Interpretations by Grand Justices

The ruling of the Council of Grand Justices is binding to all of the concerned government agencies and individuals and become part of constitutional norms. Notably, after the enactment of the 1993 Grand Justices' Adjudication Law, the Council has been granted with the power to execute the interpretations by directing the concerned agencies to take prompt actions.¹³⁷

¹³⁴ Interpretation No. 334 was rendered on January 14, 1994.

¹³⁵ See Interpretation No. 392 (December 22, 1995).

¹³⁶ See Interpretation No. 419 (December 31, 1996).

¹³⁷ See Section 2, Article 17 of the 1993 Adjudication Law.

3.2.4.1. (Un) Constitutional Rulings

As noted earlier, however, the Council of Grand Justices renders constitutional review in abstract and its rulings have not been directly applicable to individual cases. This would certainly reduce the willingness of individuals to file constitutional interpretations, as the result of unconstitutional ruling could not have any effect on their settled cases. To solve this problem, the Council has allowed certain retrials for individuals who successfully challenged the constitutionality or interpretations of concerned laws and rules.¹³⁸

3.2.4.2. Judicial Deadlines

Besides constitutional or unconstitutional rulings, the Council of Grand Justices has employed a distinctive form of constitutional ruling: the imposition of judicial deadline. In this way of judicial ruling, while the Council reached the conclusion of unconstitutionality of the challenged laws and rules, it stopped short of nullifying it immediately. Instead, Grand Justices set up a deadline, a period of six months, a year, or two years and make it clear that the unconstitutional laws or regulations will not become void until that date. The first judicial deadline imposed was in Interpretation No. 218, in which a tax standard remained valid for more than six months after it was found unconstitutional.¹³⁹

This strategy – declaring laws unconstitutional but not void until a set deadline in order to resolve legal uncertainties that might arise from instant nullification – has not been uncommon in comparative constitutional practices.¹⁴⁰ Yet, some have been

¹³⁸ See Interpretation No 177.

¹³⁹ See Interpretation No. 218 (August 14, 1987). See also Lawrence Shao-Liang Liu, *supra* note 84.

¹⁴⁰ For example, the German Constitutional Court has long employed this strategy in order to give enough time for corrective legislative action to take place and on occasion to direct

concerned political impacts and legal consistencies underlying this strategy.

3.2.4.3. Judicial Warnings

Sometimes, when the Council of Grand Justices upholds the constitutionality of challenged laws and regulations, it will issue a judicial warning of the potential unconstitutionality. Again, this has not been rare in comparative constitutional practices. The German Constitutional Court, for example, has from time to time exercised this type of ruling with a great deal of judicial precaution.¹⁴¹ The first case where the Council issued such warning was Interpretation No. 211.¹⁴² Since then, the Council has been inclined to employ this form of constitutional rulings when it has not entered the certainty of unconstitutionality of challenged laws and rules.

3.2.5. The Achievement of the Council of Grand Justices

3.2.5.1 The Incremental Development of the Council

Since its inception in 1948, there have been six Councils, who have together

parliament to adopt a specific solution. In the latter case, the Court is also likely to lay down general guidelines for the parliament to consider new legislation before the set deadline. *See* Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, at 52-4.

¹⁴¹ *See* Donald P. Kommers, *id.*, at 53-4.

¹⁴² *See* Interpretation No. 211 (December 5, 1986). The case concerned a law involving customs and anti-smuggling. The law required suspected smugglers to provide with a large amount of bail bond before they could appeal to courts. If they failed to do so, their appeals would be dismissed automatically. Clearly, as the dissenting opinion pointed out, this measure seemingly overburdened petitioners and unreasonably hampered rights to sue and to be heard in courts guaranteed by Article 16 of the ROC Constitution. To sustain this law, therefore, the Council put a great deal of emphasis on the importance of the anti-smuggling policy that could outweigh the protection of right to sue. Grand Justices also reminded the administrative agency to exercise appropriate discretion given by the law to enforce such stringent measures. In the end, however, the Council warned that this law, while legitimately pursuing anti-smuggling public policy, might need an overhaul to take suspects' right to sue more into account.

rendered more than 550 cases by the end of 2002. More importantly, the last decade witnessed an extraordinary success of the exercise of judicial power by the Council of Grand Justices.

	First Council 1948-1958	Second Council 1958-1967	Third Council 1967-1976	Fourth Council 1976-1985	Fifth Council 1985-1994	Sixth Council 1994-2002
Total Cases Rendered (Cases Petitioned)	79 (658)	43 (355)	24 (446)	53 (1145)	167 (2702)	176 (N/A)
Constitutional Interpretations (Petitioned)	25 (51)	8 (45)	2 (75)	32 (544)	149 (1846)	170 (N/A)
Unified Legal Interpretations (Petitioned)	54 (607)	35 (310)	22 (371)	21 (601)	18 (856)	6 (N/A)

3.2.5.2. The Particular Roles of the Council during the Democratization and Constitutional Reforms

There has been no doubt that the Council of Grand Justices has attributed greatly to political transitions and constitutional reforms.¹⁴³ As the following Figure shows,

¹⁴³ See Lawrence Shao-Liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 AM. J. COMP. L. 509 (1991); Fraser Mendel, *Judicial Power & Illusion: The Republic of China's Council of Grand Justices and Constitutional Interpretations*, 2 PACIFIC RIM. L. & POL. J. 157 (1993); Tsung-Fu Chen, *Judicial Review and Social Change in Post-war Taiwan* 205 (1996) (unpublished JSD dissertation, New York University, School of Law) (on file with author); Jiunn-rong Yeh, *Constitutional Changes, Constitutionalism, and the Rule of Law in Taiwan: The Role of Council of Grand Justices*, paper presented for the Conference on "Transitional Societies in Comparison: East Europe vs. Taiwan" in Prague, May 27-29, 1999 (on file with the author); Sean Cooney, *A Community Changes: Taiwan's Council of Grand Justices and Liberal Democratic Reform*, in *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* 253-80 (Kanishka Jayasuriya ed. 1999); Thomas Benjamin Ginsburg, *Growing*

the first four Councils in almost four decade rendered only five cases where the challenged rules declared inconsistent with the Constitution. In sharp contrast, the fifth Council alone annulled suspected laws and regulations in 42 cases.

Similarly, the current sixth Council, by the end of 2000, has proved itself to be progressive and active. Since 1994, this prolific Council has invalidated unconstitutional laws and regulations in more than 53 cases and it annually rendered about 30 cases. The ratio of the Council’s judicial invalidation of statutes and rules has been as high as 40 percent.¹⁴⁴

	First Council 1948-1958	Second Council 1958-1967	Third Council 1967-1976	Fourth Council 1976-1985	Fifth Council 1985-1994	Sixth Council 1994-2000
Total Cases Rendered (Petitioned)	79 (658)	43 (355)	24 (446)	53 (1145)	167 (2702)	153 (1606)
Declaring laws or Regulations Unconstitutional	0	1	0	4	42	56

The reason for the judicial activism displayed by the recent Council of Grand Justices is related to its roles during the Taiwan’s democratization in the early 1990s and succeeding constitutional reforms. While the legitimating judicial role often occurs in the initial stage of democratization, judicial roles as either coordinator in resolving constitutional inconsistencies or institutional conflicts generated by incremental constitutional reforms or protector in ensuring the rule of law and

Constitutions: Judicial Review in the New Democracies (Korea, Taiwan, China, Mongolia) (unpublished Ph.D dissertation, University of California, Berkeley, 1999) (on file with the library of the University of California, Berkeley).

¹⁴⁴ For more details, see Wen-Chen Chang, *supra*.

defending human rights last after democratization is completed and well into the later stage of democratic consolidation.

(1) Judicial Role as Legitimizing

One of the most conspicuous cases that exemplified its judicial legitimating role was Interpretation No. 261.¹⁴⁵ After the death of Chiang Ching-Kuo that derailed the Nationalist Party-State in the late 1980s, one of the most immediate steps towards democratization was to reform the national representative institutions, whose senior members had held their seats without re-election since 1947-48. Paradoxically however, the institutionalized legitimacy of Lee Teng-Hui was conferred precisely from these old institutions. Recognizing the constraints of his political legitimacy vested by the backward legality, Lee Teng-Hui still pledged to reform. But the real question was how to achieve this goal.

Thanks to the reforming alliance of reform-minded nationalists and DPP moderates, a petition regarding the constitutionality of the indefinitely prolonged tenure held by the first-term delegates in the national representative institutions was brought to the Court, the fifth Council of Grand Justices.¹⁴⁶ This petition challenged Interpretation No. 31, among other things, rendered by the first Council of Grand Justices in 1954, which allowed these senior members to continue to serve in office until the second-term representatives could be duly elected.¹⁴⁷

Amidst political chaos, on June 21, 1990, the Court handed down Interpretation No. 261, the most critical constitutional interpretations indispensable to the

¹⁴⁵ Interpretation No. 261 (June 21, 1990). For more details, *see* Wen-Chen Chang, *supra* note 5, at 354-68.

¹⁴⁶ *See* the Affidavit of the Legislative Yuan in Interpretation No. 261 (June 21, 1990).

¹⁴⁷ *See id.*

continuous process of the constitutional transformation in Taiwan.¹⁴⁸ To the surprise of everyone, the Council with its full constitutional authority ordered the first-term members in all three national elective offices who had continually served in office since 1947-48 or 1969¹⁴⁹ without running for re-election to leave office by December 31, 1991.

Moreover, it dictated that the national government must hold a national election promptly for the second-term representatives in a manner consistent with the ROC Constitution, the Council's interpretation, and the relevant laws.¹⁵⁰ Much attention, however, has been focused on the deadline for all senior members to leave office imposed by the Court. This deadline, the end of 1991, was precisely the same time period as that which President Lee Teng-Hui announced earlier in some political situations. Thus, many political scientists as well as legal scholars have read this interpretation as merely rendering constitutional legitimacy and assigning legality to a previously determined political decision.¹⁵¹

¹⁴⁸ See JOHN F. COPPER, TAIWAN'S MID-1990S ELECTIONS: TAKING THE FINAL STEPS TO DEMOCRACY 13 (1998) (stating that Taiwan's systemic reform was fostered by court rulings.); Juergen Domes, The Kuomintang and the Opposition, in IN THE SHADOW OF CHINA: POLITICAL DEVELOPMENTS IN TAIWAN SINCE 1949 128 (Steve Tsang ed. 1993); Hung-mao Tien, Taiwan's Evolution toward Democracy: A Historical Perspective, in TAIWAN: BEYOND THE ECONOMIC MIRACLE 3-23, 7-8 (Denis Fred Simon & Michael Y.M. Kau eds. 1992).

¹⁴⁹ Note that according to the 1966 Temporary Provisions, the supplementary delegates elected in 1969 were not subject to reelections. It was only after the promulgation of the 1972 Temporary Provisions that additional delegates were subject to reelections. See *supra* note. The number of delegates elected in the 1969 supplementary elections was about a dozen. See *supra* note 86.

¹⁵⁰ See Interpretation No. 261 (June 21, 1990)..

¹⁵¹ For the view of political scientists, see Chia-lung Lin, *supra* note 16, at 323-4. For the view of legal scholars, see Jau-Yuan Hwang, Constitutional Change and Political Transition

The constitutional significance of Interpretation No. 261, however, was that the Grand Justices ordered, with its full authority as well as legitimating functions, the senior members of the national representative bodies to leave office by the end of 1991 and demanded that the election of second-term representatives take place, thereby ending the undemocratic representation of more than four decades.

(2) Judicial Role as Coordinating

The second salient role that the Taiwanese Constitutional Court played in the recent decade of democratic transitions and constitutional reforms was serving as a coordinating arbiter in resolving political conflicts and institutional gridlock. Negotiated democratization and the incremental constitutional reforms it generated as a result of political compromises have engendered a great deal of incoherence, if not contradictions, in the constitutional text and thus needed interpretations to be stabilized.

One illustrative case was Interpretation No. 325, a clash between the Legislative Yuan and the Control Yuan. This case was invoked because of the re-characterization of the Control Yuan. After the 1992 Constitutional Revisions, members of the Control Yuan were no longer elected and its power of consent was removed. Yet, at the same time, the Control Yuan's powers of impeachment, censure, and auditing remained intact. Therefore, the far-reaching power to inspect administrative agencies and to issue requests to them for documents was still held by the Control Yuan. The Legislative Yuan was not granted such powers.

The institution of the Control Yuan was founded upon Sun Yat-Sen's unique political theory. Yet, the establishment of the Control Yuan clashed with the

in Taiwan since 1986 – The Role of Legal Institutions 147 (1995) (unpublished SJD Dissertation, Harvard Law School).

contemporary constitutional system, in which the Legislative Yuan, but not the Control Yuan, would be vested with the powers of inspection, oversight, and impeachment. During the authoritarian era, the legislators seldom complained about the insufficiency of their powers, as most political powers were held exclusively in the hands of the strongman. This was no longer the case with a renewed, fully elected Legislative Yuan after the democratization. They argued that after the 1992 Constitutional Revisions redefining the Control Yuan as a quasi-judicial body, the power to inspect administrative agencies and to issue requests for documents should be transferred to the Legislative Yuan.¹⁵²

The Court, struggling with the original text of the Constitution and the newly revised provisions, however, decided not to endorse entirely the assertion held by the legislators. In the lengthy ruling of Interpretation No. 325, the Court first recognized that as a result of the recent constitutional revisions, the Control Yuan was no longer a representative body. Yet, at the same time, the Court noticed that besides the revised provision indicating that the Control Yuan's members were no longer elected, its powers of inspection, censure and impeachment remained intact. Due to the small scale of constitutional revisions, the Court concluded that the original structure of the government system adopted by the Constitution was not altered, and that the revision did not transfer explicitly or implicitly the power held by the Control Yuan to the Legislative Yuan. Thus, the Control Yuan retained all the powers previously vested to it by the Constitution.¹⁵³

Nevertheless, the Court argued that in order to promptly perform its constitutional function as a representative body, it was entirely permissible for the

¹⁵² See the Affidavit of Interpretation No. 325 (July 23, 1993).

¹⁵³ See Interpretation No. 325 (July 23, 1993).

Legislative Yuan to exercise the power to request government agencies for documents and for that matter, to execute inspections. To anchor the ruling on textual grounds, the Council noted some articles in the original constitutional text. These provisions, as the Court contented, have been designed to give the Legislative Yuan sufficient tools to gather the information needed for its legislative functions. In addition, and this is what makes this interpretation radical, the Council affirmed that the Legislative Yuan may issue orders, by resolutions of the entire Yuan or various committees, to request government agencies for relevant documents and government agencies cannot refuse such requests except by due process.

It is clear that Interpretation No. 325 was a constitutional interpretation triggered by incremental, small-scale constitutional reforms. As incremental constitutional reforms often obfuscated rather than delineated the intricate power allocations in the Constitution, they may unintentionally empower the judiciary as the constitutional arbiter.

In addition to Interpretation No. 325, Interpretation No. 387 also exemplified a salient case of judicial coordination of constitutional revisions. Ever since democratic transitions and constitutional reforms were undertaken in the early 1990s, constitutional politics in Taiwan was played in great vigor. When the newly elected Legislative Yuan was inaugurated in February 1993, its members made an unprecedented request for the resignation of the Premier, the President of the Executive Yuan. They argued that the government system structured in the Constitution is parliamentary, and that accordingly, as a new legislature is assembled, the Premier must resign in order for the new legislature to have a chance to affect the administration. The Premier resisted, however, based upon the fact that he was appointed by the President and as the President had not been reelected or asked him to resign, he had no constitutional duty to resign simply because a new legislature was

assembled. Besides, there was no precedent for such an action. This resulted in the serious political gridlock between the Executive and Legislative Yuans and was brought to the Constitutional Court for constitutional solutions.

The sixth Council of Grand Justices made a bold statement in Interpretation No. 387.¹⁵⁴ The Court endorsed fully the parliamentary system as the government system embedded in the original constitutional text despite the fact that the most recent constitutional revision of 1994 changed the presidency to be directly elected by the people with certain political consensus of moving the parliamentary system into presidential or semi-presidential system. The Court held that based on the principles of democracy and responsibility, the President of the Executive Yuan, the Premier, must submit his/her resignation to the President, at the conclusion of the term of office of the existing legislature and no later than the first convocation of the new legislature.¹⁵⁵ While Interpretation No. 387 was abided, it has moved fast forward constitutional revisions on government system, political players, nationalists and the opposition alike, favored a presidential or semi-presidential system.¹⁵⁶

(3) Judicial Role as Guarding Human Rights

Finally, the most salient role displayed by the Council of Grand Justices has been the guardian of human rights with a particular emphasis on the rule of law.

For example, in a landmark decision, Interpretation No. 313, the Court articulated thoroughly what it considered to be one of the most fundamental principles of the rule of law, the non-delegation doctrine.¹⁵⁷ The Grand Justices stressed that

¹⁵⁴ See Interpretation No. 387 (October 13, 1995).

¹⁵⁵ See *id.*

¹⁵⁶ Despite the resistance of the Constitutional Court. The 1997 Constitutional Revisions were thus passed to grant more powers to the President.

¹⁵⁷ See Interpretation No. 312 (February 12, 1993). In this case, fourteen airline companies

according to Article 23 of the Constitution, fundamental rights must not be restricted except by law or by administrative rules with a clearly, specifically prescribed statutory authorization.¹⁵⁸ As far as the Council was concerned, while certain legislative delegation might be permissible, the purpose, scope, and content of such delegation must be clearly and specifically detailed and prescribed in the law. Moreover, it would be constitutionally impermissible if regulatory rules placed any restrictions upon vested rights, not intended or specifically delegated by the law.

With regard to the protection of human rights, the Court achieved an even more promising record. In Interpretation No. 275, for example, in nullifying a judicial precedent, the Court insisted that citizens must not be subject to administrative fines or other forms of punishment unless they are intentionally or negligently in violation of administrative regulations. In other words, a mere violation of regulatory rules should not amount to any punishment.¹⁵⁹ The Court also began to exercise strict scrutiny in order to protect the rights of property and entitlements,¹⁶⁰ privacy,¹⁶¹ free

protested against a rule enacted by the Ministry of Transportation that fined airline companies if they provided aircraft services for passengers who did not have an entry visa. The Council decided in favor of the airlines companies holding that the conditions and the amount of fines imposed on the defiance of administrative duties must be prescribed by law. Even if the law granted the administrative agency to make a rule, the content and scope of that delegation must be clear and specific.

¹⁵⁸ The Council has repeatedly cited Article 23 of the ROC Constitution as the constitutional source of the principle of the rule of law and the non-delegation doctrine. Article 23 prescribes that all the freedoms and rights enumerated in the preceding Article shall not be restricted by law except as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order, or to advance public welfare.

¹⁵⁹ See Interpretation No. 275 (March 8, 1991).

¹⁶⁰ See Interpretation No. 274 (February 22, 1991), Interpretation No. 280 (June 14, 1991), Interpretation No. 291 (February 28, 1992), Interpretation No. 316 (May 7, 1993),

press and publication,¹⁶² personal freedom and due process,¹⁶³ and the rights to sue¹⁶⁴ and to hold public offices.¹⁶⁵

Another examples of constitutional interpretations that have secured human rights protection rendered by Grand Justices are Interpretations No. 384 & No. 392. These two interpretations are involved with the protection of personal freedom and one of the most important constitutional principles, due process of law. They have made it possible the revision of relevant provisions in both the Code of Criminal Procedure and the Statute Governing the Prevention of Gangster such that any future restrictions on personal freedom would be consistent with the principle of due process of law.

Furthermore, Interpretation No. 471 made it explicit that the punishment of forced labor must be prescribed in proportionality to the extents of severity of crimes in order to meet with the principle of substantive due process of law and against cruel or unusual punishment. Interpretation No. 523 required that the condition for police detention be prescribed specifically in the laws in order to further secure the protection of personal freedom. Regarding wrongful imprisonment, interpretation No. 478 broadened the scope of the compensation for such human rights infringement. These constitutional interpretations demonstrate clearly Grand Justices' great

Interpretation No. 318 (May 21, 1993), and Interpretation No. 320 (June 18, 1993).

¹⁶¹ See Interpretation No. 293 (March 13, 1992).

¹⁶² See Interpretation No. 294 (March 13, 1992).

¹⁶³ See Interpretation No. 300 (July 17, 1992).

¹⁶⁴ See Interpretation No. 288 (December 13, 1991), Interpretation No. 321 (June 18, 1993). Similar to Interpretation No. 224 rendered in 1988, the Council repeatedly struck down tax regulations that restricted people's right to appeal with bonds deposited as unconstitutional. For other kinds of protection such as right to sue, see Interpretation No. 306 (October 16, 1992).

¹⁶⁵ See Interpretation No. 283 (August 6, 1991).

concerns about the protection of personal freedom.

3.2.5.3. The Prospective Reform of the Council

As noted before, the judicial reform is expected to take place by September 2003 despite the fact that the details of the proposals have not yet certain. Whether the future Judicial Yuan would be further divided into separate divisions, one of which is responsible for constitutional interpretation is going to affect the function of the Grand Justices. It is at least the consensus in the legal community that regardless of the organizational form, the function of judicial review successfully exercised thus far by the Council of Grand Justices must not only be preserved but also be reinforced.

3.3. Recent Judicial Reforms of Other Jurisdictions

In addition to the constitutional reviewed exercised by the Council of Grand Justices, other jurisdictions by the Administrative Court and Supreme Court have also undertaken a number of critical reforming measures.

3.3.1. The Expansion of Administrative Litigations

The purpose of administrative litigation is to review the lawfulness of government actions, and in so doing, the Administrative Court has been given the power to review and renounce administrative actions.

Since July 1, 2000, the High Administrative Courts have been added to the Supreme Administrative Court, originally the only Administrative Court, thereby increasing a level of trial in administrative proceedings and providing the people with one more layer of review. In addition, the scope of litigation in administrative proceedings has also been enlarged. For instance, individuals now may sue the government not only for certain wrongful or unlawful actions but also for no action or government's failure in providing certain actions. In this aspect, administrative litigation has been made greater progress in Taiwan than in Japan, as the later has not

expanded litigation scope to such an extent.

3.3.2. The Improvement of Civil Proceedings

In order to tackle the problems of often delayed proceedings in civil litigation, it has been reformed that both plaintiff and defendant now have to now review one another's litigation files prior to trial to determine the contended issues that are critical to the decisions. Issues that fail to be raised in preparatory proceedings cannot be argued in the succeeding proceedings in the courts. Judges must review these contended issues and make certain clarifications prior to trial. The purpose of concentration of trials is to save significantly time spent in the trails as well as to improve judicial efficiency.

Alternative disputed resolution such as mediation has been experimented recently. At the level of District Court, mediation has been employed as one means of alternative dispute resolutions. Mediation works well when arbitrators chosen from the communities are trusted and skilled. Therefore, the efforts have been put into the training of qualified arbitrators as well as the encouragement of the employment of mediation in resolving disputes.

3.3.3. The Expedition of Criminal Proceedings

With a steady increase in criminal cases, it is critical to the allocation of judicial resources to expedite, while taken due consideration of fairness and justice, criminal proceedings. Thus, the expanded use of summary judgments in misdemeanor cases will expedite the process of resolution.

In July 1999, one of the consensuses reached in the National Conference for Judicial Reform was adopting the plea-bargain system, derived from similar examples set by the United States and Germany. Should the plea-bargain system be adopted, Article 376 of the Code of Criminal Procedure will have to be revised accordingly. Defendants who committed misdemeanors that fall under Article 376 will be eligible

for plea bargaining if they admit to guilt either during the investigation or prior to the end of trials in the district courts. Courts thus can negotiate with the defendants or their attorneys to reach the kinds and degrees of punishment. The introduction of the plea-bargain system is now awaiting the legislative approval in the Legislative Yuan.

3.4. Conclusion

The function of judicial system in Taiwan has been regarded as a success. One of the most salient achievements has been the persistent constitutional review exercised by the Council of Grand Justices. During the democratic transition and succeeding constitutional reforms, the Grand Justices have rendered interpretations to make certain constitutionalism and the rule of law in practice. Recently, judicial reform on an even larger scale has been put on the government's high agenda. While the details have not yet been settled, the determination for reform is not in any doubts. It is hoped that after September of 2003, a remodeled Judicial Yuan will better serve as a judicial engine for the full embodiment of constitutionalism and rule of law in the new democratic Taiwan.

Chapter VI

Human Rights Developments in Taiwan: 1987-2002

4.1. Introduction

As a result of Japanese defeat in August 1945, China, then governed by the Republic of China (ROC) government, took over Taiwan on behalf of the Allied, pursuant to an order issued by General Douglas MacArthur. Two months later, China unilaterally proclaimed Taiwan a province. When China began writing its new constitution, which took effect in December 1947, it intentionally excluded Taiwan from its constitutional rule. It was not until the outbreak of the “228 Massacre,”¹⁶⁶ which occurred on 28 February 1947 and many people were killed, that China changed its mind to allow Taiwan a primitive degree of constitutional rule.¹⁶⁷

The ROC Constitution, of which Chapter 2, Articles 7 to 24, enshrined the individual rights and obligations. However, the ROC government promulgated the “Temporary Provisions” in May 1948 and further issued martial law decree in May 1949. Both the “Temporary Provisions” and martial law decree tremendously limited most of the rights guaranteed by the Constitution. In essence, these two laws triggered

¹⁶⁶ On 28 February 1947, about two thousand people gathered in front of the Bureau of Monopoly in Taipei to protest the brutal beating of a woman cigarette peddler and the killing of a bystander by the police the previous evening. The Chinese Governor, Chen Yi, responded with machine guns, killing several people on the spot. Uprisings erupted. What ensued were a series of massacres on the island by the troops sent from China by Chiang Kai-Shek that resulted in the deaths of more than 30,000 Taiwanese people.

¹⁶⁷ See Fort Fu-Te Liao and Jau-Yuan Hwang, “Think Globally, Do Locally — Internationalizing Taiwan’s Human Rights Regime,” in Peter C.Y. Chow (ed.), *Taiwan’s Modernization in Global Perspective* (Praeger, 2002), pp. 79-102, at. p. 80.

three major legal consequences: (1) military rule and control over administrative and judicial matters, (2) military trial of civilians and brutal punishment of political offenses, and (3) comprehensive state surveillance and infringement of individual rights, for example, freedoms of speech, assembly, association and movement.¹⁶⁸

The subsequent period has been named as the “White Terror Period,” which ran from 1949, when the KMT lost the Chinese Civil War to the Communists, to 1987, when martial law was lifted.¹⁶⁹ During the period, thousands of Taiwan’s most prominent citizens and leading intellectuals were dragged from their homes to be killed or vanish without explanation. Furthermore, there were also a series of cases of governmental crackdown on dissenting voices, such as the Formosa Incident (1979), the Lin family murders (1980), and the murder of Chen Wen-cheng (1981). These tragedies however only strengthened the resolve of the people to speak out and press for the realization of human rights, the rule of law, and democracy.

There were extensive violations of human rights from 1948 to 1991 when the “Temporary Provisions” and “Martial Law” order superceded the Constitution. With the end of martial law order and the ushering in of democracy in 1987, Taiwan entered a new era. Government offices were opened to public elections and the rights to free expression, assembly, and association were gradually restored. It is certainly true that the human rights situation Taiwan has improved markedly over the past 15 years. There are no more prisoners of conscience, no more extra-judicial killings, the civil liberties of freedom of the press and freedom of assemblage are, by and large,

¹⁶⁸ *Ibid.*, at 80-81.

¹⁶⁹ Fort Fu-Te Liao, “Establishing a National Human Rights Commission in Taiwan: Role of NGOs and Challenges Ahead”, *Asia-Pacific Journal on Human Rights and the Law*, Vol. 2, No. 2, 2001, pp. 90-109, at pp. 90-91.

respected.¹⁷⁰ However, Taiwan's diplomatic isolation constitutes another significant obstacle in the promotion of human rights, insulating the government from external human rights monitoring and hindering exchanges with the international human rights community.

It was not until the year 2000 that democratic transfer of power from one political party to another happened in Taiwan. Human rights have been accorded even higher priority by the new administration lead by President Chen Shui-bian. Most of his human rights policies focus on internationalizing Taiwan's human rights regime.

As far as the period is concerned, it is therefore proper to divide human rights developments in Taiwan into two periods: one is the developments after 1987 when martial law order was lifted; the other is those new human rights policies proposed by Chen's administration since 2000. Following analyses will accordingly include two parts.

4.2. Developments of Rights and Freedoms

Democratization has been a very important foundation for human rights development in Taiwan after 1987. Such democratization process greatly enhanced human rights protections, particularly those of political rights. It is therefore necessary to put a brief history of democratization in Taiwan after 1987 in the first section before we review developments of individual rights and freedoms in the next section.

4.2.1. Democratization and Human Rights Protection

On 28 September 1986, even that under martial law order no new political party was allowed, the Democratic Progressive Party (DPP) was formally established, marking the beginning of multiparty democracy in Taiwan. In November 1986, the

¹⁷⁰ Brian Kennedy, "Human Rights in Taiwan: Is the Battle Won?", Taipei Times, January 4, 2000.

DPP held its first Representative Assembly, and released a draft of its charter and platform. Other important democratic processes began in 1987 when martial law order was lifted in Taiwan and Penghu on 15 July 1987.¹⁷¹ More than two hundred people, who were tried by martial courts, had their penalties reduced and restored their political rights. It also means that no citizen will be subjected to a trial by martial court.

However, the National Security Law during the Period of National Mobilization for Suppression of the Communist Rebellion became effective at the same day when martial law order was lifted. Its Paragraph 1 Article 2 ruled that people, when assembled or associated, should not claim communism or separation of territory. Paragraph 2 of the same Article delegated that another law will be made for further regulation. Therefore, on 20 January 1988, the Law on Assembly and Parades during the Period of National Mobilization for Suppression of the Communist Rebellion was enacted, in which its Article 4 was the same as that of Paragraph 1 Article 2 of the National Security Law. After the “Temporary Provisions” was abolished in 1991 the above two laws were renamed the National Security Law and the Law on Assembly and Parades with few amendments. It was not until July 1992 the Legislative Yuan passed a revision of the National Security Law, which would reduce the number of blacklisted “*persona non grata*” from 282 to five.

In January 1988, President Chiang Ching-kuo died, and Mr. Lee Teng-hui was to complete the late President Chiang’s second six-year term, which ran from 1984 to 1990. Mr. Lee is Taiwan’s first native-born president. He was re-elected as president

¹⁷¹ Martial law order on Kinmon, Matsu, Tungsha and Nansha was not lifted until November 1992. These areas were in fact under martial law rule from 10 December 1948 to 6 November 1992.

in 1990 by indirect election. In May 1990, President Lee Teng-hui, when he inaugurated, announced a special amnesty, which includes the pardoning of dissidents Hsu Hsin-liang and Shih Ming-teh. In 1994, a new constitutional amendment ruled that president and vice-president would be elected by popular vote of all the people in free area since the ninth term from 1996. The Legislature therefore approved the Presidential and Vice Presidential Election and Recall Law, setting ground rules for the 23 March 1996, popular election of the president and vice president. Mr. Lee became the first popular elected president in Taiwan, and being as the president from 1988 to 2000. He was therefore a very important person in Taiwan's democratization process.

It was also in January 1988 that registrations for new newspapers were opened, and restrictions on the number of pages per issue were relaxed. In January 1989 two important laws were passed. First, the Law on Civic Organizations was to allow new NGOs to be formed. Secondly, the Law on the Voluntary Retirement of Senior Parliamentarians was to allow those members to be retired with fund in order to hold a full election. In March 1990, thousands of university students staged a sit-down protest at the Chiang Kai-shek Memorial Hall Plaza to express opposition to the National Assembly's attempt to expand its authority. The Council of Grand Justices, in June 1990, announced that senior parliamentarians should terminate their responsibilities by 31 December 1991. It was therefore that the eighth plenum of the National Assembly also approved a motion to force members who failed to attend the plenary session to retire by the end of July 1990. Ultimately all senior delegates to the First National Assembly, Control Yuan, and Legislative Yuan retired from office on 31 December 1991. There were therefore the first full re-elections since 1947 of the National Assembly in 1991 and Legislative Yuan in 1992. In July 1994, the Legislative Yuan passed the Self-Governance Law for Provinces and Counties,

explicitly stipulating that provincial governors be chosen by direct election. The Self-governance Law for Special Municipalities was also passed the next day. Therefore, in December 1994, the first popular elections for the governor of Taiwan Province and mayors of Taipei and Kaohsiung municipalities were held. It should be recalled that popular election of the president and vice president in Taiwan has been held since 1996.

On 22 April 1991, the National Assembly, at its sixth plenary meeting, passed the Additional Articles of the Constitution (constitutional amendments), the first since 1947, and approved the abolishment of the “Temporary Provisions.” Therefore, President Lee Teng-hui declared the termination of the Period of National Mobilization for Suppression of the Communist Rebellion, effective on 1 May 1991. He abolished the “Temporary Provisions,” and promulgated the constitutional amendments, also effective on 1 May 1991. The Legislative Yuan, also in May 1991, approved the abolishment of the Statutes for the Purging of Communist Agents.

It was not until February 1995 President Lee Teng-hui expressed an apology to families of the victims of the “228 Massacre” of 1947 at the Taipei New Park, where a monument commemorating the tragedy was built with government sponsorship. In May 1995 Regulations Governing the Management and Compensation for Victims of the “228 Massacre” passed by the Legislative Yuan. According to the regulations, a foundation was established to manage affairs concerned, and 28 February was designated a national commemoration day. The Legislative Yuan, in February 1997, passed the amendment to the fourth article of the Regulations Governing the Management and Compensation for Victims of the “228 Massacre”, stipulating that February 28, also named “Peace Memorial Day,” be a national holiday.

Tragedies resulted by martial law order were not even dealt with until the Law of Restoring People’s Rights Lost during Martial Law Period was enacted in January

1995. This Law provided compensation to victims, and restored their rights to professional practicing, civil service, pension or insurance. They could also regain their property and documents. Another law, the Compensation Law for the Improper Trials of Rebellion and Communists during Martial Law Period was enacted in June 1998. As well, the government established a foundation to compensate those victims. It has to be noted that no truth and reconciliation commission has ever been set up in Taiwan. Furthermore, the Green Island¹⁷² Human Rights Monument was completed in December 1999. In his speech at the opening, President Lee Teng-hui solemnly declared, “On the government’s behalf, let me convey to the foundation the highest of respect, and to the victims of repression let me offer the deepest of apologies!” In February 2001, President Chen Shui-bian urged: “Academia Historica should immediately set up a complete archive to preserve these documents about the White Terror era and the Kaohsiung Incident, which will help historians learn about the real face of that age.”¹⁷³ It was in May 2001, half a century after they were wrongfully imprisoned, 15 victims of the Luku Incident¹⁷⁴, which is regarded as the biggest political incident of the White Terror Period, were awarded a total of NT\$117,876,000

¹⁷² In the early years of ROC rule in Taiwan, the government sent political prisoners to Green Island.

¹⁷³ See Taipei Times, 28 February 2001.

¹⁷⁴ The incident took place in 1952, in the mountain village of Luku, located between Shihting and Hsichih in northern Taiwan. At the time, the Kuomintang authorities were in the process of “cleansing the countryside,” and some people living in Shihting noticed the five-starred Communist Chinese flag flying in Luku. The government dispatched troops to encircle the communists. They imposed full martial law, and any persons found without personal identification documents were arrested. During this action, 183 people in the Shihting, Hsichih and Juifang areas were accused of “organizing a military base and secretly conspiring to dispose of Taiwan,” and arrested. Of these, 36 were executed by firing squad.

(about US\$3.5 million) in compensation by the Taipei District Court.¹⁷⁵

Apart from the first constitutional amendments in 1991, five more constitutional amendments were further added in 1992, 1994, 1997, 1999, and 2000, respectively. However, it has to be noted that most of constitutional amendments focus on the adjustment of governmental structure and democratic procedure. Constitutional amendments adopted in 1991 and 2000 did not even focus on issues related human rights protections.

After 1992, some amendments, which enhanced the rights of dignity, security and equality of women and disability, and the racial status and political participation of indigenous people, had been inserted into constitutional amendments. In 1992 three paragraphs concerning rights of women, disabled and indigenous people were included into then Article 18 of the Constitutional Amendments. One paragraph stated: “The State should maintain women’s dignity, protect women’s security and liberty, eliminate sexual discrimination, and promote equality between sexes.” The second said: “The State should guarantee disable persons’ insurance, medical care, educational training, employment, and living maintenance and remedy.” A third paragraph articulated: “The State should guarantee the status and political participation of ‘mountain people in free area’¹⁷⁶.” It was not until 1996 that the title “mountain people” was amended by a constitutional amendment to indigenous people, as they deserve. In 1996 constitutional amendments further required the State to guarantee indigenous people’s education, culture, transportation, medical care, land, social welfare. It also demanded the State ensuring cultural diversities and positively

¹⁷⁵ See China Times, 22 May 2001.

¹⁷⁶ In the past indigenous people was called “mountain people.” In Taiwan’s laws, when deal with the relationship between two sides of the Taiwan Strait, Taiwan is referred as “free area” and China is named “mainland area.”

maintaining and promoting indigenous people's culture and language. In 1999 one paragraph was adopted to protect soldiers, which read: "The State should respect soldiers' social contribution, and guarantee their education, employment, and medical care."

As we have seen all the above-mentioned paragraphs in constitutional amendments began with words of "the State should." It was therefore mainly to put obligation on the State, but it did not directly grant rights to people. Provisions as such are in fact more like national policies than human rights or freedoms. Furthermore, no constitutional amendments have ever incorporated international human rights norms. It is true that many pieces of outdated legislation have been repealed or revised in order to provide more effective protection of human rights. The obvious gap between the international and domestic human rights regimes is still either unaware or not taken seriously at home. Consequently, in terms of human rights developments in Taiwan after 1987, we should focus more on other new laws and amendments.

4.2.2. Individual Rights and Freedoms

This section focuses on the developments of several rights and freedoms including women's rights, rights of aborigine people, freedom of expression, and the abolishment of death penalty.

4.2.2.1. Women's Rights

Article 7 of the Constitution guarantees that all citizens, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law. Some developments of the protection of women's rights are important in Taiwan. It is ruled by a constitutional amendment: "The State should maintain women's dignity, protect women's security and liberty, eliminate sexual discrimination, and promote equality between sexes." Since 1984 abortion in certain conditions has been allowed, although

it needs consent from one's spouse. The Law to Eliminate Sexual Intercourse of Children and Junior was adopted in 1995. It is to punish those who, by paying money, have sexual intercourse with young people under 18. It also provides shelter and hot lines to child prostitutes. In 1996 Civil Law was amended to allow both parents, during or after marriage, to custody their children jointly or by one of the parties according to their agreement. If an agreement cannot be reached anyone of them may apply for a court decision. It was a rule before 1996 if no agreement existed a father gain the right of custody of children. In January 1997 the Law of Preventing Crime of Sex Encroachment was passed. Therefore, the Committee for Preventing Crime of Sex Encroachment was established in Ministry of Interior, and a Center for Preventing Crime of Sex Encroachment was established in every county.¹⁷⁷ This Law further requires primary and junior high schools to include education on equality between two sexes.¹⁷⁸ In 1999 the crime of rape was amended to include one's spouse. The Domestic Violence Prevention Law went into effect in June 1999. The Committee for Preventing Domestic Violence was therefore established in Ministry of Interior. Current and ex-spouses and relatives are all protected. Those who suffered from domestic violence may apply for injunctions. The Law of Equal Employment between Two Sexes came to effect on 8 March 2002. It prevents sexual harassment in working places. It also provides women one day per month for physiology leave and eight weeks for maternity leave.¹⁷⁹ Anyone one who has worked for more than one year may apply for suspending salary but retain position for not more than two years if he or she wishes to nourish a bay less than three.¹⁸⁰ Committees of Equal Employment

¹⁷⁷ Articles 5 and 6 of the Law of Preventing Crime of Sex Encroachment.

¹⁷⁸ Article 8 of the Law of Preventing Crime of Sex Encroachment.

¹⁷⁹ Articles 14 and 15 of the Law of Equal Employment between Two Sexes.

¹⁸⁰ Article 16 of the Law of Equal Employment between Two Sexes.

between Two Sexes are established in the Commission of Labor Affairs and counties to implement with the Law.

4.2.2.2. Rights of Aborigine People

On 1 November 1996, the Legislative Yuan, in order to carry out the national policy enshrined in a constitutional amendment, passed the Organic Law of the Council for Indigenous Affairs. On December 10 of the same year, the Council of Indigenous Affairs was established for the purpose of organizing aborigine related matters under one general organization.

According to Aborigine Status Act, the term “aborigine” includes native aborigines of the mountain and lowland regions. Aborigine status recognition is divided into two parts. Mountain aborigine means permanent residents of the mountain administrative zone before the recovery of Taiwan, moreover census registration records show individual or an immediate kin of individual is of aborigine descent. On the other hand, lowland aborigine includes permanent residents of the lowland administrative zone before the recovery of Taiwan, moreover census registration records show individual or an immediate kin of individual is of aborigine descent. Aborigines, according to Article 1 of the Full Name Registration Law, should be allowed to register under their customary full names. Aborigines registered under a Han’s full name may apply for restitution of traditional full name.

In Taiwan, municipality councilors, county councilors, and village representatives are independently elected in their respective municipalities, counties, and villages. It is required by the Local Administrative Law that a municipality having an aborigine population of four thousand or more should have aborigine-elected aborigine city councilors. A county or village having a lowland aborigine population of one thousand five hundred or more should have aborigine-elected lowland aborigine city councilors among the aforementioned county council or village

representative quota. The presence of mountain aborigine population would also require the presence of aborigine-elected mountain aborigine councilor or representative.

The Aborigine Education Act explicitly states that the aborigine is the core of the aborigine education; hence the government should promote aborigine education with versatility, equality, and reverence. Aborigine education should uphold the dignity of the people, continue the ethnic lifeline, foster aborigine welfare, and enhance aborigine prosperity. It is required by the law that every department of the government should provide active assistance as well as ensure the equal education opportunity for the aborigines and the establishment of an education system suitable to the demands of the aborigine people. Educational establishments in senior high schools or higher should safeguard the admission and schooling opportunities of aborigine students; as well as reserve a quota for aborigine students in their overseas education grants/subsidies to ensure the cultivation of aborigine talents. The government should urge universities to establish colleges/ departments or establish aborigine university campuses for the development of ethnic academics, education of higher aborigine talents, and cultivation of potential aborigine educators and teachers, thereby fostering the political, economic, educational, cultural, and social development of aborigines.

The government authorities concerned are required by the Employment Service Act that they should formulate a plan for and earnestly foster the job placement of the following individuals voluntarily seeking employment from aborigines. Any corporation employing a total of 100 employees in Taiwan is obliged to employ aborigine employees amounting to a minimum of 2% of total employees during the contract fulfillment period. Otherwise, this company is liable to pay a penalty. The Aborigine Employment Rights Protection Act provides further protections. All government establishments, public schools and state-owned enterprises, except for

those establishments located in the counties of Penghu, Kinmon and Matsu, are required to employ one aborigine employee for every 100 persons employed in the following positions: contract worker, police, technician, driver, janitor, cleaner, toll/fee collector, and other non-technical positions where civil service eligibility is not required. Government establishments, public schools, and state-owned enterprises located in aborigine regions are required to fulfill the aborigine employment quota amounting to at least one-third of the total employees. Government establishments, public schools, and state-owned enterprises employing between 50 and 100 persons for the foregoing positions are required to employ one aborigine employee. The government should assist aborigine communities in establishing aborigine cooperative centers catering to the characteristic work habits of aborigines for the development of various employment opportunities.

It is enshrined in the Mountain Slope Conservation and Utilization Law that aborigines of reservation lands located within the mountain region should be taught to develop land, and have cultivation rights, land surface rights, and lease rights. Individuals continuing to operate their cultivation and land surface rights for a period of five years are entitled to acquire gratis ownership of said land, except for land designated for special purposes. Land ownership transfer is limited to aborigines.

4.2.2.3. Freedom of Expression

Media diversity has become one important development of freedom of expression in Taiwan after 1987. It was in January 1988 that registrations for new newspapers were opened, and restrictions on the number of pages per issue were relaxed. In November 1988, the Executive Yuan approved the private installation of small satellite dish antennas, which will allow viewers to tune into the KU-band and receive television programming from Japan's NHK station. In August 1993, the Cable Television Law went into effect. In December 1993, the Government Information

Office lifted the ban on radio stations, and approved the applications of 13 broadcasting companies for operation licenses. In January 1996, the Legislature passed three telecommunications laws, which were the Telecommunications Act, the Organizational Statute of the Directorate General of Telecommunications, Ministry of Transportation and Communications, and the Statute of Chunghwa Telecom Co., Ltd. These laws relieved the DGT of the function of providing telecommunications services, making it a regulatory agency only; opened the telecommunications sector to private and foreign investment; and strengthened controls on transmission frequencies. The Legislative Yuan, in May 1997, passed the third reading of the Public Television Bill, which will enable the public television station to begin broadcasting in 1998. It is of importance that the Legislative Yuan unanimously abolished the Publication Law in January 1999.

It has to be noted that the Legislative Yuan, in April 1992, revised Article 100, the sedition clause of the Criminal Code, to apply only to those who support violent action against the government. Non-violent advocacy of Communism or Taiwan independence was thereby decriminalized. In December 1993, moreover, the Legislative Yuan approved a revision of the University Law, which gave more autonomy to colleges and allows students to participate in meetings related to school affairs.

4.2.2.4. Death Penalty

The attitude of Taiwanese law to abolition may be set out under three headings.¹⁸¹ First of all, the Constitution does not clearly uphold the right to life.

¹⁸¹ Fort Fu-Te Liao, "Plugging the Gaps: Death Penalty, Taiwan and International Law", in Edmund Ryden SJ (ed.), *Taiwan Opposes the Death Penalty* (Fujen Catholic University Publisher, 2002), pp. 203-220, at p. 215.

However most scholars hold that although the Constitution does not explicitly state the right to life, it does guarantee this right; different scholars argue the point from different points of view.

Secondly, in ROC Criminal Law there are 7 crimes for which the death penalty is mandatory and 23 for which it is discretionary. In the area of special criminal laws there are 13 laws mentioning 58 crimes carrying a mandatory death sentence and a further 69 where the death sentence is discretionary. In all 157 crimes may be punished by the death penalty.¹⁸²

Finally, we can look at the Interpretations offered by the Council of Grand Justices. Interpretations No. 194 and No. 263 state that in time of unrest Articles on drug peddling and crimes of banditry, which carry mandatory death sentences, are not against Articles 23 and 7 of the Constitution.¹⁸³ Interpretation No. 476 holds that the discretionary death sentence for drug peddling is not against Articles 23 and 15 of the Constitution.¹⁸⁴

From the above it can be seen that in the ROC legal system, the Constitution does not explicitly guarantee the right to life nor does it call for abolition of the death penalty, whilst on the level of laws there are many and broad laws which allow for capital punishment, and the interpretations note that even those laws carrying

¹⁸² See Gen-Gi Chen, "Debate on retaining or abolishing the death penalty from a human rights view", *New Century forum*, No. 4, December 1998, p.69.

¹⁸³ Article 23: "All the freedoms and rights enumerated in the preceding articles shall not be abridged by law except such as may be necessary to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare." Article 7: "All citizens of the Republic of China, irrespective of sex, religion, ethnic origin, class, or party affiliation, shall be equal before the law."

¹⁸⁴ Article 15: "The right to live, the right to work, and the right to own property shall be guaranteed to the people."

mandatory death sentences are not against the Constitution. We can say that Taiwan is not only supportive of the death penalty, but seeks to expand its use.

However, it has to be noted that Chen's administration wishes to put forward, whose policy objectives are to replace mandatory death sentences in various statutes with discretionary death sentences while reducing the overall number of crimes calling for death sentences.¹⁸⁵ Several achievements have in fact been completed. First, the series of amendments to the Criminal Code in recent years have already replaced most articles, which prescribe mandatory death sentences to allow discretionary adoption of either death or life sentences. Secondly, the Legislative Yuan has officially terminated the controversial Bandit Law, which included mandatory death sentences for a wide range of offenses. Thirdly, it is promised by the current government that it will continue to re-examine and revise related laws to replace remaining mandatory death penalties with discretionary death penalties in the future. It will then reduce the overall scope of the death penalty and move in stages toward achievement of total abolition. It is however too early to expect how many years will it take.

4.3. New Government, New Human Rights Policies

On 18 March 2000, Mr. Chen Shui-bian, the candidate of the then opposition party, DPP, won the presidential election, which ended KMT's ruling over Taiwan since 1945. Immediately after he knew his winning of the election, Mr. Chen spoke: "The government lead by Annette Lu and I will take advantage of Taiwan's developmental experience to assist the promotion of democracy and preservation of

¹⁸⁵ See 2002 Human Rights Policy White Paper of the Republic of China (Taiwan) Human Rights Infrastructure-building for a Human Rights State, February 2002, p. 60.

human rights in international societies.”¹⁸⁶ On 20 May 2002, Mr. Chen Shui-bian, in his inaugural speech, “Taiwan Stands Up: Toward the Dawn of a Rising Era,” accentuated:

[W]e are also willing to promise a more active contribution in safeguarding international human rights. The Republic of China cannot and will not remain outside global human rights trends. We will abide by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Vienna Declaration and Program of Action. We will bring the Republic of China back into the international human rights system. The new government will request the Legislative Yuan to pass and ratify the International Bill of Rights as a domestic law of Taiwan, so that it will formally become the “Taiwan Bill of Rights.” We hope to set up an independent national human rights commission in Taiwan, thereby realizing an action long advocated by the United Nations.¹⁸⁷

Such speech triggered new government’s new human rights policies in Taiwan in the new millennium. In order to carry out such policies the government has created mechanisms in order to deliberate related policies and laws, as well as coordinate and promote related measures taken by various agencies. The Executive Yuan has established the inter-ministerial Human Rights Protection and Promotion Committee as the primary policymaking and coordination body in the field. In addition, the Presidential Office has created the Human Rights Advisory Group to serve as advisors to the President on realizing his announced ideal of “building a human rights state.”

The Presidential Human Rights Advisory Group was established on 24 October 2000. With Vice President Hsiu-lien Annette Lu as convener, the Group consists of 21

¹⁸⁶ Chen Shui-bian, Victory speech after the 10th Republic of China Presidential and Vice Presidential Election, 18 March 2000.

¹⁸⁷ President Chen Shui-bian, Inaugural Speech, “Taiwan Stands Up: Toward the Dawn of a Rising Era,” 20 May 2000.

scholars and experts brought together to advise the President. According to Article 1 of the “Guidelines for the Establishment of the Presidential Human Rights Advisory Group,” the main function of the Group is “to provide advice and recommendations to the President at appropriate times ... in order to protect and improve the domestic human rights conditions, promote participation in international human rights activities, propagate human rights consciousness....” To realize this objective, the Group has organized six working groups, on domestication of the International Bill of Rights, the National Human Rights Commission, human rights policy, international human rights activities, human rights consciousness and education, and evaluation of current human rights conditions.

The Executive Yuan Human Rights Protection and Promotion Committee was established in July 2001, with then Vice Premier Lai In-jaw as convener, Minister without portfolio Hsu Chih-hsiung and Research, Development, and Evaluation Commission Chairman Lin Chia-cheng as co-conveners. The current convener is Premier Yu Shyi-kun. Members of the Committee include the Secretary-General of the Executive Yuan, the Minister of the Interior, the Minister of Foreign Affairs, the Minister of Defense, the Minister of Education, the Minister of Justice, the Director-General of the Government Information Office, the Director-General of the Department of Health, the Administrator of the Environmental Protection Administration, the Chairman of the Council of Labor Affairs, and the Chairman of the Council of Indigenous Peoples’ Affairs, as well as thirteen scholars and experts from the private sector. In order to achieve the function of coordination of the human rights policies of the various agencies, the Committee also invites other relevant agencies to attend its sessions. Furthermore, it has established an advisory committee composed of additional scholars and experts to broaden its sources of information. The Committee is also responsible for coordination and supervision of the

administrative practices, policies, and measures of the Executive Yuan's various ministries and commissions.

As expressed by President Chen himself, initially new human rights policies include two main fields. Firstly, the government wishes to set up an independent national human rights commission. Secondly, it is wished that the International Bill of Rights could be brought home into the land of Taiwan. Under this topic, one thing should be done is the ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) by the Legislation Yuan (Parliament). The other issue is to enact a "Taiwan Bill of Rights."

4.3.1. National Human Rights Commission

In Taiwan, the idea of creating a national human rights commission is in fact coming from the bottom up. It originated in civil society, particularly in the Taiwan Association for Human Rights, and was adopted by the new government on 20 May 2000.

As Taiwan has long been isolated from the international human rights regime, few discussions on and promotions of the issue of establishing a national human rights commission in Taiwan have been presented. It was not until the end of 1999 that there was a stir in the air when some non-governmental organisations, lead by the Taiwan Association for Human Rights, set out to mobilise public opinion. In that meeting, a "Coalition for the Promotion of a national human rights commission in Taiwan"¹⁸⁸ was organised. It was stated that the "Paris Principles"¹⁸⁹ and the

¹⁸⁸ Feng-Jeng Lin, "The Role of NGOs in setting up a National Human Rights Commission in Taiwan", paper presented at the *International Conference on National Human Rights Commissions: Promoting and Protecting Human Rights*, Taipei, Taiwan, 2-4 January 2001.

experiences of other countries would be consulted in designing a national human rights commission. Its functions would include investigation of violations of human rights, writing and revision of laws to conform to international standards, as well as human rights education. The principles of independence, effectiveness and reflection of the diversity of society were also affirmed.¹⁹⁰

The Coalition in turn established two task forces in January 2000. One of the task forces was charged with winning the endorsement for a national human rights commission of each of the candidates in the presidential race, while the other had the responsibility of drafting the NGO proposed organic law. By early October 2000, “The National Human Rights Commission Bill” and its “general explanatory notes” were agreed upon by the Coalition.¹⁹¹ The bill was sent to the Legislative Yuan in 2001. However, new members of the Legislative Yuan were elected in December 2001. Because the Legislative Yuan has a rule that all bills must be re-read by new members, the bill has to start over again when the new members take office in February 2002. The bill is still pending before the Legislative Yuan.

¹⁸⁹ Principles concerning the status of national institutions for the defence and promotion of human rights, which are also known as the “Paris Principles,” were adopted during the first international meeting of national human rights institutions in Paris in 1991. They were adopted by the General Assembly of the United Nations on 20 December 1993 by resolution 48/134. The Paris Principles include three main sections on national institutions’ competencies and attributes, composition and guarantee of independence and pluralism, and methods of operation. The Paris Principles also include principles concerning national institutions having quasi-judicial power.

¹⁹⁰ Press Release of the Coalition on 9 December 1999.

¹⁹¹ For the whole process of drafting the “NGO HRC Act,” please see Mab Huang, “Drafting a Bill for a National Human Rights Commission: Taiwan, 2000”, paper presented at the *International Conference on National Human Rights Commissions: Promoting and Protecting Human Rights*, Taipei, Taiwan, 2-4 January 2001.

On the other hand, the task force that was charged with winning the endorsement for a national human rights commission of each of the candidates in the presidential race in 2000 did a good job. Major presidential candidates, including Lien Chan, Chen Shui-bian and Hsu Hsin-liang, all endorsed the idea. Upon winning the election, the DPP's Chen Shui-bian made it one of the new government's human rights policies. To carry out the policy pledge of President Chen, in 2001 the current administration began preparing a draft bill for the National Human Rights Commission, which after several rounds of revision has reached its final form. That bill has been submitted to the Legislative Yuan for its deliberation.

Therefore, there are currently two bills for the National Human Rights Commission before the Legislative Yuan. The bill from the Coalition includes a new paragraph to Article 17 of the "Law of the Structure of the Office of President" and "The National Human Rights Commission Act." ("NGO HRC Act") The bill from the government contains three parts: a new Article 17-1 of the "Law of the Structure of the Office of President," "The National Human Rights Commission Act" ("Governmental HRC Act") and "The Law of Exercising Power of the National Human Rights Commission." ("Governmental HRC Power Act")

4.3.1.1. Where

The Paris Principles stress that a national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text. In Taiwan, the Coalition, in fact, wishes to set up a Taiwanese national human rights commission in addition to and independent from, the executive, legislative, judiciary and other branches. To achieve this goal there would need to be a constitutional amendment permitting the potential Taiwanese national human rights commission to hold a constitutional status. However, because it has proven quite difficult to pass such a constitutional amendment, the Coalition chose to put the

Taiwanese national human rights commission under the Presidential Office. The manner chosen was to insert a new paragraph into Article 17 of the “Law of the Structure of the Office of President”, which will provide the commission with its legal status. With this new paragraph, the commission’s independence was explicitly guaranteed.

On the other hand the government adopted the idea from the Coalition, and proposed no constitutional amendment. As well, the government decided to establish the National Human rights Commission under the Presidential Office, while guaranteeing it as an independent commission. However, the government proposed a new Article 17-1 of the “Organic Law of the Presidential Office” in order to differentiate the National Human Rights Commission from other institutions and agencies originally included in Article 17, such as the Academia Historica, an official documents agency, and the Academia Sinica, a national research institute. It is also explicitly stated in Article 17-1 that the National Human Rights Commission exercises its powers independently.

4.3.1.2 Functions

The Paris Principles state that a national institution shall be given as broad a mandate as possible. A national institution shall have the following responsibilities:

(1) To submit to the government, parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the protection and promotion of human rights.

(2) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.

(3) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation.

(4) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence;

(5) To cooperate with the United Nations and any other agency in the United Nations system, the regional institutions and the national institutions of other countries which are competent in the areas of the protection and promotion of human rights;

(6) To assist in the formulation of programs for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles; and

(7) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

In Taiwan both the Coalition and the government wish to adopt the mandates stressed by the Paris Principles as far as possible. The “NGO HRC Act” from the Coalition includes 21 Articles. Article 1 of the bill states that the aims of the National Human Rights Commission Act are to fulfil the Constitutional protection of human rights, to establish an infrastructure for promoting and protecting human rights, to ensure social fairness and justice, and to comply with universal human rights values and standards. According to Article 2 of the “NGO HRC Act,” the functions of the commission are as broad as to include the following:

(1) To investigate significant human rights violations and present reports with remedial measures, and whenever necessary, provide assistance;

(2) To review the Constitution, laws and regulations, and propose constitutional or legal amendments or legislative bills to ensure that all comply with international human rights standards;

(3) To work out national human rights policies;

(4) To undertake and promote research and education in the field of human rights;

(5) To prepare reports on human rights issues;

(6) To co-operate with civil society, international organisations, national human rights institutions and non-governmental organisations to promote human rights protection; and

(7) Other functions authorised by the National Human Rights Commission Act or other laws.

On the other hand, according to Article 2 of the “Governmental HRC Act”, the National Human Rights Commission’s functions include:

(1) To review laws, regulations and policies relating to human rights promotion and protection.

(2) To prepare annual reports on human rights issues.

(3) To promote human rights education and to spread human rights ideas.

(4) To ensure the complement with international human rights standards and to promote cooperation among domestic and international human rights organizations.

(5) To investigate significant human rights violations.

(6) To visit relevant places that significant human rights violations may occur.

And

(7) Other related issues concerning human rights promotion and protection.

We can see that, although expressed in different words, both Bills have the same idea of adopting the context of the Paris Principles in order to comply with

international standards.

Both of the “NGO HRC Act” the “Governmental HRC Act” grant the commission a power to investigate cases of significant violations of human rights. According to both of the Bills, the commission may receive petitions from individuals or group of individuals complaining of significant violations of human rights, for which the commission will provide rules. In addition, the commission itself may initiate investigations of significant human rights violations.¹⁹² However, while the “NGO HRC Act” defines a significant human rights case as a collective, controversial or international violation of human rights, the “Governmental HRC Power Act” focuses on the existing or lack of laws, regulations and measures that may violate human rights protection, and cases that are not belong to the mandate of the Control Yuan (Ombudsmen) or are not currently examined by the judiciary.¹⁹³ Therefore, in the “NGO HRC Act,” the commission, to avoid conflicts of jurisdiction, when a relevant agency, especially the Control Yuan, has been dealing with the same case, may temporarily cease its own investigation and provide assistance to that agency. The agency is required to report its results to the commission.¹⁹⁴ When it discovers criminal acts or civil servants having violated the law, the commission, being a subsidiary to but not replacing the judiciary, shall refer those cases to the Prosecution or the Committee on the Discipline of Public Functionaries.¹⁹⁵ However, in the “Governmental HRC Power Act,” the commission should refer cases to the Control

¹⁹² Article 3 Paragraph 1 of the “NGO HRC Act” and Article 6 of the “Governmental HRC Power Act.”

¹⁹³ Article 6 of the “Governmental HRC Power Act.”

¹⁹⁴ Article 5 of the “NGO HRC Act.”

¹⁹⁵ Article 4 of the “NGO HRC Act.”

Yuan whenever it finds that those belong to the mandate of the Control Yuan.¹⁹⁶ The commission should also dismiss any case that is currently examined by the courts.¹⁹⁷

Both bills grant the commission, when exercising its investigative function, the power to enter any building or place where the commission has reasons to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies of them. The commission also has the power to require any person or governmental agency to furnish information on such points or matters as, in the opinion of the commission, may be useful for, or relevant to, the subject matter of the inquiry. Any person so required shall be legally bound to furnish such information.¹⁹⁸ The commission, by written notice, may summon persons concerned to give statements of facts or opinions.¹⁹⁹ Persons without proper reasons shall not refuse to attend. If compensation is involved, the commission may engage in friendly settlement or arbitration. The commission may refer the conclusions of friendly settlement or arbitration in which payments or certain acts are included, to the courts for execution.²⁰⁰

However, the two Bills disagree with two issues. The first issue concerns the delegation of power. In the “NGO HRC Act,” the commission may delegate investigative power to specific agencies or groups, scholars or experts.²⁰¹ However, according to the “Governmental HRC Power Act,” human rights commissioners may delegate power only to human rights investigators, who are staffs of the commission.

¹⁹⁶ Article 17 of the “Governmental HRC Power Act.”

¹⁹⁷ Article 6 of the “Governmental HRC Power Act.”

¹⁹⁸ Article 7 Paragraph 1 of the “NGO HRC Act” and Article 11 of the “Governmental HRC Power Act.”

¹⁹⁹ Article 8 of the “NGO HRC Act” and Article 11 of the “Governmental HRC Power Act.”

²⁰⁰ Article 3 Paragraphs 3 and 4 of the “NGO HRC Act.”

²⁰¹ Article 7 Paragraph 3 of the “NGO HRC Act.”

Secondly, the two Bills impose different amount of fine. While both Bills agree if fines have not been paid the commission may refer the orders to the courts for their execution, they have different views on amount. In the “NGO HRC Act,” the commission has the power to impose fines ranging from NT\$ 10,000 to NT\$ 10,000,000 on those who violate the commission’s orders.²⁰² But, in the “Governmental HRC Power Act,” the commission may impose fines ranging from NT\$ 30,000 to NT\$ 300,000.

Both Bills require that the commission, if it finds human rights violation, shall present reports on all cases, whether petitions received or by its own initiation, and send them to the relevant agencies or institutions for remedy. The agencies or institutions are obligated to notify the commission in details the manner and content of their handling of the cases.²⁰³

It is in the both Bills that the commission has to present its annual report on the national human rights status to the President and the Legislative Yuan. The commission may also produce thematic reports on specific human rights issues from time to time. All the reports and recommendations of the commission must be published, and made available and promoted to the public.²⁰⁴

4.3.1.3. Structure

The Paris Principles assert that the composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in

²⁰² Article 9 of the “NGO HRC Act.”

²⁰³ Article 3 Paragraph 2 of the “NGO HRC Act” and Article 20 of the “Governmental HRC Power Act.”

²⁰⁴ Article 6 of the “NGO HRC Act.”

the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists; trends in philosophical or religious thought; universities and qualified experts; Parliament; government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity).

Related issues have been included into both the Bills. First issue is the number of commissioner and the method of appointment. According to the “NGO HRC Act,” there will be 15 commissioners, of whom the President appoints eight and the Legislative Yuan elects seven. The commissioners themselves elect one chairperson and two deputy chairpersons, so as to avoid direct administrative appointments. The chairperson is the chair of commission meetings, and bears responsibility for the general affairs of the commission. Two deputy chairpersons are to assist the chairperson in the performance of functions.²⁰⁵ On the other hand, according to the “Governmental HRC Act,” there will be 11 commissioners, of whom the President appoints all the members. The President also appoints one chairperson and one deputy chairperson.²⁰⁶

The second issue is the qualification of commissioner. The “NGO HRC Act” emphasizes that commissioners shall be appointed from three groups: (a) those who have made particular efforts for or contributions to the activities of protection and promotion of human rights or minority rights in particular; (b) those who have written

²⁰⁵ Article 10 of the “NGO HRC Act.”

²⁰⁶ Article 3 of the “Governmental HRC Act.”

works on or made special contributions to human rights research or education; and (c) those who have served as a judge, prosecutor, lawyer or have participated in other judicious works contributing significantly to human rights protection. It is also explicitly required that the appointment of commissioners shall take notice of the diversity of society.²⁰⁷ On the other hand, the “Governmental HRC Act” focuses on the first two criteria, i.e. those who have made particular contributions to protection and promotion of human rights and those who have written works on or made special contributions to human rights research or education. The “Governmental HRC Act” deletes the third criterion, and does not include a paragraph emphasizing the diversity of society either.²⁰⁸ Both the “NGO HRC Act” and the “Governmental HRC Act” explicitly require the commissioners should exercise their powers independently, and shall not participate in activities of political parties.²⁰⁹

The third issue concerns the rank and term of commissioners. In the “NGO HRC Act,” commissioners are defined as officers of “special appointment rank,” who are not classified as general civil servants. Commissioners have the terms of six years. However, at the first appointment, the President and the Legislative Yuan shall respectively appoint three commissioners for terms of three years²¹⁰ to, as far as possible, avoid political influence and to maintain continuity. Commissioners may be re-elected or re-appointed once. Commissioners shall not serve in other civil services nor engage in professional practices. On the other hand, in the “Governmental HRC Act,” commissioners are defined as officers of highest general civil servants.

²⁰⁷ Article 11 of the “NGO HRC Act.”

²⁰⁸ Article 4 of the “Governmental HRC Act.”

²⁰⁹ Article 13 of the “NGO HRC Act” and Article 4 of the “Governmental HRC Act.”

²¹⁰ Article 10 of the “NGO HRC Act.”

Commissioners have the terms of four years.²¹¹ No special rule was designed for the first appointment; neither a paragraph was included to prevent commissioners from serving in civil services or engaging in professional practices. Commissioners are not limited as re-appointed once; therefore they can always be re-appointed.

A fourth issue is the ways of maintaining the independence of the National Human Rights Commission. In the “NGO HRC Act,” several ways have been provided. First, the Executive Yuan has no power to cut the annual budget of the commission,²¹² which means that the Legislative Yuan is the only branch that can arrange the commission’s budget. Second, no commissioner will be removed from office unless he or she has been guilty of a criminal offence or declared to be under interdiction. Third, commissioners’ expressions or votes within commission meetings will not be charged.²¹³ Fourth, the “NGO HRC Act” delegates to the commission the power to enact its own rules for meetings and procedures.²¹⁴ However, the “Governmental HRC Act” does not include any of these measures.

Fifthly, some mechanisms to help the National Human Rights Commission are also of importance. The “NGO HRC Act” includes several ways. First, the commission may establish specialised committees as it sees necessary.²¹⁵ Second, the commission may appoint domestic and foreign consultative advisors, and the commission has the power to make such regulations.²¹⁶ Third, commissioners, as their own initiation, may appoint four to six persons as assistants, specialists or

²¹¹ Article 3 of the “Governmental HRC Act.”

²¹² Article 12 of the “NGO HRC Act.”

²¹³ Article 14 of the “NGO HRC Act.”

²¹⁴ Articles 20 and 21 of the “NGO HRC Act.”

²¹⁵ Article 15 of the “NGO HRC Act.”

²¹⁶ Article 16 of the “NGO HRC Act.”

researchers.²¹⁷ Fourth, administrative staffs divided into five departments, while not to become a bloated bureaucracy, will assist the commission.²¹⁸ The “Governmental HRC Act” adopts some similar provisions concerning appointments of domestic and foreign consultative advisors and administrative staffs.²¹⁹ It is explicitly stated that the commission may establish specialised committees in the “Governmental HRC Act.” Neither the “Governmental HRC Act includes the appointments of four to six assistants for individual commissioner. However, the “Governmental HRC Act” empowers the commission to appoint several human rights investigators and researchers.²²⁰

4.3.2. Bringing International Human Rights Home

Regarding the topic of bringing international human rights home, as mentioned above, the Chen Shui-bian administration focus on two issues. One is the ratification of the two International Covenants; the other is to enact a “Taiwan Bill of Rights.” The Executive Yuan, on 14 February 2001, asked the Ministry of Foreign Affairs and the Ministry of Justice to be in charge of these two issues respectively. Before we discuss these two issues it may be help to include a brief history of the inter-relationship between Taiwan and international human rights regime.

4.3.2.1. Taiwan and International Human Rights Regime

One major purpose of the United Nations is to promote and encourage respect for human rights for *all*. The UN and its members, in pursuit of this purpose, shall act in accordance with the principle that all persons are endowed with fundamental human rights, *regardless of the country in which they live*. The Universal Declaration

²¹⁷ Article 17 of the “NGO HRC Act.”

²¹⁸ Article 18 of the “NGO HRC Act.”

²¹⁹ Articles 7-12 and 14 of the “Governmental HRC Act.”

²²⁰ Article 13 of the “Governmental HRC Act.”

of Human Rights, which the General Assembly adopted on 10 December 1948, has been proclaimed as a common standard of achievement for *all peoples and all nations*. Therefore, *no* distinction shall be made on the basis of *the international status* of the country or territory to which a person belongs.

On 16 December 1966, both ICCPR and the ICESCR were concluded. Since then, these three documents have been regarded as the International Bill of Rights. In addition, two Optional Protocols to the ICCPR were further adopted to allow individual petitions against their home states and to abolish the death penalty. Meanwhile, by 1971, the UN also concluded many other international human rights instruments such as the Convention on the Prevention and Punishment of the Genocide, the Convention on the Political Rights of Women, the Convention on the Nationality of Married Women, and the International Convention on the Elimination of All Forms of Racial Discrimination.

In the 1970s and 1980s, the international human rights regime continued to advance, leaving the then-martial-ruled Taiwan further behind. In 1976, the said two International Covenants and the Optional Protocol to the ICCPR came into force. The Convention on the Elimination of all Forms of Discrimination against Women took effect in 1981. Another important piece of human rights treaty, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 1984 and went into force in 1987, respectively. Between 1988 and 2000, the international human rights regime went even further on. A series of major instruments were adopted and implemented. The list includes: the Second Optional Protocol to the ICCPR, aiming at abolition of the death penalty (adopted in 1989 and entering into force in 1991), the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (adopted in 2000), the Convention on the Rights of the Child (adopted in 1989 and entering into force in 1990), and the Rome

Statute of the International Criminal Court (adopted in 1998 and entering into force in 2002).

The ROC was a permanent member of the Security Council of the UN between 1946 and 1971. Therefore, it has often been argued that the ROC positively participated in drafting the International Bill of Rights. The positive participant nonetheless merely signed the two International Covenants and the Optional Protocol to the ICCPR; no ratification ever followed. The ROC ratified some other international human rights instruments, such as the Convention on the Prevention and Punishment of Genocide, the Convention on the Political Rights of Women, the Convention on the Nationality of Married Women, and the International Convention on the Elimination of All Forms of Racial Discrimination. The Convention on the Prevention and Punishment of Genocide was further incorporated into domestic law. It can be argued that during the period between 1946 and 1971 the ROC had opportunities to, but did not fully join the international human rights regime.

Situations have changed dramatically since 1971. Since then, the UN and most States in the world no longer recognized the ROC government as the Chinese government, and even not a *de jure* State or government at all. Consequently, the above signatures and ratification of international treaties by the ROC government were not recognized by the UN, either. Furthermore, Taiwan (and its government) has practically lost almost all of the available opportunities to participate in the evolution of the international human rights regime thereafter.

Taiwan and international human rights instruments by 1971

Instrument	Status of signature and/or ratification	
	Signature	Ratification or Accession
United Nations Charter	26 June 1945	28 Sept 1945
Convention on the Prevention and Punishment of the Crime of Genocide	20 July 1949	5 May 1951
Convention on the Political Rights of Women	9 June 1953	27 Nov 1953
Slavery Convention	7 Dec 1953	14 Dec 1955
Protocol amending the Slavery Convention	7 Dec 1953	14 Dec 1955
Equal Remuneration Convention (ILO No. 100)	1 Mar 1958	1 May 1958
Convention on the Nationality of Married Women	20 Feb 1957	12 Aug 1958
Abolition of Forced Labour Convention (ILO No. 105)	Signature not required	23 Jan 1959
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery	23 May 1957	28 May 1959
Discrimination (Employment and Occupation) Convention (ILO No. 111)	Signature not required	31 Aug 1961
Labour Inspection Convention (ILO No. 81)	Signature not required	26 Sept 1961
Indigenous and Tribal Populations Convention (ILO No. 107)	Signature not required	10 Sept 1962
Right to Organise and Collective Bargaining Convention (ILO No. 98)	Signature not required	10 Sept 1962
Protection of Wages Convention (ILO No. 95)	Signature not required	22 Oct 1962
Convention against Discrimination in Education	Signature not required	16 Nov 1964
Maximum Weight Convention (ILO No. 127)	Signature not required	23 Dec 1969
International Convention on the Elimination of All Forms of Racial Discrimination	31 March 1966	14 Nov 1970
Accommodation of Crews Convention (Revised) (ILO No. 92)	Signature not required	23 Dec 1970
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	10 Dec 1949	Not yet ratified
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces	10 Dec 1949	Not yet ratified

Instrument	Status of signature and/or ratification	
	Signature	Ratification or Accession
at Sea		
Geneva Convention relative to the Treatment of Prisoners of War	10 Dec 1949	Not yet ratified
Geneva Convention relative to the Protection of Civilian Persons in Time of War	10 Dec 1949	Not yet ratified
Convention on the Reduction of Statelessness	30 Aug 1961	Not yet ratified
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	4 Apr 1963	Not yet ratified
International Covenant on Civil and Political Rights	5 Oct 1967	Not yet ratified
(First) Optional Protocol to the International Covenant on Civil and Political Rights	5 Oct 1967	Not yet ratified
International Covenant on Economic, Social and Cultural Rights	5 Oct 1967	Not yet ratified

Source: Ministry of Foreign Affairs, Document No. 09101164450

It may be argued that although Taiwan became more democratic, she was still an “orphan” of the international human rights regime. On the one hand, Taiwan had no opportunity to access international human rights instruments; on the other, Taiwan did not incorporate international human rights norms into its domestic legal system. There was a new start to return to the international human rights regime after Chen Shui-bian administration took power. Now the situation is that Taiwan has strong commitment to join the international human rights regime, while the reality is that the international community does not give she any opportunity. The UN system has been treating Taiwan as part of China. However, it is not reasonable to say that the PRC, who never rules Taiwan for a single day after its creation, has a legal right to represent Taiwan in the international human rights regime.

In fact, we all know that the pressure comes from Beijing. When the subject is a sovereign State, the PRC blocks Taiwan’s ways to the international community, even

though in international human rights regime, which should be universal regardless one's international status. Still the PRC tries to prevent President Chen Shui-bian, who received a freedom prize awarded by Liberal International, from going to Denmark to receive the award. It can be argued that it would be ironic if the recipient of the 2001 Prize of Freedom would be stripped of the freedom to receive the honour because of pressure from Beijing.

International human rights treaties are for *all peoples and all nations regardless of the country in which they live* and without distinction of *the international status of the country*. International human rights monitoring mechanism has been urging states to participate in as many international human right treaties as possible. It is obviously unfair to turn she down when Taiwan wishes to be abided by international human rights regime. If the international community takes universal human rights seriously, it shall make Taiwan's accession available. There will be no universal human rights without Taiwan.

4.3.2.2. Ratification of the two Covenants

The UDHR, the ICCPR, and ICESCR are collectively known as the "International Bill of Rights." Together they represent the most basic set of international human rights standards. Similar to the status of parent law, this set of international human rights regulations is the basis for so many other human rights treaties. The 1993 "Vienna Declaration and Programme of Action" (VDPA) reaffirmed the universality of the human rights guarantees of the International Bill of Rights as well as their indivisibility.

The two Covenants legally bind their contracting parties. Not only does the ICCPR require that the signatory nations submit periodic human rights status reports, but it establishes a mechanism to accept appeals from any country concerning human rights violations. Moreover, the Optional Protocol to the ICCPR confers on individual

citizens of states parties to the Protocol the right to bring complaints against governments for rights violations. The two Covenants are the most representative of international human rights treaties. As of the year 2002, 148 states had ratified the ICCPR, while another seven have signed but have yet to ratify. The ICESCR has been ratified by 145 states, with another seven having signed but not yet ratified.

Taiwan signed the ICCPR, the Optional Protocol to the ICCPR and the ICESCR in 1967. But Taiwan did not ratify any of these three important international human rights instruments by 1971. As Taiwan was under decades of authoritarian rule which had a taboo on human rights, coupled with international isolation, the importance of the international human rights treaties, as well as the related international legal issues of accession, were not given weight.

Since 20 May 2000 President Chen Shui-bian has put forth the ideal of “building a human rights state,” and has stressed the importance of catching up with international human rights standards through this process. Ratification of the ICCPR and the ICESCR is therefore an important beginning for realizing this objective. President Chen reiterated this ideal again in his remarks when he attended the founding ceremony for the Presidential Human Rights Advisory Group, in his remarks when he went to Green Island to participate in anniversary ceremony for the human rights commemorative plaque, in his January 2001 New Year’s remarks, and in his address to the eighth full meeting of the committee and first-year anniversary of the founding of the Presidential Human Rights Advisory Group.

On 18 April 2001, the 2730th meeting of the cabinet passed a proposal by the Ministry of Foreign Affairs (MOFA) to submit to the Legislative Yuan to ratify and present to the President for signature the ICCPR and the ICESCR. The Executive Yuan further stressed that “the ICCPR and the ICESCR are, of all the international human rights standards, the ones which provided fundamental guidance, and,

moreover, since our government had signed them in 1967, that they should be assigned top priority, so that they might go through the ratification procedures as quickly as possible.”²²¹

In Taiwan the ratification of the ICCPR and the ICESCR faces three problems. The first question is whether or not Taiwan should register any reservations, as allowed for in the Covenants, to any of the Covenants’ provisions. The majority of scholars on the issue advocated registering no reservations whatever. The Executive Yuan, after having its ministries and agencies survey the laws and measures that come under their purview, believed that regulations currently not conforming to the Covenants could be dealt with through revisions in the law, and thus no reservations were required. However, there was an enormous debate in the Legislative Yuan. As a result the Legislative Yuan, on 31 December 2002, passed the ratification procedure, but with reservations to Article 6 (death penalty) and Article 12 (right to liberty of movement and freedom to choose residence) of the ICCPR and Article 8 (right to form trade union) of the ICESCR. It further included a declaration to Article 1 of the ICCPR stating that “self-determination is applied to colonies or non self-governing territories only, and the ROC is a sovereignty state, therefore does not subject to self-determination.” The DPP was of the view that such declaration did not comply with common Article 1 of the two Covenants. Therefore, the DPP, on 7 January 2003, applied for repealing such declaration. Whether the DPP will be successful is still unknown by 15 January 2003.

The second problem concerns the legal status of international human rights treaties. Common practice and academic discourse holds that all treaties ratified pursuant to Article 38, Article 58 (2), and Article 63 of the Constitution share equal

²²¹ Record of the 2730th meeting of the cabinet of the Executive Yuan.

status with domestic law. However, if the deposit of the ratification instrument of a treaty or convention has yet to be consummated, when international legal binding force was not yet in effect on our country, would the treaty then have any domestic legal effect? The answer was not clear in Taiwan. However, it should be noted that the Judicial Yuan Interpretation No. 329²²² has hold:

According to the Constitution the President has the power to conclude treaties. The Premier and Ministers shall refer those treaties that should be sent to the Legislation Yuan for deliberation to the Committee of the Executive Yuan. The Legislative Yuan has the power to review those treaties. All these are explicitly enshrined in Article 38, Article 58 Paragraph 2 and Article 63 of the Constitution respectively. Treaties concluded in according to above procedures hold the same status as laws.

Since Interpretation No. 329 does not refer to deposit procedure, it is believed that once an international human rights treaty has been passed by the Legislative Yuan and signed by the President it has domestic legal status, and the same status as laws. However, there is still no law in Taiwan that makes this issue clear as a special law on ratification of treaties is under consideration by the Legislative Yuan. Such related issues are currently regulated by the Standards for Handling of Treaties and Agreements, which is enacted by the Ministry of Foreign Affairs. In order to clarify the issue of domestic legal status MOFA called a meeting to revise Article 11, Section 2 of the Standards for Handling of Treaties and Agreements on 10 April 2002. According to such provision a human rights treaty, if it has been passed by the Legislation Yuan and signed by the President, gains domestic legal status, even without deposit the ratification to the Secretary-General of the United Nations.

²²² 24 December 1993.

The third problem is: must the procedures for depositing the ratification document be immediately carried out? As called for by the stipulations of the Covenants themselves, completion of the ratification process by depositing it with the Secretary-General of the United Nations is to formally declare before the international community Taiwan's commitment to be bound by the Covenants. By completing the deposit process, it will make Taiwan a contracting state to the two Covenants, so by legal principle Taiwan should waste no time in completing the procedures. However, since both Covenants stipulate that they may be ratified or acceded to by "any State Member of the United Nations or member of any of its specialized agencies ... and by any other state which has been invited by the General Assembly..." which are conditions that Taiwan cannot presently fulfill. Moreover, under the political situation in which Taiwan presently finds itself, with the People's Republic of China interfering, in practice completion of the deposit procedure may still be problematic.

Whether to deposit the instruments of ratification or not is still a controversial issue in Taiwan. Those in support believe that by ratifying, the government will achieve rendering of the human rights Covenants into domestic law, not only bring strengthening human rights guarantees but also getting our country back on track internationally; whereas deposition, necessarily implicating our country's sovereignty and independence, would be opposed by the PRC, but whether the UN accepted it or not would not be important. Those opposed believe that there is no urgency to ratifying, and questioned whether or not they could be respected, as well as whether a failed attempt at deposition could damage national dignity and cross-Strait relations, and moreover draw criticism about the human rights standards of our diplomatic allies and the direction of our foreign relations. It seems that the approach adopted by Chen's administration is to "keep an open attitude, and, while surveying the changes

in the international situation to seize the right opportunity to act.”²²³

Taiwan’s involvement with the ICCPR and the ICESCR

Date	Event
16 December 1966	21 st session of the UN General Assembly passes both Covenants (the ROC is a participant and votes in favor).
19 December 1966	Covenants open for signatures in New York.
5 October 1967	Permanent ambassador to the UN, Liu Kai, signs the two Covenants and the Optional Protocol to the ICCPR.
25 October 1971	ROC leaves the UN; ratification work on the two Covenants shelved.
3 January 1976	ICESCR goes into effect.
23 March 1976	ICCPR goes into effect.
28 Oct 1998, 18 Dec 1998, 7 April 1999	Inviting human rights experts, scholars and representatives from government agencies, MOFA conducts three conferences to deliberate on how to promote the two Covenants. On the agenda are such questions as: (1) whether our country should promote ratification work on the Covenants; (2) whether it would be possible to file the ratification instrument with the UN Secretary-General; (3) whether our country’s related laws are in accord with the regulations set forth in the Covenants; (4) whether at time of ratification our country should register reservations. The result of its research is that the implications of the proposal are so broad and its influence so far-reaching that after being reported to the EY permission was granted to postpone implementation.
10 December 1998	50 th anniversary of the UDHR’s passage. The government issues a statement that while we are unable to accede to the Covenants, we still respect human rights, and we are making efforts to legislate related domestic laws and thereby implement the standards in the Covenants incrementally.
20 May 2000	At his inauguration, President Chen formally declares that Taiwan will respect the UDHR, the ICCPR, and the Vienna Declaration and Programme of Action, that Taiwan will reenter the international human rights regime, that the government will call on the LY to ratify the International Bill of Rights.
22 August 2000	MOFA convenes meeting of scholars, experts, and representatives from related government agencies and NGOs, in order to discuss the timing and method of ratification and accession into the Covenants, as well as alternative proposals,

²²³ See 2002 Human Rights Policy White Paper of the Republic of China (Taiwan) Human Rights Infrastructure-building for a Human Rights State, February 2002, p. 34.

Date	Event
	and domestic, international, and cross-Strait impacts.
28 November 2000	MOFA Vice Minister Wu Tzu-tan leads advisory committee made up of related personnel and legislators from the LY's Foreign and Overseas Affairs Committee, in which members affirm their support for the government policy of elevating human rights; however, there is disagreement over whether the government should try to ratify the Covenants and deposit our ratifications with the UN.
12 April 2001	EY receives recommendation that the Covenants be sent to the LY for deliberation. On 18 April the cabinet meets in its 2730 th session, and on the 25 th the two Covenants are sent to the LY.
25 April 2001	In a communication to MOFA, the EY says that if the Covenants complete the domestic ratification process, the question of deposition will arise. In order to show our government's earnestness in promoting human rights guarantees, the EY directs MOFA to make an active effort, despite the practical difficulties resulting from not being a member of the UN.
20 June 2001	MOFA calls the first supra-ministerial meeting this year to discuss questions related to the Covenants' ratification. It is resolved that the various ministries will determine which laws they administer may have conflicts with the Covenants. The several ministries will then establish channels with the respective legislators to coordinate and cooperate in enacting necessary legal revisions.
24 June 2001	The EY's newly established Human Rights Protection and Promotion Committee formally presents varied responses and measures for entering into the two Covenants, with promotional emphasis given to the fact that although the Covenants were signed in 1967, they have yet to be ratified, so we must study the ways in which domestic law needs to be revised in order to match the current unique international standing of our country.
6 August 2001	MOFA calls a meeting to deliberate on the questions of procedure and effectiveness relating to ratification of the Covenants. Views differ regarding the legal effect of treaties, which have been signed but not yet ratified and included within domestic law.
3 September 2001	MOFA holds its second supra-ministerial conference this year.
9 October 2001	With Vice Foreign Minister Chiu Jung-nan presiding, related officials and members of the LY's Foreign and Overseas Affairs Committee confer and report briefly on ratification-related problems. The legislators are asked to cooperate with the various ministries in identifying the domestic laws that might be in conflict and rectifying them.
14 December 2001	In response to the difficulty anticipated in depositing ratification instruments with the UN, MOFA calls a meeting to revise Article 11, Section 2 of the Standards for Handling of Treaties and Agreements.

Date	Event
31 December 2002	The LY passes the ratification procedure, but with declaration to Article 1 of the ICCPR and reservations to Articles 6 and 12 of the ICCPR and Article 8 of the ICESCR.
7 January 2003	The DPP applies for reconsidering of declaration to Article 1 of the ICCPR.

Source: 2002 *Human Rights Policy White Paper of the Republic of China (Taiwan) Human Rights Infrastructure-building for a Human Rights State*, February 2002, pp. 35-36. (with supplement information by the authors)

4.3.2.3. Taiwan Bill of Rights

In his inauguration speech, President Chen declared that we would be rendering the International Bill of Rights into domestic law, making them a formal “Taiwan Bill of Rights.” However, the problem is, from a legal point of view, how to achieve this goal? There are, from comparative law perspective, two directions that can be taken in rendering international human rights standards into domestic law. The first is to incorporate the international human rights standards into constitutions. Since 1990 many countries have introduced international human rights treaty or standards into their constitutional law. For example, the constitution might stipulate that international human rights treaties must be recognized and respected. Or the constitution might mandate that interpretation and application of the constitutional human rights provisions accord with international human rights treaties and standards. Or the constitution might stipulate that the agencies of the state must guarantee implementation of basic human rights and international human rights.

The other direction would be to establish a law that would give international human rights conventions the status of domestic law, what is known as incorporation of international human rights standards. One example is a recent law enacted by Norway: “Act of 21 May 1999 No. 30 Relating to the Strengthening of the Status of Human Rights in Norwegian Law” (the Human Rights Act). This law clearly stipulates that the European Convention on Human Rights (ECHR), the ICESCR, and

the ICCPR (including the two protocols) carry the full effect of domestic law. It further stipulates that should domestic law come into conflict with any of the above-mentioned treaties and protocols, then the international treaties and protocols take precedence.

Latvia, upon regaining its independence in 1990, issued its “Declaration on the Accession of the Republic of Latvia to International Instruments Relating to Human Rights.” The Declaration announced Latvia’s intention to put into effect some 53 of the United Nations international human rights instruments, including the UDHR, the ICESCR and the ICCPR. At the same time, Latvia said that it would go one better by passing legislation to implement them. In 1997 Latvia enacted its “Law on the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols No. 1, 2, 4, 7 and 11”. The primary effect of this law was to bring the ECHR into domestic law, as well as to recognize the jurisdiction of the European Commission of Human Rights and the European Court of Human Rights.

Ireland drafted its 2001 “European Convention on the Human Rights Bill”. The purpose of this bill was also to render the ECHR into domestic law. Its principal provisions were (1) judicial interpretation and application of the law must be in accord with Ireland’s national obligations under the ECHR, regardless of when the domestic law was enacted, in other words all of Ireland’s domestic law must come into accord with the standards set by the ECHR; (2) when the high court or supreme court of Ireland is weighing a case on appeal, it may at its own initiative or on by request of one of the parties, when there is no other legal relief available, declare that any law of Ireland is not in accordance with the obligations under the ECHR, and when the high court or supreme court so declares, it must forward the declaration to Ireland’s parliament; (3) all of Ireland’s government agencies must carry out the

exercise of their authority in accordance with Ireland's national obligations to the ECHR, so that all of Ireland's state behavior will be in accordance with its regulatory mandate; (4) should people believe that their rights are being violated by the behavior of any state institution, and when there is no other path of legal remedy, then they may bring suit before the high court demanding compensation for injury.

As for countries without written constitutions, the more typical model is that of passing special legislation to introduce the International Bill of Rights into domestic law. The purpose of New Zealand's "Bill of Rights Act" of 1990 and Hong Kong's 1991 "Bill of Rights Ordinance" was to put the standards in the ICCPR into effect. The preamble to New Zealand's "Bill of Rights Act" states that the purpose is to confirm New Zealand's obligations under the ICCPR, while the preamble to Hong Kong's Bill of Rights Ordinance likewise states that it intends to introduce the Covenant into Hong Kong domestic law. At the same time, these human rights statutes in New Zealand and Hong Kong have higher legal status than ordinary domestic laws. For example, Article 3 of Hong Kong's "Bill of Rights Ordinance" says that all laws passed prior to the ordinance and which are in conflict with it are no longer in effect, while Article 4 says that those which pass into law subsequent to it must accord with the regulations of the ICCPR.

The UK's 1998 Human Rights Act is also a special case, which domesticates the standards of the ECHR. It also demands that the judiciary must take account into the opinions of the various institutions created under the ECHR to interpret the Convention, including the European Court of Human Rights, the European Commission of Human Rights, and the Committee of Ministers, no matter whether the organization issued a finding, a decision, an advisory opinion or a resolution. When a higher court finds that any domestic legislation cannot be construed in a way, which is compatible with the human rights protection provisions of the ECHR, they

may make a declaration that the legislation is “incompatible” with the ECHR. The Act also provides the individual with a path of relief should his or her rights as guaranteed by the convention be violated by any public authority. The courts must also decide about providing compensation to the injured party, and such decision must accord with the standards established in Article 41 of the ECHR. As far as new legislation is concerned, the Act demands that new legislation as well as the legal interpretations must accord with the ECHR. In addition, before the second reading of any bill the government minister in charge of the bill must issue a “statement of compatibility” in which it is declared that the law accords with European human rights standards. Furthermore, with regards to public authorities, the Act renders illegal any behavior by any public authority, which violates European human rights standards.²²⁴

The problem remains: which way should Taiwan go? The most ideal and most suited to the principles of the functioning of the legal system is to make sweeping changes to the articles of the Constitution regarding human rights protection according to the spirit and content of the major international human rights conventions. One method that may be considered is to add a constitutional amendment with general provision stating that the international human rights covenants that Taiwan has ratified are to possess domestic legal status. In this way the ideal of human rights guarantees in a constitutional nation can be tightly integrated with international human rights guarantees. Moreover, the existing system for examining constitutionality can then be employed to ensure that the international human rights standards are being put into practice. It seems, unfortunately, that

²²⁴ Fort Fu-Te Liao, “Ways to Implementing International Bill of Rights — Ratification, Accession or Incorporation?” *Taipei Bar Journal*, No. 272, May 2002, pp. 36-51, at pp. 43-45.

conditions for adding constitutional amendment are not yet mature. The government therefore up to now does not propose any constitutional amendment to grant international human rights conventions constitutional status.

The second method would establish a “Human Rights Basic Law,” with reference to some international precedents. This would incorporate articles from the ICCPR and the ICESCR, as well as systematically introduce content from other international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention for the Elimination of All Forms of Racial Discrimination, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.

The Ministry of Justice presented its first draft bill of “Human Rights Basic Law” on 13 March 2001. It included 82 Articles and was divided into 14 chapters. However, this draft bill was criticized by scholars and human rights organizations. The Ministry of Justice therefore decided to revise its draft bill. On 15 June 2001, the Ministry of Justice presented its second draft bill. It included 30 Articles without division of chapters. Its Article 1 states that this Law has three purposes: first, to ensure constitutional principal of protecting fundamental rights; second, to domestically implement of international human rights treaties; to extend human rights protection system. Article 27 requires that, in order to realize the “Human Rights Basic Law,” the government should, according to financial condition, arrange budget for human rights protection with priority. It is further enshrined in Article 28 that the “Human Rights Basic Law” and other human rights related laws should be interpreted according to the Constitution, the International Bill of Rights and other international human rights instruments. According to Article 29 of the bill, human rights advisory institution is to be established for effective protection of human rights. Rights and

freedoms are guaranteed from Article 2 to Article 27. They include right to participate political activities, right to know, freedom of expression, right to nationality, freedom of movement, right of foreigner and stateless, right to fair trial, right to education and etc.

However, scholars and human rights organizations still did not feel satisfied by the second draft bill presented by the Ministry of Justice. The Executive Yuan Human Rights Protection and Promotion Committee therefore decided to hold this draft bill until further discussion and revision. By the end of 2002 the Executive Yuan did not finish revising such bill, and of course no bill for the “Human Rights Basic Law” has been sent to the Legislative Yuan.

One major problem of the “Human Rights Basic Law” is that, in terms of incorporating international human rights norms, there has been no similar domestic legal precedent in Taiwan. Therefore it is still being researched and debated. This issue still awaits further public discussion, so that the considerable number of questions can be cleared up and a consensus formed.

After further developments the Chen Shui-bian administration’s human rights policies in fact extend to a more fully comprehensive prospect, including national human rights action plan, national human rights museum, and human rights education.

4.3.3. National Human Rights Action Plan

On 2 January 2001, in his opening address to the “International Conference on National Human Rights Commissions,” President Chen further stressed:

I proposed, on behalf of my new administration, in my inaugural address last May a set of three human rights policies. The first is the creation of a national human rights commission, a step long advocated by the United Nations. The second proposes incorporating the International Bill of Human Rights into an ROC Bill of Rights. The

third is to encourage and intensify exchanges with international human rights NGOs.

These three policies respond to human rights on the global, national and NGO level. But this is only a first step. The next step would be a comprehensive national action plan as advocated by the 1993 Vienna World Conference on Human Rights.”

On 7 December 2001, at the opening ceremony and press conference for the historical exhibition “The Road to Freedom: Retrospectives on Taiwan’s Democratic Struggle and Human Rights Movement,” President Chen announced that in 2003 the National Human Rights Action Plan, whose creation by every country was demanded by the 1993 Vienna World Human Rights Conference, would be created, for “a more long-range, comprehensive, and detailed plan for bringing about ‘building a human rights state.’ This will include strengthening and renewing the core chapter of the Constitution on the rights and duties of the people.”

The concept of “national plans of action for the protection and promotion of human rights” was a product of the 1993 Vienna World Conference. The VDPA “recommends that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights.” In the Asia-Pacific region, the UN’s Office of the High Commissioner for Human Rights held a Workshop on the Development of National Plans of Action for the Promotion and Protection of Human Rights in the Asia-Pacific Region, which completed a draft set of principles, purposes, and procedures for national human rights action plans. The conclusions of both the VDPA and the Bangkok Workshop stressed that the national action plans must incorporate mechanisms for evaluation and revision. Their spirit and goals emphasized the need for the formation and existence of such plans, as an object and a foundation for sustained debate and consensus building.

Given all the serious inadequacies of Taiwan’s human rights infrastructure, the

government does not expect to create a perfect plan immediately, but it shall emphasize three points. The first is preparation of preconditions, through such projects as the Executive Yuan's survey of the administrative practices of all of its ministries and commissions, the setting up of the National Human Rights Commission, and the issuing of the country's first human rights report. Second step is working towards finalizing the National Human Rights Action Plan, which should commence in 2003. Third, when this work begins, it should follow the spirit and method emphasized by the VDPA and the Bangkok Workshop.²²⁵

The government's survey report was completed in January 2002. Its editorial format, in addition to referencing the international human rights conventions, takes into consideration the standard presentation of our existing legal codes, as well as the administrative jurisdiction of each agency. It is divided into four chapters. The second chapter present simple explanatory overviews of the history and prospects of human rights development in our country. The main substance of the report is chapter 3, wherein all human rights are divided into three broad categories: (1) civil and political rights, (2) economic, social, and cultural rights, and (3) rights of minorities and other special groups. These are then divided into sections, in which the relevant rights are further subdivided into a variety of types. Using each of those types as the analytical unit, the names and important content of each current law affecting this right, the effectiveness of its systematic implementation or execution of these laws, and the current work agenda and targets are explained in some detail. Then, each government department carried out an evaluation of the current system of laws and measures in its jurisdiction, and proposed directions which reform could take and its objectives. This

²²⁵ See 2002 Human Rights Policy White Paper of the Republic of China (Taiwan) Human Rights Infrastructure-building for a Human Rights State, February 2002, p. 49.

initial report will serve as the basis for the later phases of the survey.²²⁶

According to both of the Bills proposed by the NGOs and the government, the National Human Rights Commission will be required to issue annual national human rights reports. However, the bills still await the Legislative Yuan's review and passage, and a certain amount of preparatory time will be needed after passage before the National Human Rights Commission can be fully operational. Therefore, the Executive Yuan, in a January 2001 cabinet meeting, established March 2003 as the publication date of the country's first national human rights report. In the meantime, until the National Human Rights Commission is set up, the Executive Yuan Human Rights Protection and Promotion Committee is proceeding with plans for related drafting work. The first national human rights report will use international as well as constitutional standards in the drafting, to ensure that it will serve the functions of reports of the first and second categories.

The government has promised that, when the work of the National Human Rights Action Plan begins, it should follow the spirit and method emphasized by the VDPA and the Bangkok Workshop. The first National Human Rights Action Plan in Taiwan is due by the end of 2003.

4.3.4. National Human Rights Museum

We may also trace the history of establishing a national human rights museum back to the presidential election in 2000. During the campaign many victims of the "228 Massacre" occurred on 28 February 1947 demanded a memorial hall to memory such tragedy. Mr. Chen Shui-bian, as one of the candidates, promised to achieve this goal. He said why he promised such idea was because of both of the importance of "228 Massacre" itself and his personal experience and belief. According to Article 1

²²⁶ See *ibid.*, p. 23.

of the Constitution, the ROC should be democratic republic of the people, by the people and for the people. The purpose of the nation is to promote and protect people's freedoms and rights. All the powers and organizations of the government are designed for this purpose. However, Taiwan went through a long authoritarian ruling that turned constitutional purpose and mechanism up side down. This was the reason that the "228 Massacre" occurred. During such authoritarian ruling period human right protection became taboo or criminal. Constitutional education focused merely on governmental structure, which President Chen he himself suffered when he was a law school student.

President Chen emphasizes that the national human rights museum is designed to provide people with human rights knowledge. In his view, only people at present and in the future know human rights and constitutional history may effectively protect their own rights, participate in public affair and monitor the government. Therefore, President Chen believes that a national human rights museum will be a precious gift to victims and their families of historic tragedies and all the coming generations.²²⁷

After elected President Chen has been trying to keep his promise. First, a committee to promote the national human rights museum was established in June 2000. Duties of the members of this committee were to find a good location and a director for the national human rights museum. A building of former national library with traditional Chinese palace style was chosen. It is wished to turn a traditional building with symbol of authoritarian ruling into a significant base for promoting human rights and constitutional education all over the nation. Professor Lee Wun-Chi, a famous liberal historian, was appointed as the director.

²²⁷ President Chen Shui-bian, Speech when attended the establishment of a preparatory department for national human rights museum, 19 May 2002.

After two years' work the preparatory department of the national human rights museum was established on 19 May 2002. On the same day the Temporary Regulation of the Preparatory Department of the National Human Rights Museum was enacted by the Presidential Office.

The National Human Rights Museum will be designed with both functions of memorial hall and museum. On the one hand, it will present Taiwan's human rights history under the international human rights context, and will spread constitutional and universal human rights education in order to form a solid basement of human rights state on human rights value, knowledge and conception.²²⁸ It will therefore provide social education on human rights, democracy and constitutionalism. It will also be responsible for interchange with equivalent institutions abroad. The archiving, research and educational display functions of the National Human Rights Museum will be an important "upstream" resource in human rights education and research.

On the other hand, as for its commemorative function, it will present Taiwan's human rights history within the tapestry of world human rights history, for example by situating human rights violations such as the Wushe Incident, the February 28 Incident and the White Terror in that larger context. The National Human Rights Museum will also be a memorial hall of the "228 Massacre." It will take the "228 Massacre" as an important event in the history of international human rights developments. This Museum will remind all the Taiwanese people that a mass human rights violation tragedy such as the "228 Massacre" shall not happen again in Taiwan. It is a way to put the "228 Massacre" into a broader human being struggling for human rights to memory those scarified and to provide education for future

²²⁸ President Chen Shui-bian, Press Conference, the Exhibition "Human Rights Road — Memory of Democracy and Human Rights in Taiwan," 7 December 2001.

generations.²²⁹

The Presidential Office has been preparing for the “National Human Rights Museum Bill.” The National Human Rights Museum is supposed to be arranged under the Presidential Office. It is hoped that, after the Legislative Yuan passes the Act, the National Human Rights Museum will be established on the international human rights day this year, 10 December 2003.²³⁰

4.3.5. Human Rights Education

In October 2000, 5 months after his being as the President, President Chen expressed that we should face seriously three levels of human rights issues: human rights education, standard and mechanism. The first and most important one is human rights education, as Taiwan, because of past authoritarian rule, is lack of human rights education program and research center.²³¹

In the broader concept the human rights education includes several parts. The first is establishment of the National Human Rights Commission. As mentioned above, promoting human rights education and research is one of its important functions.

The second is establishment of the National Human Rights Museum, which will combine the functions of both commemorative hall and museum. It will be responsible for social education in human rights and democratic constitutional government.

Third is the establishment of human rights research centers at universities. Many

²²⁹ President Chen Shui-bian, Speech when attended new boos announcements for “228 Massacre Files” and “Sixth 228 Massacre Memorial Portraits,” 28 March 2002.

²³⁰ President Chen Shui-bian, Speech when attended “International Symposium of Human Rights in Taiwan,” 16 October 2002.

²³¹ President Chen Shui-bian, Speech when attended the ceremony of the establishment of Presidential Human Rights Advisory Group, 24 October 2000.

universities in other countries not only offer human rights courses, but also maintain human rights research centers. In October 2000 President Chen urged for a human rights research center in Taiwan.²³² It wasn't until the year 2001 that Soochow University, a private university, started up its Chang Fo-chuan Center for the Study of Human Rights, which is the first human rights center in Taiwan. It is argued that, aside from encouraging courses and research programs on human rights, Taiwan still has the need and the room to establish at least one other similar center. Although this proposal is still under discussion, Presidential Human Rights Advisory Group has been promoting another human rights research center, and some national universities have shown their interesting. It is therefore estimated that another human rights center may be established in a national university or research institute in the mid-2004.

The fourth topic is publications and the human rights information systems. The establishment of the National Human Rights Commission, the National Human Rights Memorial Museum and various university human rights research centers will all improve the collection of published materials and the establishing of such information systems. Similarly, it is expected that the creation of these institutions and the increased policy and program activities of the government will substantially influence the publishing market and library acquisition policies.

The fifth is international exchange. From the year 2000 onwards Taiwan's exchanges with the international human rights community has increased considerably, and this may continue to grow stronger. Many human rights activists from academia, human rights commissions, NGOs, etc. have visited Taiwan to participate some kinds of human rights activities.

The sixth item is emphasis and promotion of human rights in the national system

²³² Ibid.

of education. In order to realize President Chen's human rights education policy, the Ministry of Education established a Human Rights Education Committee in April 2001. The Committee is headed by the Minister of Education, and made up of 17 to 25 members including governmental officials and those who invited from academia and civil society. It has four working groups responsible for research and development, training of faculty and staff and planning of curricula, diffusion and promotion, and creation of space on the campuses for the development of a human rights culture.²³³ Its purpose is to promote human rights education, fundamental rights and benefits of teachers and students, respect for human rights among the citizenry, mutual respect among ethnic groups, and tolerance and caring. Its ways of achieving goals are to work out human rights education plans and valuations, to cultivate teachers, to develop educational curriculum and materials, to enhance human rights promotion, to improve measures in schools.²³⁴ It is wished that Taiwan's human rights culture would be cultivated through this process.

Some initial developments have also taken place with regard to education of civil servants and professionals. At the most important training centers, such as the National Civil Service Institute under the Civil Service Protection and Training Commission of the Examination Yuan, the required training programs for civil servants and police officers to pass from the elementary level to the junior level have added courses such as "The Constitutional System and the Protection of Human Rights" and "Gender Equality and Gender Issues." In 2001, nearly 6000 personnel

²³³ For further information please see Mab Huang, "The Present State and the Future of Human Rights Education in Taiwan", *National Policy Quarterly*, vol. 1 No.2, December 2002, pp. 69-84.

²³⁴ Ministry of Education, Promotion and Cultivation — Human Rights Education, 2002, p. 1.

received this category of training through these programs. In addition, the Institute for Judicial Professionals and the Foreign Service Institute have added a limited amount of human rights-related content to their curricula.²³⁵

Above human rights initiatives for “building a human rights state” are designed to achieve three objectives. First, after half a century of one-party monopoly of state power and 38 years of martial-law rule, the constitutional-democratic order specified in the ROC Constitution is slow to become a living reality penetrating the nation’s culture and tradition. Human rights being the heart of any constitutional democracy worthy of the name, in rebuilding the constitutional order, it is essential not only to emphasize the rule of law, but also to ensure that all laws meet human rights standards.

Second, after World War II, people are not only entitled to rights enshrined in the national constitution but also universal human rights protected by international human rights law. By emphasizing the universality of these rights and by incorporating international standards, the policies, measures and plans will serve to enrich the nation’s efforts to re-build and re-new the constitutional order.

Third, when the ROC was forced to withdraw from the UN in 1971, it was also prevented from the international human rights regime. Although designed primarily for domestic purposes, the human rights initiatives will also signal to the world that, despite diplomatic isolation imposed on us, we are still part of the global village of human rights, and that we are willing and ready to participate in the universal realization of universal rights.²³⁶

²³⁵ See 2002 Human Rights Policy White Paper of the Republic of China (Taiwan) Human Rights Infrastructure-building for a Human Rights State, February 2002, p. 55.

²³⁶ W.S. Peter Huang, “Building A Human Rights State-A Taiwan Pledge,” Taiwan Association for Human Rights, 2002.

4.4. Conclusion

In December 1946, the ROC adopted its Constitution, of which Chapter 2, Articles 7 to 24, enshrined the people's rights and obligations. However, both the "Temporary Provisions" and martial law order tremendously limited most of the rights guaranteed by the Constitution.

After 1987 democratization has been a very important foundation for human rights developments in Taiwan. It is certainly true that the human rights situation Taiwan has improved markedly over the past 15 years. There are no more prisoners of conscience, no more extra-judicial killings, the civil liberties of freedom of the press and freedom of assemblage are, by and large, respected. It has been a process of rebuilding the constitutional order and ensuring that all laws meet human rights standards.

However, Taiwan's diplomatic isolation constitutes another significant obstacle in the promotion of human rights, insulating the government from external human rights monitoring and hindering exchanges with the international human rights community.

In 2000, Mr. Chen Shui-bian won the presidential election, which ended KMT's ruling over Taiwan since 1945, and triggered new government's new human rights policies in Taiwan in the new millennium. Such human rights policies include, among others, the establishment of National Human Rights Commission and National Human Rights Museum, and proposals of human rights education, national human rights action plan and bringing international human rights home. Most of the human rights policies have been trying to meet international standards. All the policies are on their ways, but it is still too early to expect their results.

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