

Manuscript version: Author's Accepted Manuscript

The version presented in WRAP is the author's accepted manuscript and may differ from the published version or Version of Record.

Persistent WRAP URL:

<http://wrap.warwick.ac.uk/113718>

How to cite:

Please refer to published version for the most recent bibliographic citation information. If a published version is known of, the repository item page linked to above, will contain details on accessing it.

Copyright and reuse:

The Warwick Research Archive Portal (WRAP) makes this work by researchers of the University of Warwick available open access under the following conditions.

Copyright © and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable the material made available in WRAP has been checked for eligibility before being made available.

Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Publisher's statement:

Please refer to the repository item page, publisher's statement section, for further information.

For more information, please contact the WRAP Team at: wrap@warwick.ac.uk.

Seventy Years On: The Taiwan Constitutional Court And Judicial Activism In A Changing Constitutional Landscape

Tzu-Yi Lin,^{*} Ming-Sung Kuo,^{*} and Hui-Wen-Chen[†]

[Abstract]

In comparative work on judicial review in new democracies, the Taiwan Constitutional Court (TCC) has been portrayed as an instance of judicial activism in light of the process of democratisation. In our story of the TCC, we shed new light on the theme of judicial activism and democratisation. Situated in the 70-year-old TCC's institutional continuity, its journey to an activist court turns out to be a story of judicial bootstrapping. We start with the accidental rebirth of the TCC on Taiwan, which lent timely constitutional cover to a struggling constitutional dictatorship in the 1950s. Through judicial bootstrapping in the mid-1980s, the TCC eventually redeems itself as an activist constitution guardian. Our story suggests that even a semblance of judicial review under a nominal constitution can be an asset to the political transition to democracy. We conclude with reflections on the TCC's new challenges and its future role in post-democratisation Taiwan.

^{*} Distinguished Research Professor and Director, Institutum Iurisprudentiae, Academia Sinica, Taiwan; former Justice of the Taiwan Constitutional Court (2003-1011); JSD, LLM, Cornell Law School, LLM, LLB, National Taiwan University.

^{*} Associate Professor of Law, University of Warwick School of Law, UK; JSD, LLM, Yale Law School; LLM, LLB, National Taiwan University.

[†] Research Assistant, University of Warwick School of Law, UK; LLM, Harvard Law School; LLM, LLB, National Taiwan University.

[Table Of Contents]

1. Introduction	2
2. From There to Here: The TCC's Road towards the Guardian of Constitutional Democracy	7
(a) <i>Phase I: Traumatic Birth and Institutional Survival, 1948-87</i>	<i>10</i>
(b) <i>Phase II: Bootstrapping, Judicial Activism, and New Birth, 1987 —</i>	<i>17</i>
3. After Democratisation: The TCC at a Crossroads Again	22
(a) <i>Whither the TCC? Populist Messenger or Principle Defender</i>	<i>23</i>
(i) Struggling in the absence of minimal consensus	23
(ii) Steering between popular feelings and constitutional principles	27
(b) <i>Envisioning a New Court for the People: A Glimpse of the Proposed Reform of the TCC.....</i>	<i>32</i>
4. Conclusion	36

1. Introduction

The role of judicial review¹ in a constitutional order and the theme of judicial activism have received increasing attention from a new generation of scholars of comparative constitutional law. Looking beyond the experience of the Supreme Court of the United States (SCOTUS), they have yielded rich and subtle research insights into the diverse role of judicial review in a wide range of political regimes.² In the growing body of comparative work on the judicial role in new democracies, the Taiwan Constitutional Court (TCC)³ has

¹ Strictly speaking, judicial review does not necessarily concern constitutional questions. In terms of the prominent role the court has played in constitutional review or constitutional adjudication, we adopt the term judicial review to refer to the institutions of constitutional adjudication and constitutional review.

² See eg Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008); David Landau, "Political Institutions and Judicial Role in Comparative Constitutional Law" (2010) 51 *Harvard International Law Journal* 319; Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge: Cambridge University Press, 2018).

³ The institution of judicial review in Taiwan, which is widely known as the Taiwan Constitutional Court (TCC) in comparative constitutional law, is officially entrusted with the Grand Justices of the Judicial Yuan, the umbrella constitutional organ responsible for the overall judicial administration. When it was established in 1948, it was organised as the Council of Grand Justice under the Judicial Yuan. After 1993, the Council of Grand Justices no longer referred to the institution of judicial review but the designation has been preserved. Now referring to the statutory session in which the TCC formally renders its decision, the Council of Grand Justices remains the popular term for the institution of judicial review in Taiwanese media. See also Wen-Chen Chang, "Courts and Judicial Reform in Taiwan: Gradual Transformations towards the Guardian of

been portrayed as an instance of judicial activism.⁴ The widely reported Same-Sex Marriage Case, Interpretation No 748 of 2017,⁵ whereby the TCC opened the door for the legalisation of same-sex marriage in Taiwan apparently testifies to such characterisation.⁶ The Same-Sex Marriage Case not only indicates the institutional role of the TCC in Taiwan's current constitutional landscape. This landmark decision also marks how far Taiwan has moved away from a traditional patriarchal Confucian society under a quasi-military dictatorship to one of the most tolerant, liberal countries in the world over the past three decades.

Yet, just as Taiwan's path towards liberal democracy is anything but smooth, so too the TCC's journey to an activist court is winding and full of challenges. Although Taiwan has long been studied alongside other new democracies that rid themselves of the authoritarian regime at the Cold War's end in the 1990s,⁷ the TCC, which just celebrated its 70th birthday on 15 September 2018,⁸ is not a young court. To do justice to the TCC's attributed judicial

Constitutionalism and Rule of Law" in Jiunn-Rong Yeh and Wen-Chen Chang (eds), *Asian Courts in Context* (Cambridge: Cambridge University Press, 2015), pp 143, 145-46, 148-49. In this article, we use the more popular TCC to refer to the continuing Taiwanese institution of judicial review established in 1948 unless otherwise specified.

⁴ See Jerry McBeath, "Democratization and Taiwan's Constitutional Court" (2004) 11 *American Journal of Chinese Studies* 51; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2009), pp 106-57; Jiunn-rong Yeh & Wen-Chen Chang, "The Emergence of East Asian Constitutionalism: Features in Comparison" (2011) 59 *American Journal of Comparative Law* 805, 823; see also Po Jen Yap, *Courts and Democracies in Asia* (Cambridge: Cambridge University Press, 2017), pp 79-93; but cf Ming-Sung Kuo, "Moving towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics" (2016) 25 *Washington International Law Journal* 597.

⁵ When it exercises jurisdiction, the decision of the TCC, which is organically part of the Judicial Yuan (JY) as noted above, is formally styled as J.Y. Interpretation. In contrast, the TCC dismisses constitutional petitions or referrals by Resolution, not Interpretation. Resolutions in this regard are not part of the TCC case law. For the purpose of elegance, we simply refer to the official case report as Interpretation with its serial number. As interpretations result from referrals or petitions prompted by constitutional or other legal disputes, the TCC effectively rules on disputes through interpretations. Thus, we use 'interpretation', 'ruling', 'judgment', and 'decision' interchangeably when referring to the TCC case law. The full text of all the interpretations referred to in this article (except Interpretation No 768 of 2018 and Interpretation No 756 of 2017) are available in English at <https://www.judicial.gov.tw/constitutionalcourt/EN/p03.asp>.

⁶ For an expansive discussion of the Same Sex-Marriage Case, see Ming-Sung Kuo and Hui-Wen Chen, "The *Brown* Moment in Taiwan: Making Sense of the Law and Politics of the Taiwanese Same-Sex Marriage Case in a Comparative Light" 31 *Columbia Journal of Asian Law* (forthcoming). We shall further discuss this case in Section 3 (a) (ii).

⁷ See sources cited in note 4 above.

⁸ While the inaugural cohort of justices took office on 26 July 1948, the First Council of Grand Justice convened its first official meeting on 15 September 1948. The Rules Governing the Council of Grand Justices were adopted in the first official meeting, setting the institution of judicial review in motion. A useful study of

activism, the rise of judicial activism needs to be examined in light of the TCC's institutional continuity and Taiwan's changing constitutional landscape underneath which democratisation has been the driving force.

In this article, we aim to show that not only democratisation but also institutional continuity provides the reference framework required for an adequate understanding of the TCC's role in Taiwan's constitutional landscape. Our examination reveals that the TCC's unusual institutional continuity is far from the result of constitutional design. As will become clear, it is actually a function of both the changing constitutional order and the vicissitudes of fate. The case of the TCC suggests that even a semblance of judicial review under a so-called 'nominal constitution'⁹ is beneficial to the political process of democratisation in a transition society, while judicial activism can be facilitative, instead of obstructive, of democracy. To be clear, we are not naïve about the invincibility of judicial review in the guardianship of constitutional democracy. Rather, as the TCC's post-democratisation experience shows, the institution of judicial review pivots on certain political preconditions to be an effective constitutional guardian. Without minimal political consensus, judicial opinions may remain vociferous but lack efficacy.¹⁰ Furthermore, steering clear of high politics involving competing constitutional powers does not guarantee judicial review success. As more and more traditional social institutions and conventional values are under scrutiny in light of fundamental rights, judicial review does not always win people's hearts by granting claimants rights in the name of the constitution. As will be further discussed, the Taiwanese

part of the TCC early history is available in Wen-Chen Chang, *Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective* (Unpublished JSD Thesis, Yale Law School, June 2001) pp 152-57.

⁹ Nominal constitution appears in both Karl Loewenstein's "ontological" studies of constitution and Giovanni Sartori's classification of constitutions. To Loewenstein, if a constitution reflects the values of constitutional democracy in content only but is unenforced, then it is "nominal". Karl Loewenstein, *Political Power and the Governmental Process* (Chicago, IL: University of Chicago Press, 1957) pp 147-49. In contrast, Sartori regards as "nominal" constitutions that are reflective of political reality without normative substance. Giovanni Sartori, "Constitutionalism: A Preliminary Discussion" (1962) 56 *American Political Science Review* 853, 861. Judicial review under a nominal constitution in either sense can be conducive to democracy.

¹⁰ Kuo (n 4 above), pp 605-25. Failing to distinguish between activism and efficacy, Jiunn-Rong Yeh and Wen-Chen Chang regard the TCC as continuing on the path of judicial activism. See Jiunn-rong Yeh and Wen-Chen Chang, "An Evolving Court with Changing Functions: The Constitutional Court and Judicial Review in Taiwan" in Albert HY Chen and Andrew Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge: Cambridge University Press, 2018) pp 110, 111-12.

Same-Sex Marriage Case and the post-judgment politics of same-sex marriage legislation suggest that the guardian of the constitution needs to tread carefully in its capacity as the defender of constitutional principles when its decision does not speak to popular feelings.

Our argument will proceed as follows. To shed light on the winding path the TCC has taken since its installation 70 years ago and the state of judicial review in Taiwan, we shall first sketch out how the TCC has evolved from an institutional weakling into a full-fledged constitution guardian embodying judicial activism. We shall argue that riding the wave of democratisation in the mid-1980s, the TCC redeemed itself with the new image of the guardian of the constitutional order by virtue of judicial bootstrapping without disrupting institutional continuity (Section 2). Judicial activism not only characterised the TCC's performance in Taiwan's transition to constitutional democracy but also continued to shine its new image afterwards. After telling the TCC's growth story, we shall focus on the TCC's newfound role as the constitution guardian in the post-democratisation era and reflect critically on its future role in light of the proposed statutory reform of judicial review (Section 3). We shall conclude the story about the septuagenarian TCC with a summary of our argument and brief reflections on the relationship between the TCC and democratic dialogue in Taiwan's new constitutional landscape (Section 4).

Before we dig into the TCC's extraordinary institutional biography, an overview of the institutional features of the TCC is provided so that our discussion of the TCC's changing role can be better situated in Taiwan's unique constitutional context. Judicial review in the form of constitutional interpretation was first stipulated mainly in Chapter VII of the Republic of China (ROC) Constitution of 1947 (ROC Constitution), which governs the organisation of the judicial power.¹¹ The jurisdiction, procedure, and organisation of judicial review are further substantiated by statutory legislation or the TCC's internal rules.¹²

¹¹ The ROC Constitution was promulgated on 1 January 1947 following its adoption by the (Chinese) Constituent National Assembly on 25 December 1946 but did not come into force until 25 December 1947. Judicial review is provided for in Articles 78 and 79 under Chapter VII as well as Articles 171 and 173 under Chapter XIV concerning enforcement and amendment. See also Chang (n 3 above), pp 145-46. We shall further discuss the ROC Constitution and other constitutional instruments in relation to judicial review in Section 2.

¹² The Rules Governing the Council of Grand Justices, which the TCC adopted in its first official meeting in 1948, was replaced by the Council of Grand Justices Act in 1958.

According to the ROC Constitution, the TCC has two primary functions: to interpret the Constitution (constitutional interpretation) and to unify the interpretations of statutes and ordinances (uniform interpretation).¹³ In addition, the Additional Articles, ie, the post-1991 amendments to the ROC Constitution,¹⁴ invest the TCC with jurisdiction over the trial of the impeachment of President and Vice President and the dissolution of anti-constitutional political parties.¹⁵ In sum, since its inception, the TCC has operated on the continental, centralised model famously fathered by Hans Kelsen,¹⁶ despite the framer's original design.¹⁷

Apart from jurisdiction, it is worth noting that the TCC falls in line with the continental model of judicial review in terms of jurisprudence and style. In contrast to the SCOTUS' deep scepticism about comparative law, the TCC is a cosmopolitan court.¹⁸ Its cosmopolitan character is not only indicated in its early adoption of the so-called 'global model of constitutional rights', which is associated with the German-rooted framework of proportionality principle,¹⁹ and its habitual reliance on foreign law and jurisprudence.²⁰ More recently, the TCC has openly embraced international human rights law by referring to international and regional human rights treaties, even though Taiwan is not a contracting party to any of them.²¹ As regards style, the TCC allies itself with the continental model too,

¹³ The ROC Constitution Article 78. For present purposes, our discussion of the TCC will focus on its role in constitutional interpretation unless otherwise specified.

¹⁴ We shall further address the relationship between the ROC Constitution and the Additional Articles in Section 2 below. For the post-1991 amendments, see Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Oxford: Hart Publishing, 2016) pp 38-48.

¹⁵ Additional Article 5 paras 4 and 5 as well as Additional Article 3 para 9. Notably, the TCC has never been requested to adjudicate an impeachment case or to dissolve a political party to date.

¹⁶ Ginsburg (n 4 above), pp 115-17.

¹⁷ Chang (n 3 above), p 146.

¹⁸ See David S Law and Wen-Chen Chang, "The Limits of Transnational Judicial Dialogue" (2011) 86 *Washington Law Review* 523, 557-63.

¹⁹ See Kai Möller *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012); Moshe-Cohen Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013) pp 24-32. Interpretation No 409 of 1996 is considered the TCC's formal subscription to the principle of proportionality. Cheng-Yi Huang and David S Law, "Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China" in Francesca Bignami and David Zaring (eds), *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Cheltenham: Edward Elgar, 2016) p 305, 320.

²⁰ See Law and Chang (n 18 above), pp 557-63.

²¹ Wen-Chen Chang, "The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison" (2011) 36 *North Carolina Journal of International Law & Commercial Regulation*

emphasizing the Interpretation (Opinion of the Court) as the collective and institutional voice of the court rather than as the authoring judge's individual opinion.²² For this reason, the TCC Interpretations are presented as the impersonal judgments of all the justices.²³ Yet, as will be further discussed in Section 3, the TCC's recent practice in the publication of separate opinions (including concurring and dissenting opinions) suggests its departure from the continental tradition in which the unanimity of the judicial decision is preferred and becomes the default judicial style²⁴ for a plurivocal court.²⁵

With its features in jurisdiction, jurisprudence, and style revealed, let us read the TCC's institutional biography together.

2. From There to Here: The TCC's Road towards the Guardian of Constitutional Democracy

We begin with the personnel composition of the TCC, the lifeblood bearing greatly on the TCC's longevity. As it stands, the TCC is comprised of 15 justices. Notably, the number of justices was only constitutionally fixed at 15 when the Additional Articles were amended in 1997. The 1997 constitutional amendment changed the TCC on a grand scale. Apart from the fixing of the number of justices and the abovementioned extension of jurisdiction, it fundamentally altered the appointment of justices. Since the first cohort of 15 justices was sworn in under the Additional Articles in 2003,²⁶ all the TCC justices have been appointed by President, with the consent of the Legislative Yuan (parliament), to serve a non-renewable, eight-year, staggered term. Yet, to get a full picture of the constitutional

593, 604-05.

²² See Wen-Chen Chang, "The Constitutional Court of Taiwan" in András Jakab, Arthur Dyeve, and Giulio Iztovich (eds), *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press, 2017) p 641, 667.

²³ Instead of coming out as a per curium judgment, the TCC's interpretation is promulgated with the names added of all the justices who take part in the case concerned.

²⁴ See Katalin Kelemen, *Judicial Dissent in European Constitutional Courts: A Comparative and Legal Perspective* (Abingdon: Routledge, 2017) pp 39-45; cf Mitchel de S-O-L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004) pp 244-45.

²⁵ For the idea of a plurivocal style of judicial opinions, see Lasser (n 24 above), p 127.

²⁶ The provisions concerning the TCC in the 1997 constitutional amendment did not become operational until the end of the term of the Sixth Council of Grand Justices in 2003, who were appointed in 1994.

status of the TCC, we need to look beyond the Additional Articles and bring the entirety of the constitutional order into focus.

Before the Additional Articles were appended to the ROC Constitution in 1991, the supreme law governing the land of Taiwan was the ROC Constitution,²⁷ bolstered and partially suspended at once by a counterinsurgency emergency regime as provided for in the Temporary Provisions (1948-91).²⁸ As a response to the escalating civil war in China, the Temporary Provisions were first adopted in accordance with the amendment procedures of the ROC Constitution even before the inauguration of the first constitutional government on 20 May 1948.²⁹ The introduction of the parallel emergency regime by virtue of the adoption of the Temporary Provisions was a *de facto* constitutional coup and resulted in a ‘dual state’.³⁰ Notably, the provisions governing judicial review in the ROC Constitution were left unchanged with the introduction of the supposedly temporary emergency regime.³¹ Thus, the

²⁷ Japan ceded administration over Taiwan to Generalissimo CHIANG Kai-Shek, who acted on behalf of the Allied Powers, at the Second World War’s end and did not formally renounce its sovereignty over Taiwan in the San Francisco Peace Treaty of 1951. Chiang’s government and its successors have ruled Taiwan since 25 October 1945. The ROC Constitution, which was adopted by the Chinese Constituent National Assembly on 25 December 1946, applied to Taiwan on 25 December 1947 when it came into force.

²⁸ The full title is Temporary Provisions Effective during the Period of National Mobilization for Suppression of the Communist Rebellion. The Temporary Provisions were first passed by the National Assembly on 18 April 1948 followed by its promulgation on 10 May 1948 and repealed in 1991 when the first Additional Articles were enacted.

²⁹ Yeh (n 14 above), p 31. Although the ROC Constitution came into force effective on 25 December 1947, the Government established thereunder was not fully operational until, at earliest, after Chiang was sworn in as President on 20 May 1948. Chiang was elected President by the National Assembly on 19 April 1948 following the passage of the Temporary Provision on 18 April. See Secretariat of the National Assembly (國民大會秘書處) (ed), *Records of the First National Assembly, Vol One: The First Session* (第一屆國民大會實錄 (第一編)) (Taipei: Secretariat of the National Assembly, 1961) pp 217-76.

³⁰ The concept of dual state is attributed to Ernst Fraenkel, referring to the coexistence of “the prerogative state” and “the normative state” in Germany between 1933 and 1938 before Adolf Hitler took Nazi Germany into a radical stage. See Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford: Oxford University Press, 2017). The concept of dual state is revived to shed historical light on recent scholarship on “authoritarian legalism”. Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018) pp 245-52.

³¹ The original Temporary Provisions of 1948 stipulated that the National Assembly shall meet at an extraordinary session by 25 December 1950 to debate bills of constitutional amendment and decide whether to extend or repeal the Temporary Provisions if President had not yet declared the end of the Period of National Mobilization for Suppression of the Communist Rebellion. This seems to attach a sunset clause to the Temporary Provisions. Notably, with the National Assembly struggling to meet the quorum, the mandated extraordinary session was never convened, throwing the Temporary Provisions into a legal limbo following the elapse of the deadline of 25 December 1950. Secretariat of the National Assembly (國民大會秘書處) (ed), *Records of the First National Assembly, Vol Two: The Second Session* (第一屆國民大會實錄 (第二編))

ROC Constitution alone provided for the constitutional basis for the TCC before the Additional Articles were adopted to end the emergency regime in 1991.

The ROC Constitution was conspicuously parsimonious about judicial review. Apart from the provision for jurisdiction as noted in Section 1, it only provided that justices shall be appointed by President with the consent of the then provincial councils-elected Control Yuan for the task of constitutional interpretation and uniform interpretation, leaving, *inter alia*, the number and tenure of justices unaddressed.³² Rather, the membership of the TCC and the tenure of justices were provided for in an organic law governing the Judicial Yuan, the umbrella constitutional organ responsible for the overall judicial administration.³³ Inaugurated in 1948, the First Council of Grand Justices, the forebear of the TCC, was supposed to have 17 justices who served a renewable nine-year term according to the Organic Law of the Judicial Yuan of 1948 (hereinafter the 1948 Organic Law).³⁴ The terseness of the constitutional provisions of judicial review under the dual state system set the stage for the functioning of the TCC being heavily conditioned by political vicissitudes, despite its institutional continuity. In the following, we first examine the period when the TCC was a constitutional weakling (1948-87). Then we discuss the second phase of the TCC's long life, with a special focus on how the TCC gradually redeemed itself as an activist guardian of the constitutional order through an exercise of judicial bootstrapping at the height of Taiwan's transition to democracy.

(Taipei: Secretariat of the National Assembly, 1961) pp 2-13. When the rump National Assembly first convened in Taipei in 1954, it simply resolved that the Temporary Provisions continued to be effective until its repeal as it still fell short of the quorum required for the amendment of the Temporary Provisions. It is doubtful whether the National Assembly's resolution was a legal way around the procedural requirement for the extension of the Temporary Provisions. See *ibid.*, pp 199- 205. The ostensible sunset clause was eventually removed as part of the amendment of the Temporary Provision in the third normal session of the National Assembly in 1960.

³² The ROC Constitution Article 79.

³³ See note 3 above.

³⁴ The Organic Law was enacted in 1947 but did not come into force until 24 June 1948. Notably, it was unclear whether each justice would serve a separate full nine-year term under the 1948 Organic Law. This ambiguity was dispelled with the 1957 amendment stipulating that the justice who was appointed to fill a mid-term vacancy would serve until the end of the nine-year term of his predecessor. All editions of the Organic Law are retrievable at <http://jirs.judicial.gov.tw/FLAW/FLAWDAT01.asp?lsid=FL000086>. For details, see Section 2 (a).

(a) Phase I: Traumatic Birth and Institutional Survival, 1948-87

The inaugural cohort of justices took office on 26 July 1948³⁵ when the ROC Government of the Nationalist Party (also known as Kuomintang, KMT) was still seated in Nanjing, China. In its first official meeting on 15 September 1948, the TCC adopted ‘the Rules Governing the Council of Grand Justices (the 1948 Rules)’,³⁶ a byelaw that provided for the quorum, the voting rule, and other procedural rules governing constitutional and uniform interpretation until it was replaced by the Council of Grand Justice Act in 1958 (hereinafter the 1958 Act).³⁷ At that time, China was already engulfed in the intensifying armed conflicts between the Nationalists-led government troops and the Communist insurgent forces. Nevertheless, the TCC managed to issue its first two interpretations on 6 January 1949, 11 months before the ROC Government’s reassembly in Taiwan following the Nationalists’ defeat in the Chinese civil war. Noticeably, the TCC did not issue another interpretation until after over three years had passed.³⁸ The unusual hiatus provides a valuable window on the winding road the TCC has taken to the guardian of constitutional democracy that it is.

When the ROC Government was beginning to reconstitute itself in Taiwan in December 1949,³⁹ the TCC was nothing but a rump court, if you will, as only six legally appointed

³⁵ Landmark events in the TCC history are listed in its online chronicle, see <https://www.judicial.gov.tw/constitutionalcourt/p08.asp>. All the historical events discussed in the present article are based on the official TCC chronicle unless otherwise specified. The presidential proclamation for their appointment was dated 15 July 1948 according to the data on the ROC history collated by the governmental Academia Historica. See Item No 77, at <http://210.241.75.208/scripts/newsnote/tornado/searcher.exe?s=1&a=15&z=1&k=&m=0&Property=1;,&p=%A4%6A%AA%6B%A9%78&v=root&b=76>.

³⁶ See note 8 above.

³⁷ In the first place, the parental 1948 Organic Law of the Judicial Yuan was amended in 1957, *inter alia*, with the stipulation on the quorum and the voting rule in relation to the TCC exercise of the jurisdiction of constitutional interpretation in Article 6. The 1957 amendment prescribed the enactment of an implementing statute on the operation of the TCC. The implementing 1958 Act later replaced the 1948 Rules.

³⁸ Interpretation No 3 was promulgated on 21 May 1952.

³⁹ The ROC Government was officially relocated to Taiwan when the Executive Yuan, the executive arm of the government, held the first cabinet meeting in Taipei on 9 December 1949. The decision to relocate the ROC Government to Taipei was taken in the cabinet meeting of the Executive Yuan dated 7 December 1949, which took place in Chengdu. At that time, Acting President LI Tsung-Jen (李宗仁) had already flown from Hong Kong to the United State on the pretext of medical treatment on 5 December 1949. Chiang arrived in Taipei on 10 December 1949. See also Hsiao-Ting Lin, *Accidental State: Chiang Kai-shek, the United States and the*

justices in total eventually resumed office in Taipei. Given that the quorum for the TCC to meet legally was nine,⁴⁰ the TCC was effectively defunct. How could this happen? Let us rewind a bit back to mid-1948 when the TCC was still in the making. To begin with, the inaugural cohort of justices was 12, if not less, instead of 17 as stipulated in the 1948 Organic Law. Five of the Generalissimo-turned President CHIANG Kai-Shek's⁴¹ 17 nominees failed to obtain the consent of the Control Yuan, despite his Führer-like strongman status. Notably, only 9 of the 12 justice-elects later took part in the TCC's first two interpretations as not all of them actually took office,⁴² while one justice (CHANG Shih-I (張式彝)) died soon after taking office. In other words, the first two interpretations were rendered when the TCC barely met the quorum. From its very first exercise of power on, the TCC was struggling over the quorum question, portending the constitutional challenges awaiting the reconstituted ROC Government on Taiwan.⁴³

A seismic change took place in the political landscape shortly after the TCC promulgated its first two interpretations. On 21 January 1949, Chiang announced his “retirement” (引退) as a conciliatory gesture after the government troops suffered serial calamitous defeats at the hands of the Communist insurgent forces. As a result, the presidential baton formally passed to Chiang's deputy and political rival Vice President LI Tsung-Jen (李宗仁), although Chiang was determined to pull the strings behind the curtain in his capacity as the KMT president.⁴⁴ Soon after he was sworn in as acting President, Li moved to fill the eight vacancies of the TCC in March 1949. Yet, as with Chiang's inaugural confirmed nominees, not all of Li's accepted the appointment even if the Control Yuan gave

Making of Taiwan (Cambridge, MA: Harvard University Press, 2016) pp 119-21 (noting the convening of the the first cabinet meeting in Taipei on 12 December 1949).

⁴⁰ According to Article 12 of the 1948 Rules, all interpretations required at least the consent of a simple majority of the justices present with a quorum of half of all the seventeen justices. For a constitutional interpretation to be rendered, it requires at least a simple majority of all the seventeen justices to concur. A Chinese full-text version of the original 1948 Rules is available at https://www.judicial.gov.tw/constitutionalcourt/p07_2_one.asp?lawno=59&types=all.

⁴¹ When historical Chinese figures are mentioned for the first time in this article, we place their surnames before their given names in capitals.

⁴² Notwithstanding conflicting reports in literature, the online chronicle of the TCC notes that JIANG Yong (江庸) and CHI Zhaojun (郝朝俊) declined the appointment following the consent of the Control Yuan.

⁴³ See note 51 below.

⁴⁴ See Lin (n 39 above), pp 75, 100.

consent to all of his eight nominees.⁴⁵ Not much to anyone's surprise, the justices could not steer clear of the great ideological struggle between the Nationalists and the Communists, either. Instead of regrouping themselves under the banner of Free China formed on the island of Taiwan, most of the justices switched allegiance to the nascent People's Republic of China (PRC) and stayed in the Communist New China.⁴⁶ Only six out of the remaining 15 legally appointed justices of the First TCC eventually resumed office under the Nationalists-led ROC Government in Taipei during the tumultuous reconstitution period 1949-50,⁴⁷ falling far short of the quorum of nine.

To make the TCC quorate and function again, the reconstituted ROC Government, led by the restored Generalissimo Chiang, could just appoint more justices. Yet, to achieve that goal, a key question must be answered in the first place: Were the TCC seats left unoccupied by those who stayed in the New China 'legally vacant'? If not, the TCC still consisted of 15 justices during the reconstitution period and only two new justices could be added to the rump court comprised of the loyalists, still falling short of the quorum of nine.

Unable to answer the foregoing key question and busy with other constitutional urgencies,⁴⁸ Chiang did not fill the TCC vacancies until early 1952. Yet, the timing was not

⁴⁵ Both LI Haopei (李浩培) and MEI Ju-Ao (梅汝璈), who was a judge in the post-World War II International Military Tribunal for the Far East (also known as the Tokyo War Crimes Tribunal) between 1946-48, declined the appointment following the consent of the Control Yuan. For Mei's life and career, see Obituary, "Mei Ju-ao, 69, Is Dead; International-Law Expert," *New York Times*, 30 April 1973, p 34. Both stayed in China after the defeat of the Nationalist ROC Government in the Chinese civil war. Li later sat on the bench of the United Nations International Criminal Tribunal for the former Yugoslavia. A short (partial) biography of Li is available at <https://www.fichl.org/li-haopei-lecture-series/life-and-service-of-li-haopei/>.

⁴⁶ Chairman Mao Zedong proclaimed the establishment of the PRC in Beijing on 1 October 1949, while the Chinese civil war was heading towards its endgame. HSIA Chin (夏勤), one of Li's TCC appointees, took refuge and died in Hong Kong in 1950 instead of choosing sides between Beijing and Taipei. A biography of Hsia is available at <http://www.cnxia.org/news/?501.html>.

⁴⁷ Among the six "loyalists", HU Po-Yueh (胡伯岳), CHANG Yu-Hsun (張于濤), and LIN Bin (林彬) were appointed by Chiang in 1948, while YEH Tsai-Chun (葉在均), WEI Ta-Tung (魏大同), and SU Hsi-Hsun (蘇希洵) came out of Li's 1949 selection. It should be noted that it was unclear whether Justice Yeh actually resumed office as he died in Taiwan before long.

⁴⁸ "Who was the president?" was the foremost question in the wake of Chiang's resumption of presidency on 1 March 1950. It was unclear whether Chiang's "retirement" in early 1949 amounted to a formal resignation or a temporary discharge from duty. In his public statement on 21 January 1949, Chiang invoked the stipulation of Article 49 of the ROC Constitution that "[i]n case the President should be unable to attend to office due to any cause, the Vice President shall act for the President..." Yet, it is not without question whether the "cause" that

chosen without a reason. When Chiang eventually moved to fill the TCC vacancies, only Justice HU Po-Yueh (胡伯岳) and Justice SU Hsi-Hsun (蘇希洵) of the six loyalists remained in office in Taipei.⁴⁹ On the other hand, two of the nine justices who did not join the loyalist cohort in Taipei had already died by the end of 1951.⁵⁰ Moreover, there had been two vacancies resulting from Li's unaccepted job offers. As noted above, two of Li's eight nominees confirmed by the Control Yuan did not take office. Taken together, there were eight unquestionable vacancies in total when Chiang made nomination in March 1952. As it turned out, the once unanswerable issue of how many of the 17 TCC seats were vacant when the ROC Government reassembled in Taiwan was virtually resolved by the intervention of acts of God. This sheds light on why Chiang mysteriously procrastinated about the defunct TCC until early 1952, even though the reconstituted Control Yuan in Taipei, which was indispensable to filling the TCC vacancies, had no trouble meeting the quorum.⁵¹

leads to a temporary discharge from the powers and duties of the presidency includes the president's personal calculation. In an attempt to dispel any legal uncertainties, Dr WANG Chung-Hui (王寵惠), the President of the Judicial Yuan, who was the ex officio nonvoting Chairperson of the Council of Grand Justice and a former judge of the Permanent Court of International Justice, joined forces with Justice LIN Bin, one of the loyalists, on the next day. In this extrajudicial "advisory opinion", they stated that Chiang's self-declared resumption of office was justified in that Li was constitutionally relieved of his duty as acting President once the cause of Chiang's temporary discharge from duty disappeared at Chiang's whim. A news headline of Wang and Lin's statement is available in the Academia Historica data on the ROC history. See Item No 83, at <http://210.241.75.208/scripts/newsnote/tornado/searcher.exe?s=1&a=15&z=1&k=&m=0&Property=1;,&p=%A4%6A%AA%6B%A9%78&v=root&b=76>.

⁴⁹ LIN Bin (林彬) resigned from the TCC and took the office of Minister of Judicial Administration on 16 March 1950 according to the Academia Historica data on the ROC history. See Item No 4, at <http://210.241.75.208/scripts/newsnote/tornado/searcher.exe?p=%AAL%B11&property=1%3B%2C&h=0&l=0&a=15&f=0&z=1&t=0&v=root>. The Academia Historica data on the ROC history also shows that CHANG Yu-Hsun (張于濤), YEH Tsai-Chun (葉在均), and WEI Ta-Tung (魏大同) died between December 1949 and March 1952. See Item Nos 84 and 85, at <http://210.241.75.208/scripts/newsnote/tornado/searcher.exe?s=1&a=15&z=1&k=&m=0&Property=1;,&p=%A4%6A%AA%6B%A9%78&v=root&b=76>.

⁵⁰ In addition to the death of HSIA Chin (夏勤) in 1950 as noted above, LI Po-Shen (李伯申) (also known as 李肇甫 (LI Chao-Fu)), one of the inaugural justices appointed by Chiang in 1948, died in China in 1951. For Li's biography, see Du Xinxin (杜欣欣), "My Grandpa LI Chao-Fu" (祖父李肇甫), Chinese Digest (华夏文摘), No 1071, 6 October 2011, available at <http://hx.cnd.org/2011/10/06/%E3%80%90%E5%8D%8E%E5%A4%8F%E6%96%87%E6%91%98%E3%80%91%E6%9D%9C%E6%AC%A3%E6%AC%A3%EF%BC%9A%E7%A5%96%E7%88%B6%E6%9D%8E%E8%82%87%E7%94%AB/>.

⁵¹ The opposite is the National Assembly. As the National Assembly functioned as the electoral college of presidential elections and any constitutional amendment required its approval, the question of the quorum of the National Assembly posed an existential challenge to the ROC Government on Taiwan in its early days. See

Chiang nominated seven, instead of eight, justices just to enable the TCC to meet the quorum of nine so that it could function again. Following the consent of the Control Yuan on 18 March 1952, the seven new justices joined the two loyalist holdovers on 1 April. At this point, the TCC appeared to be a completely reconstituted court with only one justice (Justice HU Po-Yueh (胡伯岳)) having taken part in the first two interpretations rendered in 1949 when it was seated in Nanjing. Notably, with the attendance of the nine justices present in Taiwan in its first official meeting on 14 April,⁵² the TCC amended the 1948 Rules when it barely met the quorum. As a result of the amendment, the rendering of any interpretation required the consent of at least a simple majority of all the Justices present in the seat of the ROC Government, while to be quorate, the Council of Grand Justices must be attended by at least two-thirds of all the justices present in the seat of the ROC Government.⁵³ In this way, the reconstituted TCC substantially reduced the risk of failing the quorum in the future without being entangled in the question of whether those justices who were based outside Taiwan were still valid office holders. Formal legality and institutional continuity were thus preserved.

Under Taiwan's decades-long martial-law rule (1948-87), the role of the resurrected TCC was substantially limited, to say the least. The TCC early case law was mostly concerned with the run-of-the-mill issues about conflicting legal interpretations between government departments or ordinary courts.⁵⁴ With respect to constitutional interpretation during that period, the TCC was anything but an activist constitutional player. To be more

Secretariat of the National Assembly (n 31 above), pp 199-200; Secretariat of the National Assembly (國民大會秘書處) (ed), *Records of the First National Assembly, Volume Three: The Third Session* (第一屆國民大會實錄(第三編)) (Taipei: Secretariat of the National Assembly, 1961) pp 1-6. The National Assembly was not rid of the haunting quorum question until the rendering of Interpretation No 85 of 1960. We shall further discuss Interpretation No 85 later.

⁵² According to the Academia Historical data on the ROC history, the decision to amend was taken in a pre-meeting on 5 April, see Item Nos 89 and 90 at <http://210.241.75.208/scripts/newsnote/tornado/searcher.exe?s=1&a=15&z=1&k=&m=0&Property=1;,&p=%A4%6A%AA%6B%A9%78&v=root&b=76>.

⁵³ Article 12 of the 1948 Rules as amended in 1952. A Chinese full-text version of the 1948 Rules as amended in 1952 is available at https://www.judicial.gov.tw/constitutionalcourt/p07_2_one.asp?lawno=60&types=all.

⁵⁴ These interpretations concerned uniform interpretations such as Interpretation No 12 of 1952 and Interpretation No 98 of 1962, to name just two.

precise, the TCC was more of a convenient problem solver for the political branch when the latter sought constitutional cover for its practical needs than an independent guardian of the constitutional order. Interpretation No 3, the first interpretation that the TCC rendered in Taiwan after it came to life again, was an early example. Soon after the reconstituted TCC was set in motion in April 1952, it returned the favour by granting the Control Yuan the right to introduce legislative bills before the Legislative Yuan in Interpretation No 3 on 21 May. Interpretation No 3 was just the beginning of the TCC's long dark age under the KMT-dominated party-state regime.

Among the politically convenient interpretations rendered by the TCC before it emerged as the guardian of constitutional democracy was the infamous Interpretation No 31 of 1954. To maintain the façade constitutional legitimacy of the ROC Government, institutional continuity was key to the Nationalist fight against Communist China.⁵⁵ The question of institutional continuity first surfaced in late 1950. As the three-year term of the First Legislative Yuan was about to end in May 1951, the issue of institutional continuity came to a head while the prospect for holding parliamentary elections before the expiration of the legislative term was bleak. The crisis was pushed back with the First Legislative Yuan acting on a request from the Executive Yuan, resolving that the Legislators elected in January 1948 would continue to hold parliamentary seats after the expiration of the three-year term for one year.⁵⁶ This constitutionally controversial resolution was further followed by another two similar resolutions, enabling the same Legislators to serve well beyond their three-year term into 1954.⁵⁷ Yet, as the third one-year extension was approaching its end again and the six-year term of the First Control Yuan was also drawing to a close in early 1954, a final solution to the mandate question must be found. To no one's surprise, the solution came from the TCC this time. The Executive Yuan referred the mandate question to the TCC on 21

⁵⁵ See Jiunn-rong Yeh, "The Cult of *Fatung*: Representational Manipulation and Reconstruction in Taiwan" in Graham Hassall and Cheryl Saunders (eds), *The People's Representatives: Electoral Systems in the Asia-Pacific Region* (Sydney: Allen & Unwin, 1997) p 23.

⁵⁶ This was noted in the Executive Yuan's referral document that resulted in Interpretation No 31. See Appendix to Interpretation No 31 (in Chinese), https://www.judicial.gov.tw/constitutionalcourt/P03_01_detail.asp?expno=31&showtype=%AC%DB%C3%F6%AA%FE%A5%F3.

⁵⁷ *Ibid.*

January 1954 and it took the TCC about a week to render the consequential Interpretation No 31.⁵⁸ The TCC thereby improvised a seemingly constitutional solution to a looming legitimacy crisis by effectively extending the terms of the First Control Yuan and the already self-prolonged First Legislative Yuan indefinitely.⁵⁹

Although the rump National Assembly was ostensibly saved from the constitutional crisis posed by the mandate question,⁶⁰ it had been struggling to meet the quorum as only around 1,000 out of 3,045 delegates to the National Assembly were able to convene in Taipei after December 1949.⁶¹ With successive legal manoeuvres,⁶² the National Assembly only barely met the quorum to convene its second normal session in February 1954 where Chiang was re-elected. Yet, the quorum problem did not go away. With the passage of time, a constitutional showdown became unavoidable: the constitutional question of the presidential term limits, which came to a head at the end of Chiang's second six-year term on 20 May 1960, must be tackled head-on and it could only be resolved through constitutional amendment.

Again the TCC came to rescue with Interpretation No 85. The TCC thereby conveniently reinterpreted the whole membership of the National Assembly as including only the members who were still able to convene in Taipei. At the stroke of a pen, the whole

⁵⁸ Interpretation No 31 was promulgated on 29 January 1954 but it is not clear when the Executive Yuan referred the issue to the TCC following its decision of 21 January 1954. See *ibid.*

⁵⁹ In contrast to the constitutional provisions of President, the Legislative Yuan, and the Control Yuan, the ROC Constitution only prescribes that the National Assembly be elected every six years while the term of the National Assembly end at the convocation of a new National Assembly. See The ROC Constitution Articles 28 (term of the National Assembly), 47 (term of President), 65 (term of the Legislative Yuan), and 93 (term of the Control Yuan). The prescription of the ROC Constitution Article 28 was interpreted as providing the constitutional basis for the First National Assembly, which was elected in November 1947, to carry on should the general election not be held by the next normal session scheduled for February 1954. See Secretary of the National Assembly (n 31 above), pp 1-2.

⁶⁰ See note 59 above.

⁶¹ See Secretary of the National Assembly (n 31 above), p 9.

⁶² The Legislative Yuan amended the statutory provisions regarding the filling of vacant seats with listed replacements to expedite the seat-filling process in September 1953. Furthermore, the Legislative Yuan amended the Organic Law of the National Assembly of 1948 in December 1953, lowering the quorum from half to one third of the whole membership where the National Assembly was convened to debate and decide issues other than bills of constitutional amendment. See *ibid.*, pp 2-3, 9-10. As far as bills of constitutional amendment were concerned, the quorum was two-thirds of the whole membership of the National Assembly and stipulated in the ROC Constitution Article 174, which was replaced by Additional Article 12.

membership of the National Assembly was magically reduced from 3,045 to around 1,000. The haunting quorum problem was thus settled once and for all thanks to the TCC's judicial aid. When Interpretation No 85 was rendered on 12 February 1960, the Deputies of the National Assembly had already begun to register for its third normal session where the presidential term limits were to be lifted through the amendment of the Temporary Provisions.⁶³ Last but not least, the unanswered legal uncertainties surrounding the ostensible sunset clause of the 1948 Temporary Provisions⁶⁴ were finally dispelled in the same amendment. The emergency regime was no longer time-bound. Both Chiang's life tenure as President and the solidification of the ROC constitutional order as a dual state were indebted to Interpretation No 85 indeed.

In sum, thanks to the TCC's problem-solving interpretations, institutional continuity was saved from a civil war, a great ideological struggle, and even acts of God. The TCC in this phase provided the martial law-underpinned ROC Government with a façade of constitutional legitimacy, resulting in a very long 'Parliament'⁶⁵ with Interpretation No 31. Yet, it is also the TCC that brought this long Parliament to a close. How the TCC emptied parliamentary seats is a story for the next phase.

(b) Phase II: Bootstrapping, Judicial Activism, and New Birth, 1987—

The first forty years (1948-87) of the TCC's history as discussed above shows that the TCC's reconstitution following its relocation to Taipei was part of the ROC Government's endeavours to claim constitutional legitimacy through institutional continuity. Before the lifting of martial law on 15 July 1987, the TCC's role was limited while its interpretations had wide implications. For issues concerning separation of powers and the functioning of

⁶³ The registration began on 10 February while the third normal session opened on 20 February. See Secretary of the National Assembly (n 51 above), pp 2-8.

⁶⁴ See note 31 above.

⁶⁵ According to the controversial Interpretation No 76 of 1957, the extraconstitutional term "Parliament" was recognised and interpreted as comprising the (now-abolished) National Assembly, the then provincial councils-elected Control Yuan, and the Legislative Yuan. Elections for the First National Assembly and the First Control Yuan were held in December 1947, while the election for the First Legislative Yuan took place in January 1948.

constitutional organs, the TCC's role was limited to providing constitutional cover for political decisions.⁶⁶ Nevertheless, the TCC was indispensable to the claims of constitutional legitimacy. Moreover, because of its limited but indispensable role in the ROC Constitution's post-1949 life, it gave itself the key to opening up constitutional gridlocks, although it could not use the key without permission before the dawning of democratisation. On the other hand, the compliant TCC quietly stepped into the territory of constitutional review by setting aside a few judicial precedents vis-à-vis administrative orders and statutes⁶⁷ on grounds of constitutional rights when Taiwan was still under the martial-law rule. These two contrasting sides of the TCC in a dual state system converged when the constitutional legitimacy of the ROC Government on Taiwan could not rely only on the façade of institutional continuity anymore. Seizing the moment, the TCC redeemed itself as the guardian of the constitutional order by helping open up constitutional gridlocks at the critical juncture of Taiwan's transition to democracy.

The façade of constitutional legitimacy built on institutional continuity could not withstand acts of God for long. As Taipei was confronted with fundamental challenges to its legitimacy claim after losing its seat in the United Nations to Beijing in 1971, fundamental political reform became unavoidable.⁶⁸ Despite the addition of elected Taiwanese representatives to the ageing and shrinking First Parliament by regular elections as a result of the amendment of the Temporary Provisions in 1972,⁶⁹ the continuing operation of the 1948 Parliament no longer embodied institutional continuity. The very long 1948 Parliament became the source of embarrassment instead of the symbol of constitutional legitimacy.

⁶⁶ Interpretation Nos 3, 31, and 76 as discussed above are examples.

⁶⁷ Eg Interpretation No 177 (1982); Interpretation No 185 (1984). See also Ginsburg (n 4 above), pp 136-37. Interpretation Nos 86 and 166 were the outliers of the TCC cases law in this period. Interpretation No 86 of 1966 intimated judicial admonition about the existing control of the Executive Yuan over the judicial administration of all the courts of last resort. Judicial administration of the highest courts concerned was not reorganised as under the Judicial Yuan until the amendment of organic laws concerned in 1980. See Wen-Chen Chang et al, *Constitutionalism in Asia: Cases and Materials* (Oxford: Hart Publishing, 2014), pp 456-57. Interpretation No 166 of 1980 indirectly condemned the Police Punishment Act (違警罰法), which authorised the police to detain persons on misdemeanor offences without trial for a week or so among other things, on grounds of judicial due process. The problem was not rectified until after the promulgation of the sequel Interpretation No 251 of 1991, which ordered the Punishment Act to lapse after 1 July 1991 unless amended.

⁶⁸ Yun-han Chu and Jih-wen Lin, "Political Development in 20th-Century Taiwan: State-Building, Regime Transformation and the Construction of National Identity" (2001) No 165 *China Quarterly* 102, 118-20.

⁶⁹ See also Yeh (n 14 above), pp 39-40.

When the ROC Government was forced into gradual political reforms, the reactionary First Parliament, which had received constitutional endorsement from the TCC, became the thorniest issue. Even with the lifting of martial law on 15 July 1987 under the continuing pressure from the opposition forces and the United States, there seemed to be no immediate solution to the defiant very long First Parliament.⁷⁰

On the other hand, paralleling the gradual political reform, the TCC was beginning to flex its muscle, albeit in a gentle way. Freed from the straightjacket of the martial law, the TCC declared a few administrative regulations and statutes invalid while granting the political branch varying grace periods to remedy constitutional wrongs.⁷¹ Against this backdrop emerged the TCC as the constitutional player to whom reform-minded politicians turned in the face of the seemingly intractable constitutional crisis, the very long First Parliament. On 21 June 1990, the TCC eventually issued the landmark Interpretation No 261. By Interpretation No 261, the TCC ordered that all the sitting parliamentarians who had effectively served indefinite terms⁷² leave office by the end of 1991 and general elections for the Second Parliament be held in late 1992. It was no secret that the TCC delivered Interpretation No 261 under the auspices of the political leadership.⁷³ Yet, Taiwan's transition to democracy would have been headed in a much less peaceful direction without the constitutional cover offered by the TCC.⁷⁴ Interpretation No 261 and the TCC were integral to the success story of Taiwan's quiet revolution. By overturning Interpretation No 31, the TCC not only resolved the simmering constitutional crisis and paved the way for a series of constitutional amendment.⁷⁵ Moreover, with Interpretation No 261, the TCC

⁷⁰ Ginsburg (n 4 above), p 145.

⁷¹ Eg Interpretation No 218 (1987); Interpretation No 224 (1988); Interpretation No 251 (1990).

⁷² Apart from the members elected in 1947 and 1948, the First Parliament was added with two distinct small cohorts of members elected in Taiwan (as well as other territories controlled by the ROC Government). The first cohort comprised the members chosen in a one-off supplemental election in 1955 and served an indefinite term together with their fellow members elected in China. The second were those who had been regularly (re)elected since 1969 under the Temporary Provisions. Their terms were limited, corresponding to those stipulated in the ROC Constitution.

⁷³ See Ginsburg (n 4 above), pp 147-48.

⁷⁴ *Ibid.*, pp 146-47.

⁷⁵ The Additional Articles replaced the notorious Temporary Provisions when they were promulgated on 1 May 1991 following their adoption by the winding-down First National Assembly according to the amendment procedure of the ROC Constitution. See also Yeh (n 14 above), pp 38-39.

redeemed itself by making its own institutional continuity an asset, turning itself into a benign force for constitutional democracy. Seen in this light, Interpretation No 261 is a textbook case of judicial bootstrapping.⁷⁶

Following its transformation from a subdued constitutional player under the KMT-dominated authoritarian regime into the institutional facilitator of Taiwan's democratic transition, the TCC emerged as an activist court in both the separation of powers and rights issues. Through its interpretations over separation of powers, for example, the TCC has enhanced the function of the Legislative Yuan with the conferral of parliamentary investigative power,⁷⁷ prohibited the holding of the offices of Vice-President and Premier (of the Executive Yuan) by one person,⁷⁸ and sanctioned the constitutional requirement that Premier was responsible to the Legislative Yuan, not President, even if the latter was elected by popular votes, before the amendment of the Additional Articles in 1997.⁷⁹ Moreover, the TCC struck down a constitutional amendment supported by both the ruling KMT and the main opposition party. In Interpretation No 499 of 2000, which is suggestive of the 'basic structure doctrine',⁸⁰ the TCC declared the constitutional amendment of 1999 null and void, leading further to the comprehensive revamp of the amendment procedure.⁸¹ Taken together, the TCC's intervention in the area of separation of powers not only helped open up constitutional gridlocks but also contributed to the stability of constitutional democracy by rebalancing the powers among constitutional players.

Apart from separation of powers, the TCC also played an activist role in the matters relating to human rights. With the TCC's intervention, the received "special power relations" (*besondere Gewalthältnisse*) was gradually dismantled with the extension of judicial remedy

⁷⁶ See Kuo (n 4 above), p 604. For the discussion of the concept of bootstrapping, see Stuart Minor Benjamin, "Bootstrapping," (2012) 75 *Law and Contemporary Problems* 115, 116-17; cf Jon Elster, "Constitutional Bootstrapping in Philadelphia and Paris" in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham, NC: Duke University Press, 1994) p 57.

⁷⁷ Interpretation No 325 (1993).

⁷⁸ Interpretation No 419 (1996).

⁷⁹ Interpretation No 387 (1995); Interpretation 419 (1996).

⁸⁰ See Yaniv Rozani, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017) pp 42-47, 53-54.

⁸¹ Yeh (n 14 above), pp 46-48.

to the internal administration of the civil service, the military, the school, and even the prison.⁸² Thanks to the TCC's activist interpretations, the prosecution of the criminal libel is substantially limited with the defence of 'actual malice' adopted;⁸³ privacy is recognised as one of the unenumerated constitutional rights;⁸⁴ women are no longer subordinates to their spouse but equal partners in the marriage;⁸⁵ freedom of speech and assembly become the defining characteristic of democratic Taiwan.⁸⁶ As a result, the offence of criminal libel applies only to those with "actual malice;"⁸⁷ the statutory requirement that the cardholder submit her fingerprints in the renewal of her national ID card is no longer in place;⁸⁸ a married woman now has the right to acquire a separate domicile from her husband;⁸⁹ speeches in support of communism or secessionism are given the same protection as advocacy for democracy.⁹⁰

The changing and activist role of the TCC is not only manifested in the issues it has addressed but also indicated in the number of the interpretations it has rendered. Until the 10 October 2018, the TCC rendered 768 interpretations in total. Of the 768 interpretations, 216 were promulgated during the 1949-87 period.⁹¹ In other words, the TCC issued less than six interpretations each year under the martial law. Apart from the inauspicious political climate as discussed above, the super majority required of constitutional interpretation further precluded the TCC from constitutional politics. In an angry response to Interpretation No 76 of 1957, which put the Control Yuan and the National Assembly on a par with the

⁸² See Chien-Chih Lin, "The Judicialization of Politics in Taiwan," (2016) 3 *Asian Journal of Law and Society* 299, 306. Recently, judicial remedy has extended further to the administration of the prisons in Interpretation Nos 755 and 756. Both interpretations were promulgated on 1 December 2017.

⁸³ Interpretation No 509 (2000). See also Chang et al (n 67 above), p 705.

⁸⁴ Eg Interpretation No 509; Interpretation No 535 (2001); Interpretation No 585 (2004); Interpretation No 603 (2005), Interpretation No 631 (2007), and Interpretation No 756 (2017).

⁸⁵ Eg, Interpretation No 365 (1994); Interpretation No 410 (1996); Interpretation No 452 (1998).

⁸⁶ Chris Horton and Austin Ramzy, "Asia's Bastion of Free Speech? Move Aside, Hong Kong, It's Taiwan Now," *New York Times*, 15 April 2018, A14.

⁸⁷ Interpretation No 509 (2000).

⁸⁸ Interpretation No 603 (2005).

⁸⁹ Interpretation No 452 (1998). Notably, Interpretation No 452 extends the freedom of domicile to the male spouse in an uxorilocality. Also, with a 2010 amendment in the Civil Code, children's family name now must be based on their parents' mutual agreement or decided by lot if there is no mutual agreement instead of assuming the father's surname by default.

⁹⁰ Interpretation No 445 (1998); Interpretation No 644 (2008).

⁹¹ Uniform interpretations are included.

Legislative Yuan as the constituent chambers of a tri-cameral Parliament,⁹² the Legislative Yuan eventually enacted the Council of Grand Justices Act in 1958 in the place of the 1948 Rules.⁹³ The 1958 legislation not only raised the quorum of the TCC to three quarters of all Justices but also changed the threshold for rendering constitutional interpretations from a simple majority of the attending Justices to a three-quarter supermajority. Although the Constitutional Interpretation Procedure Act of 1993 (1993 Act), which is a wholesale revision of the 1958 Act, has lowered the majority threshold, it remains a challenge for the justices to manage a two-third majority as far as constitution review of statutes and other constitutional interpretations are concerned.⁹⁴ Even so, in contrast to its low productivity under the martial law, the TCC has issued 552 interpretations in the post-martial law era with the annual average of the interpretations rendered spiking to around 18, three times more than the 1948-87 period.

In sum, with the judicial bootstrapping in the period of transition, Interpretation No 261 in particular, the TCC has transformed itself from a convenient problem solver for the political branch of the KMT-dominated party-state into a reliable ally of progressive reformers. Judicial activism is not inimical to constitutional democracy in Taiwan. Instead, the new birth of judicial review and constitutional freedom is a result of the TCC's activist intervention in Taiwan's transition to democracy.

3. After Democratisation: The TCC at a Crossroads Again

The institutional continuity of the TCC with its evolving role in the changing constitutional landscape indicates that judicial review can help channel the forces of political reform and nurture nascent democratic institutions. The TCC experience also suggests that the effectiveness of judicial review and its constitutional role are conditioned by the broader constitutional context. When judicial review moves in tandem with democratic forces, they are mutually strengthened, contributing to the consolidation of constitutional democracy.

⁹² See note 65 above.

⁹³ See note 12 above.

⁹⁴ The constitutional review of administrative rules requires a simple majority. The 1993 Act Article 14.

When democracy arrives, however, voices silenced in the past now are eager to be heard in the liberated society. With the constructed or imposed consensus giving way to disagreement, reasonable or not,⁹⁵ how judicial review positions itself towards a diverse and sometimes divided society brings the old tension between constitutionalism and democracy to the fore.⁹⁶ To explore how the TCC copes with challenges in the post-democratisation era, we reflect on the TCC's role as the defender of constitutional principles in the face of social dissensus, followed by snippets of the recent proposed statutory reform of the TCC.

(a) Whither the TCC? Populist Messenger or Principle Defender

As noted above, the TCC was praised for its position in both separation of powers and fundamental rights when Taiwan was transitioning from political authoritarianism to constitutional democracy. In this section, we first discuss the TCC's role in a post-consensus society and then shift focus of attention to whether it has successfully stood up to popular feelings to uphold constitutional principles, with a special focus on the Same-Sex Marriage Case.

(i) Struggling in the absence of minimal consensus

The forgoing sketch suggests that judicial activism has been the characteristic feature of the TCC since its transformation into the guardian of the constitutional order. Nevertheless, judicial activism falls short of giving the whole picture of the TCC's role in Taiwan's path towards constitutional democracy. Rather, the TCC has been more of a willing follower of the democratic zeitgeist than a trailblazer in the changing political landscape.⁹⁷ All the progressive and democracy-reinforcing interpretations as noted above were effectively

⁹⁵ Compare Cass R Sunstein, *Legal Reasoning and Political Conflict* (New York, NY: Oxford University Press, 1996), pp 3-12, 58-59, with Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), pp 149-54, 157-80.

⁹⁶ Mark Tushnet, "The Judiciary and Institutions of Judicial Review" (1993) 8 *American University International Law Review* 501, 504-05. For Taiwan as a divided society, see John Fuh-sheng Hsieh, "Ethnicity, National Identity, and Domestic Politics in Taiwan" (2005) 40 *Journal of Asian and African Studies* 13. Some commentary on the TCC seems to elide from divided society to divided government. Compare Yeh (n 14 above), pp 189-91, with Yeh and Chang (n 10 above).

⁹⁷ Ginsburg (n 4 above), p 154.

answering the calls for political reform and in correspondence with the public's pursuit of liberty and equality. Even the bootstrapping Interpretation No 261 was no exception.

It comes as no surprise that the TCC's willingness to follow the zeitgeist has also led to regrettable results. One example is the TCC's reaffirmation of the constitutionality of the death penalty on the basis of the principle of proportionality in Interpretation No 476 of 1999.⁹⁸ Another example is Interpretation No 656 of 2009. Invoking the principle of proportionality again, the TCC endorsed the court-ordered public apology as remedy in the civil torts of defamation.⁹⁹ Given the strong support for the death penalty and the popular feelings for remedial public apology, it is unlikely that the TCC will revisit its case law anytime soon, not to mention change its position on such sensitive issues.

That said, the TCC upheld principles of civil rights and liberties in some contentious cases. For example, braving the possibility of angry public reaction, Interpretation No 392 of 1995 terminated the public prosecutor's unilateral power over pre-trial detention on grounds of due process. In contrast to the 'masseur' cases of the Constitutional Court of Korea that have recognised the visually impaired people's limited monopoly,¹⁰⁰ the TCC invalidated the statutory provision for restricting the awarding of massage licences to the visually impaired to uphold the principles of equal protection, proportionality, and freedom of occupation in Interpretation No 649 of 2008. Furthermore, Interpretation No 666 of 2009 paved the way for limited legalisation of prostitution by condemning the discriminatory infliction of administrative penalties on prostitutes without punishing the clients.¹⁰¹ Taken

⁹⁸ At the early stage of political reform, the TCC had upheld the statutory imposition of mandatory death penalty on the offense of kidnapping for ransom in a special criminal law in Interpretation No 263 of 1990.

⁹⁹ Compare Jiunn-rong Yeh, "Court-Ordered Apology: The Function of Courts in the Construction of Society, Culture and the Law" in Jiunn-rong Yeh (ed), *The Functional Transformation of Courts: Taiwan and Korea in Comparison* (Taipei: National Taiwan University Press, 2015) pp 21, 32-33, with Ming-Sung Kuo and Hui-Wen Chen, "Killing in Your Name: Pathology of Judicial Paternalism and the Mutation of the 'Most Serious Crimes' Requirement in Taiwan" in Jerome A Cohen, William P Alford, and Chang-Fa Lo (eds), *Taiwan and International Human Rights: A Story of Transformation* (Singapore: Springer, 2018) pp 331, 343-44.

¹⁰⁰ See Park June Hee, Choi Jung Yoon, and Park Dami, *Thirty Years of the Constitutional Court of Korea* (Seoul: Constitutional Court of Korea, 2018) pp 506-09.

¹⁰¹ In response to the dictum to the effect that the implications of prostitution to public health and conventional morality could be addressed through regulatory measures other than a blanket ban, the Legislative Yuan amended the statute concerned, providing for the designation of special districts of sex industry. Yet, no

together, the TCC seems to be partly the institutional messenger of popular feelings and partly the defender of constitutional principles in the post-martial law era.

The story we have told about the TCC so far is a success story of judicial review, regardless of whether the populist messenger or the principle defender better reflects the TCC's role in Taiwan's transition to a constitutional democracy. Importantly, the success of the TCC has pivoted on certain political preconditions. Only if politicians and the people taking different stances on constitutional issues are prepared to submit to the TCC's rulings could it be an effective guardian of constitutional democracy.¹⁰² Yet, the hyper-partisan rivalry after Taiwan's first party turnover in 2000 threw the effectiveness of the TCC into doubt indeed.¹⁰³ Although the TCC remained an activist court and continued to intervene in contentious separation of powers issues such as the administration's controversial unilateral decision to discontinue the construction of a nuclear power plant, its interpretations in this regard were not always fully complied with.¹⁰⁴ Interpretation No 627 of 2007 was a case in point. At its core was the then scandal-ridden President CHEN Shui-Bian's invocation of the state secrets privilege as to which the ROC Constitution and the Additional Articles are silent when he was implicated in the criminal investigation into his wife's alleged illicit conduct that had started in 2006. In Interpretation No 627, the TCC decreed that the High Court decide such claims through a special procedure before the Legislative Yuan could amend the Criminal Procedure Code accordingly, while affirming the provision for the state secrets privilege in the ROC Constitution. In a judicial ping-pong, however, the Supreme Court disregarded the TCC's prescription and enjoined the High Court to decide Chen's claim under a normal procedure in which no special arrangement was made for adjudicating on alleged state secrets. In the final analysis, Interpretation No 627 was rendered irrelevant as neither the Legislative Yuan nor the judiciary submitted to the TCC's ruling.¹⁰⁵

special district of sex industry has been demarcated.

¹⁰² See Ginsburg (n 4 above), p 147.

¹⁰³ See Kuo (n 4 above), pp 605-39.

¹⁰⁴ See *ibid.*, pp 605-25.

¹⁰⁵ Compare *ibid.*, pp 619-23, with Wen-Chen Chang, "Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences," (2010) 8 *International Journal Constitutional Law* 885, 900-06.

The question of the TCC's relevance became more evident when Taiwan saw its second party turnover in 2008. When the KMT retook the presidency and continued to control the Legislative Yuan, the TCC retreated from judicial activism. As a result, the TCC was sidelined in most of important constitutional issues such as the Economic Cooperation Framework Agreement (between China and Taiwan) and the change on the date of the 2012 presidential election. Worse, in the 2008-16 period, the TCC issued only about 12 interpretations each year, one third less than the average (18) in the post-martial law era.¹⁰⁶

To make sense of the TCC's ineffective judicial activism, we need to take a step back and take a closer look at the context in which the TCC found its new life. The TCC stands out from other institutions of judicial review in transition societies for its frequent interventions, albeit by invitation, to arbitrate on power struggles between constitutional organs.¹⁰⁷ With its arbitral role in such high politics, the TCC brought itself to public attention. More important, the TCC helped pave the way for peaceful transition by resolving constitutional conflicts time and again. In this way, the TCC established itself as the authoritative voice of constitutional principles, suggesting that the unelected TCC was no less legitimate than other constitutional organs in the transition period. Yet, it was more a reflection of the TCC's instrumental role in nurturing democracy than an indication of the real role of judicial review in a full-fledged democracy.

When democracy finally arrived with the president elected by popular votes, the unelected TCC appeared inferior to those constitutional players in terms of democratic legitimacy.¹⁰⁸ Resurging from the democratic baptism of election, these born again power holders became more vociferous with or without the TCC's authoritative voice of constitutional principles behind them. Thus, in the post-democratisation era, the TCC remains activist but has struggled to be effective when no common ground can be found

¹⁰⁶ Kuo (n 4 above), p 626.

¹⁰⁷ *Ibid.*, p 599. In Ran Hirschl's narrative on the emergence of juristocracy, judicial intervention in the name of fundamental rights occupies centre stage. See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2007).

¹⁰⁸ Cf Chien-Chih Lin, "Majoritarian Judicial Review: The Case of Taiwan" (2014) 9 (1) *National Taiwan University Law Review* 103 (discussing the correlation between the TCC case law and judicial legitimacy after democratisation).

among competing democratic forces.¹⁰⁹

It is true that based on the postwar German experience, constitutional patriotism has been advocated as a new civic consensus to bring the ‘post-traditional’ pluralist society together and the institution of judicial review is the linchpin of this project.¹¹⁰ As the TCC experience in the post-consensus era suggests, it is doubtful that judicial review alone is able to inculcate constitutional patriotism in a society where even a minimal consensus is hardly held.¹¹¹ On the opposite, when a hegemonic majority suddenly emerges from the competing political forces, the elected hegemony in the mantle of democracy wastes no time in claiming to speak in the name of the people, despite the continuing societal divide. The TCC’s dormancy period (2008-2016) shows that judicial review is marginalised, if not neutralised, as the enfeebled minority found no timely access to it, with a hegemonic force dominating the constitutional landscape.¹¹²

To be sure, this ostensible crisis also presents a window of opportunity for the TCC to extricate itself from high politics and reorient itself towards the defence of constitutional principles and fundamental rights.¹¹³ Whether such reorientation really realigns judicial review with citizens and thus lends a new lease of life to the TCC will become clear with our story unfolding.

(ii) Steering between popular feelings and constitutional principles

Beginning to rise in the 1980s, Taiwan’s process of democratisation is nearing completion.¹¹⁴ Yet, issues of democratic transition have not completely departed the

¹⁰⁹ See Kuo (n 4 above).

¹¹⁰ Jan-Werner Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press, 2007) pp 20-31; Justin Collings, *Democracy’s Guardians: A History of the German Federal Constitutional Court, 1951-2001* (Oxford: Oxford University Press, 2015) pp xli-xlii.

¹¹¹ See Margaret Canovan, “Patriotism is Not Enough” (2000) 30 *British Journal of Political Science* 413, 420-28. For an attempt to apply constitutional patriotism to Taiwan and other Asian countries, see Chang et al, (n 67 above), pp 86-87.

¹¹² See Kuo (n 4 above), pp 634-39.

¹¹³ Yeh and Chang (n 10, above), pp 112-13.

¹¹⁴ Ian McAllister, “Democratic Consolidation in Taiwan in Comparative Perspective” (2016) 1 *Asian Journal of Comparative Politics* 44, 56.

constitutional stage. After sitting on the back burner for years, they are now brought to the fore of the constitutional fray.¹¹⁵ Among the hotly debated issues of transitional justice is how to deal with the vast assets the KMT accumulated with its privileged status under the party-state regime. Soon after the third party turnover in 2016, a special law was passed to dispossess the KMT of its ‘ill-gotten assets’. Yet, the statutory provision for confiscation has raised the question of how to pursue transitional justice without compromising the constitutional protection of property and the equal treatment of political parties.¹¹⁶ The ongoing controversy over a recently passed pension reform statute is also a legacy of the party-state regime. Considered the KMT’s loyal forces under the party-state regime, retirees of the civil service, the military, and the teachers’ corps have received lavish pension subsidised by the government budget for decades at the cost of other social security expenditure and a high government debt.¹¹⁷ The statutory pension reform, which aims to achieve sustainable public finance with a reduced government burden, has been fiercely contested for allegedly renegeing on the principle of legitimate expectation.¹¹⁸ Together with the issue of the KMT’s ill-gotten assets, pension reform is working its way up to the TCC.¹¹⁹ The TCC does not seem to have much procedural wiggle room to extricate itself from the issues of transitional justice in the post-democratisation era.

Yet, on 5 October 2018, the TCC dismissed a referral from the Control Yuan concerning the constitutionality of the special law on the KMT’s assets.¹²⁰ Departing from

¹¹⁵ See Ernest Caldwell, “Transitional Justice Legislation in Taiwan before and during the Tsai Administration,” (2018) 27 *Washington International Law Journal* 449, 472-80.

¹¹⁶ Although the statutory text is neutral on its face, only the KMT falls within the scope of the legislation. See Jau-Yuan Hwang, Ming-Sung Kuo, and Hui-Wen Chen, “‘The Clouds Are Gathering’: Developments in Taiwanese Constitutional Law – The Year 2016 in Review” (2017) 15 *International Journal of Constitutional Law* 753, 757-58.

¹¹⁷ See “Taking on Taiwan’s Ruinous and Partisan Pension System”, *The Economist*, 18 May 2017, available at <https://www.economist.com/asia/2017/05/18/taking-on-taiwans-ruinous-and-partisan-pension-system>.

¹¹⁸ See also “Interview: Minister Lin Addresses Critiques of Pension Reform,” *Taipei Times*, 1 May 2017, p 3.

¹¹⁹ Ann Maxon, “Groups Ask for Reform Interpretation,” *Taipei Times*, 14 June 2018, p 3.

¹²⁰ A press release of the TCC’s dismissal resolution is available at <http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=373658&flag=1®i=1&key=&MuchInfo=&courtid=>. See also Wu Cheng-feng and Chung Li-hua, “Justices Dismiss Control Yuan Request,” *Taipei Times*, 8 October 2018, p 3.

its case law, the TCC resolved that the Control Yuan did not have standing to trigger the process of ‘abstract norm control (*abstrakte Normenkontrolle*)’ with respect to primary legislation.¹²¹ In this unprecedented ‘Resolution’, an ersatz interpretation in essence,¹²² the TCC decided not to decide on the grounds that legislation passed by the Legislative Yuan should not be easily plunged into constitutional uncertainty by the coordinate Control Yuan. Furthermore, the TCC noted that the petitioner behind the manufactured referral, namely the KMT, eventually would have its day before the court. There was no urgency for the TCC to get involved in the constitutional controversy of ill-gotten party assets at this point.¹²³ Along with its recent decisions,¹²⁴ the TCC’s dismissal of the Control Yuan’s referral seems to signal its continuing retreat from the front line of inter-departmental conflicts and other politically charged disputes, thereby lending tacit support to the popular calls for ending the legacy and injustice of the authoritarian past. Yet, whether the TCC’s recent deferral in deciding on constitutional principles concerning transitional justice will facilitate political dialogue or dampen the pursuit of truth and reconciliation remains to be seen. Again, the TCC is at a crossroads.

The Same-Sex Marriage Case, the epitome of the current TCC’s activism towards rights issues,¹²⁵ illustrates that the constitution guardian does not sail into a safe haven by turning away from issues of separation of powers. In Interpretation No 748 of 2017, the TCC issued a suspended remedial order along with a declaration of unconstitutionality as to the current statutory provisions governing the marriage institution in the Civil Code. Should the Legislative Yuan fail to legislate same-sex marriage during the two-year remedial grace period, the TCC further decreed that the current Civil Code would then be extended to

¹²¹ For the procedure of abstract norm control in German constitutional review, see Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 3rd edn, 2012) p 15. We shall come back to the TCC’s exercise of abstract norm control in Section 3 (b).

¹²² See note 5 above. This resolution is unprecedented in that the dismissal resolution was accompanied by two published separate opinions. The dissenting opinion of Justice Dennis Te-Chung TANG (湯德宗) was joined by four other justices. Files of both separate opinions (in Chinese) are retrievable at <http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=373649&flag=1®i=1&key=&MuchInfo=&courtid=>

¹²³ See sources cited in n 120 above.

¹²⁴ See Justice Tang’s Dissenting Opinion (n 122 above).

¹²⁵ See Kuo and Chen (n 6 above); Yeh and Chang (n 10), p 112.

same-sex couples who wish to enter into marriage.¹²⁶

Yet, even with the TCC's activist intervention, the way towards same-sex marriage is still a bumpy road. And, this speaks to the challenges facing the TCC after democratisation. As noted above, the Same-Sex Marriage Case is not the first TCC interpretation that invited criticism. Apart from the contentious separation of powers issues, the TCC has received disapproving public reaction in the interpretations concerning the cancellation of the blind masseur's monopoly status¹²⁷ or the invalidation of the compulsory collection of fingerprints tied to the renewal of national ID cards, to name just a pair.¹²⁸ Yet, the Same-Sex Marriage Case is the first case in the area of human rights that elicited strong doubts about the TCC's legitimate role in the balance of constitutional principles and traditional or religious values.¹²⁹

It is true that the TCC won praise for defending constitutional equality and civil rights. Nevertheless, instead of settling the debate over the legalisation of same-sex marriage, the Same-Sex Marriage Case provoked the conservative and religious pushbacks against not only the pursuit of same-sex marriage but also the fight against sexual orientation-based discrimination in the wake of its promulgation.¹³⁰ In light of the contrasting reactions to the Same-Sex Marriage Case, the government balked and the legislative process of extending legal marriage to same-sex couples stalled.

Both the public's fierce reaction and the political branch's lacklustre response to the Same-Sex Marriage Case are not so much an exception as the indication that the TCC is at a crossroads when authoritarianism and political violence are no longer the major concerns in Taiwan's pursuit of constitutional democracy. At the heights of democratic transition, how to get rid of the yoke of authoritarian rule was the common cause. The TCC's intervention was considered to be paving the way for political freedom. Thus, the TCC's condemnation of

¹²⁶ See Kuo and Chen (n 6 above).

¹²⁷ Interpretation No 649 (2008).

¹²⁸ Interpretation No 603 (2005).

¹²⁹ Kuo and Chen (n 6 above).

¹³⁰ *Ibid.*

rights-infringing legislation was not seen as interfering with democratic processes. Instead, its past rights-friendly interpretations were embraced by not only the political branch but also the people, giving the impetus to legal and political reform.¹³¹

In stark contrast, the halo formed around the TCC is dimmed with the Same-Sex Marriage Case receding into the background of the politics of antidiscrimination and same-sex marriage. Instead of implementing the Same-Sex Marriage Case in good faith, both the government and the legislature have turned to extrajudicial fora for guidance as to how to answer the question of same-sex marriage. After the Same-Sex Marriage Case, the debate about same-sex marriage has been thrown back into the streets.¹³² Furthermore, taking advantage of the citizen-friendly Referendum Act as amended in 2018, both supporters and opponents of same-sex marriage will have taken the battle from the streets to the polls. After months of grassroots mobilisation and street canvassing, three conflicting initiatives over same-sex marriage are bound to appear on the ballots in the local elections of November 2018.¹³³ Despite paving the way for the legalisation of same-sex marriage, the Same-Sex Marriage Case is eventually to be judged by the ballot. With the debate over same-sex marriage and gay rights carried over into the political arena following the judicial ruling, the TCC's grip on the living constitution is loosening.

It remains to be seen whether the people will curtail the Same-Sex Marriage Case or uphold the TCC. Nevertheless, it is already clear that in the post-democratisation, post-consensus era, the TCC can no longer rely on popular feelings in its guardianship of constitutional principles. Escaping into the field of fundamental rights is not an answer to the question of how to steer between popular feeling and constitutional principles. As the afterglow of the Same-Sex Marriage Case has paled in the shadow of galvanised homophobia and populist emotion, it is doubtful that the TCC facilitates democratic dialogue through its

¹³¹ Lin (n 108 above).

¹³² Catherine Lin, "Same-Sex Marriage Activists Face an Uphill Climb Ahead of Gay Rights Referendums," *Taipei Times*, 13 August 2018, p 8.

¹³³ Yen-Tu Su, "Taiwan Is Revolutionizing Democracy," *The World Post*, 5 October 2018, at https://www.washingtonpost.com/news/theworldpost/wp/2018/10/05/taiwan/?noredirect=on&utm_term=.4a170e904279.

landmark decision on human rights as some of its sympathetic readers have claimed.¹³⁴ Instead, with the constitutional principles espoused in the Same-Sex Marriage Case shaking under the threat of the ballot, the TCC's role as the constitution guardian is called into question. Mirroring the SCOTUS in the wake of *Brown v Board of Education*,¹³⁵ the TCC in Interpretation 748 opened the floodgate of impassioned political opinions and intensified the civic struggle over constitutional principles but without creating the jurisgenerative condition for political dialogue in constitutional democracy.¹³⁶

The TCC can be a dialogue facilitator beyond its role in the guardianship of the constitutional order. As the constitutional guardian, the TCC must defend constitutional principles and can be instrumental in the promotion of constitutional dialogue. Yet, it is not up to the TCC to choose between the principle defender and the dialogue facilitator, even the populist messenger. As the Same-Sex Marriage Case suggested, in the emerging new era of direct democracy,¹³⁷ the TCC has no alternative but to tread carefully in its capacity as the defender of constitutional principles; otherwise the institution of judicial review would be plunged into populist fire.

(b) Envisioning a New Court for the People: A Glimpse of the Proposed Reform of the TCC

At a crossroads, whither the TCC? We do not have the crystal ball for it. Even so, the proposed reform of the TCC reveals the direction the TCC will be heading. Following the conclusion of a national roundtable conference on comprehensive judicial reform in 2017, the Judicial Yuan has drafted and introduced the Bill of the Constitutional Litigation Act (Bill)¹³⁸ before the Legislative Yuan to replace the current Constitutional Interpretation

¹³⁴ Yeh and Chang (n10 above), pp 111-12, 137-40.

¹³⁵ 347 US 483 (1954).

¹³⁶ See Kuo and Chen (n 6 above). For the role of *Brown* in intensifying conflicts in the struggle for civil rights in the US, see Michael J Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2014) pp 290-442.

¹³⁷ Su (n 133 above).

¹³⁸ The following discussion on the reform of the TCC is based on the Bill of Constitutional Litigation Act adopted by the Judicial Yuan on 26 March 2018. The file of the bill is retrievable at <http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=323443>.

Procedure Act of 1993 (1993 Act).¹³⁹ As the title of the legislative bill indicates, the TCC, which will be adopted as the official title of the institution of judicial review and reorganised accordingly,¹⁴⁰ will be geared towards contentious proceedings in rendering constitutional interpretation. Among the miscellaneous procedural and institutional reforms, three features in the reform bill merit special mention.

The first feature of the proposed reform is to gear the TCC for the protection of individual rights through the judicialisation of constitutional interpretation proceedings. Under the 1993 Act, the TCC exercises jurisdiction over constitutional interpretation on receiving petitions from: (1) the central or local government agencies, (2) at least one-third of the Legislators (MPs), or (3) the people (individuals or corporate entities) in relation to the constitutionality of the applicable law at the end of judicial appeals for the vindication of their constitutional rights. The first two referral routes are similar to the ‘abstract norm control’ (*abstrakte Normenkontrolle*)’ proceedings in the German Federal Constitutional Court (GFCC) Act.¹⁴¹ Besides, inspired by the GFCC experience, the TCC has extended the statutory provision for ‘concrete norm control (*konkrete Normenkontrolle*)’,¹⁴² which was exclusive to the judges of the courts of last resort, to judges of all instances in Interpretation No 371 of 1995. Overall, the review exercised by the TCC is abstract in the sense that the object of judicial review is the statute or the administrative rule or other legal instruments of the same nature concerned or applicable to the judicial case, not their application.¹⁴³

Due to the focus on abstract review, the TCC does not have jurisdiction to adjudicate on the constitutionality of the rulings of the courts of last resort. As a result, the TCC has been

¹³⁹ The Bill of the Constitutional Litigation Act, which has ninety-five articles, is virtually a wholesale revision of the 1993 Act, which was the amendment of the 1958 Act and contains thirty-five articles.

¹⁴⁰ The Bill Article 1. Strictly speaking, under the proposed reform, “constitutional court (or tribunal)” does not designate the institutional body of judicial review comprised of justices. It refers only to the judicial set-up when justices exercise constitutionally prescribed jurisdictions. Thus, the “court rules” will be formally adopted by the Judicial Yuan, not the “constitutional court”, although the Judicial Yuan’s decision will be based on the resolution of all the justices. The Bill Article 4.

¹⁴¹ See Hwang, Kuo, and Chen (n 116 above), p 754. Notably, petitions from the central government agencies may also be rendered in ways evoking the institutional conflict proceedings (*Organstreitverfahren*) in Germany. For institutional conflict proceedings in Germany, see Kommers and Miller (n 121 above), pp 14-15.

¹⁴² For the procedures regarding concrete norm control in German constitutional review, see Kommers and Miller (n 121 above), p 13.

¹⁴³ See Hwang, Kuo, and Chen (n 116 above), p 756.

criticised for falling short in the protection of individual rights. Drawing on the GFCC experience, the proposed reform of the TCC will introduce the procedure of ‘constitutional complaints (*Verfassungsbeschwerde*)’ through which claimants will be able to have the rulings of the courts of last resort reviewed by the TCC on grounds of constitutional rights.¹⁴⁴ Notably, this new jurisdiction may well set the TCC and the several courts of last resort on collision course in the future.¹⁴⁵

Related to the shifting of focus to the protection of individual rights is the emphasis on transparent procedures, aimed at transforming the TCC from a privy council-like body into a full-fledged constitutional court. As envisioned in the proposed reform, public hearings will no longer be a ritualistic constitutional theatre, which only takes place in exceptional cases. Rather, public hearing will become more frequent with more procedural safeguards.¹⁴⁶ The TCC will be made more accessible to citizen participation through procedural reform, including the adoption of the *amicus curiae* briefs.¹⁴⁷

Second, the reformed TCC as envisioned in the legislative bill will be more efficient. Among the criticisms levelled at the TCC are the slow pacing of its decision-making and the obscurity of its rulings. They are interrelated. Under the 1993 Act, to render a general interpretation of constitutional principles or to decide the constitutionality of statutes requires a two-third majority of the attending justices with a quorum of two-thirds of the total membership.¹⁴⁸ As discussed above, the super majority requirement was first introduced in the 1958 Act by the Legislative Yuan to clip the wings of the TCC in retaliation against Interpretation No 76. The 1993 Act alleviated the three-quarter super majority requirement imposed by the 1958 Act indeed. It still falls short of improving the efficiency of the TCC for another reason.

¹⁴⁴ The Bill Articles 59-64.

¹⁴⁵ Cf Chien-Chih Lin and Ching-Fang Hsu, “An Inter-Court Struggle for Judicial Supremacy,” (2016) 11 *University of Pennsylvania Asian Law Review* 294, 300, 317, 326-31.

¹⁴⁶ The Bill Articles 25-29.

¹⁴⁷ The Bill Article 20.

¹⁴⁸ To strike down an administrative regulation or a municipal ordinance on constitutional grounds only takes a simple majority of those present with a quorum of two-thirds of the Justices. The 1993 Act Article 14.

As noted at the outset, the TCC's interpretation is rendered impersonal, representing the collective opinion. Specifically, each sentence, whether it is about wording or punctuation, in the holding and reasoning (*ratio decidendi*) of a constitutional interpretation requires the agreement of at least two-thirds of the attending justices. In other words, the current two-third super majority requirement not only governs the result of constitutional decisions but also applies to the construction of judicial opinions. To reach an agreement, the justices tend to choose general and abstract wording to accommodate differing individual opinions. As a result, the TCC moves in slow pace and speaks in an obscure voice.

To rectify the slow pacing and obscurity of the TCC, the proposed reform lowers the voting threshold for constitutional interpretation,¹⁴⁹ reverting to the original simple majority requirement as installed in the 1948 Rules.¹⁵⁰ With the removal of the super majority requirement, the slow-paced TCC will be able to shift gears, enhancing its productivity. Yet, to rid the TCC of obscurity requires more than the lowering of the threshold of decision-making. This brings up the reform of the style of judicial opinions, the third feature of the proposed reform.

Departing from the current continental style of impersonal judicial opinions as described above, the legislative bill introduces the Anglo-American practice: judicial opinions are authored by individual judges, while the single authored-opinion that is joined by most judges becomes the opinion of the court.¹⁵¹ Once this new judicial style is adopted, the interpretation of the TCC will no longer be rendered impersonal. Instead, the collective voice will be replaced by majority opinions. From the signatures attached to the opinion of the court, observers of the TCC will be able to tell who pens the interpretation and who the majority are. In this way, the TCC can become even more transparent to the public.

At first glance, the proposed “personalisation” of the TCC interpretation appears revolutionary. Yet, a second look reveals otherwise. As it stands, the TCC has diverged from

¹⁴⁹ For the trial of the impeachment of president or vice president and the dissolution of anti-constitutional parties, the threshold is two thirds of all the sitting judges. See The Bill Articles 75 and 80, respectively.

¹⁵⁰ Notably, the quorum varies among different procedures. The Bill Articles 30-32.

¹⁵¹ The Bill Article 33 para 2.

the continental model in judicial style. Since the new TCC Justices appointed for staggered eight-year terms issued their first Interpretation in October 2003, the TCC has issued 202 Interpretations (Nos 567-768),¹⁵² 169 of which have come with at least one separate (concurring or dissenting) opinion. With 881 separate opinions in total issued, the average number of separate opinions in each interpretation soared to 4.36. More important, since 9 April 2010 when Interpretation No 675 was promulgated, the TCC has never issued a unanimous decision. In this post-unanimity era, 668 separate opinions have been issued in 94 Interpretations, pushing the average number of separate opinions in each interpretation up to 7.11. Seen in this light, the TCC seems to have already departed from its continental pedigree of speaking with a collective voice for a plurivocal court.¹⁵³ Thus, the proposed “personalisation” continues rather than breaks with the existing practice, moving the TCC further in the plurivocal direction. As the TCC’s existing plurivocal character has been received approvingly for its representation of diverse opinions in society,¹⁵⁴ doing away with its impersonal voice will not only enhance efficiency but also bring judicial review closer to the people.

Taken together, the proposed reform envisions the TCC as the people’s court in the future. Through the introduction of constitutional complaints, the judicialisation of the TCC proceedings, the widening of citizen participation, the removal of the super majority requirement, and the personalisation of judicial opinions, among other procedural reforms, the TCC is expected to be aligned with the people. As envisioned in the reform proposal, the way out of the challenges facing the TCC as discussed in Section 3 (a) lies in (re)discovering the legitimacy of judicial review in its work for the people in the post-democratisation era.

4. Conclusion

Students of comparative constitutional law and judicial review have produced a corpus of literature on the TCC and its changing role throughout Taiwan’s meandering constitutional

¹⁵² The statistics of Interpretations in relation to separate opinions includes uniform interpretations.

¹⁵³ For a comparison of the univocal and the plurivocal judicial style, see Lasser (n 24 above), pp 244-45.

¹⁵⁴ Yeh (n 14 above), p 190.

course. Democratisation and judicial activism are the repeated theme in the praises sung to Taiwan's constitution guardian.¹⁵⁵ In this article, we read the theme of judicial activism and democratisation in a new light. Situated in the institutional continuity of the seventy-year-old TCC, the story about the TCC's journey to becoming an activist court turns out to be one of judicial bootstrapping. The case of the TCC suggests that even a semblance of judicial review under a nominal constitution can be an asset to the political process of democratisation in a transition society. To tell the story of how the once-docile Council of Grand Justices that midwifed constitutional dictatorship turned into the TCC as the activist constitution guardian and the ally of democratic forces, we began with the chimerical character of the TCC: an old court (TCC) in a new democracy (Taiwan) straightjacketed by a defunct sovereign title (ROC). We revealed the accidental rebirth of the TCC in Taiwan, which lent timely constitutional cover to the fledgling ROC Government on Taiwan in the 1950s. By virtue of judicial bootstrapping without disrupting institutional continuity amidst democratisation in the mid-1980s, the TCC redeemed itself in the new identity of the guardian of the constitutional order.

The story about the TCC's journey to becoming an activist court is one of judicial bootstrapping indeed. Without the TCC's bootstrapping exercise, the old council that the TCC was would have been made defunct together with the ROC old regime. Yet, bootstrapping is no guarantee of success. As has been told, the record of the 2008-16 period shows that with the political condition turning hostile, judicial activism does not necessarily indicate an effective court. Although the post-2016 TCC has quickly reassumed its mantle of judicial activism, the TCC is situated in a new constitutional landscape. With minimal political consensus coming apart, it seems that the TCC has tried to reorient itself towards human rights.¹⁵⁶

Yet, as we have indicated, steering clear of high politics involving competing constitutional powers does not guarantee judicial review success. The Taiwanese Same-Sex Marriage Case is a case in point. The TCC's well-crafted judicial message does not steer

¹⁵⁵ See sources cited in n 4 above.

¹⁵⁶ Yeh and Chang (n 110 above), pp 113, 140.

constitutional debate towards democratic dialogue over human rights. Rather, the TCC finds its own voice drowned out in the post-consensus vitriol. With the post-judgment politics of same-sex marriage legislation to be fought out in the ballot box, the TCC is facing new challenges; only this time, it is from its past allies: divergent forces rallied under the banner of (direct) democracy.

In light of the new constitutional landscape, the TCC is expected to realign itself with the people through institutional and procedural reforms as envisioned in the recent legislative bill.¹⁵⁷ This should be welcomed as the way forward for the TCC in a post-democratisation, post-consensus society. How effective the prospective reform will redefine the TCC as the people's court remains to be seen. As the Taiwanese Same-Sex Marriage Case and its post-judgment politics suggest, the TCC needs to tread carefully in its capacity as the defender of constitutional principles when its decision does not always speak to popular feelings in the new era. These are not just tales about the TCC but also lessons for all the constitution guardians the world over.

¹⁵⁷ Justice Jau-Yuan Hwang, "Introduction," in *Leading Cases of the Taiwan Constitutional Court: Vol One* (Taipei: The Judicial Yuan, 2018), p 1, 7.