JUDICIAL WEEKLY 中華民國107年10月19日 第1923期
司法周刊
【司法文選別冊】

憲法法院與人權保障

－司法院大法官 107 年度國際學術研討會

編　按

司法院為慶祝釋憲七十週年，於今 (107) 年 10 月 1 日、2 日假法官學院擴大舉辦大法官 107 年度國際學術研討會，由許宗力院長主持開幕；蔡英文總統並親自蒞會致詞祝賀。

研討會以「憲法法院與人權保障」為主題，邀請甫卸任之加拿大最高法院院長 Hon. Chief Justice Beverley McLachlin 等多位重量級憲法及人權學者來訪與會，就人權保障及憲法制度等議題發表專題演講或提出論文，與國內相關領域學者專家共同交流研討。為使研討會議程進行順暢，首次全程以英語進行。

蔡英文總統及許宗力院長均以英文致詞。總統就大法官釋憲制度對於穩定國家憲政秩序與人權保障之貢獻，以及憲法法庭未來之興革與展望，多所肯定與期許。許院長除致詞歡迎來自國內外的與會嘉賓外，並勾勒未來「憲法訴訟法」新制經立法院修法通過施行後，建構一個效能更高、審理程序更公開透明，以及提供完足人權保障之全新憲法審查之制度願景。

呼應本次國際學術研討會主題，許宗力院長同時提出「HOW DOES THE JUDICIAL ACTIVISM OF TAIWAN'S CONSTITUTIONAL COURT SHAPE THE LIBERAL DEMOCRATIC CONSTITUTIONAL ORDER IN TAIWAN (大法官的司法積極主義如何形塑臺灣的自由民主憲政秩序)」專文。

為讓各界人士瞭解蔡總統及許院長於本次研討會之致詞內容，特以專刊方式將之與許院長專文一併刊出，以饗讀者。

目　次

慶祝釋憲七十週年

司法院大法官107年度國際學術研討會

開幕式 總統致詞 5

Opening Remarks by President Tsai, Ing-Wen 7

開幕式 院長致詞 11

Opening Remarks by President of the Judicial Yuan, Hsu, Tzong-Li.....13

閉幕式 院長致詞 64

Closing Remarks by President of the Judicial Yuan, Hsu, Tzong-Li 66

目　次

大法官的司法積極主義如何形塑臺灣的自由民主憲政秩序

許宗力

壹、前言 17
一、名詞說明 17
二、解嚴前後的大法官 18

貳、對政治自由化與民主化的貢獻 18
一、國會全面改選：釋字第 261 號解釋 18
二、集會遊行自由：釋字第 445 號解釋 19
三、結社自由：釋字第 479、644 號解釋 20
四、修憲界限論：釋字第 499、721 號解釋 21

參、解決政治部門的爭端 23
一、核四預算案：釋字第 520 號解釋 23
二、真調會條例案：釋字第 585 號解釋 24
三、通傳會條例案：釋字第 613 號解釋 25

肆、人權保障 26
一、積極捍衛人身自由 26
二、破除特別權力關係 28
三、隱私權保障 30
四、性別平等保障 31
五、同性婚姻保障 31

伍、結語 32

目　次

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

Hsu, Tzong-Li

I. Introduction 35
A. The Description of Terms 35
B. Taiwan's Constitutional Court before and after the abolishment of martial law 36

II. The Contribution for Political Liberalization and Democratization 37
A. Complete Re-election of the National Legislatures: J.Y. Interpretation No. 261 37
B. Freedom of Assembly and Parade: J.Y. Interpretation No. 445 39
C. Freedom of Association: J.Y. Interpretation No. 479 and No. 644 40
D. The Boundaries of Constitutional Amendment- J.Y. Interpretation No. 499 and No. 721 42

III. Resolving Controversies Across Political Branches.....45
A. The Case of statutory budget of the 4th nuclear power plant: J.Y. Interpretation No. 520.....46
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 47
C. Organic Act of the National Communications Commission: J.Y. Interpretation No. 613.....49

IV. The Protection of Human Rights 51
A. Positively Ensuring Personal Freedoms 51
B. Breaking "Special Power Relationship".....55
C. The Protection of Right to Privacy 57
D. The Protection of Gender Equality.....58
E. The Protection of Same-Sex Marriage 60

V. Assessment and Conclusion 61

慶祝釋憲七十週年

司法院大法官 107 年度國際學術研討會
開幕式 總統致詞

司法院許宗力院長、各位大法官、最高法院鄭玉山院長、法官學院周占春院長、法務部蔡清祥部長，遠道而來的各國嘉賓、各位與會的學者、專家、各位女士、先生，大家早安、大家好！

今年是我國憲法法庭成立七十週年，司法院舉辦今天的「憲法法院與人權保障」國際研討會，這是我國民主憲政發展史上深具意義的日子，能參與這場盛會，我感到非常榮幸。司法院也邀請了許多國際知名的憲法學者專家與會，非常歡迎大家。

我國憲法法庭是依憲法的規定而成立，但憲法對此機構只有極為簡略的規定，憲法法庭的整體樣貌與具體功能，特別是憲法法庭的權限、組織形式及行使職權的程序，均有賴之後法庭自訂的規則及決定或立法機關通過的法規進一步規範。

臺灣歷經漫長的戒嚴時期，憲法上的權利因此受到嚴重的限制。1987 年解嚴後，臺灣歷經多年的民主化。在這段時間裡，憲法法庭致力保障人民憲法上的權利，並維護臺灣民主化轉型期間和之後的民主憲政秩序。

憲法法庭的諸多解釋也為臺灣現在穩定的憲政秩序以及全面的人權保障奠定了基礎。在每個憲政秩序面臨挑戰的關鍵時刻，憲法法庭肩負著憲法守護者的角色，適時挺身維護憲法，穩定國家憲政秩序，引領我國的民主憲政發展。

過去七十年，憲法法庭已發展成為一個行使廣泛權力的成熟機關，包括審查法律規定是否合乎憲法、解決不同政府機關爭議的權力，以及獨特的憲法疑義解釋權，相較於世界各國其他憲法法院，我國憲法法庭被賦予了全面性的司法權。

為了改革臺灣司法制度，憲法法庭進一步發現了在現行制度下憲法保障人民基本權利之問題。到目前為止，憲法法庭僅能檢視法令合憲性，無法檢視法院判決的合憲性。有鑑於此，司法院引進德國聯邦憲法法院有關「憲法訴願」之制度，讓民眾得以對法院判決的合憲性提出異議。此外，司法院也提出大法官審理案件法修正草案，並將更名為「憲法訴訟法」，一旦通

過，將賦予憲法法庭審查終審法院之確定終局裁判的合憲性，高於所有法規位階。這項革新另須強化憲法法庭組織才能完成，是憲法法庭的重大發展。在此新法之下，憲法法庭將得以檢視及平衡行政權與立法權，以及一般法院判決。憲法法庭在擴大審理範疇之後，將更能全面有效保障人民憲法上的權利。

依憲法及憲法增修條文規定，憲法法庭負責解釋憲法，統一解釋法律及命令，裁定違憲政黨的解散案件，以及總統、副總統彈劾案。憲法法庭在釋憲歷史中，我國的大法官，透過修憲、立法與司法院大法官解釋本身，無論在釋憲的聲請要件、審理程序或釋憲方式，正由會議形式的大法官會議轉型真正的法庭。

如果立法院可以在今年底通過「憲法訴訟法」，前開新制將在法律公布後二年施行。屆時憲法法庭將審理並決定所有案件，包括請求抽象審查及以法院形式和程序進行憲法訴願，而不是當前的會議型式，釋憲也會改為決定或判決。

從憲法法庭的形成與發展過程中，可以看出機關形塑的軌跡，綜合參考外國制度，並兼顧我國本土的發展。

就憲法法庭而言，我們毋須爭辯何種類型的法院制度符合憲法原意，更重要的是，應聚焦在 70 年來的法庭實務歷史脈絡，關注憲法法庭的演變及發展。在憲法的每個關鍵時刻，憲法法庭已發揮功能，維護國家安全和社會秩序，鞏固民主憲政秩序的基礎，履行保護憲法權利的承諾。

換言之，我國憲法法庭的現狀，並非制憲者於七十年前立憲當時所能預見，而是歷經半個世紀以來在國會立法層面與大法官所做出的解釋層面，以及其釋憲實務操作上，有意或無意繼受了外國憲法法院法制，並堅持了我國特有的法制，堅持本土化的結果。

無論大法官釋憲制度如何演變，憲法法庭已經為我們守護憲法七十年，在每一關鍵時刻，做出了正確的判斷，促進臺灣民主化轉型，也滿足了人民對於憲法的需求。期盼在我們的司法改革之後，特別是通過「憲法訴訟法」後，大法官將繼續引領我國民主憲政秩序的穩定發展，更有效而周延的保障人民憲法上的權利。

最後，預祝為期兩天的國際研討會圓滿成功。也期盼遠道而來的外國貴賓，在臺期間除了參與研討會分享卓見之外，也能體驗我國的風土人文、熱情好客。祝福各位嘉賓身體健康、萬事如意。

謝謝大家。

In Celebration of the 70th Anniversary of Constitutional Interpretation

2018 International Conference, Taiwan Constitutional Court, Judicial Yuan Opening Remarks by President Tsai, Ing-Wen

President HSU of the Judicial Yuan, Grand Justices of the Constitutional Court, President Cheng of the Supreme Court, President Chou of Judges Academy, Minister Tsai of the Ministry of Justice, distinguished guests from abroad, scholars and experts, ladies and gentlemen, good morning.

In celebration of the seventieth anniversary of the Constitutional Court, the Judicial Yuan holds today's international conference on "Constitutional Court and the Protection of Human Rights". This is a special day in the history of our democratic and constitutional development. I am very honored to be part of this event. The Judicial Yuan also invites many internationally renowned constitutional scholars and experts, to participate in this international conference. I would like to extend the warmest welcome to you all. Thank you for coming.

We all know that the Constitutional Court was established by the Constitution. However, the Constitution only contains rather simple provisions on this institution.

The overall picture and the specific functions of the Constitutional Court, particularly regarding jurisdictions, organizational arrangements, and the procedures of the Constitutional Court were further specified either by the rules and decisions of the Court or by the statutes enacted by the legislature afterwards.

As Taiwan was under martial law for a long time, the constitutional rights were severely limited then. After the lifting of the martial-law rule in 1987, Taiwan went through a decade-long democratization. At the same time, the Court has devoted itself to the protection of the people's constitutional rights and to the maintenance of the democratic constitutional order during and after Taiwan's democratic transition.

Many Interpretations made by the court also laid the foundations for Taiwan's current stable constitutional order and comprehensive protection of human rights.

At every critical moment of our history when the constitutional order was faced with challenges, the Constitutional Court, as the guardian of the Constitution, has stood up in due time to protect the Constitution, to stabilize the constitutional order of the nation, and to lead the development of constitutional democracy of our country.

Over the last seventy years, the Constitutional Court has developed into a mature institution exercising a wide spectrum of powers, including the power to review the constitutionality of laws and regulations, the power to settle the disputes between different governmental branches, and even the unique power to clarify the doubts arising from any Constitutional text. As compared to its counterparts around the world, Constitutional Court of ours is an institution entrusted with comprehensive jurisdictions.

As part of our effort to reform Taiwan's judicial system, the Constitutional Court has further identified a problem with the protection of the constitutional rights of the people under the current system. So far, the Constitutional Court would only review the constitutionality of laws or regulations, and not that of court decisions.

Against this backdrop, the Judicial Yuan has proposed to introduce the idea of "Constitutional Complaints", modelled after the system established by the Federal Constitutional Court of Germany, in order to allow the people to challenge the constitutionality of the court decisions here. The Constitutional Court has introduced a legislative bill to amend the current Constitutional Interpretation Procedure Act and to rename it to be "Constitutional Litigation Law". Once passed, this new Act will empower the Constitutional Court to review the constitutionality of the final decisions of the courts of last resort, on top of the law and regulations. The organization of the Constitutional Court will also be reinforced to support this reform.

It will be a watershed development of the Constitutional Court. Under this new Law, the Constitutional Court will be able to check and balance not only the executive and legislative powers, but also the decisions of ordinary courts. With the extension of such jurisdiction, the Constitutional Court will be able to provide a more complete and effective protection of the constitutional rights of the people.

Under the Constitution and its Amendments, the Constitutional Court is entrusted with the powers to interpret the Constitution, to make uniform interpretations of statutes and regulations, to adjudicate the cases on the dissolution of unconstitutional political parties, and to try the impeachment cases of

the President and Vice President. By virtue of constitutional amendments, legislation and its own Interpretations, the Constitutional Court is actually transforming itself from a "Council of Justices" to a real court, in terms of either petition requirements, court procedures or the format of interpretations.

If the legislative bill of the Constitutional Litigation Law can be adopted by the Legislative Yuan by the end of this year, the above-mentioned new systems will be implemented two years after the enactment of this new Law. At that time, the Constitutional Court will hear and decide all the case, including the petitions for abstract review and for constitutional complaints in the form and procedures of a real court, instead of the current conference module. Even the name of Interpretation will be changed to Decisions or Judgments then.

Along the formation and development of our Constitutional Court, we can see the trajectory that our institution gradually took shape. It has been a combination of borrowing from abroad and growing from soils at home.

As far as the Constitutional Court is concerned, we need not debate on which type of court system is consistent with original intent of the Constitution. More importantly, we should focus on the historical context of the court practice over such a long period of seventy years.

We shall be mindful of the evolution of our Constitutional Court and pay attention to its development. Moving through each critical constitutional moment, the Constitutional Court has functioned to safeguard the national security and the social order, to consolidate the foundation for democratic constitutional order, and to fulfill the promise to protect the constitutional rights.

In other words, the status quo of our Constitutional Court is not what could have been foreseen by the constitutional framers seventy years ago.

Instead, it has been the result of dynamic interactions between the congressional legislation, on one hand, and the Interpretations and practice of the Constitutional Court, on the other, after more than half a century's development. Intentionally or accidentally, we have borrowed many important ideas from constitutional courts abroad, while we insisted on developing our Court based on our indigenous contexts and needs.

Regardless of the evolution of the constitutional interpretation system, the Justices of the Constitutional Court have served to protect our Constitution for seventy years. At each critical moment, they

have made their proper judgments to facilitate Taiwan's democratic transition and to meet the needs of the people toward the Constitution. It is my sincere hope that, after our judicial reform, especially the adoption of Constitutional Litigation Law, the Justices of the Constitutional Court will continue to guide the stable development of our democratic constitutional order and to protect the constitutional rights of our people in a more effective and comprehensive manner.

Finally, I wish this two-day international conference a great success. I hope our distinguished guests from abroad enjoy our culture, society, and hospitality during your visit, in addition to participating in the conference and sharing your valuable insights. I would also like to extend my best wishes to all participants. I wish all of you good health and best lucks. Thank you everyone.

慶祝釋憲七十週年

司法院大法官 107 年度國際學術研討會
開幕式 院長致詞

時間：107 年 10 月 1 日（一）

地點：法官學院

各位大法官、各位遠道而來的各國嘉賓、最高法院鄭院長、法官學院周院長、各位法院院長、各位與會的學者、專家、女士、先生及同仁，大家好！

歡迎各位參加司法院大法官 107 年度國際學術研討會。今天，司法院非常的榮幸，邀請到蔡總統蒞臨會場，與我們共同歡慶這個具有紀念意義的慶祝活動；總統國政繁忙，仍在百忙之中撥冗蒞會，使這場國際學術研討會更加生輝，讓我們熱烈歡迎蔡總統！

台灣是個民主政治穩定，具有高度人權意識的國家，大法官釋憲制度與世界各國憲法法院功能相同，大法官透過釋憲，實踐憲法所賦予保障人民基本權利及維護國家憲政秩序的誡命；憲法的意旨透過大法官釋義闡明，使人權保障得以落實，憲政秩序穩固安定，具體彰顯我國憲法維護基本人權的核心價值理念，是台灣做為世界自由民主國家一份子的驕傲。

釋憲制度七十週年有二個重要代表意義：一是釋憲制度階段性成果的回顧，二是我國憲法審查制度重大變革的新局開啟。司法院已經研議完成大法官審理案件法修正草案，更名為「憲法訴訟法」，同時建立「裁判憲法審查制度」，並送請立法院審議。未來修法通過後，希望建構一個效能更高、審理程序更加公開透明，以及提供完足人權保障的全新憲法審查制度。

人權保障是跨國界、跨領域的普世價值，世界各民主法治國家的憲法法院，莫不以維護基本人權為其使命天職，我國大法官亦然。本次國際學術研討會，即以「憲法法院與人權保障」為主題，邀請甫卸任的加拿大最高法院院長 Beverley McLachlin、蒙古國憲法法院大法官 D. Solongo、D. Ganzorig、美國芝加哥大學法學院教授 Tom Ginsburg、美國德州大學 William Stamps Farish Professor of Law 教授 Richard Albert，及史特拉斯堡國際人權研究院教授 Dr. Andrew Drzemczewski 等國際法學人士從比較法觀點研討人權保障在其他國家的趨勢發展；也邀請在憲法及人權保障領域有深入研究的國內學者專家，分別從「修憲界限」、「弱勢權利之

保障」，以及「資訊隱私權之最新發展」等面向，共同探討方興未艾的基本權保障及憲法制度相關問題。而原定與會演講的立陶宛憲法法院 Hon. President Dr. Dainius Žalimas 院長雖因故未克成行，其專題演講內容亦同意由司法院洽請中央研究院法律學研究所陳玉潔博士代為宣讀。各場次的研討內容相當豐富，精彩可期。

最後，非常謝謝總統蒞會祝賀及對於司法院的期許與祝福，並預祝國際學術研討會成果豐碩、圓滿成功，謝謝各位！

In Celebration of the 70th Anniversary of Constitutional Interpretation

2018 International Conference, Taiwan Constitutional Court, Judicial Yuan

Opening Remarks by President of the Judicial Yuan, Hsu, Tzong-Li

Honorable Justices, dear guests coming all the way from various countries for this conference, Minister Tsai of the Ministry of Justice, President Cheng of the Supreme Court, President Chou of Judges Academy, Presidents from High Courts and District Courts, distinguished scholars and experts, friends of media, ladies and gentlemen, good morning,

Welcome to ”The 2018 International Conference of Taiwan Constitutional Court“. It is our great honor to invite President Tsai to celebrate this significant event together with us. We appreciate President Tsai for sparing her time to attend and make this academic conference even more meaningful. Let us give a warm welcome to President Tsai!

Now, may I briefly introduce the distinguished guests coming all the way from various countries:

Order of Introductions	Country Abbreviations	Foreign Guests
1	C	Beverley McLachlin Honorable Chief Justice of Supreme Court of Canada
2	M	Dondov Ganzorig and Damdinsuren Solongo Justices of Constitutional Court of Mongolia
3	A	Tom Ginsburg Professor of University of Chicago
4	A	Richard Albert William Stamps Farish Professor of Law of the University of Texas at Austin
5	F	Professor Dr. Andrew Drzemczewski Professor of Middlesex University London

Taiwan is a state with stable democracy and devoting to human rights protection. The Grand Justices of the Judicial Yuan stand for the Constitutional Court of Taiwan, with the same functions as those of other Constitutional Courts in the world. Judicial review of constitutionality is the most important power exerted by our Grand Justices. Our Grand Justices, through interpreting the Constitution, realize the tasks endowed by the Constitution to protect the fundamental rights of individuals and maintain the constitutional order of the nation. The meaning of the Constitution, through various circumstances and generations, guides and adequately regulates the exertion of the state power, thereby realizing the protection of human rights and the stability of constitutional order. The Honorable Justices embody and highlight the core values of protecting human rights, demonstrating Taiwan's achievement as one of the free and democratic states in the world.

This year, two thousand eighteen, is the seventieth anniversary of our Constitutional Court. In order to celebrate the milestone of this important judicial institution, the Judicial Yuan and the Judges Academy host this international academic conference. I am pleased to invite you, distinguished guests, to share our happiness.

Some constitutional court may have histories longer than seventy years. However, the seventieth anniversary of the Constitutional Court has two important meanings for us, constantly pursuing better institutions to protect the rights of the people. First, the seventieth anniversary is an occasion to review the achievements so far, including the trajectory through which the Grand Justices have devoted themselves to the development of this important institution. Second, the seventieth anniversary is an occasion to initiate a significant transformation of our Constitutional Interpretation. The Judicial Yuan has, with a broad overview, built a brand-new institution to protect the rights of the people. The Judicial Yuan has proposed a revision of the Constitutional Interpretation Procedure Act, changing its title to Constitutional Litigation Law, and sent such a proposal to the Legislative Yuan for its review and legislation. The proposed Constitutional Litigation Law seeks to build a more efficient institution for constitutional review adopting an open and transparent trial procedure, and provide more comprehensive protection of human rights. After the Constitutional Litigation Law is approved by the Legislative Yuan and enacted by our President, the constitutional interpretation will no longer be proceeded through the current mode of deliberative meetings; instead, it will become completely judicialized. Grand Justices

will form a Constitutional Court to adjudicate cases and render judgments, as the same as the procedure in many other countries that establish Constitutional Courts. The Constitutional Litigation Law will in the meantime establish the institution for the constitutional review on court judgments, including such exertion of the judicial power in the scope of the judicial review conducted by the Grand Justices. This change will further improve and make comprehensive our protection of human rights and the institution of Constitutional Interpretation.

The protection of human rights is an universal value that crosses national and disciplinary borders. The Constitutional Court of every democratic state that respects the rule of law and takes the protection of human rights as its duty. The Grand Justices of our country are no exception. This International Academic Conference chooses "Constitutional Courts and the Protection of Human Rights" as its theme. We invited the former Honorable Chief Justice Beverley McLachlin from Canada; Justices D. Solongo and D. Ganzorig from Mongolia; Professor Tom Ginsburg and Professor Richard Albert from the United States; and Dr. Andrew Drzemczewski from France. These distinguished justices and scholars will deliver their speeches on the topics that relate to Constitutional Courts, laws, and the protection of human rights. Their speeches will enable us to understand the trends of protecting human rights in other jurisdictions from the perspective of comparative law. We also invited distinguished jurists including Grand Justices, international and domestic legal professionals to share with us their research on the emerging and important topics such as "the boundaries of constitutional amendment", "the protection of the rights of the disadvantaged individuals", and "the latest developments of the right to informational privacy". As these distinguished speakers have considerable experiences and valuable insights, this Conference will surely enrich our understanding of the protection of fundamental rights and constitutional law. We also have invited the President and Secretary-General of the Constitutional Court of Lithuania, Dr. Zalimas and Dr. Daneliene. Unfortunately, they cancel their visiting at the last minute due to some unexpected and irresistible reasons.

Last but not least, I thank President Tsai for coming to this Conference and for her expectations and wishes for the Judicial Yuan. I also wish this international academic conference a successful conference. Thank you everyone!

大法官的司法積極主義如何形塑臺灣的自由民主憲政秩序

許宗力*

摘要

司法院許宗力院長於專題演講中指出，大法官於我國民主轉型、鞏固的過程中展現積極主義，勇於檢視政治部門決定，協助臺灣的自由民主憲政秩序持續穩定發展。許院長並以指標性解釋為例，說明大法官在三大面向上的貢獻：（1）促進臺灣的政治自由化、民主化；（2）解決政治部門之間的爭端；（3）落實人身自由、隱私權、性別平等及同性婚姻等基本權利保障。許院長最後表示，在方法論層面，應於個案中具體判斷採取積極主義立場是否具備憲法上正當性。

關鍵字：司法積極主義、自由民主憲政秩序、司法院大法官、民主轉型、民主鞏固、人權保障、同性婚姻

* 司法院院長

壹、前言

各位貴賓大家好，很榮幸能在司法院大法官成立七十週年的此刻，與各位齊聚一堂，舉辦這場國際學術研討會。在這七十年間，臺灣社會歷經了自由化與民主轉型，並隨著各項制度改革，逐漸讓民主憲政的文化成為臺灣人民共享的核心信念。這段過程中，大法官也致力於發揮憲法法院的功能，釐清民主、憲政主義等價值的規範內涵，保障人民的自由與權利，以及調和政治紛爭，維繫國家機關的運作。面對始終變動不居的國際、國內情勢發展，大法官適時地展現司法積極主義（judicial activism）的精神，協助確立、捍衛「自由民主憲政秩序」（the Constitutional Order of Liberal Democracy），使臺灣得以此作為價值座標，持續穩定地前行。

因此，我今天的主題是「大法官的司法積極主義如何形塑臺灣的自由民主憲政秩序」，希望探討臺灣的憲法法院在發生政治、社會爭議的當下，如何立基於司法積極主義，勇於檢視既存的政治決定，並藉此形塑憲法要求的規範價值秩序。我會以若干重要的大法官解釋作為討論對象，並預計分析三大面向：大法官對政治自由化、民主化提供了什麼樣的協助；大法官如何解決政治部門的爭端；以及大法官在人權保障上的貢獻。

一、名詞說明

在開始正式討論之前，有需要先對幾個用語進行說明。首先，無論在學理上或是公共討論中，「司法積極主義」都是一個常見的用語，但卻往往沒有被精確定義[1]，因此可能被用於指涉不同層次的問題，譬如法院的制度功能、解釋方法的採取或實體價值立場的選擇等等[2]。故司法積極主義可能被用於描述傾向自由派或保守派立場的司法判決[3]，並在不同脈絡下連結到正面或負面的意涵。

但我將僅著重於司法積極主義的制度性面向，也就是憲法法院對其他政治部門的決定，並

1 如學者提及司法積極主義可能的面向，包括將政治部門決定宣告無效、未遵循判決先例、司法「立法」、偏離廣為接受的法律解釋方法以及結果導向的司法裁判等等。See Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CALIF. L. REV. 1441, 1463-1476 (2004).

2 黃昭元 (2004)，〈憲法權利限制的司法審查標準：美國類型化多元標準模式的比較分析〉，《臺灣大學法學論叢》，33 卷 3 期，頁 49。

3 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. 1139,1139-1216 (2002).

非尊重、順服，而是採取積極介入的態度，因此也往往採取較嚴格的審查標準。此外，「自由民主憲政秩序」儘管是個內容高度開放的概念，但參考大法官過去表示過的見解，它大抵上包括民主共和國原則、國民主權原則、人權保障原則以及權力分立制衡原則，並指涉這幾項原則所共同構築的規範價值網絡。

二、解嚴前後的大法官

臺灣解嚴之前，受限於體制條件，大法官展現的司法積極主義精神極其有限。因為在動員戡亂及戒嚴法制之下，行政部門權力大幅擴張，面對獨大的行政權，違憲審查機制雖已存在，但成效不彰。當時的大法官甚少做出違憲宣告[4]，少數挑戰政治部門的解釋，也往往遭到忽略，如釋字第 86 號解釋的意旨直到該號解釋做成的 20 年後才終於落實。簡言之，在強人統治時期，大法官態度相對消極，並未有效發揮憲法守護者的功能。

不過 1980 年代臺灣展開了一場「寧靜革命」，隨著 1987 年解嚴，執政黨與民間勢力以和平的方式，開啟了分期付款式的多階段憲政改革。在這個漸進的民主轉型過程中，調整憲政架構所引發的爭議，需要制度上的仲裁機制[5]；而大法官面對憲政爭議，所要考量的也不再只有政治部門的反應，更須進一步回應整體臺灣社會對自由民主的企盼[6]。因此，在諸多條件的配合之下，大法官宛如睡獅初醒，逐漸展現司法積極主義，採取較嚴格的態度檢視政治部門的政策決定。

貳、對政治自由化與民主化的貢獻

一、國會全面改選：釋字第 261 號解釋

釋字第 261 號解釋是大法官為民主轉型進程注入的一劑強心針。中華民國憲法本文規定主權屬於國民全體，並要求應定期改選中央民意代表，但在 50 年代，因為政治情勢劇變，憲法

4 王泰升 (2012)，《台灣法律史概論》，四版，頁 143，台北：元照。

5 王泰升，前揭註 4，頁 143。

6 Cooney 教授便曾指出法官所處的政治一 法律社群（political-legal community）觀點對其造成的影響。當臺灣社會的法政社群不再僅為單一政黨所掌握，並逐漸重視自由民主，司法者的論理便逐漸傾向訴諸自由民主的價值，以維繫判決的正當性與社群接受度。*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).

效力所及的實際領土疆域，與制定憲法時的預設相比嚴重萎縮。在第一屆中央民意代表任期即將屆滿之時，為了維持憲法預設的國家統治疆域，該時的大法官作成釋字第 31 號解釋，宣示國家因重大變故而不能在原有的統治疆域內辦理次屆選舉，此時應由第一屆民意代表繼續行使職權。

然而，這導致臺灣長達四十餘年未能全面改選民意代表，不僅使人民的意見無法反映在國會當中，也讓統治者的作為不須向人民負責。因此 80 年代以來，終結「萬年國會」，推動全面改選，一直是臺灣民主改革陣營的重要目標[7]。而 1990 年國民大會自我擴權，通過增加經費及延長任期的方案，更是一舉引燃三月「野百合學運」，解散國民大會、國會全面改選成為臺灣民眾的共同訴求，立法院也順勢通過一項釋憲聲請案，請求大法官改變釋字第 31 號解釋的見解。

大法官顯然是聽見了臺灣社會熱切的民主改革籲求。在同年六月作成的釋字第 261 號解釋中，大法官表示釋字第 31 號以及憲法相關規定無意讓第一屆民意代表無限期地行使職權，並為了呼應當下社會情勢，中央民意代表應在隔年年底以前終止職權行使，由政府部門適時舉辦下一屆的選舉。大法官面對違反民主原則的舊國會結構，終於勇於做出改變，終結了萬年國會。隨後，依照第一次修正的憲法增修條文規定，民意代表應從臺灣人民中選出，於是 1991 年國民大會代表改選，1992 年立法委員改選，並回歸憲法所要求的任期限制。這一次，大法官協助重建了臺灣國會的民主正當性，使民主轉型跨出關鍵性的一步。

二、集會遊行自由：釋字第 445 號解釋

在臺灣，憲法第 14 條雖然明定人民有集會自由，但在戒嚴體制之下，戒嚴令、工會法、懲治叛亂條例以及刑法等等法令，規定了各種受禁止的集會遊行態樣，而且這些規定往往使用高度模糊的用語。藉由無孔不入的法規範授權，警察、治安部門得以享有廣泛的裁量空間，選擇性地箝制其不樂見的集會遊行。解嚴之後，「集會遊行法」的制定目的也不是鬆綁人民的集會自由，反而是執政黨延續戒嚴管制的嘗試，如此一來，勢必與 1980 年代以降已越發興盛的社會抗爭產生衝突。

釋字第 445 號解釋正是在這種背景下產生。1993 年，幾位地方環保團體的成員為了抗議政府違法傾倒工程廢土，預計舉行抗爭活動。但依照當時的法律規定，集會遊行應該在 6 天前向

7　葉俊榮 (2003)，〈超越轉型：臺灣的憲法變遷〉，氏著，《民主轉型與憲法變遷》，頁 33，台北：元照。

警察機關申請許可，抗議者未能在時限前申請，但仍如期舉辦集會，因而遭判處刑責。在社會中倡議修法的公民團體支持之下，幾位被告決定挑戰法律本身的合憲性，向大法官主張系爭規定違反憲法對集會遊行自由的保障。

在釋字第 445 號解釋中，大法官明確肯認集會遊行自由的憲法權利位階，並強調對欠缺媒體資源的人而言，「街頭上的活動」是表達意見的重要途徑，從而集會遊行自由可說是民主政治運作最重要、最不可或缺的基本人權，國家不僅不應侵害，更有義務積極保障人民集會遊行權利的落實。大法官因此採取嚴格的態度檢視幾項集會遊行的限制事由，首先是「集會遊行不得主張共產主義或分裂國土」之規定，大法官認為這已涉及表現自由的事前、內容審查，若不存在明顯而立即的危險，形同單純因為特定政治主張而禁止集會遊行，系爭規定因此違反比例原則，構成違憲。藉由「明顯而立即危險」的判準，大法官接連宣告「有事實足認有危害國家安全、社會秩序或公共利益之虞者」、「有危害生命、身體、自由或對財物造成重大損害之虞者」違憲，因為這兩項要件欠缺明確性，使警察機關得以空泛的危害可能性，就禁絕人民意見的表達，這已然違背憲法保障集會自由的意旨。透過這號解釋，大法官正式宣告，過去利用空泛法律規定授權治安部門恣意執法，並禁制特定政治觀點的做法，已不見容於保障人民集會遊行自由的民主臺灣。

三、結社自由：釋字第 479、644 號解釋

對臺灣的威權統治者而言，限縮人民組成社團的空間，有助於壓制社會中反對勢力的凝聚；也因為大中國意識形態的維繫需求，涉及特定政治主張的人民團體自始須受到禁絕。因此在戒嚴時期，人民的結社自由同樣受到各項法規的管制。解嚴之後，「人民團體法」以及其子法的規定並未隨之修正，釋字第 479、644 號解釋便是公民團體透過釋憲途徑鬆綁結社管制的嘗試。

釋字第 479 解釋的聲請人是原名「中國比較法學會」的法律學術社團，在臺灣主體意識逐漸抬頭的社會氛圍下，社團成員依照程序決議將團體名稱變更為「臺灣法學會」。然而主管機關內政部依照人民團體法及子法「社會團體許可立案作業規定」第四（一）1 點規定，認為社團名稱必須跟所屬行政區域相符，法學會既然是全國性團體，就必須以「中國」或「中華民國」為名，不得更名為「臺灣」。聲請人認為自身的結社自由已受到侵害，聲請大法官解釋。

大法官在本號解釋中認為，人民團體的名稱關涉內部成員的認同與對外的自我宣稱，因此

團體的命名決定權屬於憲法結社自由的保障範疇。大法官進一步認定行政機關訂定的子法已經逾越母法「人民團體法」的授權範圍，因為母法並未就團體名稱應如何訂定做明文規制，故系爭規定已然侵害結社自由，應失其效力。

釋字第 644 號解釋則是起源於主管機關駁回「臺北市外省人臺灣獨立促進會」的設立申請，因為依照當時的人民團體法第 2 條及 53 條規定，人民團體若主張共產主義與分裂國土，其設立應不予許可。大法官認為系爭規定是在限制人民決定集結為社團之設立自由，這類限制是對結社自由最嚴重的箝制，應該嚴格審查其合憲性。與釋字第 445 號解釋的討論脈絡雷同，大法官同樣認為在設立之時，難以從當下事實狀態連結到對國家存在或自由民主憲政秩序之危害，因此純然屬於針對特定政治主張的言論事前內容管制，這與憲法保障言論自由與結社自由的意旨不符而失其效力。

從這兩號解釋，大法官拆解了威權時代所遺留的對結社自由的不合理管控，擁有相似理念的人民得以自發地組成團體，決定自我宣稱，並擴大自身影響力，有助於在政策決定過程中呈現更多元的意見，使民主決策程序的運作更為健全。

四、修憲界限論：釋字第 499、721 號解釋

釋字第 261 號解釋協助完成中央民意代表的全面改選，但臺灣尚需面對國會結構與修憲機制的根本性改造，特別是國民大會的定位與去留問題，仍有待解決[8]。原因在於，依照中華民國憲法的原初設計，國民大會壟斷了修憲的權柄，於是在憲政改革的過程中，國民大會得以勒索政治部門，不斷收取「修憲租」而自我擴權[9]。第五次修憲時，國民大會便以無記名投票的方式，一舉改變國大代表的選舉方式及通過延長自身任期的方案，引發輿論強力撻伐，立法委員也提交三件釋憲案，聲請大法官宣告第五次憲法增修條文之修憲程序與規範內容違憲。大法官這次不只需解決憲法條文本身有無可能違憲的理論難題，更將身處於臺灣民主化的脈絡之中，透過解釋左右國民大會的憲政命運。

大法官於 2000 年作成的釋字第 499 號解釋中首先揭示，憲法修正須符合公開透明的正當

8 葉俊榮 (2003)，〈憲政的上升或沈淪：六度修憲後的定位與走向〉，氏著，《民主轉型與憲法變遷》，頁 174，台北：元照。

9 葉俊榮 (2003)，〈從「轉型法院」到「常態法院」論大法官釋字第二六一號與第四九九號解釋的解釋風格與轉型脈絡〉，氏著，《民主轉型與憲法變遷》，頁 235，台北：元照。

修憲程序要求。因為修憲作為國民主權的行使，應透過公開透明的程序使國民意見能充分表達、落實理性溝通，並讓國大代表藉此向國民負責。而在修憲時採行無記名投票，不僅違反國民大會議事規則，也因程序不符公開透明之要求，使國民無從知悉國大代表的意見，無法對其課責。故無記名投票已然構成修憲程序上的重大明顯瑕疵，不應發生效力。

再者，大法官進一步劃定實體的修憲界限，指出憲法條文當中具有本質重要性而構成憲法規範秩序存立基礎者，不能透過修憲程序加以修改。大法官將此憲法規範之基礎稱為「自由民主憲政秩序」，認為其內涵包括民主共和國原則、國民主權原則、人權保障原則及權力分立制衡原則。

第五次修憲後，國大代表的產生方式是依照立法委員選舉各政黨得票的比例分配名額，大法官批評這將使國大代表失去民意代表性質，卻又繼續執掌憲法賦予的修憲、人事同意等權限，已經牴觸民主國原則。大法官也認為自我延長任期的修憲條文牴觸自由民主憲政秩序，因為民意代表定期改選既是貫徹民意政治與國民主權原則所不可或缺的手段，除非有不能改選的正當理由，否則無故延任皆將使國大代表的職權行使無從導源自國民的付託，從而違反國民主權原則。

大法官於是宣告第五次修憲的所有條文因為違反正當修憲程序，也逾越了修憲的實體界限，在解釋公布後隨即失去效力。釋字第 499 號解釋確立了修憲機關不容侵犯的實體界限，但這道界限並非連結到特定的國族想像或意識形態，而是嚴格限縮在維繫民主憲政正常運作所必須的民主、人權保障及權力分立等價值原則，一方面保留未來政治部門改造憲政結構的彈性空間[10]，另一方面也針對威權復辟設下憲法上的自我防衛機制。而大法官對憲政改革進程的強勢介入，也加速了國民大會的終結。在第五次修憲被宣告違憲後僅僅一個月，該屆國民大會趕在任期結束之前通過第六次憲法修正，將國民大會虛級化，並僅能被動複決立法院提出的憲法修正案。此舉也讓立法院的職掌更加接近現代民主國家國會之完整權限[11]。換言之，釋字第 499 號解釋推進了臺灣代議民主體制的合理化，以及修憲程序中國民主權質素的厚實化。

時隔 14 年，釋字第 721 號解釋同樣處理憲法條文本身是否違憲的問題，而大法官再次援用修憲界限論之解釋先例。2005 年第七次憲法增修條文將立法委員選舉制度改為並立制，選民

10 許宗力 (2007)，〈憲法違憲乎？— 評釋字第四九九號解釋〉，氏著，《法與國家權力（二）》，頁 356，台北：元照。

11 葉俊榮，前揭註 8，頁 174-175。

將投下兩張票，分別從特定選區中選出區域立委，以及在得票超過 5% 的政黨中依比例選出不分區立委。聲請人是參與立委選舉的小黨，主張憲法增修條文有關並立制、政黨比例代表制及 5% 政黨門檻違背國民主權及參政權、平等權的保障。

大法官在解釋中重申憲法的修改不得違反自由民主憲政秩序，但認為第七次修憲後的立委選舉制度並未變動選舉權、平等權的核心內涵，因此尊重修憲機關的制度選擇及國民的意志展現。釋字第 721 號解釋反映出，大法官持續堅守自由民主憲政秩序作為憲法規範秩序的實質價值基礎，但嚴格把關構成逾越修憲界限的態樣，以兼顧修憲者的憲法政策形成空間。

參、解決政治部門的爭端

臺灣在 2000 年迎來第一次的政黨輪替，由民進黨取得 2 次任期共 8 年的執政權。然而在立法院中，國民黨與親民黨組成的泛藍陣營仍佔據多數，形成朝小野大的分裂政府態勢。於是，行政部門欲推行的政策往往在立法院遭到杯葛，國會多數黨則挾人數上的優勢通過執政黨所不樂見的法律；另一方面，行政權也嘗試運用其憲法權限，抵制、改變國會多數黨的政治議程設定。當行政、立法兩權相持不下，無法有效解決政治衝突時，便仰賴大法官作為爭端解決機制，調和憲政機關之間的摩擦，使國家治理機器能回到常態的憲政渠道上持續運作。

一、核四預算案：釋字第 520 號解釋

行政與立法之間的衝突首先展現在核能政策的走向之上。民進黨秉持非核家園的政策理念，執政後隨即經行政院院會決議，不再續建臺灣的第四座核能發電廠。但立法院的泛藍陣營認為核四預算已經立法院通過，應將其視為法律案，要求行政機關遵守法律，執行核四興建預算。行政院認為，立法院依照憲法第 63 條雖然享有議決預算的權限，但僅具有批准施政計畫的性質；行政院基於憲法第 53 條及憲法增修條文第 3 條第 2 項第 1 款規定，享有政策決定權限，故有權停止興建核四、不執行相關預算。因為兩個憲政機關之間基於職權行使，產生適用憲法的爭議，大法官受理行政院的聲請，作成釋字第 520 號解釋。

大法官延續解釋先例，肯認立法院通過的法定預算案屬於對國家機關的授權規範，但其話鋒一轉，提醒法定預算的停止執行如果具有變更施政方針或重要政策的作用，依照憲法權力分立制衡的機制設計，立法部門仍享有參與決策之權。因為結合觀察憲法第 63 條、憲法增修條文第 3 條第 2 項及立法院職權行使法第 16 條的規定，行政院就國家重要事項或重要政策變更，

有向立法院報告並備詢的義務。故預算的停止執行若屬重要政策變更，行政院有義務向立法院報告並備詢，立法院也不能消極杯葛，而有義務聽取報告。若報告、質詢後立法院作成反對決議，又不能協商達成解決方案，相關機關則須遵照既有憲法機制，譬如行政院長請辭、立法院提出不信任案或制定個案性法律等途徑解決爭議。

這號解釋雖起源於核能廠興建爭議，但大法官為行政、立法間的憲政衝突，指引了一套得以在未來持續遵循，用以化解爭端的互動機制。換言之，只要行政、立法間的爭執落入憲法第63條「國家其他重要事項」的範疇，立法院就有權參與決策，並得依照本號解釋勾勒的遊戲規則，依序履行報告、質詢，尋求協商解決可能；若協商仍陷入僵局，仍應循既有憲法機制做出政策方向上的終局決定，使重大公共政策不至於因政治部門間的鬥爭而長期陷入停擺[12]。

二、真調會條例案：釋字第585號解釋

2004年總統大選，不僅是雙方陣營動員國族認同的最高峰，更因為投票前夕的3月19日，民進黨正副總統候選人遭到槍擊，使得選情異常沸騰。最後泛藍陣營以些微差距落敗，引發在總統府前的示威抗議，並提起一連串的選舉訴訟以及針對319槍擊案的調查。國會多數黨為了調查需要，制定通過「三一九槍擊事件真相調查特別委員會條例」，立法院的少數黨則質疑該條例侵犯憲法權力分立及民主國等原則。再一次地，大法官面對激烈選戰後仍餘波盪漾的政治漩渦，嘗試透過釋憲機制緩和不同黨派之間的衝突。

依照學者的觀察，真調會於組織上不受其他機關監督制衡，委員任命方式也剝奪了行政的人事權限，其調查權範疇與行使方法更跨足行政權、司法權及監察權，得以行使原本分屬各憲政機關的混合性權力，已然違反權力分立及民主原則[13]。然而，大法官多數意見為了調和憲法秩序以及追求法安定性，致力對真調會條例作成合憲性解釋[14]，也藉著合憲基礎的探求，一併補充釋字第325號解釋，為立法院建構相當於歐美國家國會的調查權限。簡言之，大法官認為調查權是立法院為了行使憲法上固有職權所必須的輔助性權力，而不僅限於釋字第325號解釋所稱的文件調閱權。於是真調會條例的合憲性檢驗，關鍵即在於其組織、職權範圍及行使調查

12 許宗力(2007)，〈迎接立法國的到來？！— 評釋字第五二〇號解釋〉，氏著，《法與國家權力（二）》，頁386，台北：元照。

13 陳英鈐(2005)，〈民主鞏固與違憲審查— 釋字第五八五號解釋的困境〉，《月旦法學雜誌》，125期，頁64-69。

14 許宗力，大法官釋字第585號解釋部分不同意見書，頁37。

權的方法、程序等是否逾越國會調查權的界限，侵入其他憲法機關的核心權力領域。藉此，大法官一方面並未全面推翻真調會條例的合憲性，卻又成功將真調會的權限限縮在權力分立秩序容許的範圍之內。

於臺灣走向單一國會體制之後，這號解釋的實質貢獻是使立法院具備更完整的權能，得以有效制衡、監督行政部門。另一方面，學者 Juan J. Linz 及 Alfred Stepan 曾分析民主鞏固的意涵，他們指出在憲政面向上，當政府或非政府勢力都願意服從或習慣於透過民主程序所訂定的法律、程序或制度來解決各種衝突，一個民主體制便可視為鞏固[15]。儘管 2004 年落敗的泛藍陣營不惜透過示威抗議以及有違權力分立的真調會條例，試圖延長政治鬥爭的戰線。但隨著政治衝突導向司法途徑，大法官盡可能兼顧政治爭端中的各方立場，並作成合憲性解釋，最後各方大抵接受此號解釋結果。臺灣的民主體制安然渡過這次選戰帶來的社會動盪，持續穩健航行至今，釋字第 585 號解釋的後續效應，可說反映著台灣民主已然具備一定成熟度。

三、通傳會條例案：釋字第 613 號解釋

2005 年「通訊傳播委員會組織法」草案於立法院進行審議，由於通訊傳播委員會執掌廣播電視事業換發新證的審查權限，其職權牽涉到錯綜複雜的政商利益，因此通傳會委員的任命方式如何設計，成為國會各方角力的對象。

立法院的泛藍陣營主張參考真調會條例，採取政黨比例方式分配委員席次。通傳會條例通過後，委員產生方式便修正為由行政院及立法院各政黨依席次比例推薦委員名單，再交由提名審查委員會審查。而該提名委員會同樣依照國會政黨比例推薦人選所組成，通傳會委員一旦經提名委員會審查通過，行政院長僅能被動提名，交由立法院同意後任命。行政院的釋憲聲請主要就是針對通傳會委員任命方式而來，認為相關規定已經違反權力分立原則，侵害行政權的核心領域，也對人民的通訊傳播自由等權利造成侵害。

大法官將通傳會定性為依法獨立行使職權之獨立機關，並認為基於機關的任務性質與憲法上公共利益考量，憲法容許將特定機關自層級式官僚結構中抽離，以減少政治干擾，增加專業自主性。通傳會的任務涉及多元意見表達的保障以及對國家、政黨的公共監督，確實有需要避免政治干預，提升專業與公正性，因此立法者將通傳會設計為獨立機關，反而更加符合憲法保

15 Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, 7(2) JOURNAL OF DEMOCRACY 14, 16 (1996).

障通訊傳播自由的意旨。

然而，大法官提醒我國憲法仍要求貫徹行政一體，使行政院長能統領行政權向立法權負責，以落實責任政治。因此儘管為了通傳會的獨立性，立法權得以在制度設計上，對行政權的人事決定權施加一定限制；但出於行政權的責任政治要求，仍應保留行政院院長一定程度的人事決定權限，如果立法者對此過度剝奪，將侵犯行政權的核心領域，違背權力分立原則要求。系爭通傳會委員產生方式之規定，行政院院長僅剩 3 名委員的推薦權，於其後的審查階段毫無置喙空間，卻有義務將提名委員會通過的名單提交立法院，並有義務進行任命。大法官認為行政權對通傳會的人事決定權已近乎全遭剝奪，使行政無從落實責任政治，也導致立法過度介入行政而產生權力失衡，故系爭規定違憲。

進入數位匯流時代後，各項傳播技術的發展日新月異，在 2005 年時政治部門已預見了通訊傳播領域的高度管制需求，獨立機關正是這種新興管制需求下的產物。通傳會條例的爭議，則讓大法官得以替獨立機關尋求合理的憲法定位，並在獨立需求與行政一體、責任政治間取得平衡。更重要的是，本號解釋提醒立法部門不能以建置獨立機關為由，恣意削弱其他憲政部門的權力而擴張自身的權力，大法官協助維繫了行政與立法間的權力天秤免於失衡。

肆、人權保障

於戒嚴時期，國家機器深深滲入市民生活，綿密而不間斷地監視、壓抑被統治者的自由。因此解嚴之後，大法官迫切的任務便是捍衛人民的公民權利，使國家暴力自各個社會場域退場。另一方面，面對歷史上長期受歧視，落處不利處境的群體，大法官也往往藉由平等權的保障，積極調控社會現存的法律上、事實上不平等。

一、積極捍衛人身自由

我國憲法的基本權條款當中，唯有第 8 條人身自由條款鉅細彌遺地規範人身自由限制的程序要求，原因即在於人身自由之於基本權體系的重要性，若國家能恣意逮捕、拘禁人民，人民享有的其他基本權保障也將落空。在戒嚴時代，國家機關卻擁有許多法規範上的武器得以剝奪人身自由，而且多半空泛地交由治安單位行使，人民是自由或是深陷牢獄生活，往往只在國家的一念之間。於是在解嚴前後，大法官開始審查危及國民人身自由的相關法規範。

（一）違警罰法

在為數眾多的解釋裡，特別值得注意的是早在 1980 年代，憲法法院就曾勇於指摘這些限制人身自由的法規範。在釋字第 166 號解釋，大法官認為憲法既然規定有關人身自由的處罰應交由司法權決定，違警罰法授權警察機關得以裁決拘留、罰役，已經違反憲法第 8 條的意旨，相關規定應儘速修改而由法院為之。但這號解釋並未獲得政治部門回應，毋寧僅是大法官蒼白的吶喊。直到民主胎動，威權政權的實力逐漸削弱，在時隔 10 年之後，大法官方於釋字第 251 號解釋中，以強硬的姿態設下定期失效的期限，並要求在期限內修改法律。同樣是做成違憲宣告，但大法官這次選擇直接解消系爭規定的效力，也宣告憲法法院在人身自由領域，將更加展現積極主義的態度。

（二）檢肅流氓條例

威權統治時期沿襲了日治時期即存在的取締流氓制度，卻直到 1980 年代才將其法律化，且即使提升至法律位階，檢肅流氓條例的規範內涵仍常常遭到詬病，包括流氓概念過於模糊，程序設計對人權保障有所不周等等[16]。

1995 年的釋字第 384 號解釋著手審查檢肅流氓條例的憲法疑慮。系爭條例針對流氓行為，設有最長可達 3 年的「感訓處分」，但同條例容許檢舉流氓者身分保密，使被檢舉者根本無從與秘密證人對質，而且感訓處分與刑罰執行並不重疊，在刑罰執行完畢後，不管有無實際需要，都可能繼續執行感訓處分。因此，大法官認為系爭規定既未保障當事人的對質詰問權，更對人民的人身自由造成過度限制，因此皆違憲失效，大法官更在解釋中意味深長地提醒，政治部門應該對這部法律進行通盤檢討。

然而立法者並未聽見大法官的警告，於釋字第 523 號解釋大法官再次宣告要件過於空泛的「留置處分」制度違憲。在釋字第 636 號解釋中，大法官認為涉及人身自由的法律用語明確性須受到較嚴格的審查，並全面檢視流氓行為的要件。其中，包括欺壓善良、品性惡劣或遊蕩無賴等要件在內，皆因概念過於模糊，導致人民難以預見其行為是否受規範效果所及，遭大法官宣告與法律明確性原則不符而在一年後失效。透過這幾號解釋，大法官鍥而不捨地督促政治部門檢討這部威權時期遺留的法律，釋字第 636 號解釋作成的一年後，政治部門終於順應大法官的意見，將檢肅流氓條例廢止。

16　王泰升、薛化元、黃世杰 (2015)，《追尋臺灣法律的足跡：事件百選與法律史研究》，頁 212，台北：五南。

（三）強制工作

強制工作是保安處分制度的一環，並散落在各類威權時期訂定的法律規範當中。槍砲彈藥刀械管制條例第 19 條就是一例，其規定犯特定罪名者，在執行完刑罰之後，應進入勞動場所強制工作三年。大法官在釋字第 471 號解釋認為強制工作制度本旨是協助欠缺工作技能或正確觀念者再社會化，但系爭規定不問犯罪行為人在服完刑期後有無再接受矯治的必要，規定一律強制工作 3 年，手段上已經逾越必要程度，因此在解釋公布日起就不再適用。

另外一個例子是戡亂時期預防匪諜再犯管教辦法第 2 條規定，匪諜罪犯執行刑罰完畢後，若思想狀況未改善而有再犯之虞，經最高治安機關核定，得令其進入勞動場所強制工作。所謂的匪諜，指的是犯內亂、外患罪之人，在威權時代，犯下這些罪名的常常是意識型態或想法有「偏差」的政治犯，故系爭規定方賦予治安部門強制工作的核定權，以續行思想改造。大法官在釋字第 567 號解釋同樣引用憲法第 8 條，指出對人民身體自由之處罰應依法定程序為之。但系爭規定賦予治安機關依照行政命令就能核定強制工作的權限，已明顯違背憲法要求。

另一方面，系爭規定既然旨在對付「國家的敵人」，大法官除了援引法律保留原則，更須在實體面回應系爭法律是否具備正當性。於本號解釋大法官明確表示，即使在非常時期，仍存在著不可克減的最低限度人權保障，思想自由是人類內在精神活動與言論自由的基礎，也關涉人性尊嚴與自由民主憲政秩序的存續，故無論什麼樣的緊急狀態都不容許國家藉故加以侵害。系爭規定純然以人民思想未獲改善就剝奪其自由，要求強制工作，無疑已是國家對人民思想自由的染指，就此已違背最低限度人權保障。

直到今日，針對威權體制國家行為的憲法紅線何在，本號解釋都是大法官在人權保障面向上，所曾做過最清晰也最有力的宣示。

二、破除特別權力關係

所謂的特別權力關係指的是，針對公務員、軍人、學生、受刑人等群體，國家為達成特定目的而使其處於比一般人更加服從、拘束的地位。通常這種地位的特徵是沒有法治國原則的適用，亦即不享有基本權利、不適用法律保留，也不能向法院請求救濟。在臺灣，特別權力關係長期支配著上述幾個群體，可說是威權體制下人權保障遭到忽略的體制性例證。但在大法官數十年的努力下，盤據我國法秩序的特別權力關係已逐步被破除，回歸正常法治狀態。

以公務員群體為例，自 1984 年大法官作成釋字第 187 號解釋起，大法官接連就公務員得否因權利侵害請求法院救濟表達見解[17]。在釋字第 298 號解釋中，大法官則進一步提供更清晰的判準，認為只要行政措施構成對公務員身分的改變或造成重大影響，皆得提起救濟。釋字第 323、338、455、483 號解釋亦沿襲這個標準，並在不同個案加以具體化。

至於亦長期處於特別權力關係下的臺灣學生，大法官則在釋字第 382 號解釋中援用造成身分改變的判準。換言之，若學生遭到退學或類似處置，使其學生身分改變而損及受教育權利，大法官肯認學生有權提請救濟。在釋字第 430 號解釋中，大法官也運用類似判準替軍人開闢救濟管道。從公務員、學生到軍人，雖然大法官有意提供處於特別權力關係下的各類群體訴訟救濟，但仍是原則禁止，於滿足特定條件下開放，且也未能讓相同法理沿用到其他尚未獲得解釋的群體。

一直到釋字第 653 號解釋，藉著受羈押被告的訴訟救濟權問題，大法官申明有權利必有救濟的原則屬於訴訟權保障核心，不能因人民身分不同而遭剝奪。這意味著在概念層次，大法官終於宣示全面揚棄特別權力關係。以本號解釋為例，即使受羈押被告失去人身自由，這也不意味著就此成為國家的禁臠，在此範圍外受羈押者的權利仍受憲法保障，訴訟權自然也包含在內。在此之後，憲法法院大抵上是以案件聲請作為契機，在不同的受規範群體逐一落實這項原則，拆解特別權力關係。

譬如在釋字第 684、736 號解釋，大法官分別就學生與老師的訴訟救濟提供更廣闊的保障。而於釋字第 681、691 號解釋，大法官則首次處理受刑人的議題。這兩個案子皆涉及受刑人的假釋決定爭議，由於假釋關係到受刑人得否離開監獄生活，因此大法官肯認假釋決定已影響受刑人權利，若不服應得提起救濟。於釋字第 755 號解釋，大法官則涉足監獄中受刑人所蒙受的各項措施，點出監獄管理措施若不法侵害受刑人基本權，且非明顯輕微的侵害，就應本於有權利必有救濟的原則，讓訴訟主張跨越監獄高牆，進入法院的視野。

由上述發展可知，大法官對特別權力關係的破除，無論是適用的群體類型，或是允許救濟範圍的廣度，都隨著釋憲的實踐逐漸擴張。相較於威權時代國家提出的正當化事由往往較被容忍，大法官如今堅定不移地認為，原則上並無理由自始剝奪人民的基本權利，任何國家行政行為，在常態法治國下都應該受到憲法的檢驗。

17　如釋字第 201、243、266、312 號解釋等。

三、隱私權保障

隱私權則是另一個使人民免於受國家不當侵擾的基本公民權利，但當代國家的功能不斷擴張，為了特定行政目的或犯罪偵查等需求，仍時常試圖掌握人民的私密資訊或生活。大法官身處於這種「透明社會」之中，便不免產生替人民隱私權利把關的必要性。

釋字第 603 號解釋是大法官就隱私權保障作成的指標性案例。1997 年政治部門因認為全民指紋建檔可供避免國民身分遭到冒用、確認病人、失智者身分等，修正公布戶籍法第 8 條規定。系爭規定要求人民年滿 14 歲時應按捺指紋並請領身分證，但若拒絕按捺便將不予發給。大法官在本案中指出，基於維護人性尊嚴，個人生活私密領域免受侵擾以及個人資料的自主控制，皆屬於憲法所保障的隱私權利。而指紋屬於敏感性的個人資訊，國家既然可能以此監控個人，指紋資料的大規模蒐集就必須受到嚴格的合憲性審查。因此在嚴格審查之下，系爭規定被宣告違憲。大法官在立法院少數無法推翻多數決定時，積極介入既有政策決定，避免了全民的隱私權利受到政治部門的大規模侵害。

為了維護社會秩序，治安機關必須探查犯罪者不欲人知的言行，但在過程中卻可能過度侵入市民的私密生活領域。釋字第 631 號解釋正是要處理隱私與犯罪偵查間的衝突。這號解釋的爭議在於，通訊保障及監察法規定，在偵查中由檢察官核可通訊監察是否侵害人民秘密通訊自由。大法官特別點出相較於搜索、扣押等其他刑事強制處分，通訊監察機制無法讓受調查者事先知悉而行使刑事訴訟法上的防禦權，卻在調查時間與連續性上遠超過其他手段，甚至連帶侵害第三人之祕密通訊自由。有鑑於此，偵查機關的強制處分權需要由獨立客觀的第三方機關加以制衡，大法官於是要求通訊監察的核可需保留給法官行使，系爭規定因而違憲。藉由本號解釋，縱然國家需要偵查犯罪以維繫國安與社會秩序，但大法官仍框定出不得恣意逾越的隱私界限。

大法官於釋字第 689 號解釋中則進一步處理新聞自由與隱私權間的基本權衝突。社會秩序維護法規定無正當理由跟追他人，經勸阻不聽者得處以罰鍰，一名報社記者因跟追採訪的行為而受罰，故聲請系爭規定違憲。大法官指出這項規定的合憲性涉及多種基本權之間的權衡，包括跟追者的一般行為自由以及新聞採訪自由，以及被跟追者的身心安全、個人資料自主與公共場域不受侵擾之自由，並據此作成合憲性解釋。值得注意的是，大法官認為在公共場域仍存在不受他人侵擾的私人活動領域及資訊隱私權，甚至在拍攝、監看等資訊科技進步之下，公共場所的個人隱私需求應更加提升。因此只要主觀上具備合理隱私期待，且該期待符合社會通念，

個人即得於公共場域主張隱私權保障。這反映出大法官所詮釋的基本權內涵，亦會隨著現實社會條件的改變而作出相應調整。

四、性別平等保障

憲法第 7 條規定男女平等，憲法增修條文則要求應促進兩性地位之實質平等，可見憲法並不做「法不入家門」的自我設限。至於大法官有無貫徹憲法意旨？雖然在釋字第 554 號解釋，大法官對通姦罪實際適用上往往多對女性造成不利並無太多著墨，釋字第 728 號解釋則在私法自治與性別平等的權衡間，選擇尊重既存的法律秩序。但持平而論，大法官在諸多解釋先例中迭有佳績，勇於依據憲法規定挖掘婚姻、家庭或其他傳統社會生活領域中潛藏的不正義，審查涉及兩性間差別對待之法令是否強化了對女性的壓迫。

以釋字第 365 號為例，就民法親權行使之規定，於父母意見不一致時應以父親優先行使，大法官認為這項差別待遇難以奠基在兩性生理或社會角色的差異之上，因而應在兩年內失效。這號解釋為性別平等議題設下態度甚為嚴格的解釋先例。譬如釋字第 452 號解釋便延續類似的審查態度，民法規定妻子應以丈夫之住所為住所，儘管系爭規定設有約定住所機制，但因可能存在夫妻無法達成共識的情況，故丈夫住所為準之原則性規定，仍不符平等原則而失效。釋字第 457 號解釋亦做成類似認定，宣告因為退伍軍人之女性遺屬結婚，便失去繼承國家配給耕地權利之規定，已經對女性造成不合理之差別對待而有違平等原則。甚至在釋字第 666 號解釋，大法官審查社會秩序維護法僅處罰性工作者是否違反平等時，指出由於經濟階級與性別權力關係的交織，性工作者多屬女性，特別是經濟弱勢女性。這使得對性工作者的處罰幾乎等於對女性的處罰，據此更加彰顯系爭規定違反保障性別平等之憲法原則。由此號解釋可看出大法官透過性別平等條款的操作，已試圖進一步矯正現實社會中女性蒙受的結構性不利處境。

五、同性婚姻保障

晚近臺灣憲法法院在國際上較為人所知的事蹟，就是釋字第 748 號解釋肯認同性婚姻受憲法所保障。但本號解釋的表態時點，並非全無爭議。原因在於 2016 年政黨再次輪替後，新任總統便宣示同性婚姻合法化是其重要政策，同年亦有諸多立法委員以及個別國會政黨提出同性婚姻法案，進入審議程序。政治部門與社會各界既然尚在進行溝通對話，司法權是否適合過早介入，代替民主社會做成決定，即有一定程度疑慮。

然而若回首婚姻平權運動在臺灣的發展歷程，早在 1986 年，本號解釋的聲請人便已曾向政治部門請願，並透過訴訟救濟程序挑戰民法相關規定的合憲性。而立法部門雖處於法案審議階段，但社會中強烈的反對力量幾乎使得短期內，法案的通過毫無希望。考量到本案憲法爭議涉及人民重要基本權，其權利保障於政治部門久未作成決定下已高懸 30 年，大法官因而認為應基於對自由民主憲政秩序基本價值的維護，及時作成司法判斷。

於是，大法官認為同性戀者能否結婚，涉及憲法婚姻自由權的保障，另一方面民法現行規定也構成基於性傾向所為之差別待遇，在較嚴格的審查態度下，民法未能使同性戀者締結婚姻，已違反婚姻自由及平等權保障。儘管宣告違憲，但大法官亦顧及同婚議題的社會爭議性，因此設下兩年期間，交由立法者決定以何種形式落實同婚權利，只是當 2 年後仍欠缺規定時，同性伴侶得直接依民法規定登記結婚。

釋字第 748 號解釋引發的社會效應，至今日仍持續發酵。一個明顯的影響是，大法官將政策討論推進到落實同性婚姻的制度形式，而不再僅停留於是否容許同性婚姻的階段。但另一方面，大法官為了尊重民主程序而留下兩年的討論期，讓反對陣營有充分時間匯聚能量，並重新定位倡議路線。由於釋字第 748 號解釋仍具備一定程度的文本開放性，因此在今年年初，反同陣營主張大法官僅保障同性戀者的結合，而非婚姻；再進一步發動公民投票，希望通過允許同性結合的專法，並將民法的婚姻定義限定於異性婚。於是在兩年期間屆至之前，臺灣同性戀者的婚姻保障能否落實，仍充滿重重變數。

但無論如何，大法官在同婚議題爭議正熾，政治部門尚未做出決定之前，便選擇介入做出司法裁決，或許唯有釋字第 499 號解釋能稍稍比肩，並列為我國大法官司法積極主義的巔峰展現。

伍、結語

我國大法官藉由展現司法積極主義的憲法解釋，為臺灣的自由民主憲政秩序作出諸多面向上的貢獻。譬如促進國會改選，加速民主轉型的進程，或抵禦保守勢力對憲政價值的挑戰。此外，大法官也致力於拆解威權體制所遺留的非法治狀態，回復對公民、政治權利的保障。面對社會既存的不平等結構，或是陷於嚴重對立的政策議題，大法官也不畏於適時介入，提供價值面向的基本指引，使臺灣社會的實況能更接近憲法秩序勾勒的應然狀態。

不過，司法積極主義若意味著對於既存政治決定趨向嚴格審查，則積極主義式的憲法法

院，終將不免與負責折衝、匯聚多元民意的政治部門處於恆常的緊張關係。因此，面對何種議題、何時應採取積極主義立場，大法官仍須在方法論層次時時自我反省。

實際上，身處於民主轉型的脈絡中，無論是出於既有憲政結構的缺陷，或是各方政治勢力出現難以化解的衝突，憲法法院往往無從逃避時代的考驗，必須介入重大憲政議題的評斷。因此有學者便建議肯認轉型社會中的司法，在實際政治脈絡中，應承載促進轉型的釋憲機能[18]。舉例而言，於短時間內劇烈轉型至民主體制的國家，其憲法法院更有需要訴諸應然憲政理念，協助拆解（disentrenchment）既存的威權制度結構[19]，或是作為轉型過程對立政治勢力的調停者。簡言之，出於民主轉型的需求，大法官適時地積極介入，反而可能落實憲法正義，或緩解將造成轉型反挫的政治鬥爭，協助社會以和平的方式推進轉型。

此外，儘管憲法法院應適度尊重政治部門代表的多元民意，但仍須綜合判斷、衡量系爭議題所涉的基本權種類、侵害的強度與急迫性，憲法規範中價值決定的明確程度，甚至是所涉群體於現實社會中是否落居弱勢處境，以決定應採取的審查標準。因為政治部門仍可能遺漏某些少數觀點及利益，卻是憲法特別要求應加以考量、保障者。此時若面對政治部門，憲法法院一概採取順從、消極的態度，反而可能背離了保障少數者權利的憲法職責。因此，大法官絕非不能採取積極主義，重點仍是應於個案中，具體判斷採取積極立場是否具備憲法上正當性。

在這次演講，我嘗試討論大法官司法積極主義對我國憲政秩序的貢獻，並分別以民主化、政治爭端解決以及人權保障為子題，提出個人初步且粗淺的觀察。當前，我們正面臨著全球性的民主退潮，經濟實力崛起的威權政體，或訴諸排外、種族主義教條的保守政治勢力，不斷挑戰著我們對自由、多元、包容等價值的堅持。但在這波價值的反挫中，臺灣從未停止打造一個以民主、人權為核心信念的憲政共同體，並相信能與共享這些信念的國家，共同維繫國際社會的繁榮與和平。而大法官走過 70 年的釋憲發展，也將繼續善盡憲法職責，協助維繫一個自由、民主而多元包容的臺灣。謝謝大家。

18 葉俊榮 (2003)，〈從國家發展與憲法變遷論大法官的釋憲機能：1949-1998〉，氏著，《民主轉型與憲法變遷》，頁 310-311，台北：元照。

19 類似觀點，認為憲法在轉型過程更加扮演拆解性的角色，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

Hsu, Tzong-Li*

Abstract

In the keynote speech, President of the Judicial Yuan, Tzong-Li Hsu, pointed out that during the period of democratic transition and consolidation, Taiwan's Constitutional Court (TCC) demonstrated judicial activism to actively examine political decisions, promoting the sustainable development of the Liberal Democratic Constitutional Order in Taiwan. President Hsu introduced several leading cases of TCC to illuminate the contributions of the Court in three dimensions: (1) to foster political liberalization and democratization; (2) to resolve political disputes; (3) to ensure personal freedoms, right to privacy, gender equality and the constitutionality of same-sex marriage. President Hsu finally indicated that, methodologically, it was necessary to individually determine that if there was a constitutional justification for adopting judicial activism in respective cases.

Keywords: judicial activism, the Liberal Democratic Constitutional Order, Taiwan's Constitutional Court, democratic transition, democratic consolidation, human rights protection, same-sex marriage

* President of the Judicial Yuan

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.[1] Accordingly, it may be used to refer to issues from different

1 As legal scholarship has pointed out, the possible dimensions of judicial activism may include striking down argu-

perspectives, such as the institutional functions of the court, the methods of interpretation or the choices of substantial value judgment, and so forth.[2] Therefore, judicial activism may be used to refer to the judicial cases inclined to the liberal or conservative party,[3] 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 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,[4] and a few of the interpretations sought to challenge the political sectors were also being

ably 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).

2 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).

3 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).

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

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.[5] 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.[6] 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-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

5 *Id*. at 143.

6 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).

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.[7] 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

7 Jiunn-rong Yeh, *Beyond transformation: the Constitutional Change*, in Democratic transition and constitutional change 33 (Taiepei Angle Publishing Co., Ltd 2003).

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 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 invalided.

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.[8] 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.[9] 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

8 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).

9 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).

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 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.[10] 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.[11] 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

10 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).

11 JIUNN-RONG YEH, supra note 8, at 174-175.

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.

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 (Einzellfallgesetz).

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.[12]

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.

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

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, 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.[13] 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.[14] 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

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

14 TZONG-LI HSU, Dissenting in part opinion in J.Y. Interpretation No.585, 37.

procedures established through democratic procedures to resolve conflicts, a democratic system could be seen as consolidation.[15] 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) 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

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

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 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.[16]

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.

16 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).

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 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.[17] 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.

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

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 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, feebleminded 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 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.[18]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,[19] 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.

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

18 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).

19 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).

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.

慶祝釋憲七十週年

司法院大法官 107 年度國際學術研討會
閉幕式 院長致詞

時間：107 年 10 月 2 日（二）

地點：法官學院

各位大法官、各位貴賓、各位與會的學者、專家、女士、先生及同仁，大家好！

一連 2 天為了慶祝釋憲七十週年所舉辦的司法院大法官 107 年度國際學術研討會，很順利圓滿的在今天下午告一段落。本次研討會，本院邀請到來自外國憲法法院院長層級的貴賓，與來自美國及歐洲等國多位重量級憲法及人權學者，暨國內相關領域的學者專家，以「憲法法院與人權保障」為主題，就人權保障及憲法制度等議題發表專題演講或提出論文進行研討，為了增進研討會進行的順暢，本次研討會也首度全程以英語進行，是場隆重盛大的學術宴饗。

人民憲法上權利的保障，是我國大法官及各國憲法法院做為國家基本法守護者所關注與極力護衛的核心，伴隨著對於人權保障要求完整而細緻的趨勢氛圍，各國憲法法院所扮演的角色，可以說是任重道遠。

本次研討會，我們有機會分別聆聽：

前加拿大最高法院院長 Chief Justice Beverley McLachlin 以「Four Eras of Aboriginal Law in Canada」為題，立陶宛憲法法院院長 President Dr. Dainius Žalimas 以「The Development of Constitutional Review and Human Rights Protection by the Constitutional Court of Lithuania」為題；Dainius Žalimas 院長因故未能與會，由陳玉潔博士代為宣讀，蒙古國憲法法院大法官 Dondov Ganzorig 以「The Role of the Constitutional Court in the Process of Democratic Development in Mongolia」為題，美國芝加哥大學法學院教授 Professor Tom Ginsburg 以「The Trump Administration, Democracy, and American Constitutional Law」為題，及史特拉斯堡國際人權研究院 / 英國倫敦米得賽克斯大學教授 Dr. Andrew Drzemczewski 以「The Role and Authority of the European Court of Human Rights」為題，所發表精彩的專題演講，提供我們有關憲法在人權保障及權力分立制度發展上的省思，這些比較法上的經驗分享，相當寶貴。

另外，鑒於弱勢權利的保障，在每個時代的維權倡議聲浪中，不曾缺席；而資訊隱私權的崛起，在 e 化世代，是基本權保障領域的明日之星；有關修憲界限的議題，更涉及憲法審查極高度的專業，我國大法官就各該議題，亦曾作出不少具代表性的解釋，例如：釋字第 719 號【政府採購得標廠商應進用一定比例原住民案】、釋字第 748 號 【同性二人婚姻自由案】、釋字第 603 號【捺指紋始核發身分證案】及釋字第 499 號【88 年 9 月 15 日修正公布之憲法增修條文違憲案】等。本次研討會，大法官亦就此等與憲法法院職權及人權保障有關的議題，邀請國內外學者專家共同研討，我們分別從：

張文貞教授提出之「Constitutional Protection of Sex/Gender Equality: With the Focus on Taiwan Constitutional Court's Leading Cases」，蔡志偉副教授提出之「Conflict and Reconciliation of State's Civil Law and Indigenous Legal Traditions: Case of Land Governance」，美國德州大學教授 William Stamps Farish Professor of Law Richard Albert 提出之「The Judicial Role in Constitutional Amendment and Dismemberment」，劉定基副教授提出之「The Past, Present, and Future of the Right to Information Privacy: A Comparative Law Perspective)」及翁逸泓助理教授提出之「The Right to be Forgotten: Forget about It?」等研究心得中，探討憲法上基本權保障的未來發展空間，及憲法法院在修憲過程的定位，提供我們很多啟發思考。

本次研討會亦蒙林超駿教授、廖福特研究員、蘇彥圖副研究員、劉靜怡教授及邱文聰副研究員等與談人，就各研討議題提出精闢的觀點及深入的評析，提供我們多元的思辨空間；同時也謝謝擔任研討會 Q&A 翻譯的陳玉潔博士，使本次國際學術研討會互動流暢。研討會所獲致的豐碩成果，將提供大法官釋憲業務的參考。

最後，再次謝謝主持各場研討會及與會的大法官、遠道專程而來的外國貴賓朋友，報告人、與談人，以及所有參加研討會的來賓、同仁，祝福各位身體健康、萬事如意！

In Celebration of the 70th Anniversary of Constitutional Interpretation

2018 International Conference, Taiwan Constitutional Court, Judicial Yuan Closing Remarks by President of the Judicial Yuan, Hsu, Tzong-Li

Grand Justices, Distinguished Guests, Scholars, Experts, Ladies, Gentlemen, and Colleagues, good afternoon!

Our two-day International Academic Conference celebrating the seventieth anniversary of Taiwan's Constitutional Court successfully comes to its conclusion this afternoon. In this Conference focusing on Constitutional Courts and the Protection of Human Rights, the Judicial Yuan invited distinguished scholars and experts in Taiwan and from abroad to deliver speeches or present academic articles. In order to facilitate the discussion during the Conference, this Conference was held in English and English only, the first time in the seventy years of history. In a sense, it is an unprecedented academic banquet.

Protecting individuals'rights enshrined by the Constitution is the focus that has been emphasized and guarded emphatically by our Grand Justices and the Constitutional Court of every state, as they are the guardians for the fundamental law of each state. As the worldwide trend tends to demand more comprehensive and better protection of human rights, the role played by the Constitutional Court of every state should be more emphasized.

During this Conference, we had the opportunities to listen to the following excellent speeches:

Chief Justice Beverley McLachlin delivered a speech titled as "Four Eras of Aboriginal Law in Canada."

President of the Constitutional Court of Lithuania, Dr. Dainius Žalimas delivered an article titled as "The Development of Constitutional Review and Human Rights Protection by the Constitutional Court of Lithuania." As President Dr. Dainius Žalimas was unable to join the conference, Dr. Yu-Jie Chen was speaking in Dr. Zalimas'stead.

Justice Dondov Ganzorig of the Constitutional Court of Mongolia delivered a speech titled as "The

Role of the Constitutional Court in the Process of Democratic Development in Mongolia."

Professor Tom Ginsburg of University of Chicago Law School delivered a speech titled as "The Trump Administration, Democracy, and American Constitutional Law."

Dr. Andrew Drzemczewski of International Institute of Human Rights in Strasbourg and Middlesex University in London delivered a speech titled as "The Role and Authority of the European Court of Human Rights."

These excellent speeches enable us to reflect on the role of Constitution in the development of human rights protection and the separation of powers. These lessons of comparative law are highly valuable.

In addition, this Conference touched upon three topics. First, protecting the rights of the disadvantaged people has never been absent in every generation's quest for the protection of human rights. Second, the right to information privacy is an emerging issue in the field of protecting fundamental rights in this era of information technology. Third, the issues regarding the constitutionality of constitutional amendments, the boundaries for permissible constitutional amendment and involving special expertise in the judicial review. For these three topics, our Grand Justices made some landmark Interpretations. Some examples are: Interpretation No. 719 reviewed the constitutionality of the law requiring the winning tenderer in government procurement to employ a minimum percentage of indigenous people; Interpretation No. 748 touched upon the question of the constitutionality of same sex marriage; Interpretation No. 603 reviewed the constitutionality of the law requiring fingerprints for the issuance of personal identification cards; Interpretation No. 499 declared that the fifth Constitutional Amendments was unconstitutional on September 15, 1999. These three topics were explored in depth by the following five academic articles presented at this conference.

Professor Wen-Chen Chang presented her article with the title as "Constitutional Protection of Sex/Gender Equality: With the Focus on Taiwan Constitutional Court's Leading Cases."

Associate Professor Awi Mona presented his article with the title as "Conflict and Reconciliation of State's Civil Law and Indigenous Legal Traditions: Case of Land Governance."

William Stamps Farish Professor of Law of the University of Texas at Austin, Richard Albert, presented his article with the title as "The Judicial Role in Constitutional Amendment and Dismemberment."

Associate Professor Ting-Chi Liu presented his article with the title as “The Past, Present, and Future of the Right to Information Privacy: A Comparative Law Perspective.”

Assistant Professor Wesley Yi-Hung Weng presented his paper titled as “The Right to be Forgotten: Forget about It?”

These academic speeches and articles discussed the prospects of constitutional protection of fundamental rights and the role played by Constitutional Court in the process of Constitutional Amendment providing us with many important insights.

This Conference was further enriched by the participation by distinguished discussants, including Dr. Chao-Chun Lin, Dr. Fort Fu-Te Liao, Dr. Yen-Tu Su, Dr. Ching-Yi Liu and Dr. Wen-Tsong Chiou. The discussants provide us with excellent viewpoints, insightful comments, and many opportunities for thinking and deliberation. Thanks also go to Dr. Yu-Jie Chen, who served as the interpreter for the Q&A session of this Conference and made possible the successful interaction at this international academic conference. The valuable results of this Conference will be carefully considered by our Grand Justices in Constitutional Interpretation.

Last but not least, I thank all the Grand Justices chairing or participating in the sessions, all the distinguished guests who come from abroad, all the distinguished presenters, discussants, and all participants and colleagues. I wish you all good health and a safe journey home!