

# How does the Judicial Activism of Taiwan’s Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan\*

Hsu Tzong-li

## Outline

I. Introduction .....	2
A. The Description of Terms .....	2
B. Taiwan’s Constitutional Court before and after the abolishment of martial law .....	3
II. The Contribution for Political Liberalization and Democratization .....	3
A. Complete Re-election of the National Legislatures: J.Y. Interpretation No. 261 .....	3
B. The Freedom of Assembly and Parade: J.Y. Interpretation No. 445 .....	4
C. The Freedom of Association: J.Y. Interpretation No. 479 and No. 644 .....	5
D. The Boundaries of Constitutional Amendment- J.Y. Interpretation No. 499 and No. 721 .....	7
III. Resolving Controversies Across Political Branches .....	9
A. The Case of statutory budget of the 4th nuclear power plant : J.Y. Interpretation No. 520 .....	9
B. The Case Involving the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting: J.Y. Interpretation No. 585 .....	10
C. Organic Act of the National Communications Commission : J.Y. Interpretation No. 613 .....	11
IV. The Protection of Human Rights .....	13
A. Positively Ensuring Personal Freedoms .....	13
B. Breaking “Special Power Relationship” .....	15
C. The Protection of Right to Privacy .....	17
D. The Protection of Gender Equality .....	18
E. The Protection of Same-Sex Marriage .....	19
V. Assessment and Conclusion .....	20

---

\* Translated by Mrs. Hsin-Hsuan Lin/ S.J.D. Candidate University of Virginia, School of Law.

## **I. Introduction**

Ladies and gentlemen, I am greatly pleased to have the privilege of delivering this keynote address at the moment of the 70th anniversary of the establishment of Taiwan's Constitutional Court (hereinafter "TCC"). Over the past seventy years, Taiwanese society has experienced significant liberalization and democratic transition. The wide range of reforms has also gradually enriched the democratic constitutionalism, and it becomes the core value sharing between the people of Taiwan. During this process, the Grand Justices in the Judicial Yuan have also strived to perform the function of the Constitutional Court, aiming at clarifying the normative connotations concerning democracy and constitutionalism, ensuring the freedom and rights of the people, reconciling political turmoil, and maintaining the operations of state agencies. Faced with the ongoing and changing international and domestic circumstances, TCC has positively shown the judicial activism, and is committed to establishing and defending the "Liberal Democratic Constitutional Order," which Taiwanese society has regarded as a guiding signpost to steadily move forward.

As such, my topic for today's presentation is "How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan?" Through this speech, I seek to explore how TCC, while at the moment of significant political and social disputes have occurred, examines the existing political decisions actively, and thereby illuminates normative values as required by the Constitution. In what follows, I will discuss numbers of leading judicial interpretations, and attempt to analyze these cases in three major dimensions: What kinds of assistance and contribution did TCC provide to improve political liberalization and democratization? How did TCC resolve disputes among political branches? What is the contribution of TCC to human rights protection?

### **A. The Description of Terms**

Before jumping into the formal discussion, it is necessary to explain some terms more precisely. First of all, no matter in legal theories or in public discussion, "Judicial Activism" is common terminology, yet it is usually not well-defined.<sup>1</sup> Accordingly, it may be used to refer to issues from different perspectives, such as the institutional functions of the court, the methods of interpretation or the choices of substantial value judgment, and so forth.<sup>2</sup> Therefore, judicial activism may be used to refer to the judicial cases inclined to the liberal or conservative party,<sup>3</sup> and associated with negative or positive meanings in different contexts.

Regardless of the complexity of the meaning and usage of judicial activism, I will merely concentrate on the institutional dimensions of judicial activism. That is to say, instead of adopting the attitude of respect and obedience toward other political branches' decisions, the constitutional court would positively intervene in such disputes. Therefore, it is predictable

---

<sup>1</sup> As legal scholarship has pointed out, the possible dimensions of judicial activism may include striking down arguably constitutional actions of other branches, ignoring precedent, judicial legislation, departures from accepted interpretive methodology, and result-oriented judging, etc. See Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CALIF. L. REV. 1441, 1463-1476 (2004).

<sup>2</sup> Jau-Yuan Hwang, *Judicial Standards of Review for Restrictions on Constitutional Rights: Comparative Analysis of the U.S. Categorized Multiple Tests Approach*, NTU Law Review Issue 33 No3, 49 (2004).

<sup>3</sup> William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1217-1256 (2002); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV., 1139-1216 (2002).

## How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan

that the constitutional court would also scrutinize the political decisions more stringently. Moreover, while the conception of “liberal democratic constitutional order” remains an open question, in accordance with the precedents rendered by TCC, it generally encompasses the principle of democratic republic, sovereignty of and by the people, protection of the fundamental rights of the people as well as the check and balance of governmental powers, and thereby refers to the interconnected normative framework established by the principles mentioned above.

### **B. Taiwan's Constitutional Court before and after the abolishment of martial law**

Before Taiwan's martial law was abolished, due to the institutional limitations, it was extremely limited for TCC to exert judicial activism. During the period of mobilization to suppress rebellion and martial law, even though judicial review had existed, but, instead, it was not effective since the overwhelming power of the executive branch. TCC, at that time, rarely ruled declarations of unconstitutionality,<sup>4</sup> and a few of the interpretations sought to challenge the political sectors were also being neglected. For example, *J.Y. Interpretation No. 86* was not implemented until 20 years after it had been declared. In short, during the period of authoritarian rule, TCC's attitude was relatively negative and it failed to exercise its role as a constitutional safeguard effectively.

However, in the late 1980s, the so-called “quiet revolution” has marked a dramatic shift and Taiwan started on its path to political liberalization and democratic reform. With the end of martial law era in 1987, the ruling party and the non-government sectors peacefully launched a multi-stage constitutional reform. In this steady process of democratic transformation, to resolve disputes resulting from the constitutional structure reform would require an institutional arbitration mechanism.<sup>5</sup> Furthermore, faced with the challenges arising from constitutional quarrels, the Justices must not merely take the political branches' opinions into consideration, but also need to satisfy the need for freedom and democracy from Taiwan's society as a whole.<sup>6</sup> Cooperated with various conditions, TCC, like a sleeping lion which just awoke, gradually demonstrated judicial activism and adopted a stricter attitude to examine the decision-making of the political branches.

## **II. The Contribution for Political Liberalization and Democratization**

### **A. Complete Re-election of the National Legislatures: J.Y. Interpretation No. 261**

*J.Y. Interpretation No. 261* was a shot in the arm for the process of democratic transformation. The Constitution of the Republic of China provides that the sovereignty of the Republic of China shall reside in the whole body of citizens and the national representatives shall be re-

---

<sup>4</sup> TAY-SHENG WANG, INTRODUCTION TO TAIWAN'S LEGAL HISTORY 143 (4TH ED. TAIPEI ANGLE PUBLISHING CO., LTD 2012).

<sup>5</sup> *Id.* at 143.

<sup>6</sup> Professor Cooney has indicated how the viewpoints of the political-legal community impact judges. When the political-legal community of Taiwanese society is no longer only controlled by a single political party and gradually emphasizes liberty and democracy, the judicial reasoning would gradually tend to appeal to the value of liberal democracy to maintain the legitimacy of judgment and community acceptance. See Sean Cooney, A COMMUNITY CHANGES: Taiwan's Council of Grand Justices and Liberal Democratic reform, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 229-231 (Kanishka Jayasuriya ed., London New York: Routledge. 1999).

elected periodically. In the 1950s, however, due to the dramatic political upheavals, the territory under actual control was severely shrunk compared with the original territorial claim provided by the Constitution. At the end of the first term of the national representatives, in order to maintain the nation's ruling territory assumed by the Constitution, The Constitutional Court ruled *J.Y. interpretation No. 31*, claiming that the country was undergoing a severe change in political climate, which made re-election of the second term representatives de facto impossible. Hence, the Court held that all of the first-term representatives shall continue to exercise their respective powers.

Such action, however, led to a consequence that Taiwan failed to completely re-elect representatives for more than 40 years. This not only made the people's opinions could not be reflected appropriately in the national legislation, but also rendered the rulers' decisions being unaccountable to the people. Therefore, since the 1980s, ending the so-called "indefinite extended-term Congress," and seeking comprehensive re-election had always been an important goal of Taiwan's democratic reform camp.<sup>7</sup> In 1990, the National Assembly's self-expansion of increasing funds and extending their terms of office outraged the "Wild Lily Student Movement" in March. Dissolving the National Assembly and the complete re-election of the national legislatures became the earnest aspiration of all Taiwanese people. The Legislative Yuan, accordingly, passed a constitutional petition, calling upon TCC to resolve the deadlock they had previously created in *J.Y. Interpretation No. 31*.

The Justices apparently heard the earnest demands for democratic reforms from Taiwan's society. In the landmark decision of *J.Y. Interpretation No. 261*, which was delivered in June of the same year, TCC stated that *J.Y. Interpretation No. 31* and the relevant provisions of the Constitution had no intention to allow the first-term representatives to exercise their powers indefinitely. In order to respond to the current social demand, these national representatives should terminate their power before the end of the next year, and the Central Government would hold the next election in a timely manner. In the face of the out-of-date congressional structure that violated democratic principles, the Justices finally managed to make a change and ended the "indefinite extended-term Congress." Subsequently, in accordance with the amendment provisions of the first constitutional revision, the national representatives should be elected from the people of Taiwan. Then, the re-election of the National Assembly Delegates was held in 1991, and the Legislators were reelected in 1992, and both the representatives abided by the term limits required by the Constitution. This time, TCC successfully managed to rebuild the democratic legitimacy of the national legislatures and helped the society to take a crucial step toward democratic transitions.

## **B. Freedom of Assembly and Parade: J.Y. Interpretation No. 445**

In Taiwan, Article 14 of the Constitution provides that the people are entitled to freedom of assembly. However, under the martial law regime, the statutes including the martial law, the trade union law, the Punishment of Rebellion Act and the Criminal Code and so forth, regulated various forms of prohibited assemblies and demonstrations. These regulations, usually used highly vague legal wording. Through the pervasive authorization, the police, security, and intelligence departments had been entrusted with a wide range of discretion in

---

<sup>7</sup> JIUNN-RONG YEH, *Beyond transformation: the Constitutional Change*, in DEMOCRATIC TRANSITION AND CONSTITUTIONAL CHANGE 33 (TAIPEI ANGLE PUBLISHING CO., LTD 2003).

## How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan

order to selectively pin down the assembly and marches they disliked. After lifting the martial law, given the very fact that the legislative intent of the "Assembly and Parade Act" was not to loosen people's freedom of assembly. Instead, it was an attempt by the ruling party to extend the stringent control of the martial law. Such an attempt, as a result, was necessarily strictly conflict with the social movements that had spurred in the 1980s.

*J.Y. Interpretation No. 445* was being generated in this background. In 1993, several local environmental advocacy groups were seeking to hold protests against the illegal dumping of construction waste by the government. In accordance with the procedure as provided by law, assembly protestors were required to apply for police organ's permission 6 days ago. As a result of failing to apply for the permission timely yet still held the assembly as scheduled, protestors were sentenced to criminal penalties. Under the support of the citizen groups that advocated the legal reform, several defendants decided to challenge the constitutionality of the law itself and then argued that the provisions at issue were in violation of the freedom of assembly and parade guaranteed by the Constitution.

In the landmark decision of *J.Y. Interpretation No. 445*, The Constitutional Court explicitly recognized freedom of assembly and parade as fundamental rights on the constitutional level and emphasized that for those who lacked media resources, "activities on the streets" should be regarded as an essential manner to express opinions and speech. It made it clear that freedom of assembly and parade was the most significant and indispensable fundamental human rights in practicing democracy. As such, the state should not only infringe upon it but also have an obligation to proactively guarantee the implementation of people's rights to assemble and march. The Constitutional Court, therefore, used strict scrutiny to examine the constitutionality of the restrictions concerning assemblies and marches. First, for the requirement that any speech should not be allowed to "advocate communism or secession of territory," TCC held that the said provision, which involved the prior-constraint and content-based censorship of the freedom of expression that allowed the authorities to prohibit the assemblies and marches merely for political opinions, was inconsistent with the principle of proportionality and therefore unconstitutional. Through applying the "clear and present danger" standard, TCC successively declared the relevant provision, providing that "There are facts showing the likelihood that national security, social order or public welfare will be jeopardized;" as well as the other provision, providing that "there is the likelihood that public safety or freedom will be jeopardized, or there will be serious damage to property," were neither specific nor clear enough. The mere basis on which the competent authority may either approve or deny an application for an assembly or a parade was the future possibility of occurrence instead of a factual showing of clear and present danger. As such, the said provisions were contrary to the constitutional intention of protecting freedom of assembly. Through this interpretation, TCC officially declares that in the past, the usage of such "Carte Blanche" laws to authorize the public security department to enforce the law and to prohibit certain political viewpoints should no longer be permitted in democratic Taiwan that guarantees the freedom of people's assembly and parade.

### **C. Freedom of Association: J.Y. Interpretation No. 479 and No. 644**

For authoritarian rulers in Taiwan, limiting the space for people to form associations helps to suppress the cohesion of opposition forces in the society. And, for the purpose of maintaining the "Greater China ideology," citizens' groups involved in specific political affiliation must

be banned from the very beginning. Therefore, during the period of martial law, the freedom of association of the people was also regulated by various laws. After lifting the martial law, the provisions of the "Civil Organizations Act" and its sub-laws were not accordingly amended. Therefore, *J.Y. Interpretation No. 479* and *J.Y. Interpretation No. 644* were efforts by the citizen groups to release the association control through the approach of the constitutional petitions.

The petitioner in *J.Y. Interpretation No. 479* is the legal academic association previously known as the "Chinese Comparative Law Society". Under the social atmosphere in which Taiwanese identity was gradually rising, members of the association changed the name of the group to the "Taiwan Law Society" in accordance with the articles of association. However, the competent authority, Ministry of the Interior, refuted that the name of the association must be aligned with the administrative region of the Republic of China in accordance with the provisions of the "Civil Organizations Act" and the Sub-law "Regulations on the Licensing of Social Organizations" (Section 4 (1)). In other words, since the "Taiwan Law Society" is a national group, it must be titled with "China" or "Republic of China" and thus cannot be renamed to "Taiwan." As such, the petitioner claimed that his freedom of association had been violated and resorted to the Constitutional Court to resolve the questions on the constitutionality of this Act.

In the decision of *J.Y. Interpretation No. 479*, TCC held that a free choice of organizational name involved association's members' internal identity as well as external proclamation, and thus naming an organization fell within the protection of the Freedom of Association as provided by the Constitution. Based upon this reasoning, TCC acknowledged that the sub-law enacted by the administrative organs had already gone beyond the scope of the delegation granted by the enabling law since the enabling law did not specifically provide the matters as relating to naming an organization. As such, the provision at issue had infringed the freedom of association guaranteed by the Constitution and shall be declared null and void.

*JY Interpretation No. 644* originated from a dispute in which the competent authority dismissed the application for the establishment of the "New Taiwanese For Taiwan Independence." Prescribed by Article 2 and 53 of the "Civil Organizations Act" of the time, the application shall not be permitted if the people's groups advocated communism or secession of territory. TCC considered that the provision was to restrict the people's decision to assemble as a free association. Since such restrictions were the most severe restraint on freedom of association, its constitutionality should be strictly scrutinized. In line with the same rationale held in *J.Y. Interpretation No. 445*, TCC also acknowledged that it was difficult to infer that the current state of the fact of the establishment would cause the imminent threat to the existence of the State or the liberal democratic constitutional order, so that the rejection of the application for the establishment was purely a prior restraint of the speech for specific political opinions, which was inconsistent with the constitutional guarantee of freedom of expression and freedom of association, and thus should be invalidated.

As two interpretations mentioned above, the Justices dismantled the irrational control over freedom of association left in the era of authoritarianism. People with similar ideas are able to form groups spontaneously, decide to self-declare, and expand their influence to reflect their diverse voices in the political decision-making process, prompting the operation of democratic decision-making procedures more vigorous.

**D. The Boundaries of Constitutional Amendment- J.Y. Interpretation No. 499 and No. 721**

In assistance with *J.Y. Interpretation No. 261*, the re-election of the national representatives had been completed. Nevertheless, Taiwan still required to confront the fundamental transformation of the structure of congress and constitutional amendment mechanism, especially for the issues of abolition of the National Assembly.<sup>8</sup> The reason for this is that, in accordance with the original design of the Constitution of the Republic of China, the National Assembly monopolized the power to revise the Constitution. In the course of constitutional reform, the National Assembly kept on extorting political branches and continuously obtained the "constitutional amendment rent-seeking" to self-extend its power.<sup>9</sup> At the fifth revision of the Constitution, the National Assembly voted by anonymous balloting to alter the way of the election of itself and to extend its term of office. The actions confronted strong public criticism. In response, the Legislators also submitted three constitutional petitions to appeal to the Constitutional Court. They argued that the amendment procedure and the norms of the fifth constitutional amendments were unconstitutional. This time, TCC not only needed to resolve the theoretical problems of constitutional texts that may be unconstitutional but also needed to put itself within the context of Taiwan's democratization, shaping the constitutional destiny of the National Assembly by its interpretation.

In 2000, the Constitutional Court announced *J.Y. Interpretation No. 499*, holding that, first, because the process of amending the Constitution was the most direct action that reflected and realized sovereignty, it must be conducted openly and transparently in order to satisfy the condition of rational communication and let the National Assembly Delegates be held accountable to the citizens, hence, laid the proper foundation for a constitutional state. Therefore, adopting anonymous balloting violated not only procedural rules of the National Assembly but also the principle of openness and transparency. In addition, the irregularities rendered the electorate no way of checking the accountability of the Delegates. Accordingly, the act of amending the Constitution regarding anonymous balloting shall not take effect because the process was clearly and grossly flawed and should be held to be invalid.

Furthermore, TCC further drew the line on the boundaries of amending the Constitution. The court claimed that any amendment that altered the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence, shall not be permitted. TCC declared such fundamental nature of Constitution as the "Liberal Democratic Constitutional Order," which encompassed the principle of the democratic republic, the sovereignty of and by the people, the principle of protection of the fundamental rights as well as the check and balance of governmental powers.

The fifth round of constitutional revision confirmed that the members of the National Assembly should be appointed from among different political parties and proportioned in accordance with the ratio of votes received by each such political party and independent

---

<sup>8</sup> JIUNN-RONG YEH, The rise or fall of Constitutional politics: Orientation and trend after the sixth revision of the constitution, in *DEMOCRATIC TRANSITION AND CONSTITUTIONAL CHANGE* 174 (TAIEPEI ANGLE PUBLISHING CO., LTD 2003).

<sup>9</sup> JIUNN-RONG YEH, From Transitional Court to Normal Court: A Comparative Analysis on Ruling Characteristics and Transitional Context between Interpretations No.261 and No.499, in *DEMOCRATIC TRANSITION AND CONSTITUTIONAL CHANGE* 235 (TAIEPEI ANGLE PUBLISHING CO., LTD 2003).

candidates in the election for the members of the Legislative Yuan. TCC considered that the procedural revisions had rendered the National Assembly to lose the nature of being an elected representative while remaining its power to consent and amend the Constitution, which had already contradicted the fundamental principle of democracy. The Constitutional Court also considered that the constitutional amendments concerning the self-extension of the term of the National Assembly violated the liberal democratic constitutional order. The reasons for this was that because the re-election of representatives was an indispensable means of realizing the governance by public opinion and the principle of national sovereignty. Unless there is an ascertainable reason for not being able to reelect, outright term extension would render the authority of National Assembly unable to be derived from the nationals' entrustment, thus violating the principle of national sovereignty.

TCC accordingly declared that all the provisions of the Fifth Constitutional Amendment should be held to be invalid as of the day this Interpretation was publicly announced because they not only violated constitutional due process but also overstepped the substantive boundaries of the constitution. In short, *J.Y. Interpretation No. 499* established the inviolable boundaries with respect to the constitutional amendment. Notably, this boundary is not associated with to any specific national imagination or ideologies. Instead, it is narrowly limited within democracy, human rights protection and separation of powers which are necessary to maintain the normal functioning of democratic constitutionalism. This interpretation, on the one hand, preserves the flexible discretion for the political branches to reorganize the constitutional structure.<sup>10</sup> On the other hand, it also set the constitutional self-defense mechanism for the restoration of authoritarianism. The active intervention of TCC in the process of constitutional reform accordingly accelerated the end of the National Assembly. Only one month after the fifth constitutional amendment declared unconstitutional, the National Assembly passed the sixth constitutional amendment before the end of the term of office to defunctionalize itself and could only passively review the constitutional amendment proposal provided by the Legislative Yuan. This endeavor also entrusts the Legislative Yuan the full authority which a Congress in a modern democratic state sought to be.<sup>11</sup> In other words, *J.Y. Interpretation No. 499* pushes for the legitimacy of Taiwan's representative democracy and the consolidation of the essence of national's sovereignty through a series of constitutional revisions.

After 14 years, *J.Y. Interpretation No. 721* addressed the same issue concerning the constitutionality of the constitutional provisions themselves. Once again, TCC invoked the precedents regarding the boundaries of constitutional amendment discussed above. The seventh constitutional amendments adopt the so-called "Parallel System." The voters vote for two votes, one for selecting regional legislators from specific constituencies, and the other for selecting legislator-at-large seats in proportion to political parties gaining 5% ratio or more among votes. The petitioner was a small party participating in the election of the Legislators, claiming that parallel system, the proportional representation system of the political parties, and the threshold of 5% of the political parties against the principle of national sovereignty and the right to participate in politics and the right of equality.

---

<sup>10</sup> TZONG-LI HSU, *Is the Constitution Unconstitutional? - Examining J.Y. Interpretation No. 499*, in *LAW AND STATE AUTHORITY NO.2 356* (TAIEPEI ANGLE PUBLISHING CO., LTD 2007).

<sup>11</sup> JIUNN-RONG YEH, *supra* note 8, at 174-175.



## How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan

In this interpretation, TCC reaffirmed that the constitutional amendment should not infringe the liberal democratic constitutional order. However, the Justices determined that the legislative system after the seventh constitution revisions had not altered the essence of the right to vote and equality, and therefore respected the institutional choices made by the organ of constitutional amendments and the free will of nationals. *J.Y. Interpretation No. 721* illuminated that TCC has consistently adhered to the liberal democratic constitutional order as the substantive value basis of the normative constitutional order, yet strictly applying boundaries of the constitutional amendments and taking the necessary discretion of constitutional policy-making into consideration.

### III. Resolving Controversies Across Political Branches

Taiwan faced the first rotation of political parties in 2000, and the DPP obtained the ruling power of two terms of office for eight years. However, the Pan-Blue groups formed by the Kuomintang and the People First Party still accounted for a majority in the Legislative Yuan, leading to a divided government in which DPP controlled the executive branch while Pan-Blue groups controlled the legislative branch. As a result, the policies that the executive authorities seek to implement were usually boycotted in the Legislative Yuan. The majority of the Legislative Yuan was inclined to take advantage of the number of votes passing the law against the ruling party's position. On the other hand, the executive power also attempted to utilize its constitutional authority to resist and change the political agenda that set up by the majority of the Legislative Yuan. When the executive power and legislative powers were inconsistent and cannot adequately resolve political conflicts, they turned to rely on the Justices as an intermediary to reconcile this tension, stipulating the state's governance machinery to return to the normal constitutional channels to continue to operate.

#### A. The Case of statutory budget of the 4th nuclear power plant : J.Y. Interpretation No. 520

The conflict between the administration and the legislature was first manifested in the direction of nuclear energy policy. The DPP adhered to the policy idea of non-nuclear homes. After the ruling, it was decided by the Executive Yuan Council that it would not continue to build Taiwan's fourth nuclear power plant. However, the Pan-Blue groups of the Legislative Yuan held that the nuclear budget had been passed by the Legislative Yuan and should be regarded as a statutory bill, requiring the administrative organs to abide by the law and implement the budget for the construction of the fourth nuclear plant. The Executive Yuan believed that although the Legislative Yuan had the power to decide on the budget in accordance with Article 63 of the Constitution, it only had the nature of approving the policy plan. The Executive Yuan, based on Article 53 of the Constitution and Article 3, Paragraph 2, of the Amendment of the Constitution, had the authority to make policy decisions to stop building the fourth nuclear power plant and not to implement the relevant budget. Because this controversy involved the issue of how two constitutional organs exercised their powers and duties arising from the application of the Constitution, TCC accepted the petition of the Executive Yuan and finally delivered *J.Y. Interpretation No. 520*.

The Constitutional Court followed precedents, asserting that the statutory budget passed by the Legislative Yuan was considered an authorizing regulation. However, it switched the position sharply, reminding that with regard to a change of significant policy or political

guidelines that involved the withholding of a statutory budget, the Executive Yuan shall be responsible to the Legislative Yuan, and respect the right of the Legislative Yuan to participate in the decision-making process regarding essential nationwide issues. That is, in accordance with Article 63 of the Constitution, Article 3 of the Amendment of the Constitution and Article 16 of the Legislative Yuan Functioning Act, the Executive Yuan shall submit a report to the Legislative Yuan within reasonable time and subject [themselves] to interpellation. Namely, if the withholding of the statutory budget was considered to be the significant policy change, the Executive Yuan was obliged to report to the Legislative Yuan and subject to interpellation. Having received the above report from the Executive Yuan, the Legislative Yuan shall not passively boycott and be obligated to listen to it. It was notable that if the Legislative Yuan decided to oppose and was unable to form other resolutions, all related agencies should take proper disposition in accordance with the existing mechanisms under the Constitution. The solution indicated may include approaches by which Premier may resign, the Legislative Yuan may move for a no-confidence vote or enact the so-called legislation for an isolated case (Einzelfallgesetz).

Although this interpretation originated from the controversy over the construction of the nuclear power plant, in order to address disputes between the executive and legislature, TCC has generally constructed a guideline and an interactive mechanism that can be followed in the future. In other words, as long as the dispute between the executive and the legislature falls within the scope of Article 63 of the Constitution, the Legislative Yuan shall have the authority to participate in the decision-forming process, and subsequently comply with the game rules highlighted in this interpretation; that is, following the guideline of reporting, congressional questioning as well as seeking to resolutions in order. If the negotiations are still deadlocked, the final constitutional mechanism should still be used to make the final decision in the primary policy would not be grounded a halt for a long time.<sup>12</sup>

#### **B. The Case Involving the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting: J.Y. Interpretation No. 585**

As of the peak of the national identity of two parties' groups, the presidential election in 2004 intensified the atmosphere of the election because President and Vice President candidates were shot just the day before the presidential election. In the end, the Pan-Blue coalition lost the election with a slight gap, therefore launching demonstrations in front of the Office of President, and filed a series of suits and investigation concerning March 319 shootings. In order to investigate, the majority party in the Legislative Yuan enacted the "Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting (hereinafter the "SCITA")." The minority party in the Legislative Yuan questioned the Act violated the separation of powers and the principle of a democratic state. The Constitutional Court, once again, confronted a political whirlpool that was stirring after the fierce election campaign, and attempted to reconcile the conflict between different parties through the mechanism of the constitutional interpretation.

As scholars observed, the "Special Commission on the Investigation of the Truth in Respect of the 319 Shooting (hereinafter the "SCIT")." would not be supervised by any other agencies,

---

<sup>12</sup> TZONG-LI HSU, *The Emergence of Legislative State?!*, in *LAW AND STATE AUTHORITY* NO.2 386 (TAIEPEI ANGLE PUBLISHING CO., LTD 2007).

## How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan

and the appointment of members also deprives personnel authority owned by the executive. Furthermore, the scope of investigation rights and the method of exercising are also overlapped between administrative, judicial and supervisory powers whereby it can exercise the mixed powers originally belonging to different constitutional organs. This design has already contradicted the principle of separation of powers and principle of democracy.<sup>13</sup> However, in order to reconcile the constitutional order and pursue legal stability, the majority opinion of the Court was committed to the principle of legal interpretation in conformity with the Constitution (*verfassungskonforme Gesetzesauslegung*), and preserved the constitutionality of the SCITA.<sup>14</sup> Meanwhile, through supplementing *J.Y. Interpretation No. 325*, they also constructed an investigatory power which is equivalent to the European and American national legislatures have. In short, TCC held that the right to investigate was an auxiliary power that the Legislative Yuan must have in order to exercise its inherent powers as provided by the Constitution, and was not limited to the right to access documents as explained in *J.Y. Interpretation No. 325*. Therefore, the key to the judicial review regarding the SCITA was whether its organization, scope of the investigation, and methods as well as procedures for exercising the power of investigation exceeded the limits of congressional investigative power and infringed the core areas of the power of other constitutional organs. In this way, TCC did not completely override the constitutionality of the "Act of the Special Commission on the Investigation of the Truth," but successfully limited the authority of the Commission to the extent allowed by the principle of separation of powers.

After Taiwan moved to unicameralism, the substantive contribution of this interpretation was to endow the Legislative Yuan with more complete powers to balance and supervise the executive branch efficiently. On the other hand, Scholars Juan J. Linz and Alfred Stepan have analyzed the implications of democratic consolidation. They pointed out that in constitutionalism, when both government and non-government forces showed the willingness to obey or get accustomed to the laws, procedures or procedures established through democratic procedures to resolve conflicts, a democratic system could be seen as consolidation.<sup>15</sup> Despite the defeated Pan-Blue groups tried to extend the front line of political struggle through demonstrations and enacting the SCITA which was in violation of separation of powers, as political conflicts was been directed to judicial process, TCC attempted to balance the positions between opposed parties in the political disputes and interpreted the reviewed Act to conform with the Constitution. Finally, each party generally accepted the results of this interpretation. Taiwan's democratic system has survived this social turmoil arising from this election campaign and has proceeded to sail steadily. The follow-up effect of *J.Y. Interpretation No. 585* has proven that to Taiwan's democracy has a certain maturity.

### **C. Organic Act of the National Communications Commission : J.Y. Interpretation No. 613**

In 2005, the draft "Organic Act of the National Communication Committee" was reviewed in the Legislative Yuan. Since the National Communication Committee (hereinafter the "NCC")

---

<sup>13</sup> In-Chin Chen, *Democratic Consolidation and Judicial Review-the Dilemma in J.Y. Interpretation No. 585*, 125 *The Taiwan Law Review* 64-69 (2005).

<sup>14</sup> TZONG-LI HSU, *Dissenting in part opinion in J.Y. Interpretation No.585*, 37.

<sup>15</sup> Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, 7(2) *JOURNAL OF DEMOCRACY* 14, (1996).

is in charge of the examination and approval of the renewal of new certificates for the broadcasting and television industry, its powers involve complex political and business interests. Hence, the appointment of members of the NCC has become the political wrestling of all parties in the Legislative Yuan.

The Pan-Blue coalition of the Legislative Yuan proposed the reference to the regulations of the SCITA to allocate seats of the NCC in proportion to the seats of each political party in the Legislative Yuan. After the passage of the Act, the members of the NCC were recommended by the Executive Yuan and the Legislative Yuan, and the recommended list was then submitted to the Nominating Review Committee. The Nominating Committee was also composed of the candidates for the proportion of the political parties in the Legislative Yuan. Once the members of the NCC were reviewed and approved by the Nominating Committee, the Premier could only passively nominate and appoint them under the approval of the Legislative Yuan. The constitutional petition raised by the Executive Yuan was mainly focused on the appointment procedure. It contended that the relevant provisions of the Act of the NCC had violated the principle of separation of powers, encroaching in the core areas of administrative power, and also infringed on the people's freedom of communication.

TCC defined the NCC as an independent agency that exercise its functions and duties independently and autonomously pursuant to law. It also considered that based on the nature of the tasks of the organs and the public interest of the Constitution, the Constitution allowed certain agencies to be separated from the hierarchical bureaucratic structure to reduce political interference and increase professional autonomy. In other words, since the mission of the NCC involved the protection of diversified opinions and the public supervision of the state and political parties, there is indeed a necessity to avoid political interference and enhance professionalism and impartiality. Accordingly, the very fact that the Legislators characterized the NCC as an independent agency did faithfully conform with the intent of the protection of freedom of communication as prescribed by the Constitution.

Nevertheless, the Constitutional Court reminded that the Constitution still required the implementation of the administrative unity, which was intended to hold the Premier responsible for all of the administrative affairs under his or her supervision to implement political accountability. Therefore, in order to ensure the independence of the NCC, in the institutional design, the legislative power was allowed to impose certain restrictions on the personnel decision-making power of the administrative branch. However, due to the requirement of the political accountability of administrative power, it was still necessary to retain the Premier's personnel authority to a certain degree. Hence, if the legislator deprived this authority exceedingly, it was considered to infringe on the core areas of administrative power and violate the principle of separation of powers. Under this rationale, in the issue of appointing NCC's members, the Premier could recommend only three out of the eighteen candidates for membership in the NCC. Then, he or she had no say in the personnel affairs during the review of the Nominating Committee, yet was obliged to send the nominations to the Legislative Yuan for the latter's confirmation, and to appoint those candidates confirmed by the Legislative Yuan as members of the NCC. The Constitutional Court pointed out that it was considerably apparent that the Premier was deprived of virtually all of his or her power to decide on personnel affairs, making it impossible for the executive to implement the principle of politics of accountability, and it also led to excessive interference in the administration of

## How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan

the legislature and the resulting imbalance of power. As such, the disputed regulations were unconstitutional.

After entering the digital convergence era, the development of various communication technologies is vastly changing. In 2005, the political branches foresaw the highly regulatory demand in the field of communication. Independent agencies are the product of this emerging regulatory demand. The controversy of the Act of the NCC urged TCC to seek a reasonable constitutional position for the independent agencies and to strike a balance between its independent demand, administrative unity, and politics of accountability. More importantly, this interpretation reminds the legislature that it cannot expand its power by arbitrarily weakening the power of other constitutional organs on the grounds of the establishment of an independent agency. The Constitutional Court assists in leveraging the power between the executive and the legislature.

### **IV. The Protection of Human Rights**

During the martial law period, the state governance machine penetrated deeply into the life of the citizens, monitoring and suppressing the freedom of the ruled. Therefore, after the martial law was lifted, the urgent mission of the Constitutional Court was to defend the fundamental rights of the people and to expel the state violence out of various social fields. On the other hand, in the face of groups that have long been discriminated against in history and are disadvantaged, TCC often actively regulates the existing legal and de facto inequalities in society through the protection of equality.

#### **A. Positively Ensuring Personal Freedoms**

Among the Bill of Rights in the Constitution, Article 8 of the personal freedom clauses elaborately specifies the procedural requirements for restrictions on personal freedoms. The reason is that given the importance of personal freedoms to the fundamental rights system, the protection of other fundamental rights would be undermined if the state can arrest and detain the people arbitrarily. In the era of martial law, state organs, however, had various weapons entrusted by the laws to deprive people of their personal freedoms, and most of them were arbitrarily authorize security agencies to execute. In other words, whether a citizen is free or prisoned subjectively rested upon the state machinery at whim. As such, during the decades before and after the lifting of the Martial Law, TCC initiated a series of examination on the relevant laws and regulations that endangered the personal freedoms of the people.

##### **(A) The Act Governing the Punishment of Police Offences**

Among the numerous numbers of the J.Y. Interpretation, it is worthwhile noting that since the 1980s, TCC had ever been brave to criticize those regulations which restrict personal freedoms. In *J.Y. Interpretation No.166*, TCC held that since the Constitution provided that judicial power shall determine any sanctions on personal freedoms, the Act Governing the Punishment of Police Offences, which authorized police departments to detain and forced labor people, already violated Article 8 of the Constitution so that relevant regulations had to be transferred to the court as soon as possible. However, this interpretation did not receive a response from the political branches, and would instead a pale cry from TCC. It had not been implemented until the fetal movement of democratic transitions ten years later. TCC delivered

*J.Y. Interpretation No. 251*, actively requesting that the Act shall be null and void within a specific time limit and require all relevant provisions thus has to be revised by that date. While as the same with declaring unconstitutional as *J.Y. Interpretation No. 166*, TCC chose to dissolve the legal effects of the disputed provisions directly, which implied that the Constitutional Court would show a more positive attitude in the field of personal freedoms.

### **(B) Act for the Prevention of Gangster**

The authoritarian ruler inherited the hooligan prohibition system which had already existed during the Japanese colonial period, but the rule was not regulated by law until the 1980s. Even if it was stipulated by the Act for the Prevention of Gangster, the normative connotation of the Act was often criticized. For example, the concept of the gangster was too vague, and the procedure was not complete enough for human rights protection, and so forth.<sup>16</sup>

*J.Y. Interpretation No. 384* in 1995 addressed the constitutionality of the Act for the Prevention of Gangster. The provisions were aimed at rogue behavior and imposed correction and training programs on a prisoner for up to three years. However, the same regulations allowed the identity of the whistleblowers to be kept confidential, so that deprived of the right of the accused to confront the witnesses. Furthermore, the imposition of the correction and training and punishment did not overlap, after the execution of the penalty, regardless of the actual needs, it might continue to impose correction and training. As such, TCC contended that the provisions at issue did not guarantee the right of the accused to confront the witnesses, but imposed excessive restrictions on the personal freedom of the people. Such provisions should be invalid. In the interpretation, TCC further reminded that the political branch should conduct a comprehensive review of this Act.

However, the legislator did not hear the Justice's warning. In *J.Y. interpretation No. 523*, once again, the Constitutional Court declared that the "retained punishment" system, which was too vague, was unconstitutional. Similarly, in *J.Y. Interpretation No. 636*, TCC considered that the clarity of legal terms relating to personal freedoms should be subject to stricter scrutiny and conducted a comprehensive review of the elements of hooliganism. These terms, including bullying goodness, bad character or roaming rogue, etc., were too vague, which made it difficult for the people to foresee whether their behaviors were regulated by the normative rules, and thus, TCC held that they were inconsistent with the principle of clarity and definiteness of law and shall be invalid after one year. Through these interpretations, TCC persistently urged the political branch to review the authoritarian and unconstitutional elements within this Act. One year after the announcement of *J.Y. Interpretation No. 636*, the political branch finally complied with the opinion of TCC and abolished the Act for the Prevention of Gangster.

### **(C) Forced Labor**

Forced Labor is part of the rehabilitative measures and is scattered in various legal norms enacted during the authoritarian period. Article 19 of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife is an example. It provides that a person

---

<sup>16</sup> TAY-SHENG WANG, HUA-YUAN XUE, SHI-JIE HUANG, PURSUING THE FOOTPRINT OF TAIWAN'S LAW: HUNDREDS HIGHLIGHTS OF EVENTS AND THE STUDY OF LEGAL HISTORY 212 (TAIEPEI WU-NAN BOOK INC.2015).

## How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan

who commits a specific crime should enter the workplace for forced labor for three years after the execution of the penalty. TCC asserted in *J.Y. Interpretation No. 471* that the forced labor system sought to assist those who lacked job skills or correct concept to re-socialize, but the provision imposed a mandatory measure of three-year compulsory labor without considering the necessity of prevention or treatment of the person's propensity to endanger the society, which had exceeded the necessary level. So that it would be null and void from the date of the announcement.

Another example is the Article 2 of the Disciplinary Measures for the Prevention of Repeat Offenses by Communist Espionage Criminals during the Period of National Mobilization for the Suppression of the Communist Rebellion provided, "For convicted communist espionage felons having completed a term of imprisonment or re-education training but likely to recommit the offense(s) due to lack of improvement in beliefs or behaviors, they may be transferred into a labor and education facility for compulsory work." The so-called espionage refers to persons who commit civil disturbance and treason. In the era of authoritarianism, those who commit these crimes are often political prisoners whose ideology or ideas have "deviation." The provision, therefore, authorizes the security department to verify the necessity of forced labor in order to continue the transformation of ideas. In *J.Y. Interpretation No. 567*, TCC also cited the Article 8 of the Constitution, pointing out the punishment of personal freedoms shall be executed in accordance with the principle of due process. Yet, it was obviously in violation of the imperative of the Constitution that the provision granted the security department the authority to approve mandatory work in accordance with mere administrative orders.

On the other hand, since the provision focused on dealing with the "enemy of the state," in addition to invoking the principle of legal reservation, TCC also must respond to the controversy of whether the law was justified in substantial dimension. In this interpretation, TCC indicated that even in an extraordinary period, there was still a minimum level of human rights protection that cannot be derogated. Freedom of thought was the basis of human inner spiritual activity and freedom of speech. It also concerned the persistence of human dignity and liberal democratic constitutional order. As such, no matter what kind of state of emergency was, the state would not be allowed to infringe upon it. Under this rationale, it was apparently a violation of the minimum human rights protection that the provision had provided that people's freedom could be deprived and be forced labor purely due to their minds. Such provision had already constituted a state's violation of people's freedom of minds, and thus violated the minimum human rights protection.

Nowadays, the red line of the constitution against the behavior of the authoritarian state, this interpretation is the clearest and authoritative declaration of the Constitutional Court in the face of human rights protection.

### **B. Breaking "Special Power Relationship"**

The so-called "special power relationship" (*Besonderes Gewaltverhältnis*) means that the civil servants, soldiers, students, prisoners or other groups are in a status which is more obedient to the state than the average person, in order to achieve specific state purposes. Often this status is characterized by the absence of the principle of the rule of law, that is, the absence of fundamental rights, the inapplicability of the principle of legal reservations, and the inability

to seek remedies from the courts. In Taiwan, “special power relationship” has continually dominated the above groups, which can be said to be a typical example of human rights protection being ignored under the authoritarian system. However, under the efforts of the Constitutional Court for decades, the “special power relationship” deeply rooted in our state’s legal order has gradually been broken and the normal status of the rule of law has gradually been restored.

Taking the civil servants’ group as an example, since the announcement of *J.Y. Interpretation No. 187* in 1984, TCC has successively provided its implications on whether civil servants can request judicial relief for rights violations.<sup>17</sup> In *J.Y. Interpretation No. 298*, TCC further provided clearer criteria, holding that as long as the administrative measures constituted a change in the status of the civil servant or had a significant impact, he would be able to seek remedies in court. It is notable that this rationale has been duplicated in *J.Y. Interpretation No. 323, 338, 455, and 483* and concretized in different cases.

Concerning Taiwanese students who have consistently been in the “special power relationship”, TCC applied the same rationale of “a change in the status” in *J.Y. Interpretation No. 382*. That is to say, if a student has been dropped out of school or treated similarly, changing his or her status as a student and jeopardizing the right to education, TCC would recognize the student’s right to seek remedies. In *J.Y. Interpretation No. 430*, TCC also duplicated similar rationale to open up relief channels for the military. From civil servants, students to military personnel, although TCC intends to provide various types of groups with judicial remedies under the special power relations, they are still prohibited in general except for some particular conditions. It also fails to allow the same rationale to be used until other groups have yet to be covered.

Until *J.Y. Interpretation No. 653*, by the issue of detention of the defendant's right to seek judicial remedies, TCC affirmed that the principle of “Ubi jus, ibi remedium” was the core essence of the protection of the right to sue and cannot be deprived because of the different people's identities. This means that at the conceptual level, the Justices finally declared a total abandonment of the “special power relationship”. Taking this interpretation as an example, even if the defendant in custody loses his or her personal freedoms, this does not necessarily mean that it becomes a slave of the state. Outside the scope of being custody, defendants are still protected by the Constitution, and the right to sue is certainly included. Since that, the Constitutional Court has been making use of the disputed cases as an opportunity to implement this principle one by one in different regulated groups and to dismantle the special power relations.

For example, in *J.Y. Interpretation No. 684 and 736*, TCC provided more broad protection for the litigation relief of students and teachers. In *J.Y. Interpretation No. 681 and 691*, the Justices addressed the issue of the sentenced person for the first time. Both cases involve the prisoner's parole decision dispute. Since the parole involves whether the prisoner can leave the prison, the Justices accordingly admit that the parole decision has affected the rights of the prisoners. Thus, if prisoners do not accept the parole decision, they are entitled to have the right to access the courts. In *J.Y. Interpretation No. 755*, TCC further stepped in the domain of various measures suffered by the prisoners in the prison, pointing out that if the

---

<sup>17</sup> More specific cases, See *J.Y. Interpretation No. 201, 243, 266, 312*.



## How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan

management measures were infringed upon the fundamental rights of prisoners which were not obviously minor violations, based upon the principle of "Ubi jus, ibi remedium," they should be allowed to enter into the courts and entitled to judicial relief.

As discussed above, it can be seen that, the scope of the abolishment of "special power relationship" has gradually expanded as the implement of a series of judicial interpretations. Compared with the justifications which could easily be tolerated during the era of authoritarian rule, the Constitutional Court now firmly believes that there is no reason in principle to deprive the people of their fundamental rights from the beginning, which also means that the Constitution should scrutinize any state's administrative act under the principle of the rule of law.

### **C. The Protection of Right to Privacy**

The right to privacy is another fundamental civil right that protects the people from being improperly invaded by the state. However, as the pervasively expanding functions of the modern states, the rulers usually attempt to grasp the private information or life of the people for specific administrative purposes or criminal investigations. When the Constitutional Court resides in this "transparent society," it will inevitably have to take the responsibility to guarantee people's rights to privacy.

*J.Y. Interpretation No. 603* is considered a representative case of how TCC implements the protection of privacy rights. In 1997, the political branch revised the provisions of Article 8 of the Household Registration Act because it believed that establishing fingerprinting data of all the people could be used to avoid the fraudulent use of national identity, confirm the identity of patients, feeble-minded senior citizens. The provision, therefore, required that when a citizen reached the age of 14, he or she should press the fingerprint to ask for the identity card, and it would not be issued without a citizen being fingerprinted. In this case, because of the protection of human dignity, TCC pointed out that individuality and moral integrity, as well as preventing invasions of personal privacy and maintaining self-control of personal information were subject to the rights to privacy prescribed by the Constitution. As such, since fingerprints were sensitive personal information, whereby the state might monitor individuals. Hence, the large-scale collection of fingerprint data must be subject to strict scrutiny. Under the strict scrutiny, the provisions at issue were held unconstitutional. When the minority in the Legislative Yuan could not overturn the majority decision, TCC actively intervened in the current policy decisions and avoided the mass violation of the privacy rights of the entire people.

In order to maintain the social order, the public security organs must investigate the concealed words and deeds of the perpetrators. During this process, they may excessively invade the private life of the citizens. *J.Y. Interpretation No. 631* accurately illuminated the conflict between privacy and criminal investigation. The issue in this interpretation involves whether the writs of communication monitoring issued by the prosecutor's authority in the investigation violated people's freedom of privacy of correspondence. TCC specifically pointed out that compared with other coercive measures such as search and seizure, the communication monitoring mechanism was more threatening in such a way that the person under surveillance was not notified, nor was he given the opportunity to exercise defensive rights in advance, and this mechanism was also with the characteristics of continuity within a

specific period of time that overrode other means, thereby causing a jeopardy upon even third-party's freedom of privacy of correspondence. In view of this, the coercive measures of the investigative organ need to be checked and balanced by an independent and objective third-party organ. TCC, therefore, required that the approval of the writs shall be retained for the judge to exercise so that the provision at issue was unconstitutional. In sum, this interpretation makes it clear that even though the state needs to investigate crimes to maintain national security and social order, the state is not allowed to exceed the boundaries of privacy that has been framed by the Constitutional Court.

In *J.Y. Interpretation No. 689*, TCC further addressed the tension of fundamental rights between freedom of the press and the right to privacy. The Social Order Maintenance Act seeks to punish a stalking behavior which has been urged to stop yet continues without any legitimate reason. A newspaper reporter was punished for the act of chasing the interview and thus filed a constitutional petition. TCC accordingly held that the constitutionality of this provision involves the balancing between multiple fundamental rights, including the freedom of movement, the freedom of press and newsgathering, as well as the freedom from bodily and mental harms, the right to autonomous control of personal information and the freedom from intrusion in the public sphere, whereby preserved the constitutionality of the provision. It is notable that the Court believes that, even though in the public domain, there are still private areas of activity and information privacy rights that are not invaded by others. Especially under the advancement of information technology such as filming and monitoring, the personal privacy needs in public places should be further enhanced. Therefore, as long as there is subjectively reasonable expectation of privacy, and such expectation is aligned with social understanding, individuals can claim privacy protection in the public domain. This reflects that the interpretations of the Constitutional Court will also be adjusted in accordance with the change of social circumstances.

#### **D. The Protection of Gender Equality**

Article 7 of the Constitution demands equality between men and women. The constitutional amendments require that the substantive equality of the status of the two sexes should be promoted. It apparently has shown that the Constitution does not make self-limitation of "laws do not enter the family." As for whether the Judges justly respond to the demands of the Constitution? Although *J.Y. Interpretation No. 554* did not indicate too much regarding that the actual application of the crime of adultery was often unfavorable to women. Besides, in *J.Y. Interpretation No. 728*, faced with the leveraging between the autonomy of private law and gender equality, the Judges chose to respect the existing legal order. However, fairly speaking, TCC has not only repeatedly made remarkable achievements in many precedents, but also has the courage to delve into injustices hidden in the field of marriage, family or other traditional social lives. In accordance with the Constitution, TCC examines whether the provisions which involve differentiated treatments between the sexes strengthen the oppression against the female.

Taking *J.Y. Interpretation No. 365* as an example. The Civil Code stipulates that in situations of parental disagreement in exercising parental rights over that of a minor, the father shall have the right of final decision. TCC believes that the differential treatment noted above is difficult to lay foundation on the differences between the physiological and social roles of the sexes so that it should be invalid within two years. This interpretation established a

## How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan

considerably strict attitude on the issue of gender equality. *J.Y. Interpretation No. 452* further duplicated a similar standard of judicial review. Specifically, The Civil Code provides that the wife should use her husband's residence at her residence. Although there is an agreed residence mechanism in the dispute, there may be cases when the husband and wife cannot reach a consensus. In this regards, the standard rule that taking the husband's residence as the principal residence is still inconsistent with the principle of equality. Subsequently, TCC also made a similar finding in *J.Y. Interpretation No. 457*, declaring that because the daughters of the deceased veterans were married, they were not able to inherit the rights to receive farmland distributed by the country, which had caused unreasonable discrimination against women and violated the principle of equality.

Furthermore, in *J.Y. Interpretation No. 666*, when TCC examined the provision of Social Order Maintenance Act regarding the issue about whether punishing sex workers were violating equality, it pointed out that due to the intertwining of economic class and gender power relations, sex workers were mostly women, especially economically disadvantaged women. This makes the punishment for sex workers is most likely to punish the female, which further highlights the constitutional principle of the guarantee of gender equality. The interpretation has proven that TCC has attempted to further correct the structural disadvantages of women in the real society through the operation of the gender equality clause.

### **E. The Protection of Same-Sex Marriage**

The well-known achievement of Taiwan's Constitutional Court among the international community is *J.Y. Interpretation No. 748*, in which the Justices recognized that the Constitution guarantees the same-sex marriage. However, the timing of the declaration of this interpretation is not entirely uncontroversial. The reason is that after the political party was again rotated in 2016, the new president declared that the legalization of same-sex marriage was her essential policy. In the same year, many Legislators and respective congressional parties proposed the same-sex marriage bills and entered the review process of legislation. Since the political branches and the various sectors of the society are still engaged in communication and dialogue, it remains doubtful that whether the judgement of the judicial power is appropriate to substitute the decision-making of the democratic society.

Nevertheless, if we look back on the development of the marriage equality movement in Taiwan, as early as 1986, the claimant had ever filed a petition to the political branch and challenged the constitutionality of the relevant provisions of the Civil Code through the approach of legal relief. On the other side, although the legislative branch is in the stage of reviewing the bill, the strong opposition groups in the society have almost made the passage of the bill hopeless within the short term. In view of the constitutional dispute in this case involves the essential fundamental rights of the people, and its rights have been suspended for more than 30 years under the long-term hesitation of the political branches; the Justices, therefore, believe that the judicial judgment should be made in a timely manner based on the maintenance of the fundamental values of the liberal democratic constitutional order.

Accordingly, TCC believes that whether homosexuals can marry involves the protection of the freedom of marriage as prescribed by the Constitution. On the other hand, the current provisions of the Civil Code also constitute differential treatment based on sexual orientation.

Under stricter scrutiny, the failure of the Civil Code for enabling the homosexuals to marry has already violated the freedom of marriage and the protection of equality. Although the provision at issue has been ruled unconstitutional, TCC also took the social controversy of the issue toward same-sex marriage into consideration, and thus set up the two-year term, urging the Legislators to decide in which method they seek to implement the same-sex marriage rights. Namely, only when the regulations were still vacuumed after two years, the same-sex couple would be allowed to register to marriage directly in accordance with the provisions of the Civil Code. In any case, TCC chose to intervene in the highly controversial issue of same-sex marriage, and made the judicial judgement before the decision-making by the political branches. Perhaps only *J.Y. Interpretation No. 499* can be slightly compared with it, paralleling as the peak of Judicial Activism demonstrated by Taiwan's Constitutional Court.

## V. Assessment and Conclusion

By means of the constitutional interpretations which demonstrate Judicial Activism, TCC has made tremendous contributions to Taiwan's liberal democratic constitutional order, including promoting the re-election of Congress, accelerating the process of democratic transition, or resisting the challenges from conservative forces on constitutionalism. Besides, TCC also commits to dismantling the status of non-rule of law left over by the authoritarian regimes and restoring the protection of civil and political rights. Faced with the unjust social structure, or the policy issues that fall into serious social confrontation, TCC has not been afraid to provide fundamental normative guidance, promoting the reality of Taiwan society to approach the ideal state portrayed by the Constitution.

However, if judicial activism implies strict scrutiny of existing political decisions, the activist constitutional court will inevitably be in constant tension with the political branches which are responsible for leveraging and gathering pluralistic public opinions. As a result, in the face of the puzzles regarding in which issues and when they should take an activist stance, TCC must still reflect on its interpretations at the methodological level.

As a matter of fact, in the context of democratic transition, whether it is due to the defects of the existing constitutional structure, or the conflicts of political forces that are difficult to resolve, the Constitutional Court has always been no escape from the test of the times and must intervene in the significant constitutional controversies. Scholars, therefore, have proposed that the judiciary in a transitional society should bear the judicial function for promoting transformation in the specific political context.<sup>18</sup> For example, for countries which were dramatically shifted to a democratic regime, their constitutional court is more necessary to resort to the normative constitutional value, assisting to disentrench the existing authoritarian system,<sup>19</sup> or serve as a mediator between opposing political forces in the process of transition. In short, due to the need of democratic transition, the proactive and well-timed intervention by the Constitutional Court would instead implement constitutional justice, or alleviate the political confrontation that will result in the frustration of transition, and assist in promoting the society toward transformation peacefully.

---

<sup>18</sup> JIUNN-RONG YEH, Function of Constitutional Interpretation by the Council of Grand Justices in the Context of National Development and Constitutional Change: 1949-1998, in DEMOCRATIC TRANSITION AND CONSTITUTIONAL CHANGE 310-311 (2003).

<sup>19</sup> The similar viewpoints as noted above, considering that the Constitution is more likely to play a dismantling role in the process of democratic transition, See RUTI G. TEITEL, TRANSITIONAL JUSTICE 198 (2000).

## How does the Judicial Activism of Taiwan's Constitutional Court shape the Liberal Democratic Constitutional Order in Taiwan

In addition, although the Constitutional Court should appropriately respect the pluralism represented by the political branches, it is still necessary to comprehensively measure the types of fundamental rights involved in the disputed issues, the intensity and urgency of the violations, the clarity of the demands in the constitutional norms, and even whether the group involved is in a vulnerable status in the real society, to determine the standard of judicial review to be adopted. After all, the political branches may still miss specific minority groups' standpoints and interests, whose protection instead is particularly required by the constitutional imperative. At the moment, in the face of the political branches, if the Constitutional Court indiscriminately adopt a submissive and negative attitude, it may deviate from the constitutional imperative of protecting the rights of the minority. Hence, the Constitutional Court is never incapable of adopting judicial activism, but instead needs to individually determine that if there is a constitutional justification for adopting activism in respective cases.

In this speech, I attempted to explore the contribution of TCC's judicial activism to the constitutional order in our country and provided the preliminary and rough personal observations by the various subjects, including democratization, political dispute settlement and human rights protection. We are currently facing a global democratic backsliding, the rise of the authoritarian regimes with emerging economic power, or the conservative political forces that resort to xenophobia and racist dogmas, continually challenging our commitment to the liberal values such as freedom, pluralism, and tolerance. However, in this wave of the backlash against constitutional democracy, Taiwan has never stopped building up a constitutional community with democracy and human rights as its core beliefs, and sincerely believes that she can promote the prosperity and peace of the international community with countries that share the identical beliefs. Walking through 70 years of constitutional development, Taiwan's Constitutional Court will proceed to accomplish its constitutional duties and constantly maintain a free, democratic, pluralistic and inclusive Taiwan. Thank you so much for your kind attention.