

Introduction*

I. Development of the Taiwan Constitutional Court

The Taiwan Constitutional Court (“TCC”)¹ is the oldest constitutional court in Asia. Its establishment can be dated back to the Council of Grand Justices, whose members took office on July 26, 1948, in Nanjing, China, under the 1947 Constitution of the Republic of China (“R.O.C.”). The Council held its first meeting on September 15, 1948, and rendered its first two Interpretations on January 6, 1949. Due to the outbreak of war in China and the military conflicts across the Taiwan Straits, the Council did not render any additional interpretations during the next three years or so. On May 21, 1952, a re-organized council of nine Justices² made its first Interpretation (No. 3) in Taiwan. From that time forward, the Council has continued to function and gradually developed into a constitutional court.

Before October 2003, the TCC was composed of seventeen Justices, serving for fixed and renewable nine-year terms. At least three Justices once served for three consecutive terms, or twenty-seven years. Dating to October 2003, the total number of Justices has been reduced to fifteen. In accordance with Article 5 of the Additional Articles of the Constitution, either eight or seven

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¹ Before 1993, the TCC was named “the Council of Grand Justices” of the Judicial Yuan. After the enactment of the Constitutional Court Procedure Act of 1993, its English title was changed to “Constitutional Court.” For simplicity, this Introduction will use the title “Constitutional Court” to refer to the institution of Grand Justices in charge of constitutional interpretation and other powers vested by the Constitution unless otherwise indicated.

² Among the nine Justices making Interpretation No. 3, seven were appointed in April 1952 in Taiwan. Of the two Justices appointed in China, only one participated in the making of the first two Interpretations.

Justices are to be appointed, on a staggered basis, for fixed but non-renewable eight-year terms. The President nominates and appoints all Justices with legislative confirmation. The composition of the TCC has been, in practice, a mix of legal experts with various backgrounds. In the past twenty years, about one-half of Justices have been chosen from academia, with the other half consisting of judges, prosecutors and attorneys.

II. Jurisdiction of the TCC

Articles 78 and 79 of the 1947 Constitution vest two primary powers in the TCC: (1) constitutional interpretation and (2) uniform interpretation of statutes and regulations. The Additional Articles of the Constitution, enacted in 1991, added a third power to mandate of the TCC: “declaration and dissolution of unconstitutional political parties.” In 2005, the amended Additional Articles of the Constitution added a fourth power, “impeachment of the President and Vice President,” to the TCC.

Open court proceedings and public oral hearings are mandatory for exercise of both the powers of the declaration of unconstitutional political parties and trial of Presidential impeachment cases. For both constitutional interpretations and uniform interpretations, oral hearings are optional and exceptional. These two types of interpretations are mainly done by conference deliberation among Justices. As of August 2018, there have been no actual cases involving the above-mentioned third and fourth powers. The powers to issue constitutional interpretations and uniform interpretations have thus remained the core functions of the TCC since 1948.

Over the years, the constitutional interpretation of the TCC has developed into a system based on the model of centralized and abstract review. In spite of academic debates, the TCC has been, in practice, the only judicial institution wielding the power to declare a statute unconstitutional and therefore null and

void.³ Under the Constitutional Court Procedure Act (“CCPA”) of 1993, any government authority that is one of the highest organs of the central or a local government, or at least one-third of the Legislators, or the people (including individuals, political parties and legal entities) may petition the TCC for constitutional interpretation. In its own Interpretation No. 371 (1995), the TCC further allowed courts of any level, after suspending court proceedings, to petition the TCC for review of the constitutionality of a statute applicable to the pending case. In the case of a petition by the people, the losing party of a court case may petition the TCC only after exhaustion of ordinary judicial remedies. And the TCC may only rule on the constitutionality of a statute or regulation applied by a final court in a specific case. Once the TCC finds the applied statute or regulation unconstitutional, the petitioner will usually be awarded the opportunity to ask for retrial of his/her case by an ordinary court. Except for those interpretations addressing specific inter-branch disputes involving separation of powers issues, most constitutional interpretations of the TCC are rendered in the form of abstract review of the constitutionality of statutes or regulations, or of clarifying doubts concerning the meanings of disputed constitutional provisions.

III. Work of the TCC

A TCC decision on constitutional interpretation or uniform interpretation is given the name “Judicial Yuan Interpretation” (“J.Y. Interpretation”). To render an interpretation on the constitutionality of a statute, the CCPA of 1993 requires

³ Before the promulgation of the 1947 R.O.C. Constitution, the only written constitution adopting the model of centralized and abstract review was probably that of Austria, which re-established its Constitutional Court by the *Verfassungsurberleitungsgesetz* of May 1, 1945. Citing draft proposals and minutes of the Constitutional Convention of the 1947 R.O.C. Constitution, some constitutional scholars have argued that the original intent of the framers was to set up a U.S. style of Supreme Court and to allow all levels of courts to exercise decentralized and concrete review. For a brief discussion, *see, e.g.*, David Law & Wen-Chen Chang, The Limits of Global Judicial Dialogue, *Washington Law Review* 86: 523, 544-45 (2011).

a two-thirds majority of votes with a quorum of two-thirds of Justices present. To rule on the constitutionality of a regulation, there need only be a simple majority of votes with a quorum of two-thirds of Justices present. As regards a uniform interpretation, it requires only a simple majority of votes with a majority of Justices present.

While each J.Y Interpretation is announced in the name of the court, affixed with the names of all Justices present, each Justice is also permitted to publish a concurring or dissenting opinion in her or his name. Upon dismissing a petition, the TCC usually issues a decision with brief reasoning (called a “Resolution”) by a simple majority. In May 2018, the TCC decided to permit the publication of any Justice’s concurring or dissenting opinion on dismissal decisions in the future.

Over the last decade, the TCC has usually received an average of 450 new petitions annually. About ninety-five percent of the total petitions were filed by the people, and ninety-five percent or so of petitions were for constitutional interpretation. Approximately ninety-five percent of the total petitions were denied review.

In conjunction with Taiwan’s democratization after 1987, the TCC has become a much more active constitutional court. From September 1948 to September 2020, the TCC has rendered a total of 794 J.Y. Interpretations, averaging eleven Interpretations per year. Of the 794 Interpretations, 216 Interpretations (including Interpretation Nos. 1 and 2 rendered in China) were decided during the 1949-1987 period of martial-law rule, whereas 578 Interpretations were issued after democratization. In other words, the TCC rendered approximately 5.6 Interpretations annually in the thirty-eight-year era of martial-law rule, whereas the annual average has increased significantly to approximately eighteen annually in the subsequent three decades. As compared to the pure statistical number of the TCC’s works, the outcomes have been even more significant. In nearly forty percent of the Interpretations made during the

period from 1985 and 2020, the TCC found unconstitutional either the statute or regulation in dispute, or at least part thereof. By and large, the TCC has emerged as the Guardian of the Constitution.

A more detailed breakdown of the numbers of Interpretations made by the TCC in various periods is illustrated below:

Table 1: Numbers of Interpretations Issued by the TCC from 1948 to 2020

TCC	Years	Total Number of Interpretations Made by Each TCC	Average Number of Interpretations Per Year	Number (%) of Interpretations Declaring Laws Unconstitutional
The First	Jul. 1948-Sep. 1958	79	7.9	0 (0%)
The Second	Oct. 1958-Sep. 1967	43	4.8	1 (2%)
The Third	Oct. 1967-Sep. 1976	24	2.7	0 (0%)
The Fourth	Oct. 1976-Sep. 1985	53	5.9	3 (6%)
The Fifth	Oct. 1985-Sep. 1994	167	18.6	39 (23%)
The Sixth	Oct. 1994-Sep. 2003	200	22.2	69 (35%)
	Oct. 2003-Sep.-2020	228	13.4	127 (55.7%)

During the past seven decades, the TCC has made numerous impactful decisions, twenty-one of which are reprinted in this volume. In J.Y. Interpretation No. 261 of 1990, the TCC mandated the re-election of national legislative bodies, which had not held any complete re-election since 1949. This Interpretation eventually opened the door to Taiwan's full democratization in the 1990s. Ten

years later, the TCC, in J.Y. Interpretation No. 499 of 2000, declared the entirety of the Additional Articles of the Constitution enacted in September 1999 unconstitutional. This has been one of few decisions ever made by either a Constitutional or Supreme Court around the world that has declared constitutional amendments unconstitutional. In regard to the institution of constitutional review, the TCC has made a number of decisions (*e.g.*, J.Y. Interpretations Nos. 177, 185, 188, 193, 209, 686, 725 and 741) to clarify the binding force of its own interpretations on ordinary courts and other government branches, filling in the blanks left undefined by legislation. In light of a similar statutory gap, the TCC, in J.Y. Interpretation No. 599 of 2005, issued an injunction to halt the implementation of a nationwide mandatory fingerprinting program. In J.Y. Interpretation No. 371 of 1995, the TCC even widened the access for itself to be petitioned by allowing courts of any level to petition for constitutional interpretation.

On the protection of constitutional rights, the TCC has issued multiple groundbreaking decisions. On top of many interpretations on the issues of property rights, due process and equal protection, several interpretations on free speech, the right to informational privacy and same-sex marriage are noteworthy here. J.Y. Interpretation No. 744 of 2017 applied the test of strict scrutiny to strike down the prior censorship of cosmetic advertisements. Along with the line of Interpretations Nos. 445, 644, and 718, this recent J.Y. Interpretation No. 744 indicated the strong willingness of the TCC to safeguard the freedom of expression against state intrusion. In J.Y. Interpretation No. 603 of 2005, the TCC annulled a statutory provision which authorized the government to collect the fingerprints of Taiwanese people above the age of fourteen when issuing mandatory national identification cards. In May 2017, the TCC handed down J.Y. Interpretation No. 748, which declared unconstitutional the Marriage Chapter of the Civil Code for its failure to recognize same-sex marriage. This Interpretation

has paved the way toward legalization of same-sex marriage in Taiwan. In May 2019, Taiwan's Legislative Yuan (parliament) adopted a special act to implement the mandate of Interpretation No. 748. As a result, Taiwan became the first Asian country and the 27th country in the world to recognize same-sex marriage.

IV. Future Prospects

In early 2018, the Judicial Yuan introduced to the Legislative Yuan a statutory bill in order to amend and replace the somewhat outdated CCPA of 1993. This new Act was adopted by the Legislative Yuan in December 2018, and promulgated by the President on January 4, 2019. This new Act, scheduled to take effect on January 4, 2022, will not only dramatically overhaul the court's procedures, but also expand the jurisdiction of the TCC to a significant degree. On the procedural side, the TCC will be expected or required to hold more oral hearings on petitions for constitutional interpretation or uniform interpretation. Also, the threshold to make an Interpretation will be lowered to a simple majority of votes from the two-thirds of votes required under the current CCPA of 1993. The existing designation, "J.Y. Interpretation," will be renamed "Decision of the Taiwan Constitutional Court," and its format will follow the practice of other courts in Taiwan. However, the most significant change will be the introduction of "constitutional complaint," similar to the system of *Urteilsverfassungsbeschwerde* in Germany. By lodging a constitutional complaint, the individual petitioner may also challenge the constitutionality of a court decision of final instance on top of the constitutionality of the statute or regulation applied in the court decision. By the same token, the TCC can overturn a court decision, if found unconstitutional, and remand it back to its original court for retrial. This new type of petition would expand the TCC's jurisdiction to include the function of "concrete review." Though it would definitely increase the caseload of the TCC in the future, the TCC would also take a big step ahead, toward the more effective protection of constitutional rights.