

Appendix I

THE GRAND JUSTICES' ROLE IN PROCESS OF THE R.O.C. DEMOCRATIC CONSTITUTIONALISM*

INTRODUCTION

Often referred to as “the Guardian of the Constitution” by the people it serves, the Grand Justices Council of the Judicial Yuan, under which the Constitutional Court has been established since 1992, is the highest judicial body of the nation, charged with interpreting the Constitution of the Republic of China. The Republic’s Constitution of 1947 is based on the political doctrines advocated by the nation’s Founding Father, Dr. Sun Yat-sen. These doctrines are elaborated as the “Three Principles of the People”, including Nationalism, Democracy, and Social Welfare of People, namely of the People, by the People, and for the People. The “Five-Power Government”, as envisioned by Dr. Sun, is a hybridization of classical Chinese political traditions and Montesquieu’s doctrine of the separation of powers, from which arise the delicate checks and balances between the Executive, Legislative, Judicial, Examination, and Control Yuans.

The Judicial Yuan, of which the Grand Justices Council is its main body, supervises the administration of the court system. The Grand Justices Council, however, is not a court of final instance for civil, criminal and administrative cases, but instead a body of ultimate authority to review the constitutional validity of relevant statutes or regulations whenever legal remedies are exhausted. The Constitutional Court, comprised of the entire Grand Justices Council, is vested with the power to review, and dissolve if necessary, any political party that threatens the existence of the Republic or the democratic constitutional order.

Since its inception in 1948, the Grand Justices has gone through six terms and rendered over 623 decisions. Cases in the early days of the Republic focused on defining the function and authority of government, and on settling disputes between various

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government agencies. As time progressed, cases involving fundamental rights of individuals have been increasing. Current court dockets are dominated by those cases initiated by individuals instead of government agencies.

I. THE BIRTH OF A CONSTITUTION

1. Historical Background

The idea of a constitutional state for the Chinese people was first conceived in the late nineteenth century while the country was still under the rule of the Ch'ing Dynasty. The empire, steeped in tradition and phobia, had suffered a series of grave military and diplomatic setbacks against the voracious Western powers. In an attempt to modernize and strengthen the faltering kingdom, patriotic intellectuals K'ang Yu-wei and Liang Ch' I-ch'ao proposed to Emperor Kuang-hi in 1898 an ambitious reform program to convert the nation to a constitutional monarchy.

The program was heartily embraced by the young and liberal emperor, who was eager to reinvigorate his declining nation. Historically referred to as the Hundred Day's Reform, Emperor Kuang-hi's ambitious vision lasted no longer than a few decrees before it was brutally crushed by the archconservative Empress Dowager Ts'u-hsi. The reform participants were either executed or banished, and the Emperor himself was seized and detained until his death ten years later. Empress Dowager Tz'u-hsi took over the government and drove the empire further along its faltering path towards destruction. The unfortunate failure of this early attempt at reform considerably delayed the modernization of China and its subsequent constitutional development, yet it sowed the seeds of revolution to come a decade later.

In 1894, Dr. Sun Yat-sen, a man who is revered as the founding father of modern China by all Chinese, began to advocate for revolution to save China from the foreign colonialists. A patriotic intellectual with a cosmopolitan outlook, Dr. Sun was born in southern China, raised by his elder brother in Hawaii, and educated in Western medicine at the Hongkong University. He recognized the severity of the threat that Western imperialism posed on his motherland, and believed that the destruction of China can only be averted through the timely overthrow of corrupt dynastic rule.

As the political platform of this revolution, Dr. Sun advocated the “Three Principles of the People”: Nationalism, Democracy, and the Social Welfare of People (i.e. of the People, by the People, for the People.) As part of the revolutionary process, his doctrines appealed to the people’s sense of nationalism, and urged the overthrow of authoritarian Manchurian rule in order to establish in its place a government of the people. This newly established government would take the form of a democracy administered by the people, and function to provide for the people it serves. To this end, Dr. Sun crafted the “Fundamentals of National Reconstruction”, in which he outlined a meticulous plan to develop China’s infrastructure step by step.

Inspired by Dr. Sun’s visionary ideology and ardor, the people of China rose repeatedly in rebellion against the Ch’ing Dynasty. After ten unsuccessful attempts, the rebels finally in 1911 forced the Emperor to abdicate peacefully, bringing thousands of years of rule by monarchy to its overdue conclusion. With the demise of the Ch’ing Dynasty, the Republic of China, the first republic on the Asian continent, was subsequently born. The Revolutionary Alliance Society, led by Dr. Sun, was pivotal in dawning this new era of Chinese history, and did consequently evolve into the Nationalist Party (Kuomintang or KMT) as the Republic took shape.

In the early days of the Republic, before the political basis of a fledgling democracy had enough time to take root, the powerful remnants of the Ch’ing Dynasty, notably those with military might, threatened to tear the new nation asunder. Notwithstanding conciliatory efforts made by Dr. Sun and his disciples, true peace and stability between the warlords could not be achieved in the new China, and disarray befell the entire country as feuding factions seized dominance. Dr. Sun and his organization retreated to the southern province of Guangdong, where KMT established a power base both politically and militarily.

In 1925, Dr. Sun passed away in Beijing while making a last-ditch effort to negotiate peace between the warlords and unify the nation. In the following year, Generalissimo Chiang Kai-shek, Dr. Sun’s heir-apparent in the KMT, commenced military actions against the warlords in northern China. The Northern Expedition concluded successfully in 1928, and China was at last unified as a republic.

When the Republic was formed in 1911, the new government promulgated the

Provisional Basic Law, a legal framework by which the nation would be governed prior to the adoption of a constitution. In 1912, a constitutional assembly was convened at the Heaven's Temple in Beijing, and a document named "The Heaven's Temple Constitution Draft" was prepared. However, the nation's unstable political climate defeated this effort. In the subsequent years, each administration proposed its own draft of the constitution, but none were ever successfully adopted.

In 1923, during President Tsao-kun's administration, a constitution based on the Heaven's Temple Constitution Draft did actually pass through three readings in the Congress, and may be called the first constitution of the Republic of China. However, President Tsao-kun's election was tainted by scandalous bribery, and his government soon fell apart in 1924. Consequently, the legitimacy of the 1923 draft was always in doubt, and is not generally accepted by legal historians as a valid constitution.

After the successful Northern Expedition, the KMT set about organizing the National Government in the city of Nanjing. Step by step, this new government tried to advance Dr. Sun's political legacy by guiding the nation towards the democratic constitutional state he had envisioned. As laid down by Dr. Sun prior to his passing, the process of political reconstruction in the Republic of China was to be divided into three stages, namely the military period, the political tutelage period, and the constitutional period. The period from the 1911 revolution to the nation's reunification in 1928 was to be properly referred as the "military period." The period from the establishment of the National Government in Nanjing to the formal adoption of a legitimate constitution was to be referred as the "tutelage period." During this period, the Government would promote democratic processes and educate its citizens in the exercise of their rights. The "constitutional period" has been ongoing and evolving since the promulgation of our modern Constitution.

The National Government promulgated in 1928 the Organic Law of the Government of China, and in 1931 the Provisional Constitution for the Period of Political Tutelage. It adopted a "Five-Power" governmental structure based on Dr. Sun's unique political theory and principles. The National Government targeted a six-year schedule of "political tutelage" to prepare the people for a democratic constitution. A committee to draft the constitution was established in 1933, and the final document it produced on May 5, 1936, is historically referred to as "the Double Five Draft Constitution." This

draft incorporated most of Dr. Sun's ideas, and may be the version that most closely resembles Dr. Sun's vision.

The official adoption and enactment by the National Assembly would be necessary prior to the promulgation of the nation's constitution. Election of delegates to the National Assembly was scheduled to be complete by October 10, 1936, in order to achieve the date targeted by the Government for promulgation, November 12, 1936. However, elections in various provinces were not completed on time, compelling the Government to postpone the enactment of a constitution for yet another year. The KMT resolved to convene the National Assembly on November 12, 1937, for said purpose.

Once again, however, history intervened to sidetrack China's progress towards democracy. In July of 1937, on the eve of World War II, the Sino-Japanese War broke out following Japan's full-scale invasion of China. The chaos of war had made it impossible to summon the elected delegates from provinces occupied by the Japanese invaders, thus suspending the constitutional convention for the duration of the War.

China endured and resisted brutal mutilation at the hands of the Japanese Empire for eight years before it could rise victorious with the Allies in 1945. After evicting the invaders from its sovereignty, the Central Government (formerly called the National Government) resumed its agenda for framing a constitution. Through a series of "Political Consultation Conferences" held by the KMT along with other major political parties, notably the Chinese Communists Party, a substantially revised Double Five Draft Constitution was agreed upon as an acceptable compromise.

On November 15, 1946, the National Assembly was convened in Nanjing for enactment of the Constitution. The revised draft based upon resolutions reached by the aforesaid Political Consultation Conferences finally passed three readings at the convention, and was formally adopted as the Constitution for the Republic of China. It was thus promulgated on January 1, 1947, to be effective as of December 25, 1947.

At this point, it would appear that the struggle of many years to adopt a constitution has come to a fruitful end, and the fulfillment of the founding father's dream is at last within reach. Regrettably, however, in less than a year after the Constitution was adopted, the Chinese Communists began a civil war against the Central Government.

Exhausted after eight years of war against the Japanese invaders, the Central Government, held by the KMT, lost ground steadily to the Chinese Communists.

In 1949, the Central Government retreated to Taiwan, an island off China's southern coast that was returned to Chinese sovereignty after World War II following 50 years of Japanese imperialist occupation. Meanwhile, the Chinese Communists proclaimed its sovereignty over China as the government of People's Republic of China (PRC), and promulgated its own socialist constitution. Over the years, the Central Government of the Republic of China has unwaveringly pronounced the Communists a renegade regime, and vowed to eliminate it. The two factions assert constant political and military tension across the Taiwan Strait, and disarray has once again befallen China. Under such adverse political environment, the Republic of China Constitution, once sovereign over entire China, must for the time being survive and evolve on Taiwan as this new chapter of history resolves itself.

Upon relocation to Taiwan, President Chiang Kai-shek promptly instated law and order with a firm hand. The National Assembly, in abidance to President Chiang's dictate for stringent social order, adopted the Temporary Provisions for Wartime. The Provisions suspended parts of the Constitution, thus enabling the government to abridge certain fundamental rights of the people for the sake of security. Draconian measures such as the declaration of martial law, indefinite postponement of congressional re-elections, and removal of presidential term limits, were implemented to insure political stability. While in hindsight the wisdom of such totalitarian measures may be questionable, it must be pointed out that events of the period necessitated painful sacrifices, through which social order and political stability could seem more relevant to the survival of the Republic than democratic reforms.

In the ensuing decades, the Temporary Provisions remained in place while the Government set about building a vibrant economy on Taiwan. Between the 1950s and the 1970s, Taiwan's export-oriented economy sustained a high growth rate, and steadily accumulated a foreign currency reserve that ranked among the highest in the world. The prospering economy helped nurture the society's potential to advance politically. Gradually, the people of Taiwan demanded, in ever increasing volume, more social freedom and political participation. In 1987, President Chiang Ching-kuo, the son of President Chiang Kai-shek, answered the peoples' call for political freedom and social

liberty by lifting martial law at long last.

President Lee Teng-huei took office in 1988 after President Chiang Ching-kuo passed away. Over the next decade, President Lee presided over a series of important political reforms to turn the state into a genuine democracy. In 1990, by judicial interpretation of the Constitution, the long overdue congressional election was resumed after forty three years of suspension. Subsequently, the Temporary Provisions was repealed, and the Period of National Mobilization for Suppression of the Communist Rebellion came to an end. The development of the Republic's constitution had thus arrived at a new era.

Between 1991 and 2000, the National Assembly enacted five amendments to the Constitution. These amendments redistributed legislative powers, vacated the provincial structure and, most significantly, converted the presidency to an office directly elected by the people. In 1995, for the first time in the Republic's history, the head of the government was elected directly by the citizens residing in Taiwan. As observed by many legal historians, the inauguration of Mr. Lee as the first popularly elected President is paramount to a *de facto* Second Republic.

The robustness of the Constitution faced yet another test in 1999, when the outcome of a bitterly contested presidential election necessitated the Republic's first transfer of power from the ruling party to the opposition party. In accordance with the Constitution, the KMT, which had governed the Republic since its inception, handed over the reins of government to the Democratic Progressive Party (DPP) in a peaceful and timely manner. The inauguration of President Chen Sui-bian exemplifies the maturity of the Republic and the strength of the Constitution. Notwithstanding differences in political affiliation, all citizens of the Republic can at last expect equal protection and guarantees under the Constitution.

However, in spite of its revocation of the Period of National Mobilization for Suppression of the Communist Rebellion and cessation of open belligerence towards the Communist regime, the Government of the Republic of China has not officially renounced its territorial claims on Mainland China, a stance implicitly irreconcilable with the current administration's political intentions. Therefore, it may be objectively observed that the Constitution has retained its heritage from the 1911 Republic, all the

while seeking a viable identity in its presently ambivalent situation.

2. The Theory of the Constitution

The Republic of China Constitution is at its core the brainchild of Dr. Sun Yat-sen. In an effort to adapt China's historically and socially conservative society to a new democratic order, Dr. Sun melded its classical political thinking with Montesquieu's doctrine of separation of powers to create the "Five-Power Constitution" theory.

To those learned in Montesquieu's construction of a three-fold separation of governmental powers, the Republic of China Constitution could seem novel, yet ingenuous. Dr. Sun incorporated elements of traditional Chinese political structure into the classical Montesquieu model to form a five-fold separation of governmental powers: Executive Yuan, Legislative Yuan, Judicial Yuan, Examination Yuan, and Control Yuan ("Yuan" being the Chinese phonetic for a government branch.) In addition to the customary checks-and-balances between the executive, legislative, and judicial branches, Dr. Sun designed two more branches with a distinctive Chinese heritage, that of the Executive and Control Yuans. This "Five-Power Constitution" theory is in fact an extension of Montesquieu's doctrine, and accords with mainstream political thought underlying a modern democracy.

Unlike the traditional aristocracy in Western history, imperial authorities in Chinese history had always elevated commoner into the ruling class through rigorous examinations to ensure honesty and fairness in the power of government. Dr. Sun reasoned this to be a worthy idea, and conceptualized the Examination Yuan to parallel such function in a democracy. As the branch in charge of all personnel affairs for the government, it administers uniform examinations to qualify civil service positions and professional licenses.

Throughout the various dynasties in Chinese history, the emperors had maintained, in spite of their absolute power to rule, an independent authority to impeach and censor aberrant government officials as well as to admonish, on occasion, the emperors themselves. Dr. Sun believed that China's new government must vest similar authority and independence in the Control Yuan to ensure integrity and efficiency throughout its hierarchy. Consequently, the Control Yuan is charged with the responsibility to investigate government misconduct, impeach high-ranking officials, as well as audit the govern-

ment's budget.

While developing the "Five-Power Constitution", Dr. Sun painstakingly studied the constitutions of various governments around the world, objectively evaluated the roots of their strengths and weaknesses, and tirelessly engineered the roadmap by which national reconstruction would navigate once the timing was ripe.

Dr. Sun proposed to divide the traditional imperial powers into three clearly defined authorities and, along modern political thoughts, properly allocated them to the three independent branches of government - the legislative, the executive, and the judicial. Furthermore, he vacated from the legislative branch the power of impeachment and censor, and from the executive branch the power of examination, and re-distributed them respectively to two additional independent branches patterned after the traditional Chinese government. Indeed, the new structure may resemble neither the imperial China of the past nor the modern democracy of the West. However, if one were to study the structure objectively, one cannot fail to identify the checks-and-balances of a democratic form of government, and that the "Five-Power Constitution" is merely an extension of the three power model, conceived to meet a unique political necessity. The five-power government, as conceived and advocated by Dr. Sun, was intended to install a democracy that is at once efficient and free of corruption.

Unlike the President of the United States, who serves as the head of state as well as the chief of the executive branch, the President of the Republic of China is not the chief of the executive branch. Instead, The President of the Executive Yuan serves as its chief, while the President serves as a coordination center for the aforementioned five branches of government.

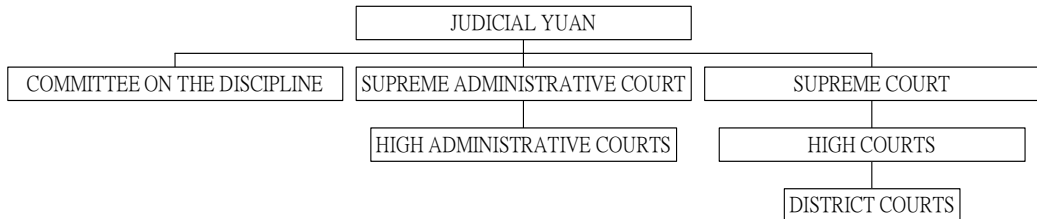
Counterbalancing the five ruling powers wielded by the government are the four political powers held by the electorate, viz. election, recall, initiative, and referendum. The people, through every vote they cast, assert their authority as the master of the government by guiding its course and speed in accordance with their collective vision.

II. THE JUDICIAL ORGANIZATION: A MULTI-TRACK SYSTEM

The present-day judicial system of the Republic of China is rooted in the judicial reform implemented by the Ch'ing Dynasty in its final years. As a last-ditch effort to revitalize the nation, the Imperial court attempted to cast away the legal system that had been practiced since the beginning of Chinese history, and adopt a new Western-style legal system. In 1906, the Imperial court retained Japanese advisors to help it draft new penal and civil codes based on the continental civil law tradition, and planned a Western style court system to be implemented later. After the 1911 revolution, the Republic of China government inherited the new codes and operated on this basis. However, ongoing armed conflicts between the warlords hindered any progress of judicial reform, and it was not until after the successful completion of the KMT-led Northern Expedition to overthrow the self-proclaimed separatist warlords that the National Government could finally press on with the modernization of its judicial system. The Judicial Yuan was established on November 16, 1928, officially marking a new beginning in China's legal history.

The 1947 Constitution laid down the structure of the present-day judicial system. Unlike the court system of the United States and many other nations, that of the Republic of China is a multiple track system. A three-tier court system, composed of the Supreme Court, the High Courts, and the District Courts, was established to handle civil and criminal cases of general jurisdiction; the District Courts have original jurisdiction over civil and criminal cases; the High Courts have appellate jurisdiction over the District Courts, and original jurisdiction for treason cases; the Supreme Court is the court of last resort, and reviews only issues of law. Parallel with these courts of general jurisdiction are the Administrative Court, which reviews legal controversies between the government and the general public, and the Committee on the Discipline of Public Functionaries, which presides over trials of civil servants accused of misconduct. Presiding over this multi-track system is the the Judicial Yuan with the Grand Justices Council as its main body. With the final authority to interpret the Constitution and render uniform review and ruling of the statutes and regulations in case of conflicts, the Grand Justices Council brings the normative force of the Constitution into full effect.

ORGANIC CHART OF THE JUDICIAL YUAN



When the government was initially organized in the early days of the republic, the court system, with the exception of the Supreme Court which was placed under the jurisdiction of the Judicial Yuan, was, as a matter of administrative expediency, administered by the Ministry of Justice, an arm of the Executive Yuan. Consequently, the line separating the judicial and the executive branch was blurred, and the checks and balances intended by the constitution became ambiguous. The Grand Justices Council's Interpretation No. 86 rendered in 1960 condemned this contradiction of the separation of powers. However, the Legislative Yuan was slow to follow through with the interpretation, and it was not until 1980 the court system was finally severed from the administration of the prosecutor's office and returned to the jurisdiction of the Judicial Yuan where it rightfully belongs. Subsequently, clear demarcation existed between judicial and executive powers, and great strides made towards judicial independence and constitutional checks and balances.

III. THE GRAND JUSTICES COUNCIL: ITS ROLE AND FUNCTIONS

1. An Overview of Its Institutional Development

The Grand Justices and Constitutional Court of the Judicial Yuan is the organ charged with exclusive power of judicial review in the Republic of China. Articles 78 and 79 of the Constitution, which provide that the Judicial Yuan shall have a certain number of grand justices to interpret the constitution and to render uniform interpretation of laws and regulations, vest the jurisdiction in the Grand Justices. Pursuant to said

provisions, the Grand Justices Council was established in 1947.

In Article 13 of the 1992 Constitutional Amendment, provision was made for the Grand Justices to constitute a Constitutional Court to declare the dissolution of any political party violating the Constitution. As the result, a new courtroom for the Constitutional Court was constructed within the Judicial Yuan, and the “Grand Justices Council” has been addressed the “Constitutional Court” as well to reflect this newly commissioned authority.

In Article 5 of the 1997 Constitutional Amendment, rules regarding the composition of the Grand Justices and Constitutional Court were significantly revised. The number of grand justices is reduced from seventeen to fifteen, the service term is shortened from nine years to eight years, a limitation of one-term only is imposed, and the terms are staggered on a four-year interval. This new Amendment will be enforced as of October 1, 2003.

As originally designed by the Constitution, the President of the Judicial Yuan couldnot concurrently serve as a member of the Grand Justices. The role he played was as the chief executive officer of the entire judicial system, and as such, was the ex officio chairman for the Plenary Session of the Grand Justices Council, and the rulings and interpretations thereof were declared in his name. Although he could neither participate in the deliberation nor vote in the final ruling of the Grand Justices Council, the President of the Judicial Yuan could cast the tie-breaking vote in the event of a deadlock among the Grand Justices; the power of which, as a matter of history, had never been exercised. In essence, his role was more of an executive nature than a judicial nature. In a strict sense, such a role designated to the highest judicial officer of the nation is inconsistent with the spirit of judicial independence aspired to in Article 80 of the Constitution. Consequently, this situation was rectified in the 1997 Constitutional Amendment, whereupon any future appointment for the President of Judicial Yuan must be chosen among the Grand Justices and can preside as chief justice whenever the Court or Council is in session .

2. The Design of the Judicial Review Process

During the debate stage of the formation of the Republic of China Constitution, a proposal was put forth to have the judicial system be modeled on the United States fed-

eral court system. The Judicial Yuan was to be on a par with the United States Supreme Court. All judges under the Judicial Yuan, including those presiding over inferior courts, would enjoy the power of judicial review. However, eventually the American model was rejected and the Continental European model was adopted. After all, the Republic of China's legal system was built on the basis of a continental civil law tradition.

Under the Continental European model, a specialized constitutional court is authorized to review the constitutionality of laws in a proceeding that differs from an ordinary trial. No "cases and controversies" is required for this model of judicial review. The function of the Grand Justices Council may be summarized as follows:

- 1) The abstract control of norms - The Council may render constitutional interpretation upon petition of a governmental agency or the legislators, when (a) the boundary of an agency's constitutional duty is unclear, (b) a constitutional dispute exists between agencies over allocation of authority and responsibility, (c) the constitutionality of a statute or regulation applied by said agency or legislators is unclear. This type of review, in essence, is giving an advisory opinion without reference to a concrete case. Although it may serve as an upper level control of legislators' activities to prevent them straying away from the constitutional path, inevitably this type of review is colored by its legislative nature and sometimes even surpasses the bounds of law-making authority which is exclusively vested in the Legislature by the Constitution.
- 2) The concrete control of norms - an individual or a legal entity may, upon exhausting all remedies in a lawsuit, petition for review on the constitutionality of the statutes or regulations applied by the court in a particular proceeding. The court may petition the same *sua sponte* during the course of a trial. This type of review is similar to those exercised by the American courts. However, the power of judicial review is centralized in one place and enjoyed by the Grand Justices Council only. Prior to the Interpretation No. 177 rendered in 1982, the Grand Justices Council docket was made up principally by cases of an abstract control type, i.e., cases involving disputes between two branches of the government. This was due to the fact that the decisions of the Grand Justices were not given retroactivity to provide substantial relief for the individual litigants. However, Interpretation No. 177 has changed the picture. It granted the petitioner an opportunity for a new trial if the pertinent statute for decision in a lower court has

been declared unconstitutional. Hence it provided incentives for individual petitioners to make use of the judicial review process. As a result of this change, individual petitioner cases surged after 1980s and the function of the Grand Justices Council as protector of individual rights has become more prominent.

- 3) Unification of laws, regulations, or decrees – an individual, a legal entity, or a governmental agency, may seek a binding uniform interpretation of statutes or regulations, when conflicting opinions causes problems in an administrative measure or legal proceeding, without reference to any constitutional issues. This is not a genuine judicial review in a traditional sense, as it does not involve constitutional review, but it surely helps smooth the enforcement and execution of law and order.

3. A Trend Towards Human Rights Protection

Since its inception in 1948, the Grand Justices Council has gone through half a century and rendered more than six hundred interpretations. Earlier cases were focused on defining the roles and functions of governments, and on settling statutory disputes between agencies. As time progressed, however, the Grand Justices Council's docket began to swell with more and more petitions filed by the citizens concerned with fundamental rights of the individual.

During the war-period with the Chinese Communist Party, the survival of the Republic obviously became major consideration of the Central Government's policymaking. The National Assembly, after being relocated in Taiwan, adopted a Temporary Provisions for Wartime which suspended some part of the Constitution. The primary role of Grand Justices Council was thus to preserve the constitutional structure of the Republic, and to restore law and order. In 1954, the Grand Justices Council rendered Interpretation No. 31 which permitted members of the first-term Legislative Yuan and Control Yuan to remain in office until an election throughout China may be held. Retrospectively, this interpretation in effect created life-time tenure for the first-term central representatives. Again, in Interpretation No. 85 (1960), the Grand Justices Council interpreted the quorum requirement "one-third of the total membership of National Assembly" mandated by the Constitution to be those delegates duly elected according to law and "be able to attend" the meetings of the Assembly. The profound impact of these two interpretations, in conjunction with the enactment of the Temporary Provisions, halted the progress of democracy in the Republic of China for forty years. It was

not until 1994, when faced with the reality of aging legislators that could no longer function, and in concomitance of the constitutional amendments and the abrogation of the Temporary Provisions, the Grand Justices Council issued Interpretation No. 261 to resume national elections.

From the 1950s through the 1970s, under a relatively stable political climate facilitated by the secure, although stagnant, constitutional order, Taiwan strived to achieve substantial economic progress. With a changing socio-political atmosphere brought about by the new wealth, people became more aware, as well as more demanding, of individual's rights. Through the 1980s and beyond, the role of the Grand Justices continued to evolve as it addressed an ever-increasing number of cases concerning the fundamental rights of individuals. An attitude of judicial activism for human rights protection was readily discernible from the panels of the Fifth and Sixth Term Grand Justices, especially the latter paving such a solid foundation on which Taiwan's democratic constitutionalism become a pragmatic reality.

In the tradition of 19th century Continental European legal system, the theory of "Special Power Relationship" abridged the constitutional rights of those groups of people who occupied a submissive, "special power" relationship with the state (e.g. public servants, soldiers, students, and prison inmates). Heavily influenced by German and Japanese jurisprudence of said era, this theory was also adopted by the Republic of China government to legally curtail the rights of certain individuals. Although this legal concept declined in continental Europe after World War II, the court system of Republic of China steadfastly clung to its political appeal. It was not until 1984, when the Grand Justices Council rendered Interpretation No. 187, acknowledging the constitutional right of a public servant to sue for certificate of pension, that this theory began to fall out of favor as a legal concept. In subsequent Interpretations No. 201, No. 243, No. 266, No.298, No. 312, No. 323, No. 338, No. 382, No. 430, No. 436, the full rights of public servants, students, soldiers were repeatedly affirmed, confirming equal protection for people irrespective of sex, religion, race, class, or political party affiliation, as originally mandated by Article 7 of the Constitution. A public servant's right for administrative review in a disciplinary proceeding was elevated further in Interpretation No. 610 (2006) by heightening the notice requirement for administrative appeal pending criminal trial.

In the area of criminal procedure, the Grand Justices also heightened the protection of individual liberty. In 1980, it rendered Interpretation No. 166 condemning the Law for Punishment of Police Offenses for depriving people of freedom without a court trial. A decade later, it reiterated this stand in Interpretation No. 251 (1990) and set a deadline for the revision of said statute. As a result of this directive, the legislators enacted the Law for Maintenance of Social Order to replace the Law for Punishment of Police Offenses. In Interpretation No. 384 declared in 1995, the procedural due process for criminal defendants and their right of confrontation with adverse witness was affirmed. Yet another legal milestone was set that year when the Grand Justices, following a vigorous oral argument in the Constitutional Court, rendered Interpretation No. 392 to nullify the provisions of the Code of Criminal Procedure empowering the prosecutors to detain criminal suspects without a court-issued arrest warrant, reaffirming the construction of habeas corpus provisions contained in Article 8 of the Constitution. This decision fundamentally changed the administration of criminal justice, and elevated the protection of human rights in the Republic of China to par with other mature democratic states.

Thereafter, in Interpretation No. 551 (2002), a provision of Statute for Drug Control requiring that the same punishment for the alleged drug crime be applied to an informant wrongly accused others was deemed excessive punishment not in accord with the constitutional principle of proportionality. In Interpretation No. 556 (2003), the element of crime “continuous participation in criminal organization” for the Statute Governing the Prohibition of Organized Crime was narrowly construed, and a heavy burden of proof was placed on the prosecutor. In Interpretation No. 567 (2003), the Court condemned the previous practice of martial law era prolonging jail term by summary executive order without a trial. The Court insisted that, even in an extraordinary period, personal freedom may not be deprived without due process of law. In Interpretation No. 582 (2004), the Court stated that a defendant’s self-incriminatory statement may not be used against the interest of co-defendants without giving right of confrontation.

Personal freedom and the right of privacy is also heavily guarded beyond the administration of criminal justice. In Interpretation No. 558 (2003), the Court stressed that any limitation on freedom of residence and of change of residence shall be made only by legislators or by executive order explicitly authorized by legislators. In Interpretation

No. 559 (2003), the Court declared that the enforcement of a protective order pursuant to Domestic Violence Prevention Act involves disposition of personal freedom, hence must have explicit authority from the legislators. In Interpretation No. 588 (2005), the Court stated that a detention for enforcing administrative monetary obligation is a limitation on the personal freedom guaranteed by Article 8 of the Constitution, and must comply with due process of law. In Interpretation No. 599 (2005), the Court issued an injunction to suspend the finger prints requirement for citizen identification cards, prescribed in the Household Registration Law, as an emergency measure to prevent irreparable injury. Thereafter in Interpretation No. 603 (2005), the Court determined that the finger prints requirement is an unconstitutional invasion of privacy and abolished it.

The Grand Justices have also repeatedly upheld and advanced protection for women and children's rights. In Interpretation No. 365 (1994), it declared Article 1089 of the Civil Code, which afforded the father preferential parental right over the mother in custody battles, to be in violation of Article 7 of the Constitution, which addresses equal right of gender, as well as Article 9 of the Constitutional Amendment, which addresses the elimination of gender bias. As remedy, the Grand Justices ordered the revision of said statute to be completed by the legislature within two years. In the years that followed, Interpretation No. 410 (1996) further heightened the protection of marital property rights for women. In Interpretation No. 552 (2002), the Court stressed the importance of maintaining monogamy for preserving social order. Hence the exculpatory clause of bigamy shall be construed strictly to cases where both spouses made good faith mistake on the termination of prior marriages without fault. The validity of second marriage is recognized by law only on exceptional ground. The Court vowed to eliminate gender discrimination and to achieve gender equality in the matrimony. Consonant with the advance in biotechnology for paternity test, the Court in Interpretation No. 587 (2004) upheld a child's right to know one's own blood lineage for establishing kinship with parents. The Court recognized this as a right of personal dignity and integrity.

The Grand Justices also advanced the legitimacy of labor movements by repeated upholding labor rights. Interpretation No. 220 (1987) stated that the decisions of the Labor Disputes Arbitration Commission are appealable to the court system, as guaranteed by Article 16 of the Constitution. Interpretation No. 373 (1995) affirmed the right of educational institution workers to form a labor union, as guaranteed by Article 14 of the Constitution.

The freedom of speech and freedom of association were, above all, the most reverently guarded rights in the Republic. The right of access to media was recognized in Interpretation No. 364 (1994). Academic freedom for universities was upheld in Interpretation No. 380 (1995). The guideline limiting pornography was redefined within Interpretation No. 407 (1996). The subject matter was revisited in Interpretation No. 617 (2006). The Court indicated that sexual expression, notwithstanding protected by the Constitution as a part of the freedom of expression, may be prescribed by properly drafted, unambiguous law. The right of assembly and parade was reviewed in Interpretation No. 445 (1998). In this interpretation, the Grand Justices specifically stated that all political speeches, unless posing a clear and present danger, are protected by Article 11 of the Constitution. It includes the advocacy of communism (support for unification with People's Republic of China) or separatism (support for Taiwan independence). The government is prohibited from censoring, in any context or under any guise, the content or theme of public assembly and parade. It is worthwhile to note that because many dissidents were jailed and persecuted for vocalizing these two antithetical political beliefs during the martial law era, this explicit statement from the Grand Justices affirming tolerance of communism and separatism symbolizes the political maturity and self-confidence of contemporary Republic of China.

4. A New Forum to Settle Important Political Disputes

After the political deconstruction process of the 1980s, no authoritarian strongman could single-handedly dictate the public affairs in the Republic of China. Interpretation No.261 created a genuine representative legislature with newly found strength. Conflicts between the legislative branch and executive branch, as well as conflicts between political parties with different ideologies, became increasingly inevitable. Since Article 5, Paragraph 1, Subparagraph 3, of the Law of Constitutional Interpretation Procedure has provided that any group of legislators, comprising in number of one-third or more of the legislature, may petition the Grand Justices Council for interpretation of the constitutionality of any statute (or bill) at issue governing the legislature's functions and duties, many legislators used this provision as a way to reassert their political position in a different forum. Political factions in the minority found it expedient to resort to the Grand Justices for dispute resolution and to obtain a second chance to overturn the legislative agenda of the majority. As such, many political questions were posed as constitutional questions to the Grand Justices.

Interpretation No. 328 (1993) illustrates a case of this nature, in which the Grand Justices deflected a highly charged political question by invoking the “Political Question Doctrine”, and remanded the legislators’ query on sovereignty definition to the political arena in which it rightfully belongs. In Interpretation No. 419 (1996), the Grand Justices addressed the political question of whether the Vice President can simultaneously serve as the President of the Executive Yuan by firmly upholding the unambiguous separation of powers. Again in 1999, the Grand Justices were asked to review the validity of a highly charged “Constitutional Amendment” provision by which the members of National Assembly improperly cast ballots to extend their own service term under controversial circumstances. In an unprecedented move, the Grand Justices rendered Interpretation No. 499 (2000) declaring the constitutional amendment as contrary to democratic principles and a breach of the covenant between the constituents and their elected representatives. The executive discretion in “not” spending the budget was reviewed in Interpretation No. 520 (2001). The case involved a highly controversial political dispute for the incoming government to halt the construction of a nuclear power plant approved by the previous administration. In Interpretation No. 613 (2006), the Court declared that the organization law of National Communications Commission, which made the composition of its commissioners controlled by partisan line in the Legislative Yuan, was an invasion of executive power by the legislators. It violated the doctrine of separation of powers and impinged on the freedom of communication. The Court set a time frame for rectifying the unconstitutional provisions.

Although the legislators may have discovered a new arena in which to continue their political battles, the Grand Justices is increasingly at risk of being drawn into the center of a political firestorm. It is imperative, therefore, for the judicial branch to exercise great restraint when dealing with political questions in order to preserve its independence and impartiality.

IV. THE CONSTITUTIONAL COURT AND ITS JURISDICTION

As mentioned *supra*, the Constitutional Court, consisting of members of the Grand Justices Council, was created by Article 13 of the 1992 Constitutional Amendment (the said article has been renumbered Article 5 in the amendments that followed) in

1992 and is vested, in addition to the interpretation and uniform ruling on laws and regulations whenever in conflicts, with an exclusive jurisdiction over the following matters :

1. Dissolution of Political Parties

After martial law was lifted in 1987, new political parties mushroomed in Taiwan. The policies and principles long enforced by the ruling party, KMT on the premise that the ROC government on Taiwan represents the entire China were challenged. Notably, the Democratic Progressive Party (DDP) unambiguously proclaimed that Taiwan is a separate international entity and enacted Taiwan independence as a plank in its party platform. At the time, the matters relating to political parties on whether they should be registered and recognized as such were regulated by the then-enforced Law of Civic Organizations and authoritatively handled by the Ministry of Interior. However, when the DDP became the second largest party in Taiwan, the Ministry of Interior felt uneasy about sanctioning a political party by an executive order. It preferred to elevate this sanction to the constitutional level. Therefore, a proposal was made to setup an institution fashioned after the German constitutional court which has the power to review the loyalty of a political party to the national constitution and to dissolve that party upon a finding of conduct betraying the constitution. The newly-created Constitutional Court is hereby empowered by Article 5 of the Constitutional Amendment to try cases where the conduct of a political party may have exceeded the bounds of the Constitution and to declare the dissolution of such party if its betrayal is substantiated. However, what a political party wishes to carry out remains to be nothing but a plank, such as DPP's, even though it may be in contravention of the intent of the Constitution, is still protected by the freedom of expression under Interpretation No. 445 so far it does not pose a clear and present danger.

2. Trial of President's Impeachment

Article 2 of the 2005 Constitutional Amendment in its paragraph 9 provides that the Legislature may move to impeach the President and/or Vice President, then petition to the Constitutional Court for trial upon passing of the motion. The party so impeached shall be forth with dismissed from the office if the petition is eventually upheld by the Court. The procedure to be followed for the said trial is specified in detail in the newly-drafted law of Constitutional Procedure, which is at time of the writing still pending in the Legislature for final enactment.

3. Case of Constitutional Importance

To a petition submitted for the Court's constitutional relief, which fails to meet the requirements as enumerated in the law of Constitutional Procedure but carries with the complexity of constitutional significance, the Court may exercise its discretionary power to review the case and render an interpretation as it is fully justified under intent of the Constitution.

Except the cases of great urgency, it usually takes a year or so from the filing of petition to the declaration of Court's ruling. Between times, the situation may be drastically changed as to adversely affect the petitioner's interest or the harm caused to the petitioner becomes irreparable even if the relief so sought after is eventually granted by the Court. Thus the question on whether the Court should be empowered to take preventive measures to protect the petitioner's rights did repeatedly come up, and not until 2006, the Court finally reached an affirmative conclusion with rather cautions restraints under Interpretation 599, which states:

The preventive system used to ensure the effectiveness of the interpretations given or judgments rendered by the judiciary is one of the core functions of the judicial power, irrespective of whether it involves constitutional interpretations or trial, or concerns civil, criminal or administrative litigations. The Grand Justices, in exercising the power of constitutional interpretation, may grant the declaration of a preliminary injunction in the event that the continuance of doubt or dispute as to the constitutional provisions at issue, the application of the law or regulation in dispute, or the enforcement of the judgment for the case at issue may cause irreparable or virtually irreparable harm to any fundamental right of the people, fundamental constitutional principle or any other major public interest, that the granting of a preliminary injunction on the motion of a petitioner prior to the delivery of an interpretation for the case at issue may be imminently necessary to prevent any harm, that no other means is available to prevent such harm, and the disadvantages for not granting the same, the granting of the injunction obviously has more advantages than disadvantages.

CONCLUSION

Since the founding of the Republic of China in 1911, the move towards a modern democratic constitutional state has been a long and arduous trek. The fact that the Republic has endured civil war, foreign invasion, exile, and even elections, is a testament to the Constitution's flexibility and perseverance. The brave new world envisioned by the founding father is never lost to those who have sworn to defend the Republic's democratic principles.

The Grand Justices Council, established in 1947 as the judicial review mechanism, is at the forefront protecting the Constitution. In particular, the early accomplishments of the Grand Justices Council effectively preserved the constitutional order, and laid the solid social foundation upon which the future political and economic success would be built. Since the 1980s, the Grand Justices Council has gradually shifted its agenda to one of judicial activism, whereupon it has blossomed in strenuously affirming the rights of the individuals. This painstaking evolution across the decades is witnessed by the cases herein translated and compiled.

The politically ambiguous situation in which the Republic of China finds itself should have little impact on the future evolution of this democracy. The ideals and principles of the Constitution, when zealously upheld and defended by the faithful, have always remained to be ROC's good effort to promote, and what the Grand Justices Council and Constitutional Court have achieved on the process of democratic constitutionalism and protection of basic human rights surely deserves to be duly recognized.