

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.