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

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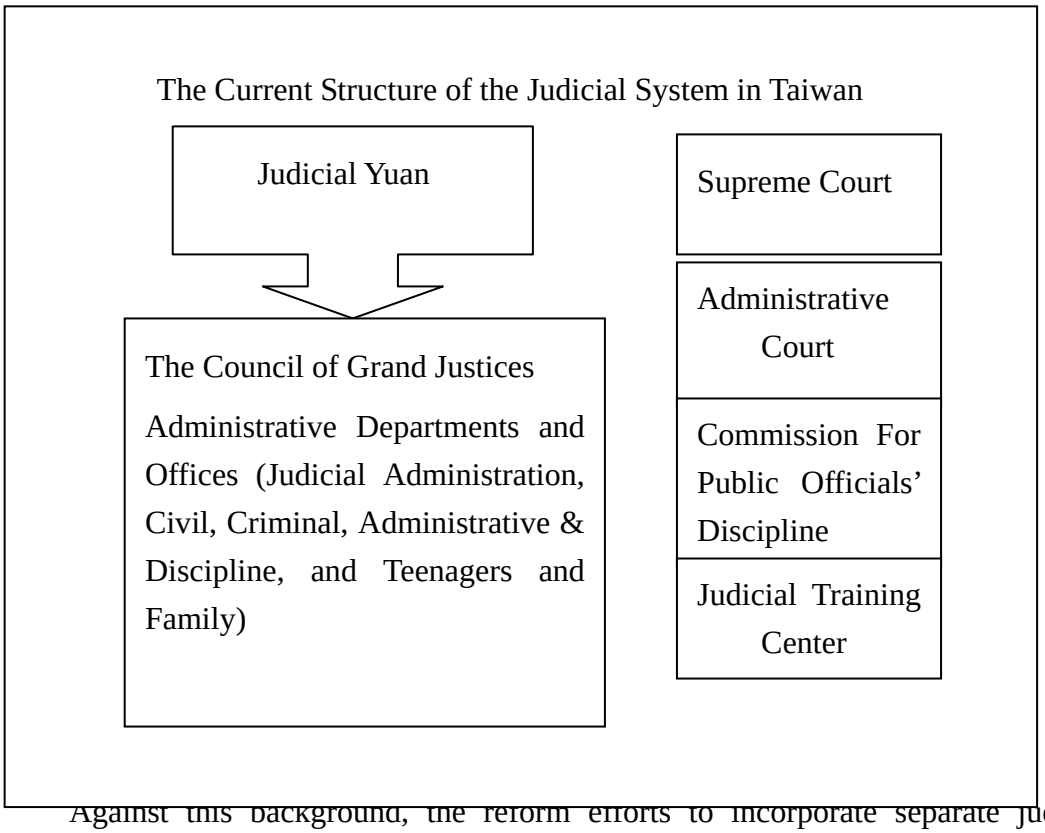
[126] *See* Article 77 of the ROC Constitution.

[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

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[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]

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[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

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[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

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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

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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 Legitimating

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

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[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 1969[149] 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]

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[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

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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

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[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

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[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

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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 sue[164] 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

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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 summery 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 trails 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.