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## The Clouds Are Gathering: Developments in Taiwanese Constitutional Law — The Year 2016 in Review\*

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### [Abstract]

In this essay, we provide an overview of constitutional law and politics resulting from the historical elections in January 2016 in the light of Taiwanese political and constitutional development. We take account of the new constitutional landscape opened by the January elections, the constitutional politics of judicial appointment, the constitutional controversies surrounding transitional justice and same-sex marriage, and the case law of the Taiwan Constitutional Court (TCC). Taken together, we observe that constitutional law and politics in 2016 develops as if it is a multi-act constitutional play culminating in the drive towards the legalization of same-sex marriage, with President, Legislators, judicial nominees, and activists playing the leading roles in the unfolding drama. Though the TCC appears to be the bland deuteragonist in the 2016 constitutional play, we suggest that as the issues surrounding various reforms are being translated into constitutional questions, the TCC may well take center stage in the next play. With the upcoming judicial fights in sight, the play of constitutional development in 2016 is best entitled “The Clouds Are Gathering.”

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## I. Introduction

Democratic election is both the fruit of and the moving force for Taiwan's changing constitutional landscape. It has been so since Taiwan set out on the metamorphosis from the fossilized Republic of China (ROC) regime to the present vibrant democracy in 1980s. While the first presidential election by popular votes in 1996 sowed the seeds of the transformational constitutional revision in 1997, both the presidential elections in 2000 and 2008 resulted in "party turnover," setting off stormy constitutional politics. Engaging in constitutional politics, reluctantly or not, the Taiwan Constitutional Court (TCC) has played a crucial role in the development of constitutional law in Taiwan.<sup>1</sup>

2016 is no exception. The election of the first female President, Tsai Ing-wen of the Democratic Progressive Party (DPP) on January 16, 2016, brings about Taiwan's third party turnover. And, the DPP controls the Legislative Yuan (Legislature) for the first time in history. With the tectonic change in the political landscape, presidential transition, transitional justice, same-sex marriage, and pension reform, to name just two pairs, are all on the reform agenda and may well impact constitutional development. Moreover, the coincidence of President Tsai's taking office and the vacancy of seven justices of the TCC in 2016 will not only change the TCC's composition but also bring it from its ten-year-long dormancy back to the center of the new constitutional dynamics set off by the 2016 elections and the forthcoming reforms.<sup>2</sup>

This paper suggests that the issues arising from the new constitutional landscape opened by the January elections remain unsettled, paving the way for the TCC's intervention in

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<sup>1</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003) 106-57.

<sup>2</sup> 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 *Wash Int'l LJ* 597, 625-34, 640-41.

the future. Apart from the introduction to the constitution and the TCC, Section II notes the constitutional politics of judicial appointment in 2016; Section III discusses the constitutional controversies surrounding transitional justice and same-sex marriage, especially the interrelationship between the politics of judicial appointment and same-sex marriage; Section IV summarizes the TCC case law of 2016.

## **II. The Constitution and the Court: Past and Present**

Mirroring its convoluted modern history, Taiwan has been governed by an ROC Constitution since 1947 soon after it was placed under the China-led belligerent occupation following Japan's unconditional surrender to the Allied Forces at the end of World War II in 1945. The ROC Constitution was passed by a Constituent National Assembly (including a small delegation from Taiwan) on December 25, 1946 in China and came into effect a year later. At that time, China was already engulfed in a civil war between the Communists and the Nationalists (also known as Kuomintang (KMT)). To fight against the mounting Communist insurgency, the ruling KMT pushed through the "Temporary Provisions" according to the provision for constitutional amendment in May 1948 while the first constitutional government was still taking shape. Thus, the nascent ROC Constitution was essentially suspended with its add-on counter-insurgency Temporary Provisions further expanded. In the meantime, a decree of regional martial-law rule was declared for Taiwan in May 1949 when the defeated KMT forces fled to Taiwan. Despite the continuing wartime status, Taiwan was placed under a four-decade-long quasi-military dictatorship by the ROC Government afterwards.<sup>3</sup>

Following the escalating democratic demonstrations and the parallel political reforms,

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<sup>3</sup> Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* 28-36 (Hart 2016).

including the lifting of martial law in 1987, the dictatorial Temporary Provisions were eventually repealed in 1991. A series of constitutional amendments have since been enacted in seven rounds of constitutional revision.<sup>4</sup> The Constitution was last amended in 2005. Appended to by “Additional Articles,” the original Constitution of 1947 has been substantially rewritten to fit with the democratic island-nation of Taiwan, only to leave the designation ROC unchanged.

The TCC — initially called the Council of Grand Justices — was inaugurated in 1948 when the ROC Government was seated in Nanjing, China. Under the KMT-dominated party-state regime, the role of the TCC was substantially limited. Yet, since the lifting of martial law on July 15, 1987, the TCC has transformed itself into the guardian of the constitutional order.<sup>5</sup> Until the end of 2016, the TCC rendered 743 Interpretations in total: 216 Interpretations (including Interpretation Nos. 1 and 2 dated January 6, 1949 when it was still seated in Nanjing) were promulgated during the 1949-87 martial-law rule, whereas 527 Interpretations were issued afterwards. Despite the recent decline in productivity over the past decade,<sup>6</sup> the TCC has continued to play an important role in constitutional politics.

According to Articles 78 and 79 of the Constitution, the TCC has two primary functions: to interpret the Constitution and to unify the interpretations of statutes and ordinances. As its full designation connotes, the TCC gains its recent public recognition mainly through its jurisdiction over constitutional interpretation. The Constitutional Interpretation Procedure Act of 1993 (CIPA) provides that 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; or (3) the people

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<sup>4</sup> *ibid* 36-48.

<sup>5</sup> Ginsburg (n 1).

<sup>6</sup> Kuo (n 2) 626.

(individuals or corporate entities) in relation to constitutional rights. The first two referral routes are similar to the “abstract norm control” procedure in the German Federal Constitutional Court Act. Besides, the TCC recognizes the German-styled “concrete norm control” procedure in Interpretation No. 371 (1995): any judge sitting in all instances may suspend the proceedings before her and refer the constitutionality of the statute applicable to the pending case to the TCC provided that she ascertains that the statute is unconstitutional.

The CIPA requires a two-thirds majority of the attending justices with a quorum of two-thirds of the total membership to decide the constitutionality of statutes. In contrast, a simple majority of those present with a quorum of two-thirds of the justices is required to declare an administrative regulation or a municipal ordinance unconstitutional. As regards the TCC’s jurisdiction over the unification of the interpretations of statute and ordinances (uniform interpretations), the CIPA provides that both the government (central and local) and the people have standing. Uniform interpretations can be rendered by a simple majority of the justices present with a reduced quorum of half of all the justices. Apart from constitutional and uniform interpretations, the Additional Articles of the Constitution (AAC) further invests the TCC with jurisdiction over the dissolution of anti-constitutional political parties and the trial of the impeachment of the President and the Vice President. The TCC has never been requested to adjudicate an impeachment case or to dissolve a political party to date.

Since its early days, the operation of the TCC has been modeled on the continental style of judicial review. Despite the distinct referral procedures, the TCC renders interpretations as advisory opinions on constitutional principles or rulings on the question of constitutionality as well as uniform interpretations with general effect in the style of

“abstract review.” The TCC traditionally conducted its business in the ambience of a privy council without the procedural characteristics of judicial proceedings. Although the TCC has been granted the discretion to hold public oral hearings since 1993, only nine out of 743 interpretations were rendered following oral hearings as of 2016.

The TCC currently comprises fifteen justices, two of whom also serve as the President and the Vice President of the Judicial Yuan, the administrative body of the whole judiciary, respectively. The power to nominate justices is vested in the President and appointments are made with the consent of the Legislature. Each justice is appointed for a staggered term of eight years and prohibited from serving consecutive terms (AAC, Article 5, Section 2).

After President Tsai Ing-wen took office on May 20, 2016, there has been a substantial change in the membership of the TCC. Five justices were scheduled to leave office on the completion of their eight-year term at the end of October. In the meantime, the President and the Vice President of the Judicial Yuan decided to step down considering increased calls for their early resignation. Thus, President Tsai nominated seven justices to fill the vacated seats left by former KMT President Ying-Jeou Ma’s appointees. During the confirmation hearings, the nominees were pressed by the Legislators to answer the highly controversial issues concerning the sovereignty of Taiwan and its relations with China in the future. More important, a wide range of current constitutional issues also came to the fore in the legislative vetting. Among them are the contentious issues about same-sex marriage and transitional justice. All of the nominees were confirmed by the DDP-controlled Legislature despite the KMT caucus’ attempted obstruction.

Notably, President Tsai nominated a former justice Professor Hsu Tzong-li, who sat on

the TCC bench from 2003 to 2011, to be the President of the Judicial Yuan and the chief justice. From the abovementioned constitutional ban on justices serving consecutive terms, some commentators inferred that this nomination was unconstitutional. However, doubt about the constitutionality of Hsu's nomination was eventually deflected given that Hsu's two appointments were not consecutive. President Hsu and the other six justices took office on November 1 following the legislative consent on October 25.

### **III. Justice and Rights: Political Constitutionalism in Action**

As noted in Introduction, the results of the elections in January 2016 create tectonic changes in Taiwanese political landscape, giving rise to further constitutional controversies. Two subjects stand out from the post-election constitutional controversies: transitional justice and the legalization of same-sex marriage (LSSM).

Echoing the experience of those countries undergoing democratic transition, transitional justice has been one of the central themes of democratic movement in Taiwan.<sup>7</sup> Among the numerous issues surrounding transitional justice is the question of the so-called “ill-gotten party assets,” which is inseparable from the KMT's privileged status under the party-state regime. As the longtime ruling party in a virtually one-party state,<sup>8</sup> the KMT has built a business empire comprising a vast real estate, companies, investments, and other assets since its taking control of Taiwan in 1945. Extensive investigations have established that the KMT accumulated its fortunes either through favorable policies under the cover of law or simply by other illicit means at the expense of the State, especially during its uninterrupted rule from 1945 to 2000 in Taiwan. There have been continuous

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<sup>7</sup> Jau-Yuan Hwang, ‘Transitional Justice in Postwar Taiwan’ in Gunter Schubert (ed), *Routledge Handbook of Contemporary Taiwan* (Routledge 2016).

<sup>8</sup> New parties were banned until 1987. Before the official ban was lifted, there were only two token lawful political parties apart from the hegemonic KMT.

public calls for the restitution of those KMT-owned “ill-gotten” assets to the State coffers by special legislation as part of transitional justice. As the KMT continued to control the parliament after it lost the presidential election in 2000, the DPP-led legislative effort to divest the KMT of its illicit assets was defeated time and again. Moreover, as the KMT was perceived as continuing to finance its political activities with party assets, the issue of ill-gotten party assets became the rallying call for the rival DPP in electoral campaigns, including the lead-up to the 2016 elections.

With its historical electoral victories in January 2016, the majority DPP soon in February introduced the legislative bill of “The Settlement of the Ill-Gotten Assets of Political Parties and Their Affiliates Act” (Ill-Gotten Assets Act) as part of its grand legislative agenda on transitional justice when the KMT still held the executive power. Despite the KMT’s fierce parliamentary obstruction and street demonstrations, the bill was pushed through in July and came into force in August following the presidential promulgation.

The issue of ill-gotten party assets was hardly resolved with the passage of legislation. As the KMT is the intended target despite the facially neutral provisions, the Ill-Gotten Assets Act raises complex constitutional issues surrounding transitional justice. Before the “Ill-Gotten Party Assets Settlement Committee” (Settlement Committee) was inaugurated, the KMT caucus had made a referral to the TCC in regard to the constitutionality of the Ill-Gotten Assets Act even if it fell short of the CIPA-required procedural threshold of one-third of Legislators.<sup>9</sup> Notably, in its referral, the KMT not only challenged the Ill-Gotten Assets Act but also questioned the constitutionality of the foregoing threshold on the grounds of its undue limitation on minority parties. The TCC dismissed the referral on the procedural ground. Nevertheless, with the Settlement

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<sup>9</sup> A request for a constitutional interpretation needs the support of at least 38 of the Legislature’s 113 members. The KMT caucus has only 35 seats.

Committee expanding investigation and the KMT continuing to resist by legal and political means, the issue of ill-gotten party assets is likely to work its way up the process of appeal, instigating the TCC to tackle the constitutional issues surrounding transitional justice before long.

LSSM is the second front of constitutional politics opened by the 2016 elections. Antidiscrimination has long been on the agenda of the civil rights movement and the petition for the LSSM can be traced back to the mid-1980s when democratization was just setting out. Yet, the same-sex marriage question did not move up the civil rights agenda until 2000s when several private member bills were introduced for its legalization in the Legislature. Besides, individual gay couples continually filed legal challenges on the definition of marriage in the Civil Code in the hope that same-sex marriage would be legalized through statutory or constitutional interpretation, but to no avail. In the meantime, social movement for antidiscrimination and gay rights continued to gain momentum, while concerns about the impact of same-sex marriage on family values also began to surface, calling for the provision for partnership instead of marriage for gay couples. Afterwards the progress towards the LSSM seemed to be plateaued as the legislative effort was stalled in 2014.

Thanks to the unrelenting effort of activists, the DPP presidential candidate Tsai Ing-wen pledged to support “marriage equality” preceding the 2016 elections. In contrast to divesting the KMT of its ill-gotten party assets, however, the non-partisan LSSM issue was not high on Tsai Administration’s agenda in terms of the lack of consensus both within and without her party. Even so, more Legislators were vociferous about the cause of same-sex marriage in the new Legislature than its predecessor. Against this backdrop President’s TCC nomination in October presented itself as the unexpected catalyst for

breaking the stalemate on the LSSM.

It was no surprise that Legislators would expect the judicial nominees to not only answer legal questions but also address policy issues such as the LSSM. Yet, most of the seven nominees lent their support for LLSM expressly in the confirmation hearings without dodging it. This was regarded as strong endorsement, breathing new life into the legislative drive for the LSSM. In the meantime, the annual LGBT Pride Parade scheduled for October, 2016 was expected to become a popular demonstration for the LSSM. In light of the shift in public opinion, new private member bills were introduced in the parliament. Suddenly the same-sex marriage question topped the political agenda.

On the other hand, this also brought about angry homophobic reactions. A series of counter-demonstrations were held while rival social forces were mobilized to stem the tide of same-sex marriage movement. As the private member bills were under scrutiny in early November, public hearings turned into violent brawls in the Legislature. With public support for same-sex marriage continuing to grow, however, the focus was shifting from the question of legalization to how it could fit into the current legal system: Would special legislation governing same-sex marriage vis-à-vis the revision of the marriage provision in the Civil Code be another form of statutory discrimination?

Leaving this issue unsettled, all the private member bills cleared the committee stage on December 26 and were referred to all party caucuses for a one-month-long compulsory reconciliation before it proceeds to the next stage. Clearing the committee stage does not suggest that the LSSM bills will muster the support of the majority of Legislators. It is in the stage of second reading at the plenary session that all important legislative issues are resolved. Notably, in the meantime, two of the petitions challenging the constitutionality of the provisions that imply the preclusion of same-sex marriage in the Civil Code have

been admitted by the TCC in 2016 pending its decision. It remains to be watched whether Taiwan will join the countries that recognize same-sex marriage by legislation or those where the judiciary has taken the lead invalidating the statutory preclusion of same-sex marriage.<sup>10</sup>

#### **IV. Remedy and Land: Two Themes of the TCC Case Law**

Over the past decade, the TCC usually received around 450-600 new petitions annually. More than 90% of the petitions came from the people. In 2016, the TCC handed out nine Interpretations and dismissed a total of 429 petitions. Although the dismissed cases are generally done within one year of their submission, it would take the TCC three years or longer to reach decisions on the merits of those admitted cases. As of the end of 2016, there were 375 leftover petitions pending the TCC's decisions.<sup>11</sup>

Among the nine Interpretations rendered in 2016, two of them are on non-constitutional, legal issues. The other seven concern two main constitutional issues: judicial remedy (or due process of law) and land rights. Interpretation Nos. 736, 737, 741, and 742 all involve judicial remedy, while Nos. 739 and 742 are on land rights. The only exception to the above two categories is No. 738, which is on occupational and business freedom. One of the two non-constitutional/ uniform Interpretations, No. 743, also concerns the land rights issue, which will also be commented below.

Judicial remedy, in light of due process of law, has been one of the TCC's favorite issues over years. Even under the authoritarian era lasting until the late 1980s, the TCC had

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<sup>10</sup> The TCC announced that a public hearing would be held for the two admitted pending petitions on March 24, 2017. According to the CIPA and the TCC's procedural rules on public hearing, the TCC must make its ruling within sixty days after hearing oral arguments.

<sup>11</sup> Statistics of the new and decided cases before the TCC in 2016 (in Mandarin) <[www.judicial.gov.tw/constitutionalcourt/P05.asp](http://www.judicial.gov.tw/constitutionalcourt/P05.asp)> accessed January 31, 2017.

made several early successful strikes by mandating judicial remedies for civil servants, students, and taxpayers, among others. By holding on to the procedural due process of law, the TCC has carefully and skillfully constructed a judicial forum to entertain the idea of the rule of law, at least in its formalistic sense, which the yet-to-be-tamed State would find it difficult to oppose overtly.

Interpretation No. 737 was petitioned by a criminal defense lawyer and his client on their access to the evidence and relevant documents presented by public prosecutors to the court for the writ of pre-trial detention. The petitioners attacked the constitutionality of Article 33, paragraph 1 of Criminal Procedural Act, which provides for the right of such access for defense attorneys during the trial stage only. Thus, both suspects and their defense attorneys are excluded from such access during the pre-trial stage. During the pre-trial court procedures for the writ of detention, both suspects and their defense attorneys are notified of the mere “facts” alleged to support the specific grounds of detention.

In Interpretation No. 737, the TCC finds unconstitutional the said and other related provisions of Criminal Procedural Act, but still valid for up to one year or until being amended by the Legislature, whichever comes first. In its reasoning, the TCC first emphasizes the importance of physical integrity and the right to judicial remedy as guaranteed by Articles 8 and 16 of the Constitution. Considering the severity of the harm on the suspects inflicted by the pre-trial detention, the TCC stipulates that the principle of due process of law be strictly followed in the detention process. Provision of the mere facts related to detention’s ground, in the opinion of the TCC, is not enough for the proper exercise of suspects and their attorneys’ rights to effective criminal defense. Even the principle of non-publicity concerning criminal investigation procedures and the

prevention of the possible dangers of destroying or forging evidence and the risks of conspiring with co-offenders or witness could only justify the partial limitation of, but not the complete ban on, suspects and their attorneys' access rights to evidence.

Interpretation No. 737 is a decision trying to correct a long-disputed legislative defect of Taiwan's criminal procedures. It does strengthen the rights of criminal defendants and their right to counsel. In the similar spirit of judicial remedy, Interpretation No. 741 aims to fix a procedural loophole arguably left by the TCC's previous decisions.

Interpretation No. 741 originated from several petitioners, whose motions for retrial were denied by the Supreme Administrative Court (SAC) on the ground that they were not the petitioners of Interpretation No. 725 and therefore could not be its beneficiaries. In Interpretation No. 725, the TCC rules unconstitutional a court precedent of the SAC, which denied the motions for retrial for those cases whose applicable laws were declared "unconstitutional but valid for a certain period of time" until being amend by the Legislature. Interpretation No. 725 overrules the said SAC precedent and demands post-final judicial remedies (including retrial and/or extraordinary appeal) be granted to the petitioners. However, Interpretation No. 725 does not expressly grant such post-final remedies to the petitioners of other Interpretations which also find applicable laws in dispute "unconstitutional but valid for a certain period of time." The SAC thus read Interpretation No. 725 in its most restrictive sense and allowed motions for retrial to the named petitioners of Interpretation No. 725 only. In Interpretation No. 741, the TCC reiterates the intention of Interpretation No. 725 is to grant such post-final remedies to the petitioners of all such Interpretations which find relevant applicable laws "unconstitutional but valid for a certain period of time."

No. 741 clarifies a long-disputed issue in Taiwan: should the courts continue to apply the laws found “unconstitutional but valid for a certain period of time” before their amendment by the Legislature? The answer is clearly NO, after Interpretation Nos. 725 and 741. On the other hand, Interpretation No. 741 also illustrates the continuing tension between the TCC and the ordinary courts of final instance (including the SAC and the Supreme Court). Since the 1980s, the final courts have been reluctant and even resistant to allow the post-final judicial remedies for those winning petitioners of the TCC Interpretations. Over years, the TCC has taken pains to force the final courts to grant such extraordinary remedies, while limiting such remedies available to those winning petitioners only. Other losing parties, if not filing their own petitions, of the same or similar cases ruled under the same applicable laws will not be granted the benefit of such extraordinary remedies. In this sense, favorable decisions of the TCC will only produce limited retroactive effect on those parties who did actually fight their cases all the way to the TCC. Such limited effect remains true even after Interpretation Nos. 725 and No. 741.

On the part of the land rights cases, Interpretation No. 743 stands out and deserves comments, too. Despite being a non-constitutional decision, this Interpretation concerns a highly controversial legal issue: could a private property originally taken by the government for public use (e.g., the construction of the subway system) be transferred to another private individual or entity in the name of public interest (e.g., economic development)?

Like many other countries, Taiwan governments, central and local, have been increasingly resorting to a variety of public-private joint ventures, such as BOT, BT and PPP, for the construction of public transportation and other infrastructure. Not

surprisingly, the traditional requirement of taking for public use has been relaxed to permit taking for public interest, which is often mixed with economic development and private interests.

Article 7 of Taiwan's Mass Rapid Transit Act permits the competent authorities to take (expropriate) private lands adjacent to the mass rapid transit system for joint-venture development, and then transfer such lands to private developers. In a station project near Taipei City, the local government first expropriated a large scale of adjacent lands from private citizens in the name of building a subway station.<sup>12</sup> Although the government did make public its intended goal of joint-venture development in the future, the plan and details of such development were not specified and disclosed at all. Without such information, those affected land owners were unable to determine whether to participate in the then mysterious development plan or accept the compensation for the taking of their lands. This development plan then grew into a monster project disproportionately larger and profitable than it first appeared. Those land owners, feeling fooled, sued for the revocation of the taking and the damages, among others. As more details surfaced, this project turned out to be a messy political scandal.

In Interpretation No. 743, the TCC rules in favor of those land owners, holding that the lands taken for public use may not be transferred to the third party (developers) for business purposes, unless expressly authorized by statutes and giving the affected land owners a prior and specific public notice of such development purpose. As the taking of the lands in dispute occurred more than two decades ago, the revocation of the taking seems infeasible now, considering the complexity of current land ownership. It remains

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<sup>12</sup> In Interpretation No. 732, the TCC holds the extent of taking private lands under the Mass Rapid Transit Act must be confined to "what is necessary" for the specific purpose of the taking in dispute, and the permission of taking whatever lands considered "adjacent" is deemed excessive and unconstitutional. Both Interpretation Nos. 732 and 743 originated from the same development project in dispute.

to be watched how this case will be settled in the long run among the local government, the developer, and those original land owners.

## **V. Conclusion**

The development of constitutional law in 2016 is like a multi-act constitutional play culminating in the LSSM drive. Democratic election, judicial appointment, and extrajudicial politics set the stage for this constitutional play while President, Legislators, judicial nominees, and activists play the leading roles in the unfolding drama. In this light, the TCC appears to be the bland deuteragonist, playing the institutional supporting role. Yet, as suggested above, with the issues surrounding various reforms translated into constitutional questions, the TCC may well take center stage in the next play. With the upcoming judicial fights in sight, the play of constitutional development in 2016 is best entitled “The Clouds Are Gathering.” To be continued...