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Table of Contents

Evolution of Taiwan's Constitutional Court from 1948 to 2011: Emergence of an Active but Divided Court

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Introduction

Being the oldest one in Asia, Taiwan's Constitutional Court[1] (hereinafter "CC") has undergone a series of reforms since the early 1990s, along with Taiwan's democratization process. In practice, it had gradually established itself as the Guardian of the Constitution or Guardian of Human Rights, as claimed by its Grand Justices and many constitutional lawyers.[2] However, its organization had remained largely unchanged until the turn of century, in spite of apparent expansion in its jurisdictions.

Entering into the 21st century, Taiwan's CC went through the first major structural transformation since its creation in 1948. In October 2003, a new group of 15 Grand Justices took office under the 1997 Constitutional Amendments, which reduced the number of Grand Justices from 17 to 15 and their term from 9 to 8 years, among other revisions. This new court was also the first Constitutional Court to be appointed after Taiwan's first party turnover in May 2000. For the first time in history, Taiwan's CC had to face many potential challenges posted by a divided government with the old Nationalist Party (Kuomintang, KMT) still in firm control of the Legislative Yuan (LY) against the twice-elected DPP

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[1] Taiwan's Constitution does not expressly provide for the title and organization of "Constitutional Court" as such. Instead, it mandates that the Judicial Yuan (the highest institution of the judicial branch), via its Grand Justices, shall exercise the power of constitutional interpretation. Taiwan Const. Art. 79, Sec. 2. Until the early 1990s, the Constitutional Court was called the "Council of Grand Justices." Since 1993, the name of "Council of Grand Justices" has no longer been used by the Judicial Yuan. For simplicity, this paper uses the title of "Constitutional Court" to refer to the institution of Grand Justices in charge of constitutional interpretation throughout its history, unless otherwise indicated.

[2] See, e.g., Yueh-Sheng Weng, "Guardian of Constitution: Reflection and Prospect" in *Administrative law and the Judiciary of the Rechtsstaat* (1994), pp. 390-410 (original in Mandarin) (calling the Constitutional Court the "Guardian of Constitution"); Yueh-Sheng Weng, "Guardian of Constitution: Reflection and Expectation" in *The Theory and Practice of Constitutional Interpretations* (2009), Fort Fu-Te Liao (ed.), pp. 1-169 (original in Mandarin); Chien-liang Lee, "Reflection on the Sixty Anniversary of the Guardian of Human Rights and its Contemporary Challenges" in *The Theory and Practice*, Fort Fu-Te Liao (ed.), pp. 467-534 (original in Mandarin).

President (2000-2008). From May 2008 to September 2011, this new CC, with several new replacements, experienced the second party turnover, which produced a united government under the KMT again.

Against this backdrop, this paper intends to review the impact of the CC's structural organization and its latest change on its overall performance from 1948 to 2011. In section two, this paper will first give a brief analysis of Taiwan's CC from 1948 to the mid-1980s, before democratization began. In section three, this paper will analyze the major reforms of the CC in the 1990s. In section four, this paper will review the overall performance of the newly reconstructed CC from 2003 to 2011. In conclusion, this paper would argue that this new CC was a much more active but divided court than any of its predecessors, due to a number of structural and personal factors. Meanwhile, as the appointment process of CC has been becoming more and more partisan, Taiwan's CC is doomed to be trapped in more politicized environments in the future, as well.

Taiwan's Constitutional Court before Democratization (1948-1987)

Origin of Taiwan's CC

Formally established in 1948, Taiwan's CC is probably the oldest in Asia. Taiwan's Constitution was officially promulgated on January 1, 1947, even before the enactment of German Basic Law (*Grundgesetz*) on May 23, 1949. The First-Term of Grand Justices took office on July 26, 1948, and held their first meeting on September 15 of the same year. On January 6, 1949, the Council of Grand Justices issued its first constitutional interpretation.[3] That said, Taiwan's CC was initially a foreign product. It originated from the post-war China. Then it was re-established in Taiwan after 1949, when the KMT government of the Republic of China (ROC) was ousted by the Chinese Communist Party (CCP) in China. While operating in China, the Council of Grand Justices only issued two constitutional interpretations. In this sense, it should be fair to regard the Council of Grand Justices as a local specialty of Taiwan now, since this institution has responded to and helped shaped the constitutional development of Taiwan over the past six decades.

A brief introduction of the historical relations between Taiwan and China is warranted here. From 1895 to 1945, Taiwan was a colony of Japan. In October 1945, the then Chinese (ROC) government took control of Taiwan from defeated Japan, under the authorization of the General Order no. 1 issued by Douglas MacArthur as the Supreme Commander for the Allied Powers on September 2, 1945.[4] Since then, Taiwan has been *de facto* administered by the ROC government, in spite of its undetermined international legal status. In December 1947, a new constitution took effect in China and was applied to Taiwan as well. Two years later, this constitution lost its territory of original application, as a result of the overthrow of the KMT/ROC government by the CCP/PRC (People's Republic of China) government. Nevertheless, this short-lived Chinese constitution (hereinafter "1947

[3] See Lee, "Reflection on the Sixty Anniversary", p. 469.
[4] For the text of this order, see http://www.taiwandocuments.org/surrender05.htm (last visited Nov. 6, 2011).

Constitution") has remained and gradually evolved to become the Taiwanese constitution since 1949.[5]

Powers of Taiwan's CC: Centralized and Abstract Review

Unlike the U.S. constitution, the 1947 Constitution expressly provides for constitutional review (called "constitutional interpretation") and vested this power in the Judicial Yuan. Any law, ordinance, regulation or rule that is in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the constitution, it shall be petitioned to the Judicial Yuan for interpretation.[6]

In spite of some controversies over its status,[7] a CC (formerly called "Council of Grand Justices") was instituted within the Judicial Yuan to exercise the centralized power of constitutional review.[8] Both the government agencies (the highest organs at either central or local levels) and private individuals may petition to the CC for constitutional interpretations. In practice, Taiwan's CC has exercised the power of constitutional review in most cases, particularly on those petitioned by the individuals. The individuals may petition to the CC only after they exhaust the ordinary legal remedies. When petitioning to the CC, they could not ask the CC to revoke the specific court decision concerned. They may only ask the CC to decide whether the laws applied in a specific court decision are unconstitutional. If so declared, the winning individual petitioner must bring his or her case back to the former court (either the Supreme Court or the Supreme Administrative Court) for retrial. In this sense, there has been no such "constitutional complaint" (*Verfassungsbeschwerde*) in Taiwan as it exists in the jurisdiction of the German Federal Constitutional Court.

[5] For a brief introduction of Taiwan's post-war constitutional history, see Jau-Yuan Hwang, *Constitutional Change and Political Transition in Taiwan since 1986: The Role of Legal Institutions* (1995**)**, (Unpublished S.J.D. Dissertation, Harvard Law School), pp. 16-71**;** Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003), pp. 111-115.

[6] See Taiwan Const. Art, 78, 171 & 172.

[7] Before the promulgation of Taiwan's Constitution in 1947, the only written constitution adopting the model of centralized and abstract judicial review was probably that of Austria, which re-enacted its Constitutional Court by its *Verfassungsueberleitungsgesetz* of May 1, 1945. The legislative history does suggest the framers of Taiwan's Constitution did look to the Supreme Court of the United States as the model of constitutional review. Some constitutional scholars of Taiwan argued that the original intent of the framers was to set up a U.S. style of Supreme Court to exercise the decentralized and concrete model of judicial review. For a brief discussion of this controversy, see David Law & Wen-Chen Chang, "The Limits of Global Judicial Dialogue", in *Washington Law Review* (2011), Vol. 86, No. 523, pp. 544-545.

[8] From 1948 to 1991, Taiwan's CC had jurisdictions over the following two matters: (1) interpretation of the constitution (constitutional review); and (2) unified interpretation of statutes and regulations. A third jurisdiction was added in 1991, i.e., "dissolution of political parties found in violation of the constitution. In 2005, a fourth power over the "impeachment of the President and Vice President" was added. The first two categories of cases are handled through plenary meetings of the Grand Justices, mostly without public hearings. The third and fourth categories are to be adjudicated by court proceedings, though no such case has ever occurred. For the purpose of this paper, only the first power of constitutional interpretation will be discussed in details.

Organization of Taiwan's CC

Until 2003, Taiwan's CC consisted of 17 Grand Justices. They served a renewable, fixed term of 9 years. Several of them once served for more than thirty years. All of the Grand Justices were to be nominated by the President and confirmed by the national legislature. Before May 1992, Grand Justices were to be confirmed by the Control Yuan (the equivalent of Ombudsmen). From May 1992 to April 2000, Grand Justices were confirmed by the National Assembly. Since May 2000, nominees for Grand Justices have to be confirmed by the Legislative Yuan (LY).[9]

Overall Performance of Taiwan's CC before Democratization

During Taiwan's martial rule era (December 1949 to July 1987), its CC's performance did not live up to the normative expectation at all. It could be fairly described as mere instrument of an authoritarian state. As Table 1 indicates, either the total numbers of decisions (called "Judicial Yuan Interpretations", "JY Interpretations") or of those decisions declaring laws unconstitutional were very low before 1985. The actual function of CC was diminished to a paper-thin symbol.

Since democratization began in the late 1980s, the CC has gradually strengthened its functions. The number of interpretations increased more than threefold after 1985. The number and ratio of interpretations declaring laws unconstitutional also surged. During the past two decades, Taiwan's CC has struggled to evolve into a more independent and competent court of constitutional review.

Table 1: Numbers of Interpretations Issued by Taiwan's CC from 1948 to 2011

Terms	Years	Total No. of Petitions	Total No. of Interpretations	Average No. of Interpretations Per Year	No. (%) of Interpretations Declaring Laws Unconstitutional
I	10.1948-09.1958	658	79	7.9	0 (0%)
II	10.1958-09.1967	355	43	4.8	1 (2%)
III	10.1967-09.1976	446	24	2.7	0 (0%)
IV	10.1976-09.1985	1145	53	5.9	3 (6%)
V	10.1985-09.1994	2702	167	18.6	39 (23%)
VI	10.1994-09.2003	2334	200	22.2	69 (35%)
	10.2003-09.2011	3350	124	15.5	61 (49.2%)

Source: Official website of the Judicial Yuan, http://www.judicial.gov.tw/constitutionalcourt/p03.asp; the numbers related to the CC of 2003-2011 were collected elsewhere and computed by the author.

[9] Taiwan Const. Art. 78 & 79; Additional Article (Const. Amend.) 6 (1991, last amended 2005).

Reform of Constitutional Court in the 1990s

Beginning from the mid-1980s, Taiwan's CC began to define the binding forces of its own interpretations, particularly on the cases petitioned by individuals against the final decisions of Supreme Court and Supreme Administrative Court.[10] As constrained by then-applicable Organization Act of the Council of Grand Justices, Taiwan's CC could not review and vacate any court decision directly. Instead, it may only rule on the constitutionality of the laws applied in the court decisions concerned. If a law or regulation is found unconstitutional, then the petitioner must apply to the court of final instance (either Supreme Court or Supreme Administrative Court) for a retrial or extraordinary appeal. In the early 1980s, both Supreme Court and (Supreme) Administrative Court once refused to allow such extraordinary remedies even after the CC declared unconstitutional the laws in question. With its own Interpretations, the CC gradually forced both courts of final instance to accept its authority on the constitutional issues and to allow such extraordinary remedies. By and large, the CC developed a normative framework of binding forces for its own interpretations in the 1980s. As a result, not only the administrative agencies and legislative assemblies but any court must abide by the relevant constitutional interpretations of the CC, while applying the statutes and regulations in any particular case.

After establishing itself as the highest authority on constitutional issues, Taiwan's CC, in the 1990s, further expanded its jurisdictions with the help of legislative and constitutional amendments, along with its own interpretations.

Let the Legislative Minority Petition: Constitutional Interpretation Procedure Act of 1993

The first major statutory reform came in 1993. In January 1993, Taiwan's parliament, the LY, enacted a new statute, "Constitutional Interpretation Procedure Act" (CIPA), to expand the CC's jurisdictions. This new law enlarged the CC's jurisdictions by allowing the minority (one-third) members of the LY and the two courts of final instance (*i.e.* Supreme Court and Administrative Court) to petition for the constitutional interpretation.[11]

Consequently, the minority members of the LY began to take advantage of this new law and filed a number of petitions on issues of constitutional and political significance. Among the 378 interpretations (No. 313-690) rendered after the enactment of the CIPA, a total of 28 (7.4%) were initially petitioned by the LY minority.[12] This number and percentage may not appear so striking. However, it is the issues involved that made this new

[10] See JY Interpretations No. 177, 183, 185, 188, 193 & 209.

[11] Another major revision was the lowering of quorum and voting threshold. In the previous law, adoption of a constitutional interpretation required a three-fourths majority of the total number of Grand Justices present at a meeting and a three-fourths majority of the present Grand Justices voting in favor. This new law of 1993 lowered both quorum and voting threshold from three-fourths to two-thirds.

[12] These 28 Interpretations are Nos. 325, 329, 342 (by the 5th Term), 380, 387, 388, 392, 401, 419, 421, 426, 436, 450, 461, 463, 467, 472, 481, 485, 499, 543 (by the 6th Term), 585, 599, 601, 603, 632, 633 & 645 (2003-2011).

petition procedure crucial for Taiwan's democratic transition and consolidation after the 1990s. For example, both Interpretations No. 387 and 419, regarding the timing of cabinet reshuffle (or Premier's resignation) after the elections of parliament and president, respectively, were petitioned by the then minority members of the LY. Interpretation No. 499, which declared the 1999 Constitutional Amendments unconstitutional, was also petitioned by the LY minority. The first injunctive order by the CC to suspend the implementation of a nationwide mandatory fingerprinting program upon issuance of new national IDs was brought about by the LY minority, as well. Many more interpretations of significance were initiated by the LY minority. By the same token, the CC has been often dragged into many fierce political fights between the ruling majority and political minority.

Let the Judges Call: Interpretation No. 371

Two years after its enactment, a provision of the 1993 CIPA was declared unconstitutional by the CC. In Interpretation No. 371 of Jan 1995, the CC found unconstitutional a provision of CIPA that allowed only the Supreme Court and (Supreme) Administrative Court to file a constitutional petition. Modeled after the German Constitutional Court, Taiwan's CC thus created a new type of petition allowing all judges at all levels of court to petition to the CC. By this procedure, if the presiding judges were convinced that the applicable laws in a pending litigation were unconstitutional, then the judges may/shall suspend the litigation and refer the laws in question to the CC for determination of their constitutionality.

Reconstructing a New CC: The 1997 Constitutional Amendments

Though the jurisdictions and petition procedures of the CC have undergone some reforms in the 1990s, its organization had remained unchanged since 1948. Only until 1997 did the organization of CC take a new turn as a result of the 1997 constitutional amendments, which also formally reshaped the central government into a semi-presidential system.

The 1997 Constitutional Amendments changed the structure and appointment process of CC, effective from October 2003, at the end of the sixth term. From 1948 to 2003, the number of Grand Justices was 17. Each Grand Justice served a renewable fixed term of 9 years. Beginning from October 2003, the new CC has consisted of 15 Grand Justices, each of whom serves a staggered, non-renewable term of eight years. Either eight or seven Grand Justices are to be replaced every four years, as originally provided for in the 1997 Constitutional Amendments.[13]

Attempted Transition towards a U.S. Style of Supreme Court: The 1999 National Judicial Conference

In July 1999, the government-sponsored National Judicial Conference reached a

[13] See Taiwan Const. Additional Article 6, Sec. 1-3.

consensus on the future status of CC. This consensus proposed to transform the CC into a US style of Supreme Court, which will be the only final and highest court on all types of cases, by the end of 2011. Although the CC itself once formally endorsed this proposal in JY Interpretation No. 530 of Oct. 2011,[14] relevant reform bills have been boycotted and stalled by the majority party (Kuomintang, "KMT") of the LY. In mid-2011, even the Judicial Yuan itself was reportedly prepared to give up this plan.[15] Without too much exaggeration, this proposal is practically dead.

Comparing the CC before and after 2003

The 1997 Constitutional Amendments did not touch upon the jurisdictions of the CC. They only transformed its organization and appointment process. In the following, this paper will evaluate the impact of such structural changes on the performance of the CC after 2003, by comparing it with the sixth term of CC (1994 to 2003).

A More Politicized Appointment Process: The Unintended Consequence of Staggered Terms

The 1997 Constitutional Amendments changed the terms of Grand Justices from a renewable nine-year term to a non-renewable eight-year one. The 15 Grand Justices appointed in 2003 were the first CC organized under this amendment. One of the original intents of this Amendment was to prevent all Grand Justices from being nominated by a single President and confirmed by the same LY. So the undue political influence associated with the traditional appointment process could be reduced. The second purpose was aimed at a more orderly passing-on of legacy or experiences every four years.

However, this original design of staggered terms soon lost its well-intended due order after 2007. When the four-year term of first eight Grand Justices appointed in 2003 came to an end in 2007, four out of eight nominees were defeated solely for partisan reasons by the KMT-controlled LY. These four vacancies were not replaced until September 2008, only after a new KMT President took office and acquired the nomination power. In 2010, two Grand Justices (being the president and vice president of the Judicial Yuan) resigned to take the blame for a series of lower courts' scandals, and were immediately replaced with two new appointees. As a result, the terms of 15 sitting Grand Justices would expire in a very scattered and not orderly staggered manner in the future: four in 2015, five in 2016, two in 2018 and four in 2019. While the President of 2012-16 will nominate only four Grand Justices, the President of 2016-20 will have the opportunity to nominate eleven, as the current President has done so since 2008. By the same token, if more Justices happen to

[14] For detailed discussion of the consensus of National Judicial Conference of 1999 and Interpretation No. 530, see, e.g., Jau-Yuan Hwang, "Institutional Choice of Judicial Review and the Status of the Judicial Yuan" in *National Taiwan University Law Journal* (2003), Vol. 32, No. 2, pp. 55-118 (in Mandarin).

[15] This new position was reported to be taken by the vice president of the Judicial Yuan while sitting as the chairman of an *ad hoc* committee on judicial reform of the Judicial Yuan. See http://www.judicial.gov.tw/revolution/judReform02.asp (last visited December 25, 2011).

leave office earlier than their eight-year term for whatever reasons, the terms of 15 Justices would become more scattered, leaning towards an individualized pattern.

Compared to the previous appointment process, the current mechanism is supposed to prevent all of 15 Justices being nominated by a single President upon expiration of their terms. Nevertheless, the current design still failed to restrain the LY majority from producing an even more partisan CC, merely by defeating those candidates suspicious of being sympathetic with the other political camp. In practice, the LY has actually become much more politicized when confirming Grand Justices nominated by the President belonging to the other party, as the case of confirmation process in 2007 well indicated.

As to the second advantage of passing on the experiences, an unintended consequence also occurred between 2007 and 2011: decrease in efficiency (overall number of interpretations issued). As stated above, from 2007 on there has been changeover of Grand Justices every year except 2009. Whenever there are more than two new Justices replacing the old ones, the overall efficiency of the CC tends to be reduced.

In the case of the U.S. Supreme Court, replacement of Justices usually occurs one after another, with many years in between. It is rare, if ever, to have more than two Justices replaced at the same time. In Taiwan' case, given the relatively short term of eight years and frequent changeover, the current appointment process of Grand Justices might in fact give each President and the LY majority an opportunity to "pack" the CC every one or two years. In the years of 1994 and 2003, respectively, both of then Presidents Lee Teng-hui and Chen Shui-bian had a much wider discretion to nominate 17 and 15 Grand Justices. Given the larger number of nominees, both Presidents produced quite balanced lists of candidates, representing a diverse spectrum of political ideologies. In each occasion, each President was able to get all of their nominees (except one in 1994) confirmed by the LY, which also exercised its power in a prudent way. Even the eight-candidate list proposed by President Chen in 2007 was a politically balanced one, though half of them were defeated by the LY out of political hostility. Since 2008, as the number of nominees shrank to five in 2008, two in 2010 and four in 2011, respectively, the current KMT President has picked his nominees based more on political loyalty than professional ability, partly because the LY has been overwhelmingly dominated by the KMT.

The experience of Taiwan suggests: When the number of candidates are larger enough, the President tends to produce a more politically balanced list of candidates. When the number of candidates decreases, the President is tempted to pick his or her own followers. The other important factor is the type of government being unified or divided. In the former case, the President would be induced to produce a list of followers, as well. In the latter case, a more prudent exercise of nomination power by the President usually leads to a more balanced and diverse list. If the above analysis is sustainable, the design of staggered terms might, in certain scenarios, increase, rather than decrease, the politicization of appointment process of Grand Justices in Taiwan in the long run, contrary to the original intent of the 1997 Constitutional Amendments.

Table 2: Degree of Politicization of the Appointment Process

	Unified Government	Divided Government
Larger Number of Candidates (Unified Term)	Tolerant List, Featuring a Token or Limited Percentage of Opposition Figures (pre-2000)	Most Balanced List, Representing a Wide Spectrum of Ideological Positions (2000-2008)
Smaller Number of Candidates (Staggered or Individualized Terms)	Most Politicized, Political Loyalty Prevails (2008-2011)	More Neutral Picks (yet to see)

A New Composition of CC: Academics v. Career Judges

The composition of CC also had a different appearance after 2003. The Organization Act of the Judicial Yuan provides for five categories of people eligible for appointment as Grand Justices. Each category is supposed to compose no more than one-third (*i.e.* five Grand Justices) of the CC. These five categories are: people (1) having served as a justice of the Supreme Court for more than ten years with a distinguished record; (2) having served as a member of the Legislative Yuan for more than nine years with a distinguished record; (3) having been a full professor of a major field of law at a university for more than ten years and having authored publications in a specialized field; (4) having served on the International Court of Justice, or having published authoritative works in the fields of public or comparative law; and (5) being a person highly reputed in the field of legal research and having political experience.[16]

In practice, application of these five categories has been quite flexible and undergone many changes. Some unwritten factors may outweigh the above five categories. Before democratization (i.e. before the appointment of the sixth term in 1994), the place of birth was once a key consideration so that the entire group of Grand Justices could "represent" each of the major sub-regions or provinces of China. As a result, the number of Grand Justices chosen from native Taiwanese was limited to three at most. Affiliation with different government authorities, e.g., the military, LY, Control Yuan, Justice Department and even the KMT, was also a significant element. The offices of Grand Justices were once distributed to the various sectors of the authoritarian regime as rewards for their loyalty.

Beginning from 1994, a new composition has emerged. Either the place of birth or the political affiliation has no longer been a legitimate concern. On the contrary, legal professionals of distinguished achievements have been dominating the pool of candidates. Thanks to the flexible interpretation of the above five categories,[17] career judges and academics have become the two largest sets of candidates for Grand Justices.

[16] For English translation of these provisions and more discussions, see Law & Chang, "The Limits of Global Judicial Dialogue", pp. 545-46.

[17] For example, in 2003, a public law scholar and a career judge of the Supreme Administrative Court were nominated under the category of "(5) being a person highly reputed in the field of legal research and having political experience." Category (2) ("having served as a member of the Legislative Yuan for more than nine years with a distinguished record") has not been cited since 1994.

From 1994 on, the percentage of academics has steadily increased. Among the 16 Grand Justices of the fifth term (1985-1994) (with one vacant seat), only five (less than one-third) were formerly scholars. Among the 16 Grand Justices of the sixth term (1994-2003) (with one vacancy), nine (56%) were formerly scholars. Among the 15 Grand Justices of the post-2003 CC, eight (53%) or nine (60%) were formerly scholars.[18] Above all, the number of public law scholars (including constitutional and administrative law) also increased from two in the fifth term, to four in the sixth term, and then to five in the post-2003 CC, which alone accounted for one-third of the cohort of the post-2003 CC.

On the surface, the bipartite composition of CC appeared similar before and after 2003. However, it is the age and generation that would distinct one from the other. Before 2003, most of Grand Justices were appointed at the ages on both sides of 60, often approaching their retirement. Since 2003, at least one-third of Justices took office at the ages around 50 and still in their peak of career, either as academics or career judges. This group of younger generation of Grand Justices proved to be the key element differentiating the two CCs before and after 2003, particularly in terms of active judicial opinions.

A More Active and Divided Court: Impact of Formerly Public-Law Academics and Other Factors

The most striking difference between the two CCs before and after 2003 should be the degree of divergence among the Grand Justices in their opinions.

As Table 3 illustrates, the numbers of concurring and dissenting opinions issued by individual Grand Justices have increased steadily since democratization. During the early period of democratization from 1985 to 1994 (the fifth term of CC), a total of 134 concurring or dissenting opinions were issued or joined by individual Grand Justices, averaging only 0.81 piece per decision. As democratization moved on the total number of individual opinions jumped to 214 pieces during the period of 1994 to 2003 averaging 1.07 per decision. After the first party turnover in 2000, the total number further increased to 309, averaging 2.49 per decision, from 2003 to 2011.

Table 3: Numbers & Background of Grand Justices Issuing Individual Opinions

Types	Oct 1985 - Sep 1994 (16 Justices)			Oct 1994 - Sep 2003 (16 Justices)			Oct 2003 - Sep 2011 (15 Justices)		
Background	J (11)	S(5)		J (7)	S(9)		J (7)	S(8)	
		PL (2)	NPL (3)		**PL (4)**	NPL (5)		**PL (5)**	NPL (3)
Concur.	4	**2**	2	38	**9**	28	53	**80**	60
C&D in part	3	**1**	1	5	**0**	1	8	**6**	10

[18] From 2003 to 2007, eight out of 15 Grand Justices were formerly academics. From 2008 to September 2011, nine were formerly academics. From October 2011 on, eight were formerly academics.

Dissent.[19]	86	**11**	24	50	**18**	65	27	**42**	23
Subtotal	93	**14**	27	93	**27**	94	88	**128**	93
		41			121			221	
Total No. of Justices Issuing Opinions[20]	134			214			309		
Total No. of Interpretations	166			200			124		
Average no. / Per Interpretation	0.81			1.07			2.49		

Note:
J: Formerly career judges (also including prosecutors and private attorneys)
S: Formerly scholars
PL: Public Law (scholars)
NPL: Non-Public Law (scholars)
C&D in part: Concurring in part and dissenting in part
Source: Official website of the Judicial Yuan, http://www.judicial.gov.tw/constitutionalcourt/p03.asp; computed by the author

In terms of the frequency of individual opinions, as Table 4 below indicates, about a half (50.5%) of the total interpretations from 1994 to 2003 had at least one Grand Justice issuing his or her own opinion. From 2003 to 2011, this ratio jumped to 73.4%. If we further compare the frequency of multiple (≧3) opinions, we may find, from 1994 to 2003, only 31 out of 200 interpretations (15.5%) had three or more Grand Justices issuing individual opinions. From 2003 to 2011, 58 out of 124 interpretations (46.8%) had three or more Grand Justices issuing individual opinions. In 12 interpretations (nearly 10%), there were at least eight (more than half) Grand Justices issuing individual opinions. In a legal culture that has been heavily influenced by European style of constitutional court and valued the unity of court as a whole, this phenomenon is noteworthy. The diversity and intensity of individual opinions issued by Grand Justices should be an important point of reference to analyze the degree of internal convergence or divergence in the decisions of CC.

[19] Before 2003, many dissenting opinions were actually concurring opinions (concurring in outcomes while differing in reasons only). Some Justices would issue dissenting opinions simply because they did not fully agree on the reasons, even if they did support the conclusions of Interpretation concerned. That explains why the numbers of dissenting opinions before 2003 are much higher than that after 2003.

[20] The number of individual opinions is computed based on the number of Justices issuing or joining such opinions. For example, if a concurring opinion is joined by two Justices, it would count as two, instead of one.

Table 4:

Frequency of Grand Justices Issuing Individual Opinions in 1994-2003 and 2003-2011

No of Justices Issuing Individual Opinions	No of Interpretations with Individual Opinions	
	1994-2003 (#367-566)	2003-2011 (#567-690)
1	50	12
2	20	21
3	10	18
4	6	7
5	4	9
6	3	8
7	7	4
8	0	8
9	1	2
10	0	1
11	0	1
Total	101	91
Percentage of Interpretations with Individual Opinions	50.5% (101/200)	73.4% (91/124)

Measured by either the total number or frequency of Grand Justices issuing individual opinions, it should be safe to conclude that the CC of 2003-2011 is obviously more active and divided than the CC of 1994-2003. Moreover, after 2003, those academics-turned-Justices were much more active and aggressive in expressing their individual opinions than their colleagues of career-judge background. Among the academia group, those formerly public law scholars have emerged as the leading voices.

There were many factors contributing to such differences. An obvious element has been the number of Grand Justices being formerly public law scholars. As Table 3 above indicates, the overall contribution, in terms of number, by the group of formerly career judges has remained almost unchanged from 1985 to 2011. On the contrary, the total number of opinions issued by those formerly non-public law scholars took a quantum jump after 1994 (from 27 to 94), but remained about the same before and after 2003 (94 v. 93). The largest increase came from the groups of formerly public law scholars. The total number of their opinions increased from trivial 14 (1985-1994) and 27 (1994-2003) to noticeable 128 (2003-2011).

Having the public law background alone does not fully explain the rapid increase of individual opinions after 2003. As Table 3 above indicates, the number of Grand Justices with the public law academic background was four (1994-2003) and five (2003-2011), respectively. However, the previous group of four issued 27 individual opinions only in nine years, while the latter group of five issued a total of 128 in eight years, as many as 4.7 times. There must be other reasons than the sheer number of such Justices.

One main reason was related to the age and generation of Grand Justices. Before 2003, most of Grand Justices were appointed in their 60s, approaching the twilight of their career. Among the five Grand Justices with public law background appointed in 2003, two were around 50 and still in the prime time of their academic career.[21] Relatively young in age and active in research, these two Grand Justices turned out to produce a lion share of individual opinions issued by those formerly public law scholars. Moreover, the younger generation of public law scholars tends to be more outspoken than their teacher-generation. Unlike the older generation, these younger public law scholars witnessed and even participated in the process of Taiwan's democratization during their early age of academic career. They had a much better opportunity to develop a freer and less-tamed mind. On the contrary, the older generation often maintained a quieter style during adjudication, partly as a result of being disciplined under the authoritarian rule for decades.[22]

The second factor is the ideological spectrum of Grand Justices after 2003. As stated above, the CC of 2003 consisted of a more balanced list of 15 Grand Justices in terms of political ideologies. The then President Chen and his DPP party did not wield a majority of seats in the LY. So he had to nominate 15 candidates representing a wide spectrum of political ideologies and legal backgrounds. He did. Not surprisingly, this balanced composition of CC eventually led to a more divided court, as indicated by the increase of individual opinions.

A third factor had to do with Taiwan's political changes in the first decade of 21st century. In May 2000, the first party turnover in history occurred in Taiwan. Through May 2008, Taiwan was often caught in a tense deadlock of divided government. Many thorny constitutional issues arising from political fights between the DPP-executive and KMT-legislative camps were brought before the CC by the LY minority or the executive branch, in order to counter the LY majority. Generally speaking, such highly political/constitutional issues often provoked heated debate among Grand Justices, and led to fewer unanimous interpretations and more individual opinions.

The fourth factor is related to the development of constitutional doctrines concerning the rights cases by the CC itself. Here those formerly public law academics played a significant role again. On the cases concerning rights, Taiwan's CC has applied the proportionality principle as the main standard to scrutiny the constitutionality of laws since the mid-1990s. After 2003, Taiwan's CC began to apply the double standard, two-track theory (content-based v. content-neutral restrictions), two-level theory (high value v. low/no value speech), and three-tier standards of review (strict scrutiny, intermediate scrutiny and rationality review) to cases involving free speech, equal protection and other constitutional rights. In recent Interpretations, the CC went further to integrate both German test of proportionality principle and the U.S. theories of three-tier standards of review. In other

[21] Justice Tzu-Yi Lin and Justice Tzong-Li Hsu were 50 and 49 years old, respectively, upon taking office in October 2003.

[22] A similar reason should explain the three Justices of non-public law academic background of 2003-2011 produced as many individual opinions (93) as that (94) by the five Justices of similar background from 1994 to 2003. A single Justice, Hon.Yu-Hsia Hsu, alone produced more than 80% of these 93 individual opinions. Being a very active criminal law professor, she was sworn in as Grand Justice at the age of 49 only.

words, Taiwan's CC has gradually adopt the model of "one (proportionality) principle, three standards (of review)" to determine the constitutionality of laws infringing constitutional rights.[23] In practice, the choice and application of an appropriate standard of review in a pending case often became the focus of debate. Quite a substantial number of individual opinions were devoted to this issue. On this matter, those Grand Justices of academics background, particularly of formerly public law scholars, have been the leading voices shaping the theory of standards of review.

Overall Performance of the CC after 2003

In terms of structure and composition, the year of 2003 marked a new watershed in the history of Taiwan's CC. The CC of 2003-2011 has been the most active and aggressive court in striking down laws and regulations. In nearly half of its interpretations (61 out of 124), it declared laws in question unconstitutional. This has been the highest percentage of unconstitutional declarations ever made by Taiwan's CC. It has been the most divided court in that this court issues the most individual opinions, averaging twice as many as that produced by any of its predecessors. Its members were appointed under the new law, which intended to diminish the political manipulation. Unfortunately, the appointment process of its members since 2007 has been the most partisan one. Although this court was appointed under a new law (constitutional amendment) intended to transform its structure, the above performance could be partly attributed to this new law. It was mainly the Justices themselves who made all the differences.

Concluding Remarks

During its sixty-plus years, Taiwan's CC has transformed from an instrument of authoritarianism to an active but divided court. Before the 1980s, the then Council of Grand Justices was an institution hardly worthy of respect. In the 1980s, it won the legal battles against both Supreme Court and Administrative Court of final instance and successfully established itself as the highest authority on legal interpretations involving constitution. In the 1990s, the jurisdictions of Taiwan's CC were significantly expanded. As a result, it gradually became the last hope of individual rights and sometimes the arbitrator of political disputes. Entering into the 21 century, Taiwan's CC continues to strengthen its role as right-protector. Nevertheless, it very often finds itself torn between increasing political confrontations among the Justices themselves as well as between the CC and the hostile political branches. In this light, the emergence of diverse individual opinions may be considered as a mirror of Taiwan's diversity and democracy.

[23] For a detailed analysis, see Jau-Yuan Hwang, *Development of Standards of Review by the Constitutional Court in Recent Years: Reception and Localization of Proportionality Principle* (in Mandarin), paper presented at the "6th Taiwan-Japan Symposium on Constitutional Study," at NTU College of Law, Taipei, Taiwan, on September 14, 2011.

A constitutional court is made to be the Guardian of the Constitution, which is supposed to protect and implement the ideas of constitutionalism. Of the many ideas associated with constitutionalism, rule of law has been one of its core principles. However, given the open and abstract nature of constitutional texts, particularly the rights provisions, we should keep reminding ourselves that it is often the opinions of judges ultimately shaping the meanings of rule of law and constitutionalism. For this matter, Taiwan's CC is no exception.

Constitutional Patriotism as an Identity – A Study on the Feasible Approach Toward Taiwan's Democratic Consolidation

Wen Cheng Chen*

"A liberal political culture is only the common denominator for a constitutional patriotism that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society."

Habermas

"If you yourself, sir, are in order, who will dare to be disorderly ?"
"The moral power of the rulers is as the wind and that of the people is as the grass. Whithersoever the wind blows, the grass is sure to bend."

Confucius, 551-479 B.C.

Introduction

We are in an age of democracy and the rule of law. Taiwan (Republic of China, ROC) is one of the third wave democracies,[1] located in East Asia with a well-studied Confucian culture. Even though it has been considered a "Pariah state" or a "vortex player" in international politics,[2] Taiwan has devoted itself to the cause of national development with but one goal in mind: to elevate itself to a position of liberal democracy. To date, however, is Taiwan truly a consolidated democracy? If the answer is

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[1] Samuel P. Huntington argues that modern history will be characterized by three waves of democratization (1828-1926, 1943-1962, and 1974-present) with two waves in reverse (1922-42, 1958-75). The third wave of democratization began in Southern Europe, "in the fifteen years following the end of the Portuguese dictatorship in 1974, democratic regimes replaced authoritarian ones in approximately thirty countries in Europe, Asia, and Latin America." See Samuel P. Huntington, *The Third Wave-Democratization in the Late Twentieth Century* (1991), pp. 16-26. Huntington pointed out that Taiwan's government significantly loosened its restrictions on political activities and devoted itself to the creation of a democratic regime in 1987 and 1988. See Huntington, ibid., p. 23.

[2] See John F. Copper, *Consolidating Taiwan's Democracy* (2005), pp. 27, 28.

yes, why? If negative, why not, and how can Taiwan commit itself to becoming consolidated?

The Trend of Democratization Studies

In the past twenty years, three critical concepts - democratic transition, democratic consolidation, and quality of democracy - have dominated the research on political democratization in developing countries.[3]

Generally speaking, in the 1980s and early 1990s, many analyses on third-wave democracies emphasized issues related to democratic transition, probing how an authoritarian regime could transform into a democratic one. In the wake of the introduction of democratic political systems in most countries at the beginning of the 1990s,[4] scholars shifted their analytical focus to democratic consolidation in the second half of the 1990s.[5] They intended to explore the longevity of a new transitional democracy.[6] At the outset of the 21st century, based on three broad motives,[7] some social scientists began to develop means of framing and assessing the quality of democracy.[8] It goes without saying that each of the three mentioned concepts of democratization, or even a hybrid, will continue to catch the eyes of some scholars in the near future.

Conditions for Democratic Consolidation

To assess the level of Taiwan's democratization, it is necessary to present the conditions for democratic consolidation. As many authors have shown, there are specific conditions to be met, or certain criteria to be evaluated, to determine if a regime has become a consolidated democracy. Huntington, for instance, proposed a "two turnover test"[9], elucidated in the

[3] See Min-hua Huang, Yun-han Chu and Yu-tzung Chang, "Quality of Democracy and Regime Legitimacy in East Asia" in *A Comparative Survey of Democracy, Governance and Development*, Working Paper Series, No. 40 (Taipei: Asian Barometer Project Office, National Taiwan University and Academia Sinica, 2007), p. 1.

[4] In 1992, more than 53 percent of countries in the world were categorized as democracies (99 of 186), and the number grew to 61 percent in 1995 (117 of 191). See Larry Diamond and Marc F. Plattner, "Introduction" in *The Global Divergence of Democracies* (2001), Larry Diamond and Marc F. Plattner (eds.), p. xii, table 2.

[5] E.g. Francis Fukuyama, "Confucianism and Democracy," (1995) in *Global Divergence*, pp. 23-36, Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, Latin America, and Post-Communist Europe* (1996), Guillermo O'Donnell, "Illusions about Consolidation" in *Global Divergence*, pp.113-130, Juan J. Linz and Alfred Stepan, "Toward Consolidated Democracies" in *Global Divergence*, pp. 93-112, Diane Ethier, "Democratic Consolidation: Institutional, Economic, and External Dimensions" in *Designs for Democratic Stability-Studies in Viable Constitutionalism* (1997), Abdo I. Baaklini and Helen Desfosses (eds.), pp. 259-284, A. Schedler, "What Is Democratic Consolidation ? " in *Global Divergence*, pp. 149-164, and Larry Diamond, *Developing Democracy: Toward Consolidation* (1999).

[6] See Ethier, "Democratic Consolidation", p. 259.

[7] The three motives are: first, that deepening democracy is a moral good; second, in order to achieve a broad and durable legitimacy, the reforms to improve democratic quality are essential; and third, for the purpose of eliminating public dissatisfaction, the advanced democracies must also reform. See Larry Diamond and Leonardo Morlino, "Introduction," in *Assessing the Quality of Democracy* (2005), Larry Diamond and Leonardo Morlino (eds.), p. ix.

[8] See ibid.

[9] Huntington's "two turnover test" is easily measured. It says that:

footnote below, arguing that when a democracy is able to pass this test, it may be viewed as consolidated. Although many others have elaborated on the same issue in different ways,[10] for the sake of descriptive comprehensiveness this article prefers to adopt Linz and Stepan's analytical framework of democratic consolidation.

Linz and Stepan first divide a regime's democratization into two phases: *transition* and *consolidation*.[11] According to Linz and Stepan,[12] only if a regime has achieved three preconditions, that is, "stateness", "a completed democratic transition", and "a government that rules democratically", will it have an opportunity to achieve democratic consolidation. Secondly, Linz and Stepan emphasize that a state may be viewed as a consolidated regime when democracy becomes "the only game in town."[13] In order to accomplish this goal, as table 1 indicates, it involves three levels of consolidation – *behavioral*, *attitudinal*, and *constitutional*. *Behavioral* consolidation requires that no significant power attempts to overthrow the democratic regime, and that the newly elected government need not care about the problem of how to avoid democratic breakdown. *Attitudinal* consolidation means that even when facing severe crises, most citizens believe that democratic procedures are the most appropriate way to govern collective life, and a strong majority of them are reluctant to support anti-democratic forces. *Constitutional* consolidation implies that all political actors are subject to the established norms (laws, procedures, and institutions). Namely, no man is above the law, the rule of law is prevalent in the country.

Finally, Linz and Stepan further proclaim five interconnected and mutually reinforcing conditions for consolidating a democracy:[14]

(1) *civil society*, in which people can advance their interests via freedom of association and expression;

By this test, a democracy may be viewed as consolidated if the party or group that takes power in the initial election at the time of transition loses a subsequent election and turns over power to those election winners, and if those election winners then peacefully turn over power to the winners of a later election. (Huntington, *Third Wave*, pp. 266-267.)

[10] See for example, Larry Diamond assessed democratic consolidation with a three-by-two table which includes three levels (elite, organization, and mass public) and two dimensions (norms/beliefs and behavior). See Diamond, *Developing Democracy*, pp. 66-73. In addition to the six cells, Diamond proposed three tasks of democratic consolidation, including democratic deepening, political institutionalization, and regime performance. See Diamond, *Developing Democracy*, pp. 73-116; Andreas Schedler, elaborated on the concepts of democratic consolidation from teleological perspectives, describing democratic consolidation as being composed of five varieties: preventing democratic breakdown, preventing democratic erosion, completing democracy, deepening democracy, and organizing democracy. According to Schedler, liberal democracy refers to a regime that upholds civil and political rights and holds fair, competitive, and inclusive elections; electoral democracy refers to a regime that manages to hold fair, competitive, and inclusive elections but fails to uphold political and civil freedoms; advanced democracy means that a regime possesses some positive traits over and above the minimal defining criteria of liberal democracy. See Andreas Schedler, "What Is Democratic Consolidatio?" *in Global Divergence*, pp. 149-159. In 2001, Schedler concluded that scholars have been studying either behavioral, attitudinal, or structural foundations of democratic consolidation. See Andreas Schedler, "Measuring Democratic Consolidation" in *Studies in Comparative International Development* (2001), Vol. 36, No. 1, pp. 66-92.

[11] See Christopher J. Walker, "Toward Democratic Consolidation ? The Argentine Supreme Court, Judicial Independence, and the Rule of Law" in *Florida Journal of International Law* (2006), Vol. 18, No. 3, p. 754.

[12] See Juan J. Linz and Alfred Stepan, "Toward Consolidated Democracies" in *Global Divergence*, p. 93.

[13] Ibid., p. 94.

[14] See ibid., pp. 96-102.

(2) *political society*, in which citizens are competent to evaluate the core institutions of a democracy, and institutional intermediaries are provided for initiating compromises;

(3) *the rule of law*, which requires that all significant actors, especially the government and the state apparatus, will adhere to constitutional guidelines even in a crisis, and be subject to the laws;

(4) *state bureaucracy*, which entails a usable bureaucracy for democratic leaders to exercise effectively their claims and to protect citizens' rights; and

(5) *economic society*, which comprises an "institutionalization of a politically regulated market."[15]

Making a comprehensive survey of Linz and Stepan's framework, as outlined in table 1, we find that it is comprised of three dimensions of democratic consolidation, and each of them contains several conditions. This article calls this the "triangular framework of democratic consolidation." It is worth noting that as long as we shine the spotlight on the three dimensions – three preconditions (a state exists, completed democratic transition, and rulers govern democratically), three levels (behavioral, attitudinal,and constitutional), and five interactive conditions (civil society, political society, the rule of law, state bureaucracy, and economic society) – we will see that the common factor or overlapping condition will be the rule of law (or constitutionalism). In other words, the rule of law is the center of gravity of the "triangular framework."

Concepts of Identity and Constitutional Patriotism

Concept of Identity

The Meaning of Identity

Identity is a mixture, compounding a psychological state of individual subjective self-consciousness with a sense of belonging, which is crucial to differentiating "who am I?" from "who is he?" as well as "who are we?" from "who are they?" It is shaped by and rooted in differences in kinship, ethnicity, language, religion, customs, history, regional ties, cultural heritage, and ideology.[16]

The Origins of Identity

In a changing, pluralistic and ethnically divided society, the origins of individuals' identities may come from anywhere. However, research shows that there are three main styles of

[15] Ibid., p.101.

[16] See Tse-Min Lin, Chin-En Wu, and Feng-Yu Lee, "'Neighborhood' Influence on the Formation of National Identity in Taiwan: Spatial Regression with Disjoint Neighborhoods" in *Political Research Quarterly* (2006), Vol. 59, No. 1, pp. 35-36, Chang-Yen Tsai, *National Identity, Ethnic Identity, and Party Identity* (2007), Maryland Series in Contemporary Asian Studies, No.1-2007(188), pp. 3-4; Wei-Chin Lee, "Taiwan's Cultural Reconstruction Movement: Identity Politics and Collective Action since 2000" in *Issues & Studies*, (2005), Vol. 41, No. 1, pp. 2-3.

identity shaping. The first theory is that one's identity is mainly a reflection of one's ethnicity; the second theory posits that identity is socially constructed; and the last contends that identity is a matter of individual choice.[17] This article does not try to explore this issue, but assumes a synthetic viewpoint of the origins of identity.

Table 1: Linz & Stepan's triangular framework of democratic consolidation

Dimensions	Criteria	Evidence of Democratic Consolidation
Three preconditions (minimal conditions)	A state exists	1. No intense conflicts about *polis'* authority and domain, demos' identities and loyalties. 2. No state, no democracy. Only if a state exists, free election can be held, winners can exercise their monopolistic power, and citizens' rights can be protected by a rule of law.
	Completing Democratic Transition	1. Free and contested elections are held. 2. The elected government can wield its de jure and de facto power.
	Rulers govern democratically	1. The elected executives do not infringe the constitution, violate individuals' rights, or impinge upon the legitimate functions of the legislature. 2. The elected executives can rule within the bounds of a state of law.
Three levels (People support democracy as "the only game in town")	Behavioral	1. No significant power attempts to overthrow the democratic regime or to secede from the state by promoting violence. 2. The newly elected government is no longer concerned about the problem of how to avoid democratic breakdown.
	Attitudinal	1. Even in the face of severe crises, the strong majority of people hold the belief that democratic procedures are the most appropriate way to govern collective life. 2. Support for anti-system alternatives is quite small or more-or-less isolated from pro-democratic forces.
	Constitutional	1. All political actors become habituated to the fact that political conflict within the state will be resolved according to established norms (laws, procedures, and institutions). 2. Violations of established norms are likely to be both ineffective and costly.
Five arenas (interrelated conditions)	Civil Society	1. People can advance their interests via freedom of association and expression. 2. Allowing for various social movements and associations from all social strata.
	Political Society	1. Citizens develop an appreciation for the core institutions of a democratic society – political parties, legislatures, elections, political leadership, and interparty alliances. 2. Requiring institutional routinization, intermediaries, and compromise to achieve a workable consensus about procedures of governance.
	The Rule of Law	1. All significant actors, especially the government and the state apparatus, will follow constitutional guidelines even in crisis, and be subject to the laws. 2. The more that all the institutions of the state function according to the principle of the state of law, the higher the quality of democracy and the better the society.
	State Bureaucracy	1. A usable bureaucracy for democratic leaders to exercise effectively their claims and to protect citizens' rights. 2. An efficient bureaucracy for government to monopolize the legitimate force in the territory.
	Economic Society	1. Pure market economies cannot come into being, and market failures would be corrected by state regulations. 2. A set of politically crafted and accepted norms, institutions, and regulations are needed to mediate between the state and the market.

[17] The further discussions, see Lin, Wu, and Lee, "'Neighborhood'", pp. 35-38.

Source: Juan J. Linz and Alfred Stepan, "Toward Consolidated Democracies" in *The Global Divergence of Democracies* (2001), Larry Diamond and Marc. F. Plattner (eds.), pp. 93-102.

Identity Concept is Fluid, not Fixed

Nothing is permanent except for change, and it has been proven that individual identity is fluid and subject to change.[18] Scholars have recognized that matters of identity rest largely on sentiment, which cannot be quantified.[19] In other words, sentiment is both dynamic and elusive. In fact, identity not only may vary spontaneously with rapid social change but also through radical manipulation by mobilizing the masses or through gradual change from long-term political socialization.

Multiple Identity is Feasible

Individuals may conceive hybrid identity. No individual will be locked into exclusive primordial identities because everything around them is transient. Suffice it to say, as far as culture is concerned, a Taipei identity may not necessarily be in contradiction to Taiwanese identity, and Taiwanese identity may not necessarily in contradiction to Chinese identity. According to Li-Li Huang et al.,[20] Taiwanese identity in particular is compatible with Chinese identity in cultural issues, which are largely able to mediate diverging aspects of the two demographic groups.

Concept of Constitutional Patriotism

The concept of constitutional patriotism was explored by Jürgen Habermas, who wrote:

> A political culture in which constitutional principles can take root needs by no means depend on all citizens' sharing the same language or the same ethnic and cultural origins. A liberal political culture is only the common denominator for a constitutional patriotism that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society.[21]

This article agrees with Shabani's observation that the political culture of a country, crystallized around its constitution, is able to provide its citizens with a double identity of simultaneously belonging to a constitutional consensus and to a specific concept of the good life, which makes each citizen both a member and a stranger within his own country.[22] And

[18] See Lin, Wu, and Lee, "'Neighborhood'", p. 35, Tsai, *National Identity*, p. 4.
[19] Mark Harrison, *Legitimacy, Meaning, and Knowledge in the Making of Taiwan Identity* (2006), p. 44.
[20] Li-Li Hwang, James H. Liu, and Maanling Chang, "'The Double Identity' of Taiwanese Chinese: A Dilemma of Politics and Culture Rooted in History" in *Asian Journal of Social Psychology* (2004), Vol. 7, p. 165.
[21] Jürgen Habermas, "Citizenship and National Identity," in idem, *Between Facts and Norms –Contributions to a Discourse Theory of Law and Democracy* (1996), p. 500.
[22] See Omid. A. Payrow Shabani, "Who's Afraid of Constitutional Patriotism ? The Binding Source of Citizenship in Constitutional States" in *Social Theory and Practice* (2002), Vol. 28, No.3, p. 425.

a constitutional patriot is willing to dedicate himself to pledging allegiance to the rule of law or constitutionalism and constitutional principles, even if his own constitution is an imperfect one.

The Outline of This Article

This article contains five parts. The Introduction (Part I) defines the conditions of democratic consolidation, highlighting Linz and Stepan's triangular framework and key related concepts. In Part II, we summarize the process of Taiwan's democratization, then examine it in terms of Linz and Stepan's triangular framework of democratic consolidation and try to identify the significant defects of Taiwan's experience. In Part III, we probe two different prospects for of Taiwan's democratization: the way of devolution-driven by identity clashes with political struggles, and the way of evolution-transcending the clashes and consolidating democracy.

In view of the fact that Taiwan has transcended the identity clashes in 2008 presidential election, we propose a feasible approach of consolidating democracy for Taiwan in Part IV, exploring what the political elite and the public can do to identify themselves as constitutional patriots in order to foster a sound political culture. Finally, we will summarize our brief remarks and draw some conclusions in Part V.

Taiwan's Democratization: Historical Portrait and Scrutiny

Historical Process of Taiwan's Democratization

The History of Taiwan and Its Democratization

The modern history of Taiwan can be divided into six periods:
(1) Japanese Colonial Period: 1895-1945,
(2) Post-war Turmoil Period: 1945-1949,
(3) Authoritative Governance Period: 1949-1987,
(4) Democratic Transition Period: 1987-2000,
(5) Semi-Consolidation Period: 2000-2008, and
(6) Democratic Consolidation Period: 2008- .
This essay considers periods (4) to (6), the era of Taiwan's Democratization.

Japanese Colonial Period: 1895-1945

In 1885, the Chinese Qing government declared Taiwan to be a full province, and set the island as a frontier settlement for poor Chinese immigrants. Only ten years later, after the Qing's defeat in the Sino-Japanese war, Taiwan was then ceded to Japan in 1895.[23] The

[23] Yun-han Chu and Jih-wen Lin, "Political Development in 20th-Century Taiwan: State-Building, Regime Transformation and the Construction of National Identity" in *The China Quarterly* (2001) Vol. 165, pp. 104-105.

Japanese first used Taiwan as a supplement to its capitalist development policy from 1895 to the mid-1930s. In the ensuing years Taiwan was transformed into a military supply factory. After World War II, control of Taiwan reverted back to the Republic of China, which was controlled by the Chiang Kai-shek-led Chinese Nationalists (Kuomintang, KMT).

Table 2: Milestones of Taiwan's Democratization (1945-2008)

Time	Events
1945	- Taiwan is retroceded to China, under the rule of the Chinese Nationalists or Kuomintang (KMT).
1947	- A Taipei street dispute over the state cigarette monopoly flares into a chain of protests against KMT rule. - It culminates in a series of massacres by government troops, called the February 28 incident.
1948	- Instituting martial law. - "Temporary Provisions Effective During the Period of Communist Rebellion" are adopted.
1949	- KMT leader Chiang Kai-shek moves to Taiwan with about 2 million supporters to escape the advancing Chinese communist army. - Washington continues to recognize Chiang's Republic of China in Taipei (ROC), not the Beijing-based People's Republic of China (PRC).
1971	- PRC replaces ROC's seat in United Nations.
1972	- US president Richard Nixon signs the Shanghai Joint Communique with the PRC, acknowledging that there is only one China and that Taiwan is part of it.
1975	- Chiang Kai-shek dies.
1977	- The Zhongli Incident.
1978	- Chiang Ching-kuo, Chiang Kai-shek's son, is chosen president.
1979	- Beijing and Washington establish diplomatic relations. - US president Jimmy Carter also signs the Taiwan Relations Act, allowing informal relations to continue between the US and Taiwan. - The Kaohsiung Incident (or the Formosa Incident).
1984	- Chiang Ching-kuo is re-elected by the National Assembly, he picks Taiwan-born Lee Teng-hui as his vice-president.
1986	- Democratic Progressive Party (DPP) forms in violation of law, KMT acquiesces. - DPP is founded and known as the party of Taiwan independence.
1987	- Chiang Ching-kuo lifts martial law.
1988	- Chiang Ching-kuo dies. His designated successor, Lee Teng-hui, is sworn in as president. - Press and assembly restrictions lifted after the end of martial law.
1991	- First constitutional reform provides for election of second-term national representatives. - Popular election of second National Assembly. - 'Temporary Provisions Effective During the Period of Communist Rebellion' are terminated.
1994	- First direct elections for Taiwan provincial governor and Taipei and Kaohsiung mayors. - Third constitutional reform provides for direct election of president and vice-president.
1996	- Taiwan's first direct presidential election; Lee Teng-hui wins with more than 50 percent of the vote.
2000	- More than 50 years of KMT rule ends as the DPP's Chen Shui-bian is elected president.
2004	- Chen Shui-bian survives an assassination attempt to win re-election by a 0.2 percent margin. - Taiwan holds its first referendum in conjunction with the presidential election, which fails to get the required 50 percent of voter participation.
2006	- Chen Shui-bian cedes some of his powers, including control of the cabinet, to the premier, as corruption allegations involving his family mount.
2008	- January 12, the KMT wins a landslide victory in legislative election. Chen Shui-bian steps down as DPP chairman. - March 22, the KMT candidate Ma Ying-jeou wins a decisive victory in presidential election.

Source: *Adapted and modified* from (1)*Taipei Times*, March 22, 2008, p. 3; (2) *Taipei Times*, March 23, 2008, p. 1; (3) Mark Harrison, *Legitimacy, Meaning, and Knowledge in the Making of Taiwan Identity* (2006), p. 44; (4) Tom Ginsburg, *Judicial Review in New Democracies-Constitutional Courts in Asian Cases* (2003), p. 155.

Post-war Turmoil Period: 1945-1949

At the outset of the end of World War II, the KMT as the then ruling party in China faced a dilemma. On the one hand, it needed to reconstruct post-war China, but it also faced a growing Chinese Communist Party (CCP) rebellion. Thus, the KMT treated Taiwan as an anti-communist base in order to suppress the rebellion. Under these circumstances, the KMT did not pay much attention to the welfare of the native Taiwanese, and appointed an incompetent governor general to run the island.

As table 2 shows, a Taipei Street dispute over the state cigarette monopoly flared into a series of protests against KMT rule in late February and early March 1947. They culminated in a chain of massacres by government troops in March and April, leading to the deaths or imprisonment of over 10,000 people,[24] that was called the February 28 Incident. This historical grievance left behind a lasting legacy of hostility and suspicion between 'outside province' mainlanders (*waishengren*) and 'native province' Taiwanese.[25] In 1948, the KMT instituted martial law and adopted the "Temporary Provisions Effective During the Period of Communist Rebellion," suspending some democratic constitutional processes in the constitution.[26] However, the KMT was defeated in the Chinese civil war in 1949, and Chiang Kai-shek's government moved to Taiwan with about 2 million supporters to escape the Chinese communist army.

Authoritative Ruling Period: 1949-1987

Generally speaking, politics in Taiwan was dominated by the KMT authoritarian regime from 1949 to 1987.[27] Although limited local elections were permitted in the 1950s, dissenters in 1960s were suppressed and political discourse ceased.[28] In the late 1970s some anti-KMT demonstrations accidentally turned into riots. Two incidents, the Zhongli Incident and the Kaohsiung Incident (or the Formosa Incident), were the highest profile examples. The Zhongli Incident in 1977 caused thousands of Taiwanese to attack the police and set fire

[24] Hwang et al., "'The Double Identity'", p. 152.
[25] Ralph N. Clough, "The Political System of Taiwan" in *The Taiwan Experience 1950-1980* (1981), James C. Hsiung (ed.), p. 354.
[26] The "Temporary Provisions Effective During the Period of Communist Rebellion" revised the ROC constitution to grant permission to president to declare martial law and to govern by decree without the need for Legislative Yuan approval of presidential powers during a natural calamity, epidemic, or economic crisis. The Temporary Provisions also suspended the two-term limit on the presidency, allowing Chiang Kai-shek to rule until his death in 1975. See Tom Ginsburg, *Judicial Review in New Democracies-Constitutional Courts in Asian Cases* (2003), pp. 113-114.
[27] Cheng-yi Lin and Wen-cheng Lin, "Democracy, Divided National Identity, and Taiwan's National Security" in *Taiwan Journal of Democracy* (2005), Vol.1, No. 2, p. 70.
[28] See Huntington, *Third Wave*, p. 20.

to buildings and motor vehicles,[29] and the Kaohsiung Incident in 1979 became a turning point in Taiwan's democracy movement,[30] because most of those accused of being involved in the Incident and their lawyers became the future elite of the Democratic Progressive Party (DPP),[31] such as Chen Shui-bian (former president of the ROC), Annette Lu (former vice president of the ROC), Su Tseng-chang (former premier of the ROC and DPP vice presidential candidate in 2008), and Frank Hsieh (former premier of the ROC and DPP presidential candidate in 2008).

In March 1986 president Chiang Ching-kuo announced a program for democratic reform, promising to initiate a democratic constitutional form of government, to return the political power to the people, and make them entirely equal before the law.[32] In September 1986, Taiwan's first opposition party, the Democratic Progressive Party (DPP), was formally founded in violation of the law, but nevertheless acquiesced by the Chiang Ching-kuo government. Because the charter of the newly founded DPP included a Taiwanese independence clause,[33] it became known as the party of Taiwanese independence. In the following year, Chiang Ching-kuo also lifted martial law. On the whole, martial law and strong presidential rule have been the defining constitutional features of the regime from 1949 to 1987.[34]

Democratic Transition Period: 1987-2000

Taiwan's democratic transition actually began late in Chiang Ching-kuo's rule when he picked Taiwan-born Lee Teng-hui as his vice-president. This move was a part of Chiang's overarching policy of Taiwanization, which was based on some deliberate considerations. First, he realized that it would be difficult to resume control for the KMT over mainland China in the foreseeable future. Second, the impact of continuous diplomatic failures, and especially the loss of Taiwan's UN membership, had already compromised the legitimacy of the KMT government severly.[35] Therefore, in order to maintain the political legitimacy of the KMT-regime, it was inevitable to recruit some of the more native province-Taiwanese in the ranks of the KMT-regime.

Soon after Lee Teng-hui succeeded Chiang Ching-kuo as president in January 1988, he accelerated political liberalization with constitutional restoration at the core of his program.[36] First of all restrictions on the press and assembly were lifted in 1988. The first round of constitutional reform ended in 1991, providing for the election of second-term national representatives. At the same time, Lee terminated the Temporary Provisions, restoring the normal constitutional order. Later, Lee demonstrated his statecraft, achieving a

[29] See Tsai, *National Identity*, p. 6, n.11.
[30] See Olwen Bedford and Kwang-kuo Hwang, *Taiwanese Identity and Democracy-The Social Psychology of Taiwan's 2004 Elections* (2006), p. 8.
[31] See Tsai, *National Identity*, pp. 6-7, n.12.
[32] See Tom Ginsburg, *Judicial Review in New Democracies*, p. 118.
[33] The clause stipulates: Taiwan's future should be decided by the people of Taiwan. *Cited from* Bedford and Hwang, *Taiwanese Identity*.
[34] See Ginsburg, *Judicial Review in New Democracies*, p. 114.
[35] Lee, "Taiwan's Cultural Reconstruction", p. 9.
[36] See Ginsburg, *Judicial Review in New Democracies*, p. 118.

third round of constitutional reform in 1994, and the constitution was amended to allow for the direct election of the president and vice-president. Taiwan's first direct presidential election was held in 1996 with Lee Teng-hui winning more than 50 percent of the vote.

In the wake of Lee's indigenization agenda, a party split in KMT loomed. The emerging cleavages in the KMT leadership with James Soong defecting to run as an independent candidate in the 2000 presidential election generally facilitated the DPP's rise to political power.[37] The DPP's candidate for presidency Chen Shui-bian eventually won 39 percent of the vote in a three-way race for president,[38] ending more than 50 years of KMT rule over Taiwan. Significantly, this was the first peaceful democratic transfer of power in Chinese history,[39] proving that Taiwan has been successful in passing the first part of the turnover test.

Semi-Consolidation Period: 2000-2008

Some scholars suggest that the inauguration of Chen Shui-bian in May 2000 initiated a new phase in Taiwan's democratic consolidation,[40] but that does not reflect the real story. Chen and the DPP encountered formidable obstacles in fulfilling their policy agenda, because they garnered only 39 percent of presidential votes and held a minority of seats in the legislature.[41] Facing this predicament, Chen's goals were constantly frustrated during his first four-year term characterized by an economic slowdown, political gridlock, continuing tensions with the PRC, Taiwan´s lack of diplomatic status, and an inefficient administration.[42] His approval rating slid from 79 percent in June 2000 to 40 percent in December 2003.[43]

To win a second term as president, Chen diverted public attention to other issues and used two strategies to consolidate his support base. On one hand, he kept relations with the PRC tense to remind the public that the PRC was always hostile to the Taiwanese. On the other hand, he manipulated ethnic clashes in interior affairs. However, Chen still clearly trailed in the polls by 10 or more percentage points in the fall of 2003.[44] That margin had narrowed considerably by election eve on March 19, when Chen and his running mate Annette Lu were shot and slightly wounded while campaigning on the streets of Tainan City

[37] See Shale Horowitz and Alexander C. Tan, "Rising China Versus Estranged Taiwan" in *Identity and Change in East Asian Conflicts-The Cases of China, Taiwan, and the Koreas* (2007), Shale Horowitz, Uk Heo and Alexander C. Tan (eds.), p. 116.

[38] See Copper, *Consolidation*, p. 168; below is the percentage of vote in the 2000 election: Chen Shui-bian 39% (DPP candidate Pan Green bloc) James Soong 37% (Independent candidate Pan blue bloc), Lien Chan 23% (KMT candidate). Source: Central Election Commission, ROC.

[39] See Ginsburg, *Judicial Review in New Democracies*, p. 119.

[40] See Hans Stockton, "Taiwan: Political and National Security of Becoming 'Taiwanese'" in *Identity and Change*, Horowitz, Heo and Tan (eds.), p. 49.

[41] See Wei-chin Lee, "Taiwan's Cultural Reconstruction", p. 14.

[42] See Cal Clark, "The Paradox of the National Identity Issue in Chen Shui-bian's 2004 Presidential Campaign: Base Constituencies vs. the Moderate Middle" in *Issues & Studies* (2005), Vol. 41, No.1, p. 74.

[43] See Chaw-yung Hsueh, "Power and Corruption in Taiwan" in *Issues & Studies* (2007), Vol. 43, No.1, p.20, table 1.

[44] See Clark, "The Paradox", pp. 70, 75.

in southern Taiwan.[45] A day later, Chen won the election by the razor-thin margin of 50.1 percent to 49.9 percent.[46] Many observers believe that the shooting earned Chen and his running mate enough sympathy votes to gain his narrow victory.

During Chen's second term between 2004 and 2008, the relationship between Chen and the DPP turned nearly entirely in a patron-client relationship, worsening Taiwan's predicament, and Chen and his family, as well as the DPP, were plagued by corruption allegations. Most notably, president Chen was accused of irregularities concerning the use of his special state affairs expense allowance, with as much as 77 percent of his total expenditure failing to comply with the rules,[47] while the first lady Wu Shu-chen was indicted for embezzling the state affairs funds. Members of Chen's government and family were indicted for or suspected of participating in insider trading, taking kickbacks, selling high positions, and illegally profiting from public engineering contracts.

Under these circumstances, Chen Shui-bian attempted a twofold strategy to prop up support for his administration. He proposed further constitutional reform which was not urgent for Taiwan, reemphasizing his desire to continue to build a Taiwanese consciousness through constitutional revisions in 2006.[48] At the same time, he played up provocative issues to anger China's leaders. What he and the DPP actually wanted to do was not to pursue the mission of Taiwan independence or clean government; their real goal was to obtain electoral support by manipulating national identity.[49]

Simply put, partly because the DPP's credibility was tarnished by its continual scandals, and partly because Chen's regime lacked administrative achievements, the legitimacy of Chen and DPP rule was eroded step by step. Hence, it appeared that Chen and the DPP were approaching a self-defeating corner. From a pragmatic perspective, although Chen's power derived from the consent of the governed through free and regular elections, Chen and his government did not adhere to the rule of law which was considered the core of democratic consolidation. Obviously, the goal of democratic consolidation in this period was not successful, and therefore we can describe it as a period of semi-consolidation.

Democratic Consolidation Period: After 2008

While Chen and his administration stressed political and ideological issues, Taiwan's electorate preferred to focus on issues concerning their daily lives, and the majority showed it had lost patience with Chen and the DPP over time. There have been three signs of such severe discontent of the Taiwanese electorate. The first sign was the outcome of local elections in December 2005 in which the opposition KMT won a total of 14 out of 23 constituencies while the ruling DPP won only six. These results have been recognized as a

[45] See Bedford and Hwang, *Taiwanese Identity*, p. 119.
[46] See Clark, "The Paradox", p. 54.
[47] See Hsueh, "Power and Corruption", p.18.
[48] See Stockton, "Taiwan: Political and National Security of Becoming 'Taiwanese'".
[49] Hans Stockton observed that into the 21st century, elite manipulation of the national identity issues in Taiwan has been a key means of obtaining electoral support. See Stockton, "Taiwan: Political and National Security of Becoming 'Taiwanese'", p. 50.

negative mid-term referendum on the reputation of Chen and the DPP.[50] The second sign was the outcome of the legislative elections in January 2008 in which the KMT won a landslide victory, achieving 81, or 72 percent, of the 113 seats contested, while the DPP garnered only 27 seats, or 24 percent of the total.[51] As a result, Chen Shui-bian was forced to step down as DPP chairman. The third, most significant sign came in March 2008 when KMT candidate Ma Ying-jeou won a decisive victory in the presidential election with 58.5 percent of the ballots.[52] In other words, the DPP was thoroughly defeated.

When the results of the presidential election were confirmed, President-elect Ma told supporters: "Your voices are heard. People have the right to demand a better life. Only change can bring hope, only change can provide opportunities."[53] DPP candidate Frank Hsieh, after losing to his KMT rival by more than 2 million votes, remarked: "The people of Taiwan used their ballots to make a decision today. I accepted the result of the election and I want to offer my congratulations to my competitor."[54] Shortly after that, incumbent president Chen issued a statement promising to stabilize the political situation before his term's end on May 20, 2008.[55] In addition, then US President George W. Bush issued a statement saying:

> I congratulate the people of Taiwan on the successful conclusion of their March 22 presidential election. Once again, Taiwan has demonstrated the strength and vitality of its democracy…Taiwan is a beacon of democracy to Asia and the world. I am confident that the election and the democratic process it represents will advance Taiwan as a prosperous, secure, and well-governed society.[56]

Just as the Chinese proverb states, "the sun shines after the rain", Taiwan now formally seemed to have a chance to pass the two turnover test according to Huntington's criteria of democratic consolidation,[57] but short before the next election in the coming year 2012 it has to be monitored whether Taiwan substantially has become a consolidated democracy or not.

Taiwan's Democratization Under Threat

Although Taiwan is perpetually threatened by China's forces, the agenda that Taiwan sets out on the democratic journey is on the move. From another point of view Taiwan's road to democratization is always under threat.

[50] See Kerry B. Dumbaugh, *Taiwan: Recent Developments and U.S. Policy Choices*, CRS Issue Brief for Congress, Order Code IB98034, The Library of Congress, February 28, 2006, p.4.
[51] The Liberty Times, January 13, 2008, p. 1.
[52] Taipei Times, March 23, 2008, p. 1.
[53] Ibid.
[54] Taipei Times, March 23, 2008, p.3.
[55] Ibid.
[56] Cited in Taipei Times, March 23, 2008, p.4.
[57] See Huntington, *Third Wave*.

According to Michael D. Swaine, the fact that China's leaders firmly reject Taiwanese independence is based on three fundamentals, that is, defending national self-respect, maintaining regime survival, and avoiding a domino effect of national separation.[58] During the period of "liberation of Taiwan" from 1949 to 1978 China often threatened Taiwan with military force.[59] and even in the ensuing period of "one country two systems"[60] from 1978 to the present, Beijing has publicly attacked any moves towards a Taiwanese independence harshly.[61] From the point of view of some western intellectuals, the focus of China's policy at present is not to assert direct territorial control over Taiwan but to avoid the island's permanent loss.[62] However, China's hostility to Taiwan and its persistent refusal to allow Taiwan to participate as a state in any international organization will only further stoke sentiments of independence .[63]

As far as Taiwan's continuous democratization is concerned, some dynamics need to be mentioned. First, under its rule from 1949 to 2000, the KMT promoted the ideology of democracy and constitutionalism based on Sun Yat-sen's philosophy.[64] Second, the continual international pressure of political liberalization, especially from the United States, helped Taiwan democratize its regime.[65] Third, the fact that non-KMT politicians (*dangwai*) launched a series of democratic movements compelled the KMT to facilitate the constitutional process of democratization.[66] Fourth, Chiang Ching-kuo believed that Taiwan would serve as a vanguard province for democratization of all mainland China.[67] In addition, Taiwan's long-term dedication to economic growth and educational investment, and the ensuing formation of the middle class and urban development were beneficial to the

[58] According to Michael D. Swaine, China's leaders believe that the permanent loss of Taiwan would deal a severe blow to Chinese prestige and self-confidence and the government would likely collapse. In addition, Taiwanese independence would also establish a dangerous precedent for other potentially secession-minded areas of the country, such as Tibet, Xinjiang, and Inner Mongolia. See Michael D. Swaine, "Trouble in Taiwan" in *Foreign Affairs* (2004), Vol. 83, No. 2, pp. 40-42.

[59] After Chiang Kai-shek retreated to Taiwan, China's leaders planned to invade Taiwan in 1950, but the Korean War changed U.S. policy toward Taiwan, and the U.S. ordered the Seventh Fleet to the Taiwan Strait to block a Chinese attack. In 1954, China again threatened Taiwan with force, prompting the U.S. to sign a defense treaty with the Chiang regime. In 1958, China attacked Taiwan-controlled islands just off China's southeastern coast, and the United States came to Taiwan's rescue again. See Copper, *Consolidating Taiwan's Democracy*, pp. 32-33.

[60] Deng Xiaoping assumed power in 1978, and he launched a series of economic development plans in order to modernize China. In January 1984, Deng stated: "After reunification, Taiwan can practice its capitalism and the mainland socialism. There will be one China with two systems, and neither side will hurt the other." See Hungdah Chiu, "From 'Liberating Taiwan' to 'One Country Two Systems'" in *China's Unification Studies* (1987), Executive Council Grand Alliance for China's Reunification under the Three Principles of the People (ed.), p. 50.

[61] See Shale Horowitz, Uk Heo and Alexander C. Tan,"Democratization and National Identity in the China-Taiwan and Korean Conflicts,"in Shale Horowitz, Uk Heo and Alexander C. Tan eds., *Identity and Change in East Asian Conflicts-The Cases of China, Taiwan, and the Koreas* (New York: Palgrave, 2007), p. 8.

[62] See Swaine, "Trouble in Taiwan", p. 40.

[63] See Lee, "Taiwan's Cultural Reconstruction", p. 33.

[64] See Ginsburg, *Judicial Review in New Democracies*, p.117; Sun Yat-sen's doctrines regarding popular sovereignty, democratic elections, local self-government, the rule of law and separation of powers were incorporated into the ROC constitution.

[65] See ibid.

[66] See ibid.

[67] See Ginsburg, *Judicial Review in New Democracies*, p. 118.

promotion of democracy. In a nutshell, Taiwan's democratization proved to be necessary for Taiwan's constant development and vice versa.

Recognizing the fact that Taiwan's democratization is an irreversible process, and believing that the United States would firmly support Taiwan's democracy, some political leaders would rather challenge Beijing's claims of sovereignty over Taiwan to obtain temporary electoral votes than debate policies to consolidate Taiwan's democracy.

Examining Taiwan's Experience through Linz & Stepan's Framework

Is Taiwan a consolidated democracy? If we adhere to a narrow definition, such as the one considering a change in ruling parties as the crucial factor of democratic consolidation,[68] then the answer will be positive. If we adopt a more comprehensive definition, the answer will be negative. For example, in the conclusion of his "*Consolidating Taiwan's Democracy*" John F. Copper remarks that

Indeed the contention that Taiwan has consolidated its democracy can be challenged. The elections…set in motion powerful trends, many of them negative, which impacted political and social stability in Taiwan. Reforms were, and are, needed and have not been accomplished. The economy and social relations have devolved. National security policy and foreign policy have been affected adversely.[69]

However, some Taiwan-centric scholars claim that by any definition or criterion, the ROC on Taiwan has become a full-fledged democracy.[70] In order to understand the question comprehensively, we will try to examine the experience of Taiwan's democratization through Linz & Stepan's triangular framework of democratic consolidation.

Taiwan's Experience Under Linz & Stepan's Test

Three Preconditions' Test

According to Linz and Stepan, there are three preconditions for a country to achieve its democratic consolidation: "a state exists", "a democratic transition has been completed", and "a government that rules democratically".

It goes without saying that Taiwan is a state. Its formal name is the Republic of China. It has a territory of about 14,000 square miles, a population of 23 million, a stable and democratic government, is diplomatically recognized by 23 allies and has informal relations with many other countries.[71] Although the people's national identity in Taiwan is divided, its government operates smoothly.

Second, Taiwan has completed its democratic transition. Free and fair, contested elections are regularly held, and the elected government enjoys its de jure and de facto power.

[68] See Copper, *Consolidating Taiwan's Democracy,* p.145.
[69] Ibid., p.167.
[70] See Lin and Lin, "Democracy, Divided National Identity", pp. 69, 71.
[71] John F. Copper made a positive comment like this. See Copper, *Consolidating Taiwan's Democracy*, pp. 146-147.

Third, with regard to the precondition that rulers govern democratically, Linz and Stepan claim that if elected executives do not infringe on the constitution, violate individual rights, impinge upon the legitimate functions of the legislature, and can rule within the bounds of a state of law, the condition would be met. In Taiwan's case, there have not been obvious constitutional infringements, human rights violations, or severe impingements of constitutional functions from 1996 to the present. However, President Chen Shui-bian, who was elected according to the ROC constitution, has said in the past, "what a hell constitution is ours!", "ROC's constitution has been dead for twice!" and "proclaiming martial law will be a choice!". Upon applying one of Diamond's indicators of democratic consolidation in which "all major leaders of government…believe that democracy is the best form of government and that rules and institutions of the constitutional system merit support"[72], it is hard to consider Taiwan as a consolidated democracy.

As to the requirement that "elected executives can rule within the bounds of a state of law" Taiwan is not so successful. As noted before, the elected president Chen was accused of financial irregularities, leading to his criminal conviction and imprisonment.[73] Based on this evidence, Taiwan is not able to completely pass the Three Preconditions' Test of Linz and Stepan's framework.

Three Levels' Test

Second, Linz and Stepan emphasize that a state may be viewed as a consolidated regime when democracy becomes "the only game in town." In order to accomplish this goal, it involves three levels of consolidation – *behavioral*, *attitudinal*, and *constitutional*.

At the *behavioral* level, at the outset of Taiwan's democratization, there was no significant non-constitutional power attempting to overthrow the democratic regime. And according to J. Bruce Jacobs' comparative finding, Taiwan has been blessed with an opposition that has used nonviolent methods to support its call for democratization.[74] Thus, the newly elected KMT-government which faces coming combined presidential and legislative elections in 2012 seems to have no need to worry how to avoid a breakdown of democracy.

Attitudinal consolidation suggests that even facing a severe crisis, most of the people believe democratic procedures are the most appropriate way to govern collective life, and a large majority of people are reluctant to support anti-democratic forces. In Taiwan's case, even if Chen, his family and his party were plagued by rampant corruption during Chen's second term, his approval ratings were in the single digits, and large-scale demonstrations motivated by anti-corruption sentiment demanded Chen's resignation,[75] while only few people tried to revolt against his government. Most people instead placed

[72] See Diamond, *Developing Democracy*, p. 69, table 3.1.

[73] See Hsueh, "Power and Corruption in Taiwan", p. 18.

[74] J. Bruce Jacobs, "Taiwan and South Korea: Comparing East Asia's Two 'Third Wave' Democracies" in *Issues & Studies* (2007), Vol. 43, No. 4, p. 249.

[75] See http://www.freedomhouse.org/template.cfm?page=22&year=2007&country=7823, accessed on April 20, 2008.

their hopes on the 2008 elections, won by the KMT and before the 2012 elections there no signs of severe political turmoils on the streets.

Constitutional consolidation implies that all political actors are subject to the established norms (laws, procedures, and institutions), namely, no man is above the law, and the rule of law prevails in the country. In Taiwan's case, in the process of democratization, most political actors have become gradually habituated to the fact that political conflict will be resolved according to established norms. The mystery-shrouded shooting incident[76] the day before the 2004 presidential election is one example. The opposition alleged that the shooting was staged to gain sympathy ballots. However, everything went back to normal after two lawsuits challenging Chen's win were rejected by Taiwan's high court,[77] even though opposition leaders and many members of the public still had some doubts about the truth.

Even so, there have been some violations of norms in the political arena. One clear example is the confirmation of members of the Control Yuan.[78] Additional Article 7 of the ROC Constitution stipulates that the Control Yuan shall have 29 members, including a president and a vice president, all of whom shall serve a term of six years. All members shall be nominated and, with the consent of the Legislative Yuan, appointed by the president of the republic. In February 2005, the term of previous Control Yuan members ended, and President Chen nominated new members and sent the list to the Legislative Yuan. But the Legislature, controlled by the opposition, failed to engage in the confirmation process. It was evidently a constitutional violation.

Five Arenas' Test

Under the five arenas' test, we first have to examine whether people in Taiwan can advance their interests via freedom of association and expression. As Table 3 indicates, Taiwan has a viable civil society with various organizations, people enjoy the freedom of association and assembly, and trade unions are independent. Human rights, social welfare, and environmental nongovernmental organizations (NGOs) are active and operate without harassment.[79]

[76] See Lee, "Taiwan's Cultural Reconstruction", p. 17, n. 45.

[77] See http://www.freedomhouse.org/template.cfm?page=22&year=2007&country=7823, accessed on April 20, 2008.

[78] The Control Yuan is one of five Yuans comprising the central government of the Republic of China. According to the constitution and its Additional Articles, the Control Yuan has the powers of impeachment, censure and audit. Besides, it may also take corrective measures against government organizations.

[79] See http://www.freedomhouse.org/template.cfm?page=22&year=2007&country=7823, accessed on April 20, 2008.

Table 3: Civil Organizations of the Republic of China (Taiwan), 2002-2006

End of year	Political organizations	Vocational organizations	Social organizations
2002	135	9040	20454
2003	138	9240	22470
2004	147	9485	24303
2005	156	9595	26135
2006	164	9853	28027

Source: http://www.moi.gov.tw/outline/4_E.htm, accessed on April 28, 2008.

Second, according to Linz and Stepan, citizens in a consolidated democracy will develop an appreciation for the core institutions of a democratic society – political parties, legislatures, elections, political leadership, and inter-party alliances. A free and active press and mass media are needed to nurture this competence. People living in Taiwan can access about 100 cable TV stations, 2,216 newspapers, 5,395 magazines, and 178 broadcasts.[80] In a nutshell, the development of the press and mass media in Taiwan is "vigorous and active"[81], helping to form a sound political society.

The third arena is the rule of law. It requires that all significant actors, especially the government and the state apparatus, follow constitutional guidelines and be subject to the law even in the case of a crisis. As noted earlier, president Chen Shui-bian, who was elected according to the ROC Constitution, has expressed several disparaging remarks on this constitution as stated above. Ironically, according to Article 48 of the ROC Constitution, the president shall, at the time of assuming office, take the following oath:

I do solemnly and sincerely swear before the people of the whole country that *I will observe the Constitution*, faithfully perform my duties, promote the welfare of the people, safeguard the security of the State, and will in no way betray the people's trust. Should I break my oath, I shall be willing to submit myself to severe punishment by the State. This is my solemn oath.

In another example, the University Evaluation Rules, promulgated by the Ministry of Education in 2007, exceeded their authority by including curricula and teaching affairs among the items the ministry could evaluate. In fact curricula and teaching affairs are forming the core content of universityautonomy[82] and are protected by the University Act as

[80] See http://info.gio.gov.tw/ct.asp?xItem=35379&ctNode=3532, accessed on April 20, 2008.

[81] See http://www.freedomhouse.org/template.cfm?page=22&year=2007&country=7823, accessed on April 20, 2008.

[82] In *Sweezy v. New Hampshire*, U.S. Supreme Court Justice Frankfurter argued that there must be four essential freedoms in a university, including: to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. See 354 U.S. 234, 263 (1957); In *Regents of University of California v. Bakke*, the Court ruled that academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. See 438 U.S. 265, 312 (1978); J. Peter Bryne, "Academic Freedom: A 'Special Concern of the First Amendment'" in *The Yale Law Journal* (1989), Vol. 99, p. 292. For further understanding of Taiwan's case, see Wen Cheng Chen, "An Analysis on

well as the ROC constitution. This case revealed that some power holders in Taiwan earnestly try to rule by decree, which undermines the rule of law.

The fourth arena is the state bureaucracy. Generally a usable and efficient bureaucracy is needed for democratic leaders to exercise their claims and to protect citizens' rights effectively. In Taiwan's case, a robust and efficient bureaucracy has indeed been established to serve the elected political leaders. Based on an examination system,[83] most civil servants in Taiwan have received prominent levels of discipline and knowledge before they assume office, including computer skills and administrative law education. Notably, Taiwan has a sound recruitment system and can be considered as being a meritocracy.[84] In fact, the fourth condition Linz and Stepan posited will be met in Taiwan.

As to the fifth arena – an economic society – it is well-known that Taiwan has experienced a successful economic development. As Linz and Stepan noted, pure market economies cannot come into being, and market failures have to be corrected by state regulations. Therefore, a set of politically crafted and accepted norms, institutions, and regulations is generally needed to mediate between the state and the market. In Taiwan's successful economic history, many economically related regulations have been enacted, and the market was institutionalized. In other words, a regulated and institutionalized economic society became a cornerstone for Taiwan's democratic consolidation.

Critical Defect: Deficiency of Constitutional Identity

From this macroscopic survey of Taiwan's democratization based on Linz and Stepan's triangular framework, two features become clear.

First, the triangular framework that Linz and Stepan envisioned for a consolidated democracy contains three dimensions and eleven conditions, and the critical focus is the rule of law (or constitutionalism). Under scrutiny, eight of eleven conditions are met in light of Taiwan's democratic experience.

Second, when we probe the three conditions that Taiwan does not meet, i.e., rulers govern democratically, constitutional consolidation supports democracy as the only game in town, and the rule of law prevails, it is easy to conclude that the critical defect of Taiwan's democratization is its deficiency of constitutional identity. One who shares an identity of constitutionalism[85] must comply with the supreme law of the land, namely the constitution,

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the Legality and Constitutionality of MOE's University Evaluation Rules" in *Chengchi Law Review* (2008), Vol. 103, pp.1-53.

[83] The Examination Yuan is one of the five Yuans comprising the central government. According to Article 83 of the ROC Constitution, the Examination Yuan shall be the highest examination organ of the State and shall have charge of matters relating to examination, employment, registration, service rating, scales of salary, promotion and transfer, security of tenure, commendation, pecuniary aid in case of death, retirement and old age pension for civil servants.

[84] Francis Fukuyama argued that Confucianism is obviously compatible with democracy, because the traditional Confucian examination system was a meritocratic institution with potentially implications. See Fukuyama, "Confucianism and Democracy" (1995) in *Global Divergence*, (eds.), p. 28.

[85] According to Michel Rosenfeld, the three characteristics of modern constitutionalism are limiting the powers of government, adherence to the rule of law, and protection of fundamental rights. See Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy" in *Southern California Law Review* (2001), Vol. 74, p. 1307; Daryl J. Levinson argued that constitutionalism is often analogized to Ulysses binding himself to the mast in order to resist the fatal call of the Sirens. See Daryl J. Levinson, "Parchment and Politics: The Positive Puzzle of

and adhere to the rule of law, even if his country is in crisis. It is noteworthy that the deficiency of constitutional identity in Taiwan is a common phenomenon among the political elite.

Consequences of the Critical Defect

This critical defect has consequences for political development. As far as Taiwan's experience is concerned, the deficiency of constitutional identity among political leaders has had five consequences.

Resulting in Constitutional Distortions

Originally, the political system of the ROC constitution was a cabinet system, but the cabinet system was not observed by Chiang Kai-shek and his successor Chiang Ching-kuo. Although several constitutional reforms were launched by Lee Teng-hui in the 1990s, Taiwan's political system is still ambiguous. Many scholars call it a "mixed" system while some call it a semi-presidential one.[86] Owing to this constitutional ambiguity, Taiwan's political leaders are apt to wield their power based on their own preferences. Therefore, power-holders in Taiwan are used to expanding their authority at the expense of constitutional prestige, because constitutional identity is not fixed in their minds, even if most of them are highly educated.

For example, as noted before, when Chen Shui-bian assumed the presidency in 2000, he garnered only 39 percent of the presidential votes while his DPP did not gain the majority in the legislature. According to some scholars and the opposition he was constitutionally required to appoint a non-DPP premier,[87] but did not do so. In order to avoid an opposition boycott, Chen subsequently ignored the Constitution, chose to interpret the Constitution himself without regard to the experts' views and defended himself by asserting he had won the election.[88] In short, Chen was willing to flaunt the Constitution rather than to comply with it. Yet when Chen Shui-bian proposed holding a referendum, a politically motivated move to win him votes in the 2004 presidential election, he appealed to the ROC Constitution.[89] To sum up, in Chen's eyes, the ROC Constitution is next to nothing or a ritual instrument or a tool for expanding his powers.

Another critical case occurred in February 2005 as noted above when President Chen nominated new members of the Control Yuan. The opposition-controlled legislature refused to screen the list even though it was constitutionally obligated to convene a

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Constitutional Commitment" in *Harvard Law Review* (2011), Vol. 124, p. 658.

[86] The so-called mixed system contains a hybrid with characteristics of presidential, parliamentary, and cabinet systems. See Copper, *Consolidating Taiwan's Democracy*, p.149.

[87] The Article 57 of the ROC Constitution stipulates that the Executive Yuan shall be responsible to the Legislative Yuan… the Executive Yuan has the duty to present to the Legislative Yuan a statement of its administrative policies and a report on its administration. While the Legislative Yuan is in session, Members of the Legislative Yuan shall have the right to question the President and the Ministers and Chairmen of Commissions of the Executive Yuan.

[88] See Copper, *Consolidating Taiwan's Democracy*, p. 149.

[89] In the summer of 2003, Chen broached the concept of holding a referendum. He appealed to the fact that the ROC constitution contains a provision (Article 17) granting the right of referendum to the citizens. See Copper, *Consolidating Taiwan's Democracy*, p. 152.

confirmation session and make a decision. Even worse, the opposition leaders did not recognize that they were violating the constitution.

Generating Corruption

As scholars have noted, the factors causing ingrained corruption in Taiwan are complex. However, the lack of a sense of the rule of law is the most important one.[90] With regard to normative concepts, the rule of law means that the state's actions must be controlled by legal rules, or at least rule-like legal norms and standards, rather than by the arbitrary and unpredictable decisions of state officials.[91] Simply put, the ideal of a government bound by the law has been central in the rhetoric of the rule of law.[92] Once a power-holder does not conceive the idea of constitutional identity, he or she will downplay the rule of law and recklessly try to appropriate public resources in private interest.

Taiwan's experience is a case in point. Chen Shui-bian, his family and DPP leaders, by ignoring the rule of law, have not been reluctant to extort bribes, take kickbacks, trade high positions, and profit from public engineering projects. Ironically, Chen and other DPP leaders have always criticized the KMT as being a so called "black-gold" (meaning corrupt) regime. It took the KMT 50 years, however, to become corrupt, but only six years for the DPP.[93] And what is worse, most of the DPP, including Chen Shui-bian, received law degrees. If they had retained a sense of constitutional identity, they would not have behaved so improperly.

Putting off the Reforms

To downplay the rule of law is apt to cause corruption, and a corrupt government will pay little attention to social reforms. As Brazil's experience shows, major social reform will not be launched as long as a country continues to be plagued by rampant corruption.[94] Chen's regime in Taiwan from 2000 to 2008 is a similar example. Because Chen and the DPP have been curbed by a series of corruption scandals, they have been limited in their ability to carry out social reforms. Instead, in order to divert public attention to other matters, they have paid considerable attention to ideological issues, such as rectification of names, adding "Issued in Taiwan" in English to ROC passports,[95] modifying history textbooks, and manipulating ethnic divisions. These campaigns exhausted much of Taiwan's national power.

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[90] See Hsueh, "Power and Corruption", p. 16.

[91] See Christopher F. Zurn, *Deliberative Democracy and the Institutes of Judicial Review* (2007), p.86; Although Richard H. Fallon Jr. argued that the rule of law is an essentially contestable concept we allege that it has a minimal normative requirement. See Richard H. Fallon, Jr., "'Rule of Law' as a Concept in Constitutional Discourse" in *Columbia Law Review* (1997), Vol. 97, No. 1, pp. 2-3.

[92] See Guido Pincione, "Market Rights and the Rule of Law: A Case for Procedural Constitutionalism" in *Harvard Journal of Law&Public Policy* (2003), Vol. 26, No. 1, p. 399.

[93] See Hsueh, "Power and Corruption", p. 14.

[94] See Georg Sorensen, *Democracy and Democratization-Processes and Prospects in a Changing World*, (3rd ed. 2008), p. 71.

[95] See Mark Harrison, *Legitimacy, Meaning, and Knowledge*, p. 192.

Reducing Social Capital

It is well-known that institutional prestige, i.e., the trust people have in institutions, contributes heavily to the social capital of a democratic regime, especially in a pluralistic and multi-ethnic society. Academic research reveals that components of social capital, including high levels of activity and interactions in voluntary associations, reduction of social costs, and social effectiveness, resulting from the trust put upon people and institutions, are beneficial to democracies.[96] We are convinced, however, that both, trust in political leaders and trust in institutions[97,] is important for cultivating a profound political culture and consolidating democracy.

In terms of trust in political leaders, as table 4 indicates, people in Taiwan have showed that they have a serious lack of trust in President Chen Shui-bian. This lack of trust probably results partly from the bad overall performance of Chen's government, partly from the continuing scandals that have plagued Chen and the DPP, and partly from Chen's inappropriate behavior based on the deficiency of constitutional identity.

Table 4: Approval Rating for President Chen Shui-bian, 2000-2006

Date	Satisfied(%)	Dissatisfied(%)	Date	Satisfied(%)	Dissatisfied(%)
Jun. 21, 2000	79	5	Mar. 21, 2004	44	33
Oct. 4, 2000	45	42	Sep. 30, 2004	41	40
Dec. 28, 2000	49	48	May 19, 2005	32	47
May 17, 2001	46	45	Dec. 4, 2005	21	62
May 16, 2002	44	46	Jan. 14, 2006	20	63
Nov. 19, 2002	36	50	May 27, 2006	16	75
May 19, 2003	42	46	Oct. 18, 2006	18	73
Dec. 16, 2003	40	50	2007-	20	70

Source: Chaw-yung Hsueh, "Power and Corruption in Taiwan" in *Issues & Studies* (2007), Vol. 43, No. 1, p. 20, table 1.

[96] See Ken Chi Ikeda and Tetsuro Kobayshi, "The Influence of Social Capital on Political Participation in the Cultural Context of Asia" in *A Comparative Survey of Democracy, Governance and Development*, Working Paper Series: No. 37 (Taipei: Asian Barometer Project Office, National Taiwan University and Academic Sinica, 2007), p. 3.

[97] From a theoretical perspective, scholars have argued that trust in political institutions, like trust in fellow citizens, is a major aspect of liberal democratic theory. See Chaw-yung Hsueh, "Power and Corruption", p. 21.

Table 5: Trust in Institutions in Taiwan, 2006

Central government		Parliament		Legal system	
Trust a lot	2.4%	Trust a lot	1.7%	Trust a lot	2.8%
Trust to a degree	31.9%	Trust to a degree	19.2%	Trust to a degree	29.1%
Don't really trust	37.8%	Don't really trust	44.7%	Don't really trust	38.3%
Don't trust at all	24.0%	Don't trust at all	27.4%	Don't trust at all	24.5%

Source: Adopted from Chong-Min Park, Democratic Consolidation in East Asia, *Japanese Journal of Political Science* (2007), Vol. 8, No. 3, p. 317, table 4.

The trust in institutions is the other indicator for evaluating the level of social capital. As table 5 indicates, only one-third (34 percent) trusted the executive branch of government, only one-fifth (21 percent) trusted the Legislature,[98] and only 32 percent trusted the Judiciary in 2006. This showed that people in Taiwan were disgusted with politicians' negative performances caused by a lack of constitutional identity.

Undermining Public Trust

Because of the lack of constitutional identity, some political leaders are apt to engage in illegal behaviors and to manipulate political rumors to advance their own interests, undoubtedly undermining social trust.

For instance, the unlicensed radio stations in southern Taiwan, which are usually perceived to be pro-DPP, [99] became tools for political manipulation in the 2004 presidential election. On March 19, 2004, the day before the election, when Chen Shui-bian and his running mate were injured after being shot in southern Taiwan, the underground radio stations denounced the incident as a conspiracy of the pan-Blue bloc (KMT and People First Party coalition) without any verification. Some stations even rumored that it was a mandate of heaven for Chen to govern for another four years.[100] Eventually, Chen garnered a number of sympathy votes from the incident in an election he won by a razor-thin margin. Hence, it appeared that public trust, an essential value that underpins a free and democratic society, had become an empty concept in Taiwan during the Chen tenure.

Devolution or Evolution: Taiwan Is at the Crossroads

In the first months of 2008, the opposition KMT gained an absolute majority in the Legislature and regained the presidency, meaning Taiwan passed Huntington's two turnover test. But is it really possible for Taiwan to march toward a fully consolidated democracy?

[98] Chong-Min Park, "Democratic Consolidation in East Asia" in *Japanese Journal of Political Science*, (2007), Vol. 8, No. 3, p. 317.
[99] See Lee, "Taiwan's Cultural Reconstruction", p. 31.
[100] Ibid.

We are convinced that Taiwan with the coming election is at the crossroads in the process of democratization and has two options: devolution and evolution.

Devolution: Driven by Identity Clashes with Political Struggles

If Taiwan's politics is driven by identity cleavages, which are a major feature of the ongoing election campaign, Taiwan will move toward a road of democratic devolution. But if Taiwan is able to transcend clashes over identity and opt for deepening the constitutional identity of the political elite and the country's citizens, it will move toward democratic evolution.

Identity Clashes do Exist in Taiwan

There are two main identity cleavages, if not potential clashes in Taiwan's political culture: in an ethnical - and in a national sense. Each of them plays a significant role in the process of Taiwan's democratization.

Ethnic Identity Clash in Taiwan

Taiwan's 23 million people belong to four main ethnic groups: 70% are Hoklo, who migrated to Taiwan from Fukien province, 15% are Hakka, who moved to Taiwan from Guangdong, 13% are Mainlanders, who came to Taiwan from various parts of China after the end of the World War II, and 2% are Aborigines, who inhabited Taiwan before the first Chinese settlers arrived in the 17th century.[101] Generally, Hoklo and Hakka are called Taiwanese or Islanders (as table 6 indicates).

Table 6: Composition of Taiwan's Population

Taiwanese (Islanders)		Mainlanders	Aborigines
Haklo (Minnanren)	Hakka		
70%	15%	13%	2%

Source: Chang-Yen Tsai, *National Identity, Ethnic Identity, and Party Identity* (2007), Maryland Series in Contemporary Asian Studies, No.1-2007 (188), p.10; Cheng-yi Lin and Wen-cheng Lin, "Democracy, Divided National Identity, and Taiwan's National Security" in *Taiwan Journal of Democracy* (2005), Vol. 1, No. 2, p. 71.

The "ethnic" friction between Mainlanders and Taiwanese has three main origins: differences in dialect and customs, the legacy of the above mentioned February 28 Incident,

[101] See Lin and Lin, "Democracy, Divided National Identity, and Taiwan's National Security", p. 71.

and the dominant position of Mainlanders on the island.[102] First, the Hoklos are speakers of local variants of the Fukien dialect, the Hakkas speak a different dialect, while the Mainlanders speak a variety of other dialects. Some occasional misunderstandings in daily life result from differences in dialects. Second, the February 28 Incident in 1947 sowed the seeds of animosity between the two groups of Taiwanese (Hoklos and Hakka) and Mainlanders. Third, the fact that the Mainlanders as a clear minority group occupy most of the higher level positions in government and the higher echelons of bureaucracy enhances the tension between Mainlanders and Taiwanese.

National Identity Clash in Taiwan

Shale Horowitz et al. argue that national identity has strong implications for defining national interests,[103] and Taiwan's elections, party coalition, and cross-Strait relations (to Mainland China) have been shaped by national identity.

National identity clashes in Taiwan have historical origins. As this article noted earlier, Taiwan was ceded to Japan in 1895 and was returned to the ROC in 1945. The ensuing civil war resulted in a *de facto* separation between Mainland China and Taiwan from 1949 that has lasted to the present day. It is noteworthy that while Chinese and Taiwanese share common roots in culture, they have become politically separate in the last 100 years.[104] In recent years, although Taiwan has become dependent on the Chinese market and has quickly moved towards China economically, it has just as quickly moved away from China politically during the DPP - rule.[105] What is worse, China has never abandoned its stance of intimidating Taiwan by military force, making the independence issue prevalent on the island. During the tenure of incumbent KMT president Ma Ying-jeou the relations between the ROC and PRC have seen a significant reversal of the tensions increasing since 2000, reflected by a series of – mainly economic – agreements and prospects even for a future peace agreement while Ma was unwilling to touch more sensitive political and security issues like a concrete statement pro-unification.

Under these circumstances, national identity in Taiwan has been shaped by the people's attitude towards Taiwan's future, i.e. pro-unification, pro-status quo, and pro-independence. As table 7 indicates, the percentage of reunification supporters is higher than that of independence supporters among Hakkas and Mainlanders. On the other hand, the percentage of independence supporters is a little higher than that of reunification supporters among Haklos, and about one-half of each ethnic group support maintaining the status quo. In other words, pro-status quo is the mainstream opinion of Taiwan's people, but independence and reunification are still contestable issues. Generally speaking, national identity in Taiwan is related to ethnic identity.

[102] See Clough, "The Political System of Taiwan", pp. 354-355.
[103] See Horowitz, Heo and Tan, "Democratization and National Identity", p. 3.
[104] See Hwang, Liu, and Chang, "'The Double Identity'", p. 150.
[105] See Copper, *Consolidating Taiwan's Democracy*, p. 33.

Table 7: Different ethnic groups' position on whether Taiwan should be independent or unify with Mainland China (1994-2003)

		1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Average
Hakka	Pro-Reunification	20.9	25.4	29.0	20.8	19.3	15.7	27.3	25.1	17.4	19.3	22.0
	Pro-Status Quo	48.2	40.6	47.1	45.6	51.9	57.0	47.6	47.3	54.4	52.2	49.2
	Pro-Independence	12.9	9.8	13.9	16.8	17.7	16.3	11.9	14.6	15.7	17.2	14.7
Hoklo	Pro-Reunification	16.7	17.2	20.6	16.7	14.7	9.5	18.1	16.3	16.4	12.7	15.9
	Pro-Status Quo	50.1	40.5	46.6	49.1	46.1	52.7	47.5	52.0	49.3	54.5	48.8
	Pro-Independence	12.5	13.5	17.3	19.4	21.2	19.9	11.0	18.0	20.5	21.0	17.4
Main-landers	Pro-Reunification	43.7	45.1	49.4	43.8	31.9	24.3	35.6	40.3	31.5	31.5	37.7
	Pro-Status Quo	47.7	39.1	40.5	47.5	47.9	56.5	45.2	50.6	53.5	52.8	48.1
	Pro-Independence	4.0	4.6	6.5	4.4	9.6	8.4	2.2	5.5	8.0	8.7	6.2

Source: *Adopted from* Election Study Center, National Chengchi University; Lu-huei Chen & Ying-lung Chou, "Change and Continuity of People's Preference on the Taiwan Independence Issue" in *East Asian Studies* (2004), Vol. 35, No. 2, p. 165.

Identity Clash Manipulations Endanger Young Democracy

Identity Clash Manipulations Caused by Political Battles

As far as most people in Taiwan are concerned, the distinctions between ethnic groups are of little significance in their daily lives, but the differences are routinely highlighted by Taiwanese politicians in the country's frequent elections.[106] Cognizant of the fact that Hoklos and Hakkas are the majority of the electorate, Taiwanese politicians routinely manipulate their "Taiwanese" consciousness to garner votes. Since the outset of Taiwan's democratic transition in 1987, many manipulations of identity divisions have met with electoral success, vindicating the view of many Taiwanese politicians that such an identity-based campaign is the key to winning elections. Thus, Taiwan's identity differences are every now and then exacerbated by regular political battles.

It has been noted that Taiwanese politicians habitually adopt antithetical phrases or slogans to manipulate differences in identity, including "Love Taiwan v. Sell out Taiwan"[107], "Genuine Taiwanese v. Chinese Foreigners", and "Indigenous Regime v. Alien Regime". Those antitheses, like knives, divide Taiwan's populace into two opposite camps, and the continual confrontations only exacerbate the identity clashes.

[106] See Bedford and Hwang, *Taiwanese Identity and Democracy*, p. 5.

[107] For example, former DPP Legislator Shen Fu-hsiung proposed that the DPP require that legislative candidates not use the topics of ethnicity, indigenization, or "Love Taiwan" as themes in the election campaign. Shen criticized Chen Shui-bian for manipulating ethnic issues pertaining to Taiwanese national identity to gain votes, and highlighted the long-term negative social impact of these actions. However, Shen was derided by a popular pro-independence call-in TV show host who asked his audience, "Is Loving Taiwan a crim ? " See Bedford and Hwang, *Taiwanese Identity and Democracy*, pp. 187, 188.

Constitutional democracy is a stable mechanism for determining who governs the state with legitimacy founded on popular consent and how the rulers wield their powers within constitutional boundaries to protect human rights and improve people's welfare. Significantly, constitutional democracy is based on human rationality, both of the governors and of the governed. From this perspective, free, fair, regular, peaceful and policy-based elections will play a central role in a constitutional democracy. The main purpose of electoral systems in a regime is to accurately register the preferences of the electorate.[108] In order to obtain an accurate reading of these preferences, elections should not be manipulated by those who would be our governors. Namely, political elites cannot predetermine political outcomes by manipulating voters.[109]

In Taiwan's case, losing an election implies not only the loss of power to rule, but also the loss of control of the interpretation of the social ethos.[110] Moreover,

Taiwan is a fragile new democracy in which multi-ethnic groups cohabitate. Therefore, if political leaders have an ambition to manipulate identity cleavages in Taiwan's elections, it will inevitably undermine the political rationality of the constituency and endanger the new fragile democracy. After all, democratic politics depends on the existence of a series of principles and values,[111] and these principles and values will be entrenched not by temporary passions but by enduring political rationality.

Evolution: Transcending the Clashes and Consolidating Democracy

Certainly, Taiwan may opt for an evolutionary democratic path to become a consolidated democracy, and its top priority and core task will be to transcend identity clashes. Fortunately, when we examine the identity clashes from an empirical perspective we find they are surmountable.

Identity Clashes are Surmountable in Taiwan

Short-Term Electoral Syndrome

Taiwan is a multi-ethnic and migratory society. People's identities in Taiwan are not fixed or primordial; they are changeable and socially constructed.[112] During the past several decades, interaction and intermarriages between ethnicities and nationalities have revised the model of traditional identity shaping, which is based purely on bloodlines.

Empirically, Taiwan's identity divisions are expressed in regular elections. As research findings demonstrate, different degrees of ethnic political consciousness among Taiwan's ethnic groups are the result more of political mobilization than of a simple reliance

[108] See Guy-Uriel E. Charles, "Democracy and Distortion" in *Cornell Law Review,* (2007), Vol. 92, p. 608.
[109] Ibid., p. 615.
[110] See Lee, "Taiwan's Cultural Reconstruction", p. 30.
[111] See Charles, "Democracy and Distortion", p. 608.
[112] See Juan J. Linz and Alfred Stepan, "Toward Consolidated Democracies" in *Global Divergence*, p. 106.

on objective ethnic background.[113] Simply put, it is just a short-term electoral syndrome. When there is no election, there is no identity clash.

Identity Manipulations Will be Counterproductive

As this article noted earlier, many manipulations of identity divisions have been successful in Taiwan's elections, and hence the pro-independence DPP and other like-minded Taiwanese candidates view appeals to Taiwanese identity as a key asset of their nation.[114] These appeals, however, are easily exhausted when overused. As table 8 indicates, while the pro-independence DPP and its candidates are good at playing on Taiwanese consciousness, the party lost nearly every election from 2005 to 2008. If identity cleavage manipulations were truly effective in Taiwan's elections, Taiwanese politicians would never lose an election because of the ethnic composition of population (as table 6 indicates). It goes without saying that the overuse of identity clashes has been and will be counterproductive.
Moreover, the KMT has competently shifted its electoral strategy to phrase some of its campaign slogans in a way that balances the effects of the DPP's manipulation of the identity issue, such as "Taiwan First," "Love Taiwan," "Love Taiwan 12 Projects,"[115] and "I Will Not Sell Taiwan Out".[116] Frankly speaking, identity clash manipulations will become a failure in political markets in Taiwan, which means they are surmountable.

Table 8: KMT & DPP's Percentage of the Vote (2004-2008)

Time	Elections	KMT	DPP
2004/03/20	Presidential election	49.9%	50.1%
2005/12/03	County magistrate election	40.2%	22.3%
2006/12/11	Mayor of Taipei city election	53.8%	40.9%
2006/12/11	Mayor of Kaohsiung city election	49.2%	49.4%
2008/01/12	Legislative election	71.7%	23.9%
2008/03/22	Presidential election	58.5%	41.5%

Source: Central Election Commission (R.O.C), http://www.cec.gov.tw/ , accessed on April 20, 2008.

[113] See Lee, "Taiwan's Cultural Reconstruction", p. 42.
[114] See Horowitz and Tan, "Rising China Versus Estranged Taiwan", p. 119.
[115] "Love Taiwan 12 Projects" was one of Ma Ying-jeou's (the KMT candidate) election platforms in 2008. Further details see *Taipei Times*, March 21, 2008, p. 4.
[116] Ma Ying-jeou, the KMT presidential candidate in 2008, vowed to his supporters in a campaign address that "I, Ma Ying-jeou will not sell Taiwan out." See *Taipei Times*, March 22, 2008, p. 3.

Table 9: Taiwanese/Chinese Identification Trend Distribution in Taiwan, 1992-2006

Identity date	Taiwanese (percent)	Both Taiwanese and Chinese (percent)	Chinese (percent)	Non response (percent)
Dec.1992	18.8	49.1	23.2	8.9
Dec.1994	20.2	44.6	26.2	8.9
Dec.1996	26.2	46.2	21.4	6.2
Dec.1998	36.7	40.3	16.3	6.7
Dec.2000	37.3	46.3	9.1	7.2
Dec.2001	43.2	41.8	10.3	4.7
Dec.2002	40.5	45.4	8.5	5.6
Dec.2003	43.2	42.9	7.7	6.3
Dec.2004	43.7	44.4	6.1	5.7
Dec.2005	46.5	42.0	7.3	4.1
Dec.2006	44.1	45.2	6.4	4.3

Source: *Adopted from* Chang-Yen Tsai, *National Identity, Ethnic Identity, and Party Identity* (2007), Maryland Series in Contemporary Asian Studies, No.1-2007 (188), p.17, Figure 1.

Double Identities Are Feasible in Taiwan

As a matter of fact, people's identities in Taiwan are not fixed or primordial. As table 9 indicates, the number of people who identify themselves as Taiwanese is about the same as the number identifying themselves as both Taiwanese and Chinese. Because Taiwanese identity consists of both cultural and political elements[117] and people who identify themselves as Taiwanese may also identify with Chinese culture, if the PRC reduces its hostility to Taiwan, the open-ended probability of double identities among the majority in Taiwan will underpin the country's transcendence of identity clashes.

Paving the Way for Taiwan toward Consolidating Democracy

Every cloud has a silver lining. From an empirical perspective, the last presidential election in March 2008 illustrates that Taiwan is capable of transcending identity clashes. It therefore

[117] See Meihui Liu and Li-Ching Hung, "Identity Issues in Taiwan's History Curriculum", in *International Journal of Educational Research* (2002), Vol. 37, p. 568.

appears that facilitating the development of constitutional identity is an urgent priority on Taiwan's future agenda if it intends to become a consolidated democracy.

2008 Election: An Illustration for Taiwan's Transcendence

The last presidential election in March 2008 had so far an epochal impact on the country. The candidate of the pro-independence DPP, the ruling party, was Frank Hsieh, a Taiwanese with a strong Taiwanese consciousness and a former premier and Kaoshiung mayor. Hsieh's rival was the former mayor of Taipei, Ma Ying-jeou, the candidate of the then opposition KMT, a so-called pro-reunification party. Particularly noteworthy, Ma is a mainlander who was born in Hong Kong, a harbor city of the PRC.

During the campaign, Hsieh and the DPP devoted themselves to portraying Ma as a traitor, a man who was apt to sell out Taiwan to the PRC. The charges grew more aggressive after Ma admitted that he was in possession of a U.S. "green card" when he studied in the United States, and Hsieh's camp insisted the green card remained valid to the present day. In other words, Hsieh and the DPP tried to play the old trick of manipulating the identity issue to gain more votes. Some scholars were willing to define the recent election as a campaign centered on national identity. For instance, Michael Hsiao, the executive director of the center for Asia-Pacific Area Studies at Academia Sinica, argued that "three variables emerged as defining parameters of this election: national identity, national security and national economic recovery. The central issue of the three remains national identity."[118] Gerrit van der Wees, the editor of Taiwan Communique (a publication based in Washington), wrote an essay entitled "Ma is on the Wrong Side of History," [119] and argued that "Ma was one of the KMT opponents of this move toward full-fledged democracy."[120] However, the "tagged traitor", the man who was "on the Wrong Side of History", won the election by a 17-percentage-point margin with 58.5 percent of the ballots.

If Taiwan's identity clashes were as serious and if national identity were as important to Taiwan's public as the scholars suggested, then Frank Hsieh would have won the presidential election. The last election, in fact, indicates that there is not such a strong identity conflict in the daily lives of the Taiwanese, and judging from its result, the 2008 presidential election was a clear demonstration of Taiwan´s ability to transcendent at least the severest identity cleavages by its democratization process.

Taiwan Must Urgently Facilitate Constitutional Identity

Now, as Taiwan seems to be capable of transcending identity clashes, it is time to consolidate its young democracy. As this article showed in part II, the critical defect in the process of Taiwan's democratization has been a deficiency of constitutional identity, which has led to many negative consequences.

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[118] Michael Hsiao, "It's about Governance, Democracy" in *Taipei Times*, March 22, 2008, p.8.
[119] Gerrit van der Wees, "Ma is on the Wrong Side of History" in *Taipei Times*, March 17, 2008, p. 8.
[120] Ibid.

The coming years will be a critical age in which Taiwan can facilitate deepening the constitutional identity of the people and the political elite. The ending KMT – tenure indicates a positive trend. There are several reasons for this: First, as the political reality showed that identity manipulations have become market failures, the political elite in Taiwan may have learned the lessons. Second, most of the people in Taiwan look forward to maintaining the status quo in the future (as table 7 indicates).[121] Third, Ma's administration has demonstrated that it did not take the role of a troublemaker in the international community, and his platforms for peace was apt to launch a *rapprochement* with the PRC and to establish positive US-Taiwan relations[122], thereby eliminating problematic external factors. And finally, new economic plans were put into effect giving the economy a priority over sensitive issues. However, the situation will become uncertain if the DPP's president candidate, Tsai Ing-wen, is elected as the next president in 2012. Because the base of DPP's support is smaller than KMT's, DPP's elites may be willing to employ again the policy of the identity manipulations to maintain their ruling.

A Feasible Approach for Taiwan: The Constitutional Patriot as an Identity

For the time being, Taiwan's priority in consolidating its democracy is to reinforce the constitutional identity of the political elite and the public. There is no authentic constitutional democracy without a profound political culture in which the political elite and the public are willing to pledge their allegiance to existing constitutional norms.

The Constitutional Patriot as an Identity: Fidelity to an Imperfect Constitution

In other words, it is urgent for Taiwan to shape a political culture in which each political actor will commit himself to bearing an ethic of responsibility[123] to serve as a constitutional

[121] According to Freedom House's report, polls consistently showed that more than 80 percent of Taiwan's people would prefer to maintain the status quo in cross-strait relations. See http://www.freedomhouse.org/template.cfm?page=22&year=2007&country=7823, accessed on April 20, 2008.

[122] President-elect Ma Ying-jeou identified four pillars of Taiwan's national security: the soft power of economic globalization; military deterrence through a defensive capability; ensuring the status quo through a "three noes policy" - no negotiations on unification, no pursuit of de jure independence and no cross-strait use of military force - along with the acceptance of the "1992 consensus" ("one China" with different interpretations); and restoring mutual trust and military cooperation with the US, mending relations with ASEAN, Japan and Korea and being a "peacemaking" member of the international community. See Hsiao, "It's about Governance, Democracy".
On December 23, 2011, the U.S. announced that Taiwan has been officially listed as a candidate for the U.S. Visa Waiver Program. The announcement was made just three weeks before Taiwan's presidential election, which will be held on January 14, 2012. This announcement also shows that Ma's executive performance has been affirmed by the U.S. Government. See http://nottspolitics.org/2011/12/23/us-prefers-ma-but-will-work-with-tsai/, accessed on December 29, 2011.

[123] According to Max Weber, the ethic of responsibility means that one must answer for the (foreseeable) consequences of one's actions. See Max Weber, "The Profession and Vocation of Politics" in *Weber - Political Writings* (2003), Peter Lassman and Ronald Speirs (eds.), pp. 359-360.

patriot. Although Habermas's concept of constitutional patriotism is vulnerable to criticism,[124] his core assertions – the exclusion of nationalism from democracy[125] and loyalty to the universal principles and practices of democracy and human rights[126] – are not only valuable in portraying Taiwan's unique situation, both internal and external,[127] but also pragmatic in overcoming Taiwan's current democratization dilemmas.

The ROC Constitution is Imperfect in Historical Context

Taiwan's current constitution, called the Constitution of the Republic of China (ROC Constitution), is to a certain extent indeed imperfect due to a historical dilemma. The ROC Constitution was enacted on December 25, 1946 and took effect one year later. Theoretically, the ROC Constitution is binding over all of China's territory (including Taiwan) under the rule of the Nationalist KMT. However, since China was taken over by the Chinese Communist Party (CCP) in 1949 and the Nationalist KMT retreated to Taiwan, *de facto* sovereignty of the ROC has been limited to Taiwan. In a word, the validity of the ROC Constitution has been confined to Taiwan since 1949.

The mentioned historical dilemma resulted from the fact that both of the two states across the Taiwan Strait announced that there was only one China, and only one legitimate government of China in the world. The Nationalist KMT saw itself as China's only legitimate government and made up its mind to retake the mainland. Based on this mindset, the Nationalist KMT never intended to draft a new constitution. When the the pro-independence DPP became the ruling party in 2000 the situation changed: any intention of the government to draft a new constitution has been viewed as the attempt to gain *de jure* independence to recognized by the PRC and the international community, and hence been stopped.

A big problem is that the ROC Constitution was designed for all of China, not only for Taiwan. Therefore, there are some constitutional arrangements that are apt to be at odds with Taiwan's existing political situation. For instance, Article 64 of the ROC Constitution provides that "Members of the Legislative Yuan shall be elected in accordance with the following provisions:

(1) Those to be elected from the provinces and by the municipalities…;
(2) Those to be elected from Mongolian Leagues and Banners;

[124] See Margaret Canovan, "Patriotism Is Not Enough" in *British Journal of Political Science* (2000), Vol. 30, pp. 413-432; Vito Breda, "The Incoherence of the Patriotic State: A Critique of 'Constitutional Patriotism'" in *Res Publica* (2004), Vol. 10, No. 3, pp. 247-265; Skeptics also charged that constitutional patriotism was too abstract and "bloodless." See Jan-Werner Müller, "The End of Denial: Solidarity, Diversity, and Constitutional Patriotism in Germany" in *Dissent* (2006), Vol. 53, No. 3, p.21.

[125] See Breda, "The Incoherence of the Patriotic State", p. 265.

[126] See Canovan, "Patriotism Is Not Enough", p. 418.

[127] Taiwan's unique situation is seen from two perspectives: internally, Taiwan is a multiethnic society with historical conflicts and national identity clashes; externally, Taiwan has an extraordinary status in the international community. In fact, Taiwan has a territory of about 14,000 square miles, a population of 23 million, a stable and democratic government, and 23 full diplomatic allies and informal relations with many other countries. However, it has not been admitted as a membership in the United Nations.

(3) Those to be elected from Tibet….” However, both Mongolia and Tibet have not been under the control of the ROC since 1949.

In view of the above-mentioned problems, it is obvious that the ROC Constitution is imperfect in light of Taiwan’s political reality. Even so, it is not fatally flawed. There are several mechanisms for promoting constitutional flexibility in pragmatic politics, such as constitutional interpretations via judicial review and constitutional amendments.

The Fundamentals of the ROC Constitution Are Still Sound

In fact, the fundamentals that underpin the ROC Constitution are still sound. The Grand Justices[128] declared in Interpretation No. 499 that the essential principles of the ROC Constitution embrace democratic republicanism (Article 1), popular sovereignty (Article 2), human rights protection (Chapter 2), and the separation of powers and checks and balances. Generally speaking, these principles are compatible with the universal doctrines of modern constitutionalism. As a matter of fact, although it is imperfect, the ROC Constitution has succeeded in helping Taiwan to evolve from an authoritarian regime into a liberal democracy.

The ROC Constitution (including its texts and principles), as an embodiment of the existing norms, will continue to play a critical role in the process of Taiwan’s democratic consolidation. In a nutshell, although it is imperfect, it merits support.

Political Elites as Constitutional Patriots: Two Feasible Paths

In view of the above arguments, this article proposes two feasible paths to facilitate constitutional identity taking root among Taiwan’s elite: one is passive and the other is active.

Passive Path: Political Elites Must set Good Examples

In a young democracy, like Taiwan’s, the demonstration effect of the political elite’s behavior is an important element in the process of shaping political culture. Because Taiwan is culturally influenced by Confucianism, it is appropriate to ask the elites to act as role models in complying with the existing imperfect constitution. The Discourses and Sayings of Confucius (chapter 12) assert “If you yourself, sir, are in order, who will dare to be disorderly?” and “The moral power of the rulers is as the wind, and that of the people is as the grass. Whithersoever the wind blows, the grass is sure to bend.” Thus, Taiwan’s political elites have a moral responsibility to abide by the existing constitutional norms, procedures, and laws in order to promote institutional trust[129] and, as a consequence, to create a better quality of democracy.

[128]Article 78 of the ROC Constitution provides that “The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders.” Section 2, Article 79 of the ROC Constitution provides that “The Judicial Yuan shall have a number of Grand Justices to take charge of matters specified in Article 78 of this Constitution, who shall be nominated and, with the consent of the Control Yuan, appointed by the President of the Republic.”

[129] According to Larry Diamond, democracy can be consolidated only when no significant collective actors

Pragmatically, the executive elites should not be able to thwart the rule of law. They should instead adhere to the doctrine of administration according to the law, because the executive functions are so wide-ranging as to include a responsibility for deciding whether to abide by or to depart from or suspend the rule of law.[130] As Timothy Endicott notes, adherence to the rule of law is a virtue primarily of the executive.[131] In addition, the actions of the state, which are taken through the behavior of the political elite, should be subject to some fundamental principles, such as adjudication according to the law, the remedy and protection of rights, proportionality, due process of law, the stability of law, and the subjection of public authorities to judicial review. In other words, at the most basic level, the political elite should demonstrate their political will and take the initiative in adhering to the rule of law and the principles of constitutionalism.

As far as Taiwan is concerned, if the elites are accustomed to setting good examples in complying with the existing imperfect constitution, constitutional consciousness, political rationality and constitutional identity will become ingrained in their minds and hence in those of the people and will result in a cultural reconstruction movement over a period of time.

Active Path: Holding the Political Elites Accountable

The passive path for facilitating the constitutional identity of the political elites is feasible but may not succeed on its own; the active method that Taiwan may simultaneously adopt is to hold the political elites accountable. In a word, both passive and active projects may be put into effect.

Theoretically, as James Madison noted in *The Federalist Papers*, "power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it."[132] He, thus, is highlighting the principle that "ambition must be made to counteract ambition."[133] Simply put, Madison believed that some devices were needed to control government abuses.[134] In this article's words, it is necessary for a democratic regime to hold the political elites accountable, both on a vertical and horizontal level.

On a vertical level, accountability means that the elected political elites have an obligation to answer for their decisions when asked by citizens. Only when the political elites are consistently held accountable can the constitutional rationale that the legitimacy of a governor's power derives from the consent of the governed be embedded in the political culture. Therefore, there must be several methods available to hold the political elites accountable in a liberal democracy. First of all, fair, free and competitive elections must be held regularly to offer alternatives to the voters and give the electorate the chance to push

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challenge the legitimacy of democratic institutions or regularly violate its constitutional norms, procedures, and laws. See Diamond, *Developing Democracy*, p. 67.

[130] Timothy Endicott, "The Reason of the Law" in *The American Journal of Jurisprudence* (2003), Vol. 48, p. 87.

[131] Ibid.

[132] James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (1987), p. 309.

[133] Ibid., p. 319.

[134] Ibid.

incumbents for poor performance or undesirable policies.[135] Second, comprehensive and regular public polling results must be easily accessible by the public. But because the political elites are used to downplay the importance of the public opinion after they assume power, the people will be truly sovereign only on the day of the elections.[136] Third, voters are informed of official actions in order to assess the performance of government. This mechanism will help to reduce the official violations of law. Fourth, a feasible recall system should be established in which voters can force incompetent elected leaders to step down in the middle of their tenures.

On a horizontal level, accountability means that the elected political elite have an obligation to answer for their decisions when asked by coordinate branches. Horizontal accountability may be performed through institutional arrangements, especially independent government agencies, such as a central electoral commission, a government ombudsman, an anti-corruption commission, parliamentary investigation committees, and a constitutional court.[137] If Taiwan strengthens these mechanisms, the political elites will be forced to pledge their allegiance to the rule of law and constitutional principles, and democracy will be consolidated.

In addition, in order to consolidate Taiwan's democracy, the political elites should be subject to proportional requirements in means-ends relations. The doctrine of proportionality is not merely a constitutional limitation on the power to punish,[138] but also a limitation on the political actions of the elites. In other words, the political elites should not obey the only rule of choosing the best means for the very ends, and they must simultaneously take the legality and constitutionality into consideration.

The Ordinary Citizen as a Constitutional Patriot

The success of democratic consolidation relies on a broad base of popular support. According to Larry Diamond, a regime will be consolidated if more than 70 percent of the public consistently believes that democracy is preferable to any other form of government, and no more than 15 percent of the public actively prefers an authoritarian form of government.[139] As table 10 indicates, 75 percent of the people in Taiwan viewed democracy as better than "strongman rule" and 71 percent viewed democracy as better than military rule. In contrast, only 4 percent viewed "strongman rule" as better than democracy, and only 5 percent viewed military rule as better than democracy. It is evident that Diamond's conditions are met in Taiwan. Simply put, most of the people in Taiwan support the democratic regime.

[135] See Diamond and Morlino, "Introduction", p. xx.
[136] Pasquale Pasquino, One and Three: "Separation of Powers and the Independence of the Judiciary in the Italian Constitution" in *Constitutional Culture and Democratic Rule* (2001), John Ferejohn, Jack N. Rakove, and Jonathan Riley (eds.), p. 206.
[137] See Diamond and Morlino, "Introduction", p. xxi.
[138] See Alice Ristroph, "Proportionality as a Principle of Limited Government" in *Duke Law Journal* (2005), Vol. 55, p. 263.
[139] See Diamond, *Developing Democracy*, p. 69, table 3.1.

Table 10: Relative Preference for Democracy over Authoritarian Alternatives

	Taiwan	S. Korea	Japan
Democracy vs. Strongman rule			
Democracy better	75.2%	45.0%	45.4%
No preference	13.7	36.8	32.9
Strongman rule better	4.2	9.7	5.4
Democracy vs. Military rule			
Democracy better	71.7%	65.9%	70.7%
No preference	16.3	22.5	15.1
Military rule better	5.6	4.1	1.4

Source: 2006 Asia Barometer Survey; *Adopted from* Chong-Min Park, "Democratic Consolidation in East Asia" in *Japanese Journal of Political Science* (2007), Vol.8, No.3, p.311, table 2.

However, the fact that most of the people support democracy does not assure the success of democratic consolidation. In addition, as a constitutional patriot, an ordinary citizen should consistently keep an eye on the behavior of the political elites and criticize the irregularities of power-holders. As to intellectuals, they should not only speak the truth, but speak the truth to power.[140] It is noteworthy that some quarters of Taiwan's society do not deem illegal or unconstitutional action a dishonor. As constitutional patriots, they must change this paradoxical cognition and condemn those who violate the law or constitution. After all, we cannot take the existence of democracy for granted and must dedicate ourselves to preserving it.[141] As a result, if Taiwan's people change their inappropriate cognition, it will be conducive to Taiwan's democratic consolidation in the long run.

Conclusion

In order to maintain a young democracy, the mission of democratic consolidation should be carried out as soon as possible. Based on Linz and Stepan's triangular framework of democratic consolidation, a democracy will be consolidated if several conditions are met. This article examined Taiwan's democratic experience in terms of Linz and Stepan's criteria and found that the deficiency of constitutional identity has to be considered as a critical defect of Taiwan's democratization. This flaw, according to our findings, results in negative consequences, which undoubtedly endanger Taiwan's democratic consolidation.

[140] According to Bruce Ackerman, the legal scholar's rightful aim is not simply to speak the truth, though this is hard enough. It is to speak the truth to power. See Bruce Ackerman, "Revolution on a Human Scale" in *The Yale Law Journal* (1999), Vol. 108, p. 2347.

[141] Aharon Barak, "The Supreme Court 2001 Term, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" in *Harvard Law Review* (2002), Vol. 116, p. 36; Aharon Barak, *The Judge in a Democracy* (2006), pp. 20-21.

Although Taiwan passed Huntington's "two turnover test" in March 2008, it is at a crossroads of its process of democratization. In a word, Taiwan has two options: devolution--characterized by identity clashes exacerbated by political struggles or evolution-transcending identity clashes and consolidating democracy. Fortunately, every cloud has a silver lining, and the 2008 election in Taiwan has proved that the country was able to transcend identity clashes, making it now urgent for Taiwan to facilitate the deepening of the constitutional identity of the political elites and the public in the face of and after the upcoming elections early in 2012.

This article proposes two feasible paths to deepen the constitutional identity of Taiwan's elites: one is "the passive path – political elites must set good examples", and the other is "the active path – holding the political elites accountable." As to facilitating the constitutional identity of Taiwan's public, people who support democracy will play the most important role and the empirical fact is that more than 70 percent of Taiwan's people steadily support a democratic regime. Some methods are available to help in these efforts such as a consistent monitoring of the behavior of the political elites, criticizing the irregularities of power-holders, speaking the truth to power, and regarding violations of law or the constitution as dishonors.

In these final paragraphs, this article would like to highlight the significances of Taiwan's democratic consolidation, from both internal and external perspectives.

From an internal perspective, a consolidated democracy will make Taiwan peaceful, stable, and safe. Georg Sorensen notes that peaceful ways of solving domestic conflicts are seen as morally superior to violent behavior, and this view is transferred to international relations between democracies;[142] the more that people support democracy, the more that the peaceful transfer of power will be possible. Fewer clashes will occur, and society will become more stable. Moreover, democracy is compatible with existing worldwide moral values, and a consolidated democracy will increase Taiwan's ideological legitimacy in the international community. Also, if Taiwan is viewed as a full-fledged democracy, it will win the support of world powers, especially the United States.[143] This will reduce the threat coming from the PRC significantly.

From an external perspective, Taiwan's democratic consolidation would set an example for China, promote regional stability in the Asia-Pacific area, and ultimately be conducive to international peace. Both Taiwan and China are culturally influenced by Confucianism, and if Taiwan is capable of obtaining democratic success, it will be a model for China and a bellwether that predicts China's future.[144] Although China's leaders have always detested the idea of democracy in their country,[145] it cannot be denied that China has been incorporated into a world system in which the western order's strong framework of rules and institutions is established by advanced liberal democracies.[146] Now that China is

[142] See Sorensen, *Democracy and Democratization-Processes*, p. 134.

[143] Although the Taiwan Relations Act (TRA) of 1979 commits the U.S. government to help Taiwan provide for her defense, it is up to individual U.S. presidents to decide on the use of military force. See Horowitz and Tan, "Rising China Versus Estranged Taiwan", p. 126.

[144] See Copper, *Consolidating Taiwan's Democracy*, p. 33.

[145] Ibid.

[146] See Ikenberry, "The Rise of China and the Future of the West - Can the Liberal System Survive?" in *Foreign*

increasingly working within the western order,[147]it is inevitably and spontaneously influenced by the rule of law, and democracy presupposes the rule of law.

Also, both the China-Taiwan and the Korean conflicts have been viewed as global "flashpoints" [148] that endanger regional and international peace. Once Taiwan's democracy is consolidated, its democratic mechanism will lead to peaceful relations with the PRC. As a result, the regional peace will be firmly assured. And it certainly will also be conducive to international peace.

Affairs (2008), Vol. 87, No. 1, p. 31.

[147] Ibid.

[148] See Harrison, *Legitimacy, Meaning, and Knowledge*, p.194; Horowitz, Heo and Tan, "Democratization and National Identity", p. 1.

A Centurial Review of Administrative Litigation Law of ROC: Taiwan's Perspective

Chien-Liang Lee*

Introduction

In traditional discussions about administrative litigation, the law of administrative appeal may be considered as the first base of legal relief while administrative litigation law may be considered as the second base. Taken together, they are forming the system of remedies against administrative action. In fact, in many systems, anyone who would like to file for administrative litigation is required firstly to go through an administrative appeal procedure. While the administrative appeal procedure still belongs to the realm of the administration and therefore is substantially different from administrative litigation done by the courts, it is a legal prerequisite of the latter. Consequently, the present article will discuss administrative litigation law covering the entire process.

There are two different approaches to the history of legal systems: one emphasizing the historical foundations while the other stressing the actual practice of the past legal system. In conducting historical studies both approaches are compatible and might complement each other in most cases. However, Taiwan is exceptional insofar as the major part of its past legal system is no longer in effect while at the same time, much of the present system indeed came from foreign sources. Taiwanese Administrative Litigation Law is a case in point.

Historically, administrative litigation law developed in the wake of the post-Rechtsstaatism, that is the reason why discussions on the history of administrative litigation typically traced back to the modern period as its starting point. In the case of Taiwan, the history of Taiwanese Administrative Litigation Law could be divided into three periods according to the governments ruling over Taiwan: the period of Qing Dynasty of China, the period of Japanese rule and period under the Republic of China (ROC), respectively. However, for the present purpose, the central piece of legislation is the Administrative Litigation Law of the ROC.

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The Administrative Litigation Law of the ROC was adopted in 1932 in China. Although the Law of 1932 was not implemented in Taiwan in its first twenty years because Taiwan was ruled by Japanese regime in that period, the 1932 Law remained to be the only law on administrative litigation that has been implemented in Taiwan because Japan did not implement its Administrative Litigation Law[1] in Taiwan either.[2] Therefore the experience of implementing the Administrative Litigation Law of the ROC in China has some bearings for Taiwan. Further, the origin of the 1932 Administrative Litigation Law of the ROC can be traced back to the Article 10 of the Provisional Constitution of the ROC in 1911, which reads, "Anyone can make a petition to the Ping Zheng Yuan (平政院) if his rights are infringed by governmental officials". If one adopts such a perspective, the year 2011 marks the centennial of the inception of the idea of legal relief against administrative actions in China. As the Administrative Litigation Law of the ROC has been practiced for almost a century now, it has been established as an institution. This article offers a review of a century of Administrative Litigation Law of the ROC. It will show that not only Administrative Litigation Law is significant for the democratic practice of Taiwan, but it also might serve as a reference point for similar systems in other Asia countries.

Preparatory

Taiwan was governed by the Qing Empire of China from 1683 to 1895. In 1906, the Qing Empire of China prepared to undertake its legal reform, including drafting for a new constitution. As regard the Judiciary, the "Penalty Ministry" was re-organized into the Ministry of Justice, and the Da-Li Temple, which had been responsible for adjudicating serious cases, was reformed into the Da-Li Yuan (大理院), which was assigned the adjudication function in general, with lower levels of adjudicative bodies, together with judiciary administration. Moreover, in the 1908 "Constitutional Outline" and its "Annual Work Plan", the Constitutional Commission and the Consultative Yuan proposed the establishment of the "Administrative Judicial Yuan (行政訴訟院)". In 1910, the Constitutional Commission promulgated the institution of the Administrative Adjudication Law and drafted the system and duties for the officials in the "Administrative Judgment Yuan", which represented an unprecedented development in the history of modern Chinese administrative litigation. However, it could not be implemented in Taiwan, which had by then been ceded to Japan for 15 years. Meanwhile in (mainland) China, the idea of establishing an "Administrative Judgment Yuan" was suspended due to the end of the Qing dynasty in 1911 by the Xinhai Revolution (辛亥革命).

[1] The Treaty of Maguan was singed on April 17, 1895. China cedes to Japan in perpetuity and full sovereignty of the Penghu group, Taiwan and the eastern portion of the bay of Liaodong Peninsula together with all fortifications, arsenals and public property. On October 25, 1945, when Chen Yi as a chief executive in Taiwan accepted a surrender instrument from General Rikichi Ando, Taiwan officially terminated the rule under Japanese regime.

[2] See Chien-Liang Lee, "The History, Development and Contemporary issue of Administrative Litigation Law in Taiwan" in *Cross-Strait, Four-Region Law Development in Taiwan, China, Hong Kong, and Macau*, Volume *One, Constitutional Review and Administrative Litigation*, Dennis T.C. Tang and Peng-Hsiang Wang (eds.), pp. 260-270 (in Chinese).

Predecessor of the Administrative Court: Period of Ping Zheng Yuan (From 1911 to 1932)

The inception of the idea of Administrative Litigation Law (of the ROC) was born with the establishment of the ROC itself. As mentioned above, the Provisional Constitution of ROC, promulgated in 1912, states in Article 10 that anyone whose rights were infringed could appeal to the Ping Zheng Yuan. And Article 49 provides that "the matters of administrative litigation shall be stipulated by legislation." In 1914, the Beijing government set up the Ping Zheng Yuan, in accordance with the *Order of Development of the Ping Zheng Yuan* (平政院編制令) of March 31, 1914, and put it directly under the President of the ROC. Such a system was modeled on those found in the European countries (especially France), in which the administrative court system was separated from the general courts. The legislative basis of the system was found in the Administrative Litigation Regulation (行政訴訟條例) of May 18, 1914, and the Administrative Litigation Act (行政訴訟法) of July 20 of the same year, both consisted of 35 Articles, in which the basic structure of the Chinese administrative litigation system was established, which may be described as follows:[3]

1. The status of the Ping Zheng Yuan was comparable to that of the central administrative court in France. It was directly under the President of the Republic, thus not a part of the Judicial Branch.
2. The scope of administrative litigation was expressed in generalized provisions, with the administrative act (Verwaltungsakt) as its subject-matters.
3. The proceeding of the administrative litigation incorporated oral pleadings.
4. The judgment of the Ping Zheng Yuan was final, with no opportunity of appeal.
5. The execution of the judgment was to be mandated by Presidential Order.
6. The judge's status was protected by law.

Former period of administrative litigation (From 1932 to 1999)

The Administrative Court was established in 1918, alongside the Judicial Yuan. A new Administrative Litigation Act (行政訴訟法) of the ROC and the Organizational Act of Administrative Court (行政法院組織法) were promulgated on November 17, 1932 and implemented on June 23, 1933. The full texts comprised 27 articles when it was first implemented. Later, it was amended in 1935 (containing 29 articles), 1937 (30 articles), and 1942 (34 articles).

[3] See Yueh-sheng Weng, "The Modernization of the Procedures of the Administrative Court" in *Administrative Law and Rule of Law* (3rd ed. 1979), pp. 386-387 (in Chinese).

In Taiwan, the Administrative Litigation Law was implemented on October 25, 1945, but the system of administrative litigation started to operate some time later when the Central Government moved to Taiwan in 1950[4]. At first, there was only one panel, consisting of 15 members and receiving only 23 cases in a year. The amount of cases soon increased as a result of the land reform and the general development in politics, economy, culture, education and business. In 1956, another panel was added to help resolve the increasing case load, and it was transformed into a three panel system later. In terms of the structure and the litigation process of the administrative courts it was initially kept intact, until in 1969 and 1975 the Administrative Litigation Act was twice amended and expanded to 34 articles, which served as the summary framework for the administrative litigation system for over 20 years until its comprehensive amendment in 1998. This period may be called the "former administrative litigation period."

According to the 1969 Administrative Litigation Act, "Anyone whose rights or interests were unlawfully or improperly infringed by an administrative act done by an agency in the central or local governments is entitled to file an administrative appeal in accordance with this Act. Anyone who is not satisfied with the result of the administrative appeal, or in case when the agency does not make a decision on his appeal in three months or, in the case of re-appeal, in two months, may file for a remedy by means of administrative litigation to a court." Generally, the former administrative litigation system had the following characteristics:

1. The administrative act (Verwaltungsakt) was the core object of administrative litigation.

   Any dispute involving an administrative act may be the subject of an administrative litigation, unless otherwise provided or assigned to the ordinary court or other agencies by other legislations.

2. An administrative litigation must be preceded by an administrative appeal

   For self-review of administrative agencies and to lessen the workload of the administrative courts, litigants had to go through the administrative appeal and re-appeal procedures before filing an administrative litigation.

3. The typical remedy pleaded was the revocation of administrative actions

   The main purpose of "revocation of administrative actions" is to ask the administrative court to revoke or amend an illegal administrative act or decision on appeals. Although Article 2, paragraph 1 provided that "anyone who files an administrative litigation may file for supplementary damage compensation before the litigation proceeding is concluded", which may be characterized as a "performance procedure", however, due to the lack of

[4] See Memoirs of the Judicial Yuan, Vol. 2, Committee memoirs of the Judicial Yuan (ed.), p. 1372 below.

necessary practical procedures such a suit has never been filed. Further, after the implementation of the State Compensation Act in 1981, the compensation proceeding was assigned to the ordinary courts (Article 12) , so the compensation suit, supplementary to administrative litigation, has never come to be a reality.

4. One-level trial system

The administrative court system had only one level , so the first instance, last resort, and trial on matters of fact and law were combined in the administrative court and its judgment was final.

In Taiwan, the administrative court system began its operation in 1950. In the beginning land cases formed the majority because of the implementation of land reform policies at the time. With the rapid development of industry and business, cases involving taxation and customs duties soon increased.[5] Since 1988, patent and trademark cases have been mainly responsible for the workload of the administrative courts.[6]

New Period of Administrative Litigation (From 2000 to now)

The history and development of Taiwan's system of administrative litigation shows that in the former period of administrative litigation revocation of an administrative action was the predominant type of remedy. Procedures for remedies such as "action for ordering an administrative action", "declaration of invalidity", "confirmation of the (non)existence of legal relationships", "declaration of invalidity of administrative acts already executed or annulled due to other reasons", "compensation under public law" were lacking. On the other hand, due to multiple procedural prerequisites and absence of opportunity to appeal, it was considered that the protection offered by the old administrative litigation system was not sufficient for meeting the constitutional requirements. In light of the above-mentioned, the Judicial Yuan (司法院) initiated an amendment discussion leading to the formation of the Administrative Litigation Amendment Commission in July 1981. Finally, the drafting of the Administrative Litigation Amendment was completed after 11 years. It was reviewed on June 7, 1995 by a joint judicial and legal commission conference hosted by the Legislative Yuan, and was approved on October 2, 1998, and was finally implemented on July 1, 2000.

The amendments were extensive. The full text increased to 308 articles and strengthened the overall framework as well as the content of the administrative procedure law. The aim of the new Administrative Litigation Act was to protect people's rights, to ensure that the executive power of the government is lawfully exercised and to improve the functioning of the judiciary. For these purposes, the amendments included:

[5] Ibid., pp. 1458-1468.
[6] See Cases Analysis of the Judicial Yuan, published in 1993, p. 576.

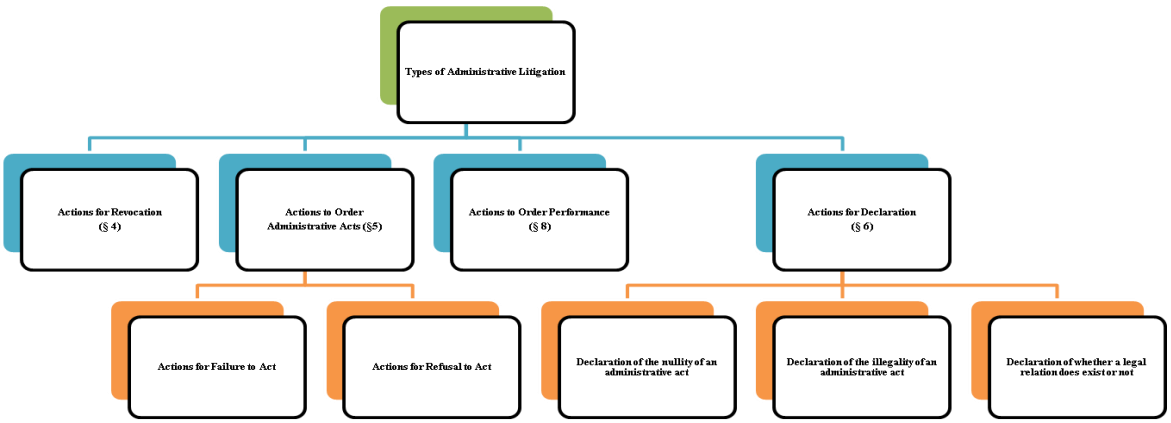
1. Expansion of the Scope of Jurisdictions of Administrative Litigation

According to Article 2 of the Administrative Litigation Law, administrative litigation may be initiated concerning all disputes arising under public law, unless other statutes expressively assign the competence to another court or agency.

2. Broadening of the Types of Administrative Litigation

Besides actions for revocation of administrative acts, "actions to order an administrative act", "actions for declaration" and "actions to order performance" were introduced (Article 3). "Actions to order administrative act" refers to the right of anyone who seeks the motion of an administrative act from any administrative agency that bestow benefits to him. He, according to the law, may bring an action to order such administrative acts (Article 5). "Actions for declaration" means actions brought for the declaration of nullity of an administrative act, declaration of whether a certain legal relation under the public law does or does not exist, or the declaration of the illegality of an administrative act that was executed or annulled due to other reasons (Article 6). "Actions to order performance" means actions to order performance brought to the administrative courts. Such actions include actions for the transfer of property interests for reasons that arise under public law, actions to order acts other than administrative acts, and actions for the performance of government contracts (Article 8). (See Figure 1)

Figure 1
Types of Administrative Litigation



3. Increase of the Level of Administrative Litigation

   Structurally the administrative litigation system was changed into a two-level system, by adding the first-instance court, the "Higher Administrative Courts' and renaming of the original Administrative Court into "Supreme Administrative Court". Accordingly the High Administrative Courts are now in charge of cases of first instance, conducting trials on matters of facts and law, while the Supreme Administrative Court is in charge of appeal cases, holding trials concerning legal questions only and acting as a court of the last resort.

4. Setting up Public Interest Litigation and Class Action

   Two new types of procedure were introduced into the administrative litigation system:

   The new public interest litigation allows a citizen to file an administrative litigation against illegal declarations of an administrative agency on matters on which he/she does not have direct interest. The limitations of such a right are provided by law (Article 9). Class action allows a legal person – be it a public interest group or a foundation –, duly authorized by the majority of its members, to file a suit with respect to legal relations regarding matters that fall within its constitutive purpose on behalf of the common interests of its members (Article 35).

5. Dividing Competence between Branches of the Judiciary

   Another new feature concerns the relations between the different branches of the judiciary, namely the ordinary (civil and criminal) branches and the administrative branch. A dual litigation system distributes cases based on the same facts or legal relation either to the ordinary courts or the administrative courts respectively. In this light a pre-procedure principle of division of the competences was built into the Act to prevent divergent fact-finding and legal interpretations by different judicial branches. Therefore, a civil or criminal litigation whose judgment depends upon the validity of administrative acts shall be suspended until a decision on that regard is made by the Administrative Court (Articles 12 and 177).

6. Oral Proceedings

   In accordance with the reformed Administrative Litigation Law the High Administrative Courts, acting as courts of first instance, are required to take oral arguments by the parties as a litigation principle. This principle was entrenched by reference to relevant provisions in the Civil Procedure Code (Articles 109 and121 to 132).

7. "Circumstantial Judgment"

Inspired by Article 31 of Japan's Administrative Litigation Act, the new law introduced a so called "circumstantial judgment", which allows the Administrative Court, after thoroughly considering and balancing the personal interests of the litigants with the public interests involved and reaching a conclusion that revocation or modification of the administrative acts is manifestly prejudicial to public interests, to refrain from revoking the administrative acts and may overrule the suit brought by the plaintiff. In such circumstances, the Administrative Court shall declare the administrative acts in question illegal, and order the respective agency to restore the status or compensate for the loss suffered by the plaintiff (Article 198).

8. The Principle of Change of Circumstances

The principle of change of circumstances, a principle of private law, was introduced into public law by the enactment of the Administrative Procedural Act, in accordance with which, in the case of changes of circumstances occurring after the conclusion of an administrative contract to the extent beyond the expectation at the time of conclusion of the contract, thereby making the original stipulations in the contract obviously unfair, either party may request the other party to make appropriate adjustment to the contract, and is entitled to terminate the contract if no adjustment is possible (Article 147 of Administrative Procedural Law). The principle was incorporated into the Administrative Litigation Act, which enables the administrative courts, on petition, to make necessary adjustment to its judgment in terms of performance of contract or altering the content of the legal relations (Article 203).

9. Settlement Procedure

In principle, where the public interest is involved, administrative litigation is not subject to private settlement. However, in circumstances where the whole object of the litigation is owned by the petitioner and the subject-matter does not involve public interest, there is a case for allowing the proceedings to be terminated on settlement between the parties, in the interest of prompt settlement of the disputes. The Administrative Litigation Act made such an allowance, and the procedures for reaching such a settlement, the requirements, and the effect of the records are stipulated in the Act (Articles 219 to 228).

10. The Summary Procedure

A summary procedure is provided for in the reformed Act, aiming at prompt settlement. The summary proceeding is applicable to subject-matters with monetary

value or price not exceeding a certain threshold, and cases concerning minor administrative offences (Articles 229 to 237).

11. The Provisional Measures Procedure

The provisional measures procedure was incorporated into the new Act to enable the preservation of the object of monetary payment or the rights of the parties (Articles 293 to 303).

12. The Enforcement Procedure

Enforcement procedures were added, tailored to each type of procedure, and specifying entitlement foreclosure, enforcement measures and their procedures in each case (Articles 304 to 307). In terms of the subject matters, tax cases are primarily involved and cases regarding land, trademark, environmental protection, customs duties and examination are also so empowered.

Latest Development

Specialization of the Administrative Court

Patent, trademark, copyright, integrated circuit and trade secret issues, which concern intellectual property rights, continue to increase along with the rapid development of technology. Further, intellectual property rights which may be involved in civil disputes are highly specialized and often have an international dimension. On the other hand, most of the judges who sit on the administrative cases lack the necessary background, knowledge, and training necessary, in particular with respect to evidential matters. As a consequence, they tend to rely on expert appraisal reports in making their judgments. Additionally, due to the dual system mentioned above, the existence of intellectual property rights falls under the jurisdiction of administrative courts, while the legal consequences of the alleged infringement of the intellectual property rights fall under the competence of the ordinary courts. In procedural terms, judges in civil or criminal courts often have to suspend the proceedings before them, in waiting for the administrative courts to make a ruling on the existence of the rights involved, which delay the procedures. To improve this situation, the formation of a specialized intellectual property court was suggested in December 2003 but the plan to establish such a court was announced by the Judicial Yuan in February 2004. After further attempts, a preparatory intellectual property court was set up on February 17, 2006 under the approved draft Organizational Act for the Intellectual Property Court and the Intellectual Property Cases Procedure Act. After their adoption by the Legislative Yuan, the President announced the implementation date of March 28, 2007, and ordered it to put into practice from July 1, 2008 on.

The Organizational Act for the Intellectual Property Court has 8 chapters and 45 articles while the Intellectual Property Cases Procedure Act comprises 5 chapters and 39 articles. Intellectual property rights cases are judged by the Intellectual Property Court according to these Acts, with technology advisors' help in providing information collection and analysis. This is a new, more specialized system of administrative proceedings.

Trial Level Reform and Traffic Cases

On November 1, 2011, the latest amendment of the administrative litigation procedure was announced by the President on November 23 after their adoption by the Legislative Yuan. To date, the implementation date has yet been decided by the Judicial Yuan. The amendments primarily relate to the following two aspects:

1. The trial level of administrative litigation was changed into a "two-level / three-trial system" (see Figure 2).
2. Traffic cases are distributed to the Administrative Court.

The amendments to the Administrative Litigation Act, the Organizational Act of the Administrative Court, the Court Organization Act, the Act Governing the Punishment of Violation of Road Traffic Regulations and the Intellectual Property Cases Procedure Act were approved after their adoption by the Legislative Yuan.

The current system of administrative litigation uses a "two-level/two-trial" system, the administrative courts in Taipei, Taichung and Kaohsiung are the first instance courts, while the Supreme Administrative Court in Taipei acts as the court of last resort. For the convenience of their users, new trial panels for administrative cases were added in the district courts, taking charge of traffic cases, first instance summary proceeding cases, enforcement cases, preservation of evidence and provisional measures cases, and so on.
Secondly, the character of traffic cases is that they are of large numbers with relatively simple and uniform content. In the old system, the procedures for administrative remedies in traffic cases are governed by the Code of Criminal Procedure, which gives rise to the controversy of being no sufficient for the purpose of protecting the private rights. Under the new system of administrative litigation, the remedies for proceeding traffic cases are assigned to the administrative courts and will be dealt with by the panels in the district courts (see Figure 3).

Prospects

As once said by the German jurist Gustav Radbruch, “An interpreter may understand the law better than its creators did understand it. The Law may be wiser than its creators – it even *has to* be wiser than its creators.”[7] A legislator’s wisdom may not be inferior to the wisdom of an interpreter, but it is the interpreter who realizes the wisdom of a

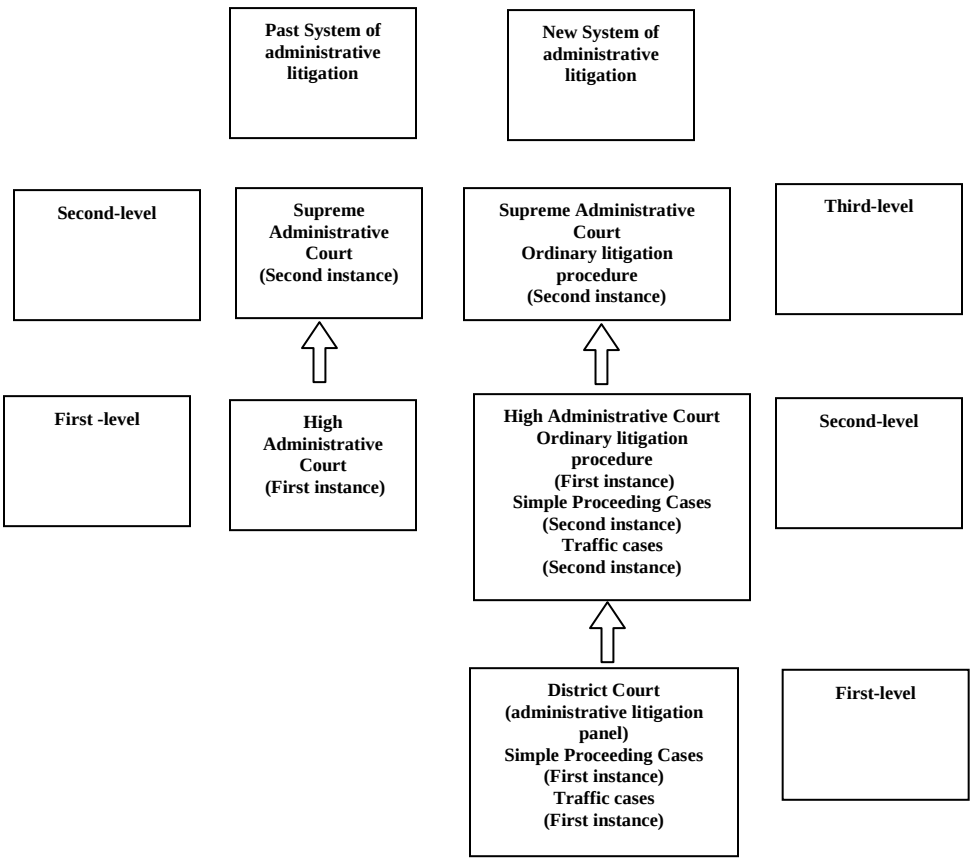
[7] See Gustav Radbruch, “Die Logik der Rechtswissenschaft” in *Rechtsphilosophie* (8th ed. 1973), Erik Wolf/Hans-Peter Schneider (eds.), p. 207, free translation by the author.

law and by doing so, in the ideal case, grasps the idea of justice which is inherent in the law already. After being established for half a century, we truly may say that the history of Administrative Litigation Law of the ROC is now more complete.

Furthermore, the Taiwanese administrative court system has proven that it is able to respond to Savingny's dictum that the interpretation of law is not only a science but also an art[8] - if they are made by law interpreters (especially administrative court judges) who are agreeing with the legal system and responding to the demands of the society and practical justice as well.

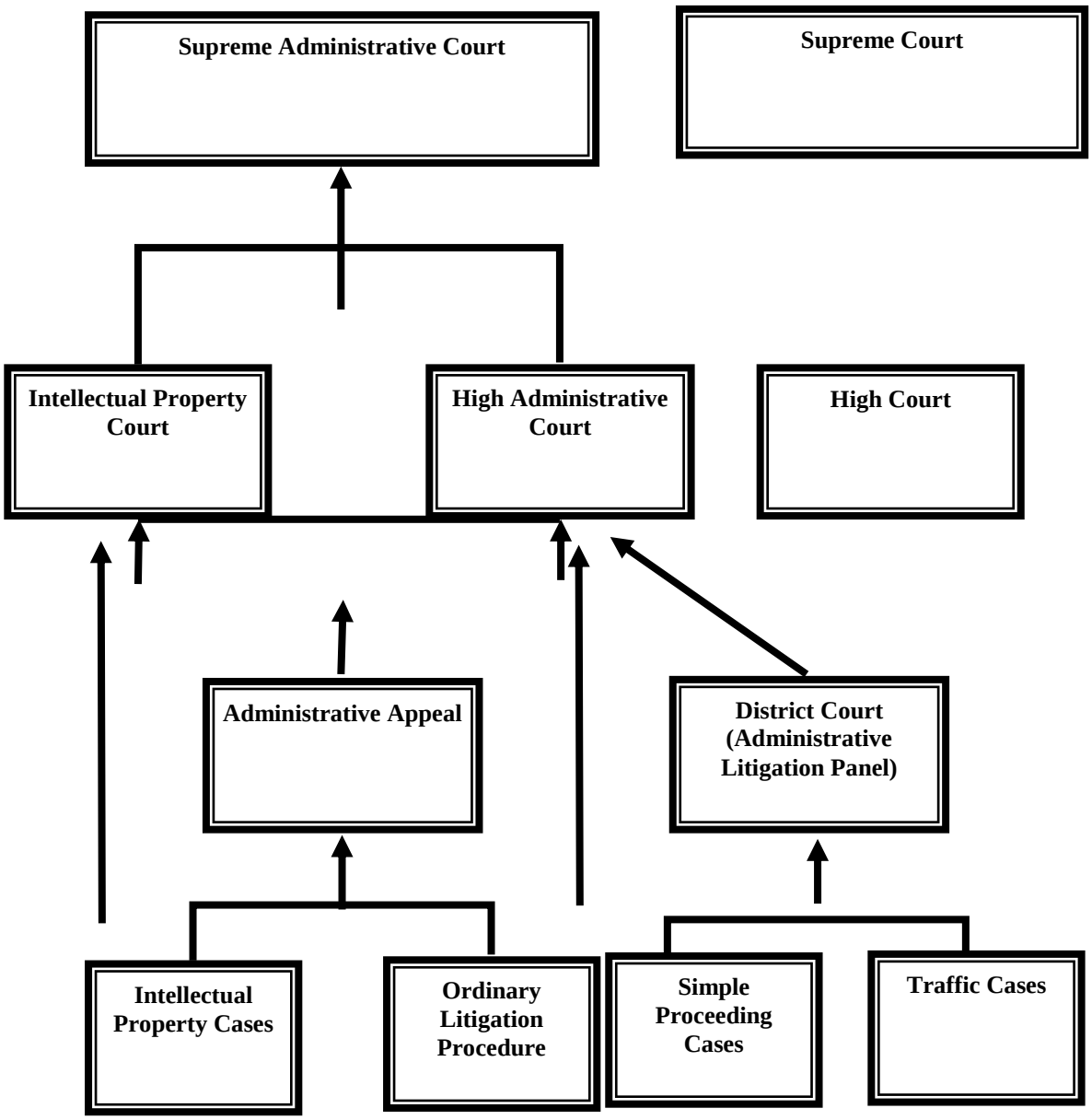
Figure 2

Comparison of the New and Past System of Administrative Litigation



[8] See Friedrich Carl von Savingy, *System des heutigen römischen Rechts* (1841), Vol. I, p. 206, transl. by William Holloway, *System of the Modern Roman Law* (1867, reprint 1993).

Figure 3
Level Structure of Court Organization and Administrative Litigation



The Binding Force of the Chinese Constitution as a Source of Legitimacy

Libin Xie*

Introduction

Common Perception: China's Constitution Possesses no Binding Force due to the Lack of a Constitutionality Review Mechanism

The Chinese Constitution (CC) is widely regarded as a paper tiger without teeth. People holding this view usually point out the contrast between the reality and the letter of the Constitution. Regarding the state structure in the light of the constitution, the National People's Congress (NPC) is officially the organ of highest state power and thus supreme. The State Council, the Supreme People's Court, as well as the Supreme People's Procuratorate report to the NPC. However, the NPC serves practically merely as a "transitional station" where retired ministers or other former high officials stay for one or two terms before they completely quit the scene. On the other hand civil servants of the NPC typically grasp every chance to move to the executive branch. The State Council thus has effectively a predominant status compared with the NPC. Even compared with the Communist Party (CP), the NPC appears less important. The CP shall abide the Constitution, which is clearly prescribed in the last sentence of the Constitution. In reality, the behavior of the CP does not always conform to the Constitution in this sense. For instance, although the Constitution provides for the leading role of the CP[1], this provision can hardly serve as the constitutional basis for the nomenklatura system in which the CP controls the appointments of key positions in all major institutions, including people's congresses, governments and administrative agencies, courts, procuratorates, and surprisingly, also state owned enterprises[2]. Nor does the Constitution authorize the CP to maintain a structure of party organizations on each level and in each publicly funded institution.

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[1] See Section 7 of the Preamble of the Chinese Constitution: "...Under the **leadership of the Chinese Communist Party...** the Chinese people of all nationalities will ...."

[2] This is not hard to understand considering the fact that every state owned enterprise has an administrative rank and is treated correspondingly. For instance, CNPC (China National Petroleum Corporation) has the rank of and treated

Concerning constitutional rights, the situation is hardly more encouraging. The Constitution not only provides for traditional liberal rights such as property (Art. 13 CC), freedom of speech, of the press, of assembly, of association (Art. 35 CC), religious freedom (Art. 36 CC), personal freedom (Art. 37 CC), but also many social rights such as the right to work (Art. 42 CC), the right to rest (Art. 43 CC), even the right to material assistance for old, ill, or disabled citizens (Art. 45 CC). In reality, clear violations of liberal rights take place very often, even when we do not interpret those rights in a libertarian way.[3] Tellingly, the legislator has not yet passed a Press Law. While there is no official explanation for this situation, rumor has spread that a Press Law would have to protect citizens' freedom of speech and of the press to an extent which in the end could endanger the present level of control of the press by the state apparatus . However, a substantial change of the current press regime seems not probable in the foreseeable future. A respective more liberal legislation therefore is equally unrealistic. Regarding social rights, the level of social welfare in China is so low that western "capitalist" countries like even the USA and Japan are much more "socialist", not to mention European countries, especially Scandinavian ones.

From these undeniable facts, most scholars draw the conclusion that the Chinese constitution does not possess any significant binding force. People usually attribute the unsatisfactory implementation of the constitution explicitly or implicitly to the lack of its justiciability. According to this view, understandably, the establishment of a constitutional court of whatever kind seems to be of key importance for the cause and success of constitutionalism in China. Against this background, it is only natural that scholars have been discussing a design for a judicial review institution for China in the past 30 years, especially since the beginning of the 21st century. Three models have been so far taken into consideration, namely, the American, the German, and the French model.

Approach of This Article

This article challenges the mainstream viewpoint. While there is very often a sharp contrast between the practice and the Constitution in China, it might not be prudent to conclude that the Chinese constitution does not have any impact on reality. Rather it is a question of the degree to what extent any constitution has binding force on public power. Furthermore, it is doubtful that a constitutional court alone could or would give “teeth” to a

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like a ministry. Correspondingly, the chairman of CNPC is on the same level as a minister, as shown by the CV of the present chairman, Mr. Jiang Jiemin, who was already appointed Deputy Governor of Qinghai Province in June 2000, before he was named Vice President of CNPC in April 2004 and President of PetroChina in May 2004. Since November 2011 he is Chairman of CNPC. See www.cnpc.com.cn/en/aboutcnpc/companyprofile/topmanagement/jiangjiemin.htm.

[3] For instance, libertarians maintain that the government may limit speech which constitutes a clear and present danger, citing the clear-and-present-danger doctrine first announced by the U.S. Supreme Court in *Schenck v. United States*, 249 U.S. 47. This approach favors freedom of speech unreasonably, for not giving due consideration to rights of other citizens' and the public interest endangered by the speech in question. The government can certainly limit harmful speech that does not present a clear and present danger yet, but it must strike a balance between freedom of speech and legitimate concerns of the government. But even so, it is hard to justify harsh convictions of dissidents, often around Christmas, for publishing critical articles on websites (that cannot be accessed from China any way). See Randell S. Peeronboom, “Assessing Human Rights in China: Why the Double Standard” in *Cornell International Law Journal* (2004), Vol. 38, No. 1, pp. 112, 113.

constitution. Empirically, there are many constitutional courts in the world that seldom declare the behavior of the government or a statute passed by the parliament to be unconstitutional. Based on these considerations, we will examine how much binding force the Chinese Constitution really has, and then go on to inquire the possible causes.

Compliance with the ConstitutionDespite a Lack of Constitutional Review General: the Significance of Constitutional Behavior of the Government

Similar to the phenomena that scandals are wonderful news in journalism, breaches of constitutional rights and positions attract wide public attention. Prevalent violations of a constitution tend to make us blind for constitutional behavior of the government. In China, those who testify that the government has followed the Constitution are exposed to the accusation that they flatter or trade with public power. Consequently, it is hard to hear any voice arguing for the constitutionality of governmental action. As a matter of fact, it is difficult, or even impossible, for the government to violate the constitution under all circumstances. Therefore, there must be some governmental behavior that is unquestionably constitutional.

Similarly, concerning undoubtedly unconstitutional behavior of the government, we must bear in mind that unconstitutionality is a question of degree, similar to the fact that there are serious felonies and petty crimes. In this respect, it is commonly observed that the gap between the practice and the constitution is becoming smaller than it was in the past. For example, the CP has returned much power to state organs. At least in the field of legislation, although the CP retains many channels to influence or even completely control the legislative process, its role has diminished to some extent.[4]

Two Incidents Indicative of the Binding Force of Constitution

The theoretical existence of constitutional behavior of the government is demonstrated by two concrete incidents below.

Postponement of Property Law legislation

After the Contract Law was promulgated in 1999, the national legislator turned to the legislation of a property law. A draft of the property law went through the third reading on June 26th, 2005. On July 8th, the draft was publicized to solicit opinions nationwide.[5] After reading the draft, Mr. Gong Xiantian, a professor at Beijing University, publicized an open letter on August 12th, 2005, claiming the draft to be unconstitutional. Essentially, he

[4]See Randell S. Peeronboom, "Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China" in *Berkeley Journal of International Law* (2001), Vol. 19, No. 2, p. 202.

[5]全国人大常委会办公厅：《关于公布<物权法（草案）>征求意见的通知》，载：刘贻清、张勤德 (编)：《"巩献田旋风"实录：关于《物权法(草案)》的大讨论》，中国财政经济出版社，2007年， 第6、7页。

criticized the protection of private property by the draft, because socialist public property is one of the essential characteristics of a socialist constitution.[6] This open criticism attracted the close attention of the national legislator. On September 13th, 2005, Mr. Hu Kangsheng, vice chairman of the Legal Committee of the NPC, also the director of the Legal Affairs Committee of the Standing Committee of the NPC, met with Professor Gong Xiantian.[7] On September 26th, 2005, Mr. Wu Bangguo, Chairman of the Standing Committee of NPC, put forward his opinion concerning the further improvement of the draft. On October 22nd, the draft went through the fourth reading. In his report concerning the modification of the draft delivered at this reading, Mr. Hu Kangsheng, on behalf of the Legal Committee of the NPC, crystallized the opinion of Mr. Wu Bangguo into three principles: the correct political direction shall be upheld; the actual circumstances and the reality shall be taken into consideration; and the relationship between the property law and other laws shall be handled properly. Interestingly, the Meeting of the Chairman of the Standing Committee of the NPC decided that the draft would not be submitted to the Standing Committee of the NPC and to the yearly convention of the NPC in 2006 as expected.[8] On August 22nd, 2006, the fifth reading took place. On October 26th, 2006, the Standing Committee of theNPC discussed the revised draft at its sixth reading. Finally, on March 16th, 2007, the NPC passed the final draft. The Property Law went into effect on October 1st, 2007.

As a matter of fact, Mr. Gong Xiantian's interpretation of socialist principles in the Chinese Constitution (Art. 1 CC) is characterized by fundamentalist socialist ideology. This stiff understanding of socialism prohibits private property in general, especially private ownership of the means of production. However, the socialism principle should be interpreted comprehensively, e.g. in light of the whole Constitution. Considering the Constitution legitimizes private economy in Art. 11[9] and protects the lawful property of citizens in Art. 13[10], the legislator indeed fulfilled its constitutional duty to protect private property, including ownership of the means of production by enacting the Property Law. It is absurd to argue that this law violates socialist principles.

However, for the purpose of this article, it does not matter whether Gons's understanding of the Constitution is correct or not. The point is that the discussion about the unconstitutionality of the draft of Property Law led to the delay of the legislative process. In fact, the Standing Committee of the NPC interprets the constitution (Art. 67 CC). No other

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[6] 巩献田：《一部违背宪法和背离社会主义基本原则的<物权法（草案）>》，载刘贻清、张勤德 (编)：《“巩献田旋风”实录：关于《物权法(草案)》的大讨论》，中国财政经济出版社，2007年，第25、26页。

[7] 喻权域：《前言》，载刘贻清、张勤德 (编)：《“巩献田旋风”实录：关于《物权法(草案)》的大讨论》，中国财政经济出版社，2007年，第3页。

[8] 喻权域：《前言》，载刘贻清、张勤德 (编)：《“巩献田旋风”实录：关于《物权法(草案)》的大讨论》，中国财政经济出版社，2007年，第3页。

[9] Article 11 (1) Individual, private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market economy. (2) The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy.

[10] Article 13 (1) Citizens' lawful private property is inviolable. (2) The State, in accordance with law, protects the rights of citizens to private property and to its inheritance. (3) The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned.

state organ has the power to determine the unconstitutionality of the legislation. Therefore, the Standing Committee of the NPC could just have ignored the doubts raised by scholars. However, the legislator took the criticism of unconstitutionality very seriously, and obviously not because he feared a – nonexistent – constitutional court.

Discussion of Constitutionality During the Legislation of the Beijing Urban Appearance Regulation

In 2002, the Standing Committee of Beijing Municipal People's Congress promulgated the Beijing Urban Appearance Regulation (hereinafter as Regulation) (《北京市市容环境卫生条例》). During the legislative process, various measures were considered to prevent private behavior causing harm to the appearance of the city. A notorious headache of the city administration was an usual habit of the city´s population to hang, post, scribble, depict, and spurt advertisements of various kinds illegally at public places. Very often, these kinds of advertisements contain telephone numbers to enable potential customers to require the offered services for instance a falsified certificate or a fake official stamp. It was discussed that this problem might be solved by authorizing the city administration to require telecommunication companies to suspend the use of relevant telephone numbers, to prevent the related distribution of these illegal advertisements. However, it was pointed out that this measure might violate Article 40 of the Chinese Constitution, which stipulates that:

> The freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organization or individual may, on any ground, infringe upon the freedom and privacy of citizens' correspondence except in cases where, to meet the needs of state security or of investigation into criminal offenses, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law.

To avoid such possible violation of citizens' freedom and privacy of correspondence, the Regulation eventually did not provide for the suspension of telephone numbers appearing on illegally distributed advertisements harming the urban appearance.

In 2006, the Regulation was revised, among others, to help create a pleasant environment for the coming Olympic Games in 2008. As the implementation of the regulation did not achieve a satisfying result concerning the unlawfully distributed advertisements (for unlawful products and services) the proposal was put on the table again. A core issue of the subsequent debates was again the constitutionality of this measure. , One opinion claimed that there would have been no violation of basic rights for the following reason: if a respective telephone number would have been suspended, the owner of the number would still have been free to communicate with other means and even telephone numbers, even he, admittedly, would not be able to use the suspended number.

Another argument stated that this measure would not violate the privacy of correspondence, since this basic right, according to this opinion, prevents state organs only from collecting information about the correspondence, especially about the contents of the

communication. This opinion was accepted by the Standing Committee of the Beijing Municipal People's Congress. Consequently, the measure of suspending telephone numbers in the prescribed context is now formally stipulated in Art. 43 of the Regulation.[11]

This measure would neither violate privacy of correspondence, since this basic right prevents state organs from collecting information about the correspondence, especially about the contents of the communication. This opinion was accepted by the Standing Committee of Beijing Municipal People's Congress. Consequently, the measure of suspending telephone numbers is now formally stipulated in Art. 43 of the Regulation.[12]

Unlike statutes, a regulation passed by a people's congress on the province level could be annulled by the Standing Committee of the NPC if it contravenes the constitution (Art. 67 CC). However, no local regulation has been annulled this way. Therefore, the Beijing legislature did not need to trouble itself with constitutionality concerns when it entered in the reported discussions.

Analysis

In the Property Law legislative process, the Standing Committee responded promptly and sensitively to the criticism of unconstitutionality raised by a professor not directly involved in the legislation. Similarly, as the Beijing Urban Appearance Regulation was drafted and revised a few years later, the Standing Committee of Beijing Municipal People's Congress seriously discussed the constitutionality of a measure to tackle the problem of ugly illegal advertisements in the public. These incidents clearly show that national and local legislators pay attention to questions of constitutionality indeed, although there is no functioning mechanism to review the constitutionality of a norm either before or after its promulgation. In this sense, these two incidents rebut the notion that the constitution does not bind public power.

However, this conclusion faces some serious challenges. Skeptics may argue that these two incidents are just coincidental events. This is in parts especially true for the Property Law legislation. Only after the first draft was publicized, the author of the open letter could read and criticize it. The national legislature itself did not realize the possible violation of the constitution. In fact, drafts are not always publicized. For instance, several drafts of the Property Law were considered, but not all of them were publicized to solicit public opinions. Therefore, scholars and individuals do not always have the very opportunity to raise possible constitutional questions during the legislative process. Confronted with these arguments, we agree that these two incidents are coincidental to some extent, given certain factors such as the process of legislation is not fully transparent. But even if drafts would generally be published, there is no guarantee that someone would always raise justified doubts of constitutionality. Even in the second incident, the legislature realized the question of constitutionality somehow by chance. However, the point here is that, no matter how the constitutional question once was raised, both the national and the Beijing local

[11] An official with the Legal Affairs Office of the Beijing Municipal People's Congress told the author this incident in 2009.

[12] An official of the Legal Affairs Office of the Beijing Municipal People's Congress told the author this incident in 2009.

legislature took the question seriously after it was brought up.

Furthermore, skeptics may maintain that these two incidents are not representative. Maybe the national and Beijing legislature paid special attention to the constitutionality of the legislation projects involved, given extraordinary circumstances. For instance, in the Property Law legislation incident, the criticism of unconstitutionality expressed in the open letter attracted much attention in the public, so that much pressure appeared for the national legislature, who had practically no choice but to handle the matter appropriately. If the letter was not an open one and the general public was not informed, the legislature would not have been put under pressure to respond to the criticism. The fact that the legislature is reluctant to publish every draft in a legislation process just indicates its unwillingness to be confronted with such pressure and thus being influenced by public opinion. This argument is of course a strong one. Rich empirical evidence would definitely help us determine whether national and local legislatures make efforts to ensure the constitutionality of legislation on a regular basis. However, more empirical examples are not available. We have to rely on the two incidents at hand. It is hardly persuasive to conclude that the national and all the local legislatures, or even institutions of the executive and the judicial branch on the central and local levels, try to ensure that their behavior is constitutional. We might probably say that at least some legislatures sometimes pay attention to constitutional questions. This might well be the case also with other state organs.

In sum, the two incidents show us that national and local legislatures at least sometimes take the constitutionality of their legislation seriously, although no constitutional court of any kind would ever carry out a review. We also reasonably believe that this is also the case with many other state organs.

Compliance With the Constitution to Derive Legitimacy

Given that there is no institutionalized mechanism to investigate and eventually punish violations of the constitution, why do state organs bother themselves by following the constraints put on them by the constitution? Here are some obvious possible causes. For instance, while it is naive to suppose that all officials possess impeccable human nature, it is equally wrong to regard people in power as wicked without exception. It might well be the case that persons in charge of a state organ choose to act constitutionally, just because it is regarded as the right thing to do. Furthermore, it might serve their own interest to uphold the constitution in certain circumstances. The constitution provides for the relationship between different state organs. Those that cannot really exercise their constitutionally granted powers might well be motivated to demand that all state organs (and even the CP) shall follow the constitution, and not encroach on the constitutional powers of others. For this reason, the NPC and local people's congresses would welcome the constitutional behavior of the CP and the executive branch on central and local levels.

In addition to these possible causes of constitutional behavior, this article would propose the hypothesis that state organs choose to follow the constitution, eventually because they want to make their power appear legitimate; they want their powers to appear legitimate, because legitimacy provides an essential potential for the protection of political power. This hypothesis is to be examined here.

Legitimacy as a Condition for Maintaining Power

People in power try to hold their grip on power. Various approaches can be applied for this purpose. Compulsory means are widely adopted all over the world. Police, courts, prisons and the military are the most common means to guard power in this way.

However, it would be naive to believe that power could be maintained solely with compulsory means. For the power to be secure, the political system must be legitimate in the eyes of the majority. Only when people generally identify with, or at least tolerate the present regime, would they not only refrain from challenging the present system, but also actively cooperate to counteract attempts to undermine it. Thus the power structure in the existing system could be preserved and protected by a legimacy derived from constitutional conduct. On the contrary, if the behavior of the legislature, the executive and the judiciary is perceived to be unconstitutional, the support for the government will necessarily decrease, the public power will be exposed to contempt, disrespect and finally implicit or explicit attacks. For this reason, every regime tries to foster and maintain the belief in its legitimacy.[13]

Sources of Legitimacy

Why would people believe that the regime is legitimate? Legitimacy can be derived from various sources, as follows.

Charisma of Leaders

Charismatic persons are thought to possess supernatural, or superhuman, or at least extraordinary abilities that common people do not have. For this reason, charismatic persons are widely believed to be leaders. As long as charismatic leaders promote greatly the well-being of the followers, the belief in them is further strengthened.[14] They enjoy full, or even the blind trust of the masses. Whatever decision the leader makes, he can count on overwhelming support from all walks of life. Consequently, a political order appears legitimate for the masses, if it is created or endorsed by a charismatic leader.

China has seen two charismatic leaders in Mao Zedong and Deng Xiaoping. Mao was an outstanding military strategist. Mainly under his leadership, the living conditions of the peasants improved greatly, which made him appear charismatic. Mainly with the support from peasants, the Communists beat the Nationalists (Kuomintang) and founded the People's Republic of China. From 1949 to his death in 1976, Mao was the real leader of China. While Mao is remembered as the most important founder of the PRC, Deng is mainly celebrated for his success in developing the economy and the benefits brought thereby for the masses after Mao's death, although he was also a military leader who has risked his life. Both leaders enjoyed high esteem among the masses. But after Deng's death in 1997, China has seen no charismatic leader that could be compared with Mao and Deng. The leaders after them have no legendary experiences in revolutionary wars and just look like common people,

[13] See Max Weber, Wirtschaft und Gesellschaft (2005), p. 157.
[14] See ibid., p. 179.

possessing no ability to work wonders, i.e., to bring positive changes to people' lives to the extend as Mao and Deng did. Correspondingly, while the political system gained much legitimacy from Mao and Deng, no current politician as a single leader is able to command a comparable charisma which could serve as an effective source of legitimacy.

Socialist Ideology

After the Japanese invaders were defeated in 1945, the tension between the Communists and Nationalists became irreconciable. In the end, a civil war broke out, which is called in mainland China the war of liberation, which aimed to liberate the people from the rule of the Nationalists. The Communists used socialist ideology to gain the support of the masses. They criticized the rule of the Nationalists as undemocratic and as serving only the interests of great landlords and big capitalists. The Communists would establish a regime of the people. Concerning the ownership of means of production, private ownership should be replaced by socialist public ownership, thus exploitation of workers and peasants by capitalists and landlords would be eliminated. According to socialist ideology, workers and peasants constitute the people and form an alliance; within this alliance, workers represent the most advanced production force, stand for the direction of history, and therefore play a leading role, which is realized by the avant-garde of the working class, namely, the Communist Party. This theory can be summarized by the following formula: the people = workers and peasants = the Communist Party. On this basis the people's democratic dictatorship shall be practiced, namely, the workers and peasants shall exercise dictatorship against those who do not belong to the people. This ideology had much appeal to workers and peasants. In line with this ideology, the Communists confiscated landlords' land and distributed it to peasants. This and other practices in the interest of the masses proved to the masses that the socialist ideology was in their interest. With wide support especially from the peasants, the Communists won the civil war, drove the Nationalists to Taiwan, and founded the People' Republic of China in 1949. After that, socialist ideology became the official ideology of the state, which is stipulated in all four constitutions passed in 1954, 1975, 1978 and 1982 respectively. In the present constitution of 1982, Section 7 of the Preamble provides for the so called four cardinal principles: leadership of the Chinese Communist Party, the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of 'Three Represents', the people's democratic dictatorship, and the socialist road. Some of these principles are stated again in Art. 1, which provides that China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants, and that the socialist system is the basic system.

After the founding of the People's Republic of China in 1949, the reality corresponded to a great extent to the socialist ideology: private economy (which is necessarily linked with the exploitation) was completely prohibited or strictly limited; and capitalists as exploiters were not part of the people and could not join the the CP. However, as time passed by, the practice deviated more and more from the text of the Constitution. The prohibition of the private sector from 1949 to 1978 led the national economy of China to the brink of a total collapse, while Asian neighbors like Japan, South Korea and Singapore

enjoyed decades of rapid economic growth. Deng Xiaoping wisely changed course and gave priority to economic growth. For this purpose, private economy was legalized step by step, which was clearly shown by the several amendments of Art. 11 of the Constitution. Originally, private economy was limited to so called "individual economy (个体经济, geti jingji)", meaning business of an individual or a household that normally employs nobody or only a few, e.g. less than seven, persons other than family members. Individual economy was only a "supplement of the socialist public economy". In 1988, "private enterprise economy" (私营经济, siying jingji) referring to enterprises hiring more employees were legalized by the first amendment, regarded also as a supplement of the public economy. Eleven years later, Article 11 was modified again. The new wording spoke of "nonpublic economy like individual economy and private enterprise economy", avoiding the expression of "private" economy out of ideological reasons, and suggested that other forms of "nonpublic economy" are also legitimate. What is more, the so-called non-public economy is no longer seen only as a supplement of the public economy, but as "an essential part of the socialist market economy". The legalization of the non-public economy was strongly criticized. Deng Xiaoping defended this approach by saying that "it is glorious to get rich", and that "poverty is not socialism". While the government tried to make people believe that the propositions of Deng were not denial, but the development of Marxism, Leninism and Mao Zedong Thought, the official rhetoric was not always persuasive. Especially after private entrepreneurs were allowed to become Party members, the traditional understanding of people as workers and peasants, excluding exploiters, was confronted with an insurmountable challenge.

In sum, the development of the practice makes the official ideology (that could be roughly described as: the people = workers and peasants = the Communist Party) appear more and more outdated and out of touch with reality. Correspondingly, it becomes harder and harder for the regime to gain legitimacy from traditional socialist ideology.

Economic Growth

Since Deng Xiaoping started the reform and opening-up process, China has experienced extraordinary economic growth. Millions of common people have benefited from the rapid development. A political system that has made this happen is of course legitimate because it promotes happiness of the people, which leads to the wide support of the majority. As a result, although the economic policy of the past decades is questioned from time to time by some non- mainstream voices, the amount of individuals in favor of changing the course of economic development is tiny and can be ignored.

However, the economic growth in China has caused serious problems, and thus become less capable of providing legitimacy for the regime. Here we only need to point out some major challenges. Firstly, the development very often takes place without distributing the burden fairly. Millions of citizens must sacrifice their hometowns to make place for the Three Gorges dam and hardly receive fair compensation. Even if the project brings economic benefits to the whole nation, this project is a disaster for those involved. Generally, many citizens' homes and land are taken away without fair compensation in the name of development, very often just to make room for commercial housing projects. Secondly, the

development has caused many environmental disasters that degrade people's living conditions. The Three Gorges dam might have led to irrevocable negative impacts on the ecological environment. Large-scale production with old technologies causes heavy pollution. While people have become richer, they also need to spend more on health problems caused by pollution, e.g., lung problems thanks to poor air quality. For the people involved, economic well-being without health is not necessarily better than less wealth with good health. Thirdly, the unfair distribution has led to the perception that only a minority benefits greatly from development; some become super rich and eventually migrate to western countries with a clean ecological environment, while many more individuals are left behind as absolute or relative losers. One does not need to be a follower of Bentham's utilitarianism to reach the conclusion that the political system is not a just one if it does not further the interests of the majority.

All in all, although the rapid economic growth in China has improved the living conditions of many people, the negative impacts can no longer be neglected and become more and more obvious. Consequently, economic development can only partially serve as a source of legitimacy for the regime.

Compliance with the Constitution

Against this background compliance with the constitution makes the government legitimate for two reasons. Firstly, only through subjection to the Constitution, public power can base itself on the popular will. Since the constitution is - presumed to be - made by the people, state organs are in the end authorized, and at the same time limited by the constitution. If the operation of public power violates the constitution, it can no longer be said to be based on the will of the people as expressed in the constitution, since it is logically impossible that the people would ever authorize public power to violate popular will (indicated by the constitution)[15]. Therefore, if state organs violate the constitution, they undermine the very source of democratic legitimacy on which they rely upon.

Secondly, a regime shall not only claim legitimacy by having itself authorized by the will of the people, but also gain legitimacy by respecting individuals' freedom. In other words, a political system is just, only when it is both democratic and liberal. A democratic tyranny is illegitimate, just like any other tyranny. Under a modern constitution, the government shall respect individuals' freedom by subjecting itself to the constitution. The constitution adopts two approaches to protect freedom. On the one hand, various state organs with different powers are created, so that it is hard, if not completely impossible, for any single state organ to possess too much power and thus endanger freedom. On the other hand,

[15] Opponents of this opinion may maintain that violations of the Constitution might be constitutional, e.g., in a state of emergency. Like many constitutions, the Chinese Constitution contains provisions regulating emergent situations. For instance, Art. 67 empowers the Standing Committee to decide on entering the state of emergency throughout the country or in particular provinces, autonomous regions, or municipalities directly under the Central Government; Art. 80 provides that the President proclaims entering of the state of emergency; according to Art. 89, the State Council shall decide on entering the state of emergency in parts of provinces, autonomous regions, and municipalities directly under the Central Government. In a state of emergency, state organs have exceptional powers, but this is still authorized by the Constitution and presents no breach.

basic rights provisions directly protect specific freedoms and prohibit state organs from doing anything to the contrary.

In a word, compliance with the constitution makes the behavior of public power not only democratically, but also ethically legitimate. The constitution is thus an essential source of legitimacy.

Analysis

While a regime must gain sufficient legitimacy, it does not matter where the legitimacy is derived. However, as time passes by, the "output" of different sources of legitimacy may vary, resulting in the necessity for the government to make corresponding adjustments. In the Chinese context, charismatic leaders, socialist ideology and economic growth as sources of legitimacy have already seen their best days. For instance, today it would be regarded by many people as a special kind of humor to invoke socialist ideology. To the same extent, compliance with the constitution becomes more important to make up for the decrease of other sources. A favorable circumstance is the fact that the Chinese legal system has been making rapid progress in the past decades. More and more people have received some kind of legal education. Consequently, a sense of law and modern citizenship has not only appeared among the general public, but also become stronger and stronger in elite cyrcles. More individuals tend to think about the legitimacy of the system, expect or explicitly demand that the government shall act lawfully, especially in line with the constitution. This necessarily creates pressure for the government to follow the constitution.

However, it would be naive to expect the regime to comply with the Constitution without exception. In fact, the government often undertakes a balancing act: it wants to derive legitimacy by complying with the Constitution, but it would not always sacrifice its political goals due to constitutional concerns. For instance, the General Office of Beijing Municipal Government issued a so-called "notice" on February 16th, 2011, forbidding any household from outside Beijing and any household in Beijing already possessing a home to buy a home.[16] This policy raises many questions, including some constitutional ones. Scholars question its constitutionality.[17] Despite constitutional concerns, the government perhaps thinks it too dangerous to allow real estate prices to go up further, therefore, it is ready to take radical measures, even unconstitutional ones, to prevent unreasonable development of the home market. Similarly, in the second instance introduced above, facing the pressing task of creating a clean environment for the Olympic Games in 2008, the Standing Committee of Beijing People' Congress might have stipulated the said measure to tackle troublesome advertisements, even if it still thought the measure to be a violation of freedom and privacy of correspondence. It is highly likely that the government would abide by the Constitution to gain legitimacy, only when the goal of the government is deemed less important than the constitutionality of governmental action. In this sense, the cause of

[16]《北京市人民政府办公厅关于贯彻落实国务院办公厅文件精神进一步加强本市房地产市场调控工作的通知》, http://zhengwu.beijing.gov.cn/gzdt/gggs/t1155165.htm。

[17] This policy might violate the principle of socialist market economy (Art. 15 CC), property clause (Art. 13 CC), equality right (Art. 33 Sec. 2 CC), etc. See 秦前红：《房地产市场行政规制与政府权力边界》，载《法学》2011年第4期, 30-34.

constitutionalism in China still leaves much to be desired. From an optimistic perspective, however, some progress has undeniably been made: while the government seldom pays attention to the question of constitutionality, it is ready to violate the Constitution only when it is really "necessary". In other words, the regime realizes that an unconstitutional act causes a loss of legitimacy, a high price only to be paid for really important goals.

Conclusion: Pursuit of Legitimacy as one Cause of State Organs' Compliance with the Constitution in China

To sum up, the two instances clearly show that national and local legislators, and probably state organs in general, at least sometimes consciously pay attention not to overstep the limits imposed by the constitution. It might be explained by the need of the regime to gain legitimacy to secure its rule. Among various sources of legitimacy, compliance with the constitution becomes more and more important in China. To gain legitimacy, it is a reasonable choice for state organs to subject themselves to the constitution. Thus, the pursuit of legitimacy is an important cause of constitutional behavior of state organs, although the government still tends to take unconstitutional measures when it is believed necessary to achieve very important goals. Admittedly, this cause does not exclude, but can rather coexist peacefully with other possible causes for constitutional behavior of state organs. In a given incident of constitutional behavior of a state organ, it is often impossible to determine the real cause or causes. Interviews with the decision-makers would be helpful, but are usually unrealistic. For this reason, the real motivation for taking constitutional questions seriously in the two instances introduced above may remain unclear forever.

Democratization of the Administration – From the Top Down and/or From the Bottom Up

Toru Mori*

Civil Society and Administration

In this article I will examine from the analysis of the reforms of Japanese administration whether the possibility exists that civil society can contribute to the democratization of state organizations. I will also refer to the theoretical debate in Germany in order to gain useful suggestions for this study.

Civil society consists of many kinds of groups which aim to spread their own views and interests. It is true that interest groups have long existed in every democratic country. They have acted, and still now act, politically, but their relationship with politics has been faced with the same skepticism as corporatism or cliental politics. This negative image comes from the modality and use of their influence. Their political power relies on their economical power, and so they are not transparent or open to the public. Their dialogues with state organizations are mostly not open to public scrutiny. This mechanism seems to give some groups a privileged status.

I realize that the attention to civil society has grown because the activities of various groups *in* society have shown significant influences on national and international politics in recent years. Citizens exercise their freedom of speech and association to appeal to the public for some issues which they believe are necessary to improve or "save" the society. These voluntary activities have been playing an important social and political role. The basis of their influence lies in support from citizens. The main field of their activities is the civil society itself, not in the direct connection with state organizations, even if they want to influence the political process.

In the parliamentary system, parliament is the central organ to sum up the various interests and views of the people. Parliament and the ruling parties have been criticized, however, for being not sensitive enough to the real wishes of citizens. Jürgen Habermas, a

* Professor of Law, Kyoto University. This article is a revised version of my lecture at the workshop "Roles of Citizen/Civil Society and Responsibility of State" in the IVR World Congress in Frankfurt am Main in 2011. I thank Tatsuji Ohno for his invitation to the workshop and his comment there.

central figure in stressing the political role of civil society, has observed, "Even the political parties, which, according to the German Basic Law, Article 21, are entitled to 'participate in forming the political will of the people' have now become an independent power cartel integrating all branches of government."[1] It is expected that the influences from civil society can break this cartel and make the lawmaking process more transparent and sensitive to the discussions outside of parliament. "Here the social substratum for the realization of the system of rights consists … in the currents of communication and public opinion that, emerging from civil society and the public sphere, are converted into communicative power through democratic procedures."[2]

As Habermas recognizes, however, the power of parliament as legislator has weakened in the face of today's complex social conditions. In order to correspond to the rapid changes of knowledge and technology, the contents of laws cannot be stable or concrete. "The weak binding power of regulatory law, however, demands compensations primarily in the area of *administration*, where officials can no longer restrict their activity to a normatively neutral, technically competent implementation of statutes." When the administration must decide politically, it should do so "in forms of communication and according to procedures that satisfy the conditions of constitutional legitimacy. This implies a 'democratization' of the administration."[3] One can call this manner of "democratization" as a bottom up process because communication starts at the grass root level and grows its influence toward the top of the administration.

This demand of democratization of the administration has difficulties, however, because it does not have such a fixed form as parliament has in the Constitution. There is no universally right answer to the problem which forms of participation are most legitimate and suited to reflect the opinions of citizens. Habermas describes it as "a question of the interplay of institutional imagination and cautious experimentation," but he thinks of course that this is an experiment worth trying.[4]

When one refers to the democratization of the administration, however, one does not necessarily mean strengthening the influence of civil society. I will explain the ambivalence in this concept by showing the experience of the reform of administrative organizations in Japan.

The Reform of the Administrative Organization in Japan

In the 1990s the most important reform of administrative organizations since the 1940s was carried out in Japan. The central aim of this reform was to break the "rule of bureaucracy," which was considered as the characteristic of Japanese society as a whole. The lack of transparency of the policy-making process in Japan was criticized both within and without. The Basic Act on Central Government Reform, the law summarizing the reform policies, included provisions which prescribed the administration to open its structure to greater public participation and scrutiny. The effort to foster greater transparency of

[1] Jürgen Habermas, *Between Facts and Norms* (1996), transl. by William Rehg, p. 434.
[2] Ibid., p. 442.
[3] Ibid., p. 440. See also James Bohman, *Public Deliberation* (1996), pp. 188-192.
[4] Ibid., p. 441.

government processes and actions was partially realized with the passage of the Freedom of Information Act in Japan. In addition it sought to ensure that "the government will reflect the public opinion in the policy making and keep this process fair and transparent." When the government wants to formulate an important policy, it should make its proposal public in order to "invite opinions of specialists, persons concerned and the people in general" and take these into consideration (so called "public comments").[5] "Public comments" were introduced by a revision of the Administrative Procedures Act.

These measures presupposed a positive role of the smooth flow of information across the boundary of administrative organizations. The laws seeking to foster greater fairness and transparency reflected long standing criticisms of the Japanese bureaucracy that it acted in the opaque manner in its dealings with interest groups. These reforms envisioned the participation of various citizens many of whom did not have privileged status. We might say that the reformers were aware of the significance of civil society as the force for democratizing the administration.

However, this manner of democratization was never envisioned as the focus of the reform agenda. Its main aim was the "reinforcement of the function of cabinet."[6] The Basic Act on Central Government Reform set forth clearly that the prime minister has the explicit power to propose important policies in the cabinet and founded new organizations to support the function of the cabinet, especially the office of the prime minister. The reform flowed from the belief that the administration should be democratized from the top down. The political legitimacy derives from the will of the people which is shown primarily in the result of elections, and so the ministers, especially the prime minister, should lead the administrative organizations powerfully.

At the same time a certain constitutional theory which aimed to strengthen the democratic legitimacy of the cabinet came to exert great influence in Japan. It insisted that the election should function in fact as the direct decision of the ruling party and the cabinet. In Japan the LDP possessed the majority of parliament for a long time. Therefore the election did not function as the chance to select the ruling party. The cabinet changed only as a result of struggles in the party. This political situation seemed to be a possible reason why the government was chronically so weak. Because it could not rely on the mandate of the electorate, it could not accomplish its policies against the sustained resistance of the bureaucracy. It was said that to break this boundary, the cabinet should derive their political legitimacy from the direct consent of the people. This theory did not demand the introduction of the presidential system (this would require a constitutional amendment), but the changes to the election and party system sought to frame the election as an opportunity to endow the cabinet with a true public mandate. It aimed also to democratize the administration by strengthening the actual power of ministers.[7]

We can see from what has been said that the reform in Japan included two different ways to democratize the administration, though this fact was rarely mentioned. Though these alternatives could cooperate to break the power of the bureaucracy, there was, theoretically

[5] Basic Act on Central Government Reform, Art. 50.
[6] Basic Act on Central Government Reform, Art. 1.
[7] See Kazuyuki Takahashi, *Kokuminn-naikaku-sei no Rinen to Un'you* (Idea and Practice of the Cabinet Selected by the People) (1994).

viewed, a deep tension between them. In order to democratize the administration from the top down, one may suppose, the organization should be structured hierarchically. Its aim could be realized only by the recognition by the permanent bureaucracy of the principle of ministerial leadership and responsibility. To the contrary, opening the administration to the inputs from civil society implies weakening the function of hierarchy. It would mean the recognition of the democratic legitimacy of the policy-making process at the bottom of the organization which cooperates with outside transparently. However, regrettably no debate is underway in Japan on the relationship of the different potentialities implicit in the comprehensive reform of the administration.

In Germany, in contrast, the normative meaning of the various administrative organizations has been discussed as an important problem of Constitutional Law. We will now turn to the consideration of this dispute to know the problem more exactly.

Controversy About the Content of Democratic Legitimacy in Germany

Christoph Möllers insisted in 1999 that the meaning of democracy for the organization of the administration was one of the most disputed themes in German public law. The main issue is "if there can be another model of legitimacy of administration than the classical form of the administrative organization which is directed at the ideal type of hierarchical ministerial administration." It is said that the projects to give some administrative organizations the autonomous legitimacy are enabled by opening them to subjects who can claim their status to democratize them. The opposite side asserts that such a chance of participation of persons concerned cannot claim democratic legitimacy at all.[8]

This controversy was sharpened in Germany during the 1990s when the German Federal Constitutional Court showed a very hard attitude against the doctrine of "autonomous legitimacy" of the administration. It declared a law of a *Land* unconstitutional which allowed a representative organ of public servants to participate in the decision-making process of the administration about all matters concerning themselves. The Court thought that the principle of popular sovereignty implied that the people should influence the activities of the state effectively. To guarantee this constitutional request, it demanded so called "uninterrupted chain of legitimation" from the people via a parliament selected by them and the government relying on its confidence to the public servants bound by the orders of the government. In contrast, the participation of public servants could not have a meaning of democratizing the administration. It was the people as a whole that should influence the acts of the state. No parts of them could have privileged status. To give the representative organ of public servants the authority to decide with the administrative organizations meant to privilege a special interest group, however. "There is no room for 'autonomy' of public employees even in the matters of public employment." The principle of democracy required that only the positions which could take responsibility to parliament through the control of the government might make the last decisions.[9]

[8] See Christoph Möllers, "Braucht das öffentliche Recht einen neuen Methoden- und Richtungsstreit?" in *Verwaltungsarchiv* 90 (1999), pp. 187, 188f.
[9] BVerfGE 93, 37, 66-70.

The Constitutional Court showed its concept of democracy more clearly in a decision against the suffrage of foreigners. It declared there that the holder of the sovereign power was the people and that this people meant the German nationals, which built a united group as the subject of democracy. The principle of popular sovereignty did not imply that the decisions of the state should be legitimated by the persons concerned at each time. Democracy presupposed by the German Basic Law had nothing to do with the idea that the holders of political rights should be congruent with the persons subject to the state power.[10]

This hard attitude of the Constitutional Court was supported by the constitutional theory of a judge of that day, Ernst-Wolfgang Böckenförde. According to this theory, democracy, first of all, is a political concept and the people as the sovereign are forming "a political unity of destiny" which has to decide as a unity. In this sense, it cannot be dissolved into an amalgam of private persons who aim to participate according to their own interests only. Therefore, he distinguishes strictly between democracy as a political principle and the demands of various particularistic groups (pressure groups) to influence on policies as an expression of private interests.[11] In fact, he assigns the parliament to legitimately monopolize the representation of the sovereign because only it is selected by the whole people in the framework of parliamentary system. According to his theory, the participation of particularistic groups in the democratic decision-making process violates democratic principles. It may rather disrupt the function of democracy also by obstructing the orders of the government responsible to parliament. Therefore, the administrative body has to be structured hierarchically to secure the legitimate flow of political authority.

One can realize easily that Böckenforde's theory is much influenced by the decisionism of his teacher (*Lehrer*) Carl Schmitt. Such a theory seems to take a too state-centered view of democracy and tends to forget the real situation of the people. The daily politics need not demand the decision of the people destined to unify themselves, but should grasp their various wishes. "The people as a whole" should not be treated as a mythical entity.

Many scholars have criticized the understanding of democracy by Böckenförde and the Constitutional Court as far as the Court followed his positions during his tenure. The Basic Law itself seems to allow various structures of federal administration in Art. 86 and 87. In today's complex society, furthermore, the "effective" influence of the people on policies which the Court demanded in some decisions during Böckenförde´s tenure cannot be realized by the only one way through parliament. The fetishism of "uninterrupted chain of legitimation" cannot give the people any real power. Just to substitute for this weakness, it is necessary to consider various structures of administrative organizations which can keep up with the real wishes of the people. In contrast to the abstract legitimacy of politicians selected by elections, the groups of citizens do not lose their concrete existence in the society even in the process of participation. Public interest can be found not by ignoring various interests of private citizens, but only by considering them with a broad outlook.[12]

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[10] BVerfGE 83, 37, 50-52.

[11] See Ernst-Wolfgang Böckenförde, "Demokratie als Verfassungsprinzip" in idem, *Staat, Verfassung, Demokratie* (1991), pp. 289, 311-316.

[12] See, e.g., Brun-Otto Bryde, "Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie, Staatswissenschaften und Staatspraxis" in Staatswisschaften und Staatspraxis (1994), 5, p. 305; Alfred Rinken, "Demokratie und Hierarchie" in Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft (1996),

Horst Dreier shows a balanced position about this problem. He admits the necessity of the hierarchy principle in administrative organization in order to secure democratic legitimacy, but is cautious not to treat it as an absolute claim. The function of hierarchy is dependent on many conditions which are now difficult to meet, for example, clear provisions of laws and a stable environment. Without these the administration itself becomes a "power factor." In order to control it and make it work appropriately for concrete situations, the participation of citizens is needed.[13] On the other hand, he is aware that the independence of administrative sectors includes the danger that they might liberate themselves from the political programs of the state as a whole and pursue their segmental interests with the opaque cooperation with particular groups. The law must prevent this danger by keeping the control of these organs. It should prescribe the basic frame of policies to be made, fair rules of participation, transparency of the process and so on. Then these organs could claim their democratic character to some extent, even if not the people as a whole, but only persons concerned participate. Autonomy is not irrelevant to democracy. "Only the balance between unity and plurality" is the right answer to the problem of legitimacy of the public administration.[14]

In fact, the German Federal Constitutional Court itself has relaxed its hard attitude against the autonomy of the administrative organization after the retirement of Böckenförde. In a decision for an autonomous administrative sector, it admitted that the democracy which demanded real influence of the people allowed organization types different from the hierarchy. Both democracy and functional autonomy were based on the idea that people should decide themselves freely. "The Basic Law allowed also special forms of participation of persons concerned in the exercise of public functions." Of course, their structure should secure fair consideration of the interests concerned.[15]

We can conclude that to organize the administrative body strictly according to the principle of hierarchy in order to strengthen the political leadership ignores the real roots of deficits of democracy. We should point out, however, that even the theory in Germany asserting that the hierarchical principle has only a relative validity admits the necessity of control of the law which should include the rules making the participation in the administration fair and transparent. Only then the participation of citizens can be worth trying to democratize the state administration. When these conditions are met, on the other hand, we should not be too cautious about the role of civil society even if it consists of groups claiming particularistic aims. Policies should be made during an administrative process which attempts to gather various claims and to transform them to policies in the public interest. We should stress the importance of this process all the more, because its participants cannot be appointed through such an official process as the election, even if the administration tries to select them as fairly as possible. Their considerations, therefore, should be exposed widely to criticism from the outside.

70, p. 282; Thomas Blanke, "Antidemokratische Effekte der verfassungsgerichtlichen Demokratietheorie" in *Kritische Justiz* (1998), 31, p. 452. See as a book supporting the doctrine of Böckenförde, Matthias Jestaedt, *Demokratieprinzip und Kondominialverwaltung* (1993).

[13] See Horst Dreier, *Hierarchische Verwaltung im demokratischen Staat* (1991), p. 145-157.

[14] Ibid., pp. 283-293. See also Thomas Groß, *Das Kollegialprinzip in der Verwaltungsorganization* (1999), pp. 165-199, 251-270.

[15] BVerfGE 107,59, 91-94.

I want to add that democratizing the administration from the bottom up does not necessarily mean a pursuit of consensus of all relevant groups in the society. Consensus is desirable, of course, but the aim of an administrative procedure which is open to concerned persons does not imply the necessity of consent as such. It only aims at making policies suited to the concrete situation. To give each group a veto power might diminish its readiness to compromise and disrupt the function of the respective procedures. Discussion must be ended at some time and the matter must be decided even against the objection of a minority. The term of deliberation must be neither too short nor too long. It is also the responsibility of the officials who act under the control of the government to find the timing suited for the decision.[16]

"Public Comments" and Councils in Japan

We have now gained the theoretical viewpoints to consider the possibility and conditions of democratization of the administration from the bottom up. We will now analyze the concrete measures taken by the reform of administrative organizations in Japan. As we have seen, its main concept was to strengthen the leadership of the cabinet. Therefore, the risk to lose the unity of policies which is truly included in the democratization from the bottom did not need to be worried sincerely. On the other hand, it did not try to close the organization to accomplish the orders of the ministers, but tried to open it to be able to reflect people's real wishes. Although the reform admitted the ultimate superiority of officially elected politicians, it did not take a fictitious view about their democratic legitimacy. We can say that the project itself took a balanced way to reform the Japanese bureaucracy, although it was not fully aware of it. Of course, there remain concrete problems to be mentioned.

As we have already seen, the reform introduced the institution of "public comments." The revised Administrative Procedures Act requires that after comments are gathered the administration make public the summary of the comments and its reactions to them. If it does not adopt some opinions, it must show the reason. The law does not allow it to ignore them. "Public comments" have been established as a normal step to make policies.

There are critical comments to the democratizing role of "public comments," however. Comments are invited only after the courses of the policies are decided in the administration. The competence to judge how persuasive each comment is also remains by it. "Public Comments" do not involve the process to construct policies with citizens' ideas. We have to concede that just because of this weakness this reform did not raise a large resistance in bureaucracy.[17]

I can agree with this criticism, but I still want to stress the important meaning of "public comments." It gives all citizens official chances to say something concretely about policies of the state, although as a result their power remains very weak. Not only the privileged interest groups, but all the persons concerned gain the possibility to influence them. It has stimulated activities of many groups in fact. Furthermore, the response of the

[16] See Armin von Bogdandy, "Demokratisch, demokratischer, am demokratischsten?" in *Festschrift für Alexander Hollerbach* (2001), pp. 363, 373-376.

[17] See Akiko Toyoshima, "Public Comments" no Igi to Kadai (Significance and Problems of "Public Comments") in *Jumin-sanka no System-kaikaku* (Tsutomu Muroi ed. 2003), pp. 174, 189f.

administration to the comments which is opened to the public might arouse continuing debate. Anyway, "public comments" do not involve any severe problem of legitimacy. They are not exclusive, and the power to control the process remains undoubtedly by the administration.

To the contrary, councils which consist of limited members appointed by the administration and deliberate on specific policies to make a proposal were treated coldly in the reform. The Basic Act on Central Government Reform prescribed to abolish them in principle[18]. This rather radical judgment against the councils could be explained by the idea that in fact they are covers of the bureaucracy. Only the specialists who are friendly to the bureaucracy are gathered and they rather disrupt the leadership of politicians by relying on their professional authority. Councils became then a symbol of the opaque relationship between the bureaucracy and interest groups.

Is it really possible, however, for the administration to build policies without councils? Tokiyasu Fujita, a famous professor of Administrative Law and one of the central figures of the reform project, thinks it is possible. He supposes that the establishment of both "public comments" and "the meetings of specialists in the true meaning" is able to substitute for councils and function better than these.[19] It means that the organs for democratic legitimacy and for technical reasoning can and should be separated. The meetings of limited specialists should be purified to technical problems without political relevance.

This severance seems both impossible and undesirable, however. The power of "public comments" is weak, as we have seen. Moreover, it is illusionary to suppose the place purified from politics. In the technical problems so highly developed that the help of specialists is needed, we cannot expect their agreements. Especially, the problem what society should do with uncertain data and analyses divides them necessarily according to their political attitudes. They cannot help considering the related interests in the society. And so, the inevitable political meaning of their activities arouses critics in the public inevitably. The knowledge of specialists has only a relative superiority to that of citizens at least in the politics and should not be treated as an authority free form criticism of citizens. We need not refer to Carl Schmitt to understand that everything could be a ground of political controversy.[20]

Fujita's theory may come from his concern that the discussion of limited members cannot claim democratic legitimacy. But this seems a too narrow conception of it. When the rules of participation and discussion are improved to fulfill the standards of fairness and transparency, the role of councils to democratize the administration should not be denied. Contrary to "public comments," they are able to build policies autonomously. I suppose that well equipped councils can gather both technical information and its political implication from various sides of specialists and citizens concerned with social problems. It is meaningful from the viewpoint of democracy to build up public policies through their discussion. To improve the democratic character of councils, we must take care of the

[18] See Basic Act on Central Government Reform, Art.30 (2)

[19] See Tokiyasu Fujita, "Singikai-seido Zakkan (Some Consideration on Councils)" in *Gyoseiho no Kiso-riron* II 242 (2005). See as criticism Hiroshi Shiono, *Gyoseiho III* (Administrative Law III) (3rd ed. 2006), pp. 80-82

[20] See Carl Schmitt, "Das Problem der innerpolitischen Neutralität des Staates" (1930) in idem, *Verfassungsrechtliche Aufsätze* (1958), pp. 41, 49-51.

connection of discussions between inside and outside. They should be exposed to critics in order not to be transformed to a place giving privileges to specific interests. Transparency is indeed demanded for the councils saved from abolishment also in the Basic Act.[21] In recent years many interim reports of councils are publicized and "public comments" on them are invited which are able to exert an influence on the final version. The combination of procedures like this surely contributes to improving the legitimacy of proposed policies.

Several measures have been taken in Japan to advance the fairness of the appointment of members of councils, for example, to require the agreement of parliament and to advertise for the position publicly. The former enables to examine the aptitude of candidates publicly, but involves the danger to strengthen the political antagonism in councils. I suppose that this risk is not so high in Japan, however, because the social groups there are not structured according to the inclination of political parties.

In these years, the practice of inviting applications for the council members from citizens has been spreading rapidly in the local governments. It is not clear, however, if this method is suited to the role of councils to gather relevant knowledge and to adjust the interests concerned.[22] It is true that each council is established for a specific aim and is not the general representative organ of the people. With this method of selection, however, it becomes possible to recruit persons concerned with whom the administration has no contact. It is impossible for the officials of the administration to make clear who has a relevant interest with the topic to be discussed, even if they want to gather relevant ideas widely. To improve the democratic character of councils, after all, the relevance should not be decided one-sidedly by the administration. We can consider the public invitation of council members to be a method to open them to the persons concerned who act independently of the state so far. I think that this method is not contrary to the character of councils. In fact, most applicants are the persons who are much interested in the theme. If more persons apply for the position than needed, therefore, the members should not be decided by lot, but the persons who have more relevant interest and more knowledge should be selected. We should not forget that even so the interests represented in a council cannot be perfectly comprehensive. All the more, the officials cannot be indifferent to the process of the deliberation in councils.[23]

The public invitation of council members enlarges the chance of the groups in civil society to participate in the policy-making process. This has a positive meaning for its democratic character, because they have the background of the citizens supporting their views freely. Differing from the interest groups which gain their political power from their economical influence, furthermore, the groups acting in civil society have to take care of the transparent relationship between inside and outside the councils. We must notice, however, that their opinions remain those of partial groups in the society. There is no group which is representative of the people as a whole, and the amalgam of the groups in councils is not yet

[21] See Basic Act on Central Government Reform, Art.30 (5). In fact, as Fujita recognizes, the number of councils did not diminish drastically through the reform.

[22] See Akiko Toyoshima, "Shingikai ni okeru Jumin-sanka no Mondai (The Problems about the Participation of Citizens in Councils)" in *Jumin-sanka no System-kaikaku* (Tsutomu Muroi ed. 2003), pp. 174, 189f.

[23] See Hans-Heinrich Trute, "Die demokratische Legitimation der Verwaltung" in *Grundlagen des Verwaltungsrechts*, Bd. I (2006), p. 307, marginal note100 (saying that the cooperation with private persons rather increases the burden of the administration.)

equal to the people. The administration has to take care to keep various opinions heard in the discussion and, as I have already said, to end it when it is ripe enough to decide. Opinions of each group themselves are not worth realizing. The councils must take responsibility for building up public policies from various real wishes of the people. There may remain losers. Of course, the attachment of a minority opinion may be meaningful to give useful information for the discussion which can and should continue after the end of the deliberation in the councils.

We can now conclude that opening the administration to civil society is not an easy task. It includes both the possibility to democratize it and the danger to invite its dysfunction. The real concerns of the people should be heard, but at the same time they must be transformed to public policies through deliberation. The moderate control of officials is needed in this process, but it must not be excessive, otherwise the autonomous dynamics of the process would be suffered. Anyway, "this ambivalence is to be endured"[24] to make the state organizations more democratic.

[24] Dreier, *Hierarchische Verwaltung*, p. 275.