

## Article

# A Comparative Study of Judicial Review Procedure Types—The Option of Constitutional Procedure System in Reform of the Constitutional Review of Taiwan

Chien-Liang Lee\*

### ABSTRACT

*Justices of the Judicial Yuan in Taiwan are entrusted the power of judicial review by the Constitution. For ensuring the constitutional primacy, judicial guarantee model is adopted. The maintenance of the constitutional primacy refers to the establishment of a democratic and decentralized political system to safeguard people's basic rights and provide effective right remedies. However, there is no hierarchy between the democratic principles and the principle of separation of powers. From the point of view of democratic principles, giving laws enacted by the legislature, which based on direct public opinions, to the judiciary, which only has indirect democratic legitimacy, to review its constitutionality may cause a number of constitutional disputes. For example, whether the exercise of constitutional jurisdiction makes the political center incline from democratic representation, which was always supervised by public opinions, towards adjudication, which are not supervised by public opinions but have status protection; whether judicial review system affect the operation of democratic politics and lead to the "solidification" of the national government affairs; and so on. In other words, whether judicial review can accommodate to the dynamic character of the democratic constitutional regime,*

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\* Research Professor, Institutum Iurisprudentiae, Academia Sinica, Taipei, Taiwan; Professor of Law, College of Law, National Taiwan University. E-mail: chenny@gate.sinica.edu.tw.

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*and then fit in the open specifications orientation that the Constitution holds towards the politics, economy, and social development. This is really the fundamental issue of the practice of constitutionalism. Therefore, the article will start from the interrelationships of the constitutional primacy, democratic principles, and the separation of powers to explore the choices of judicial review system and constitutional litigation system, and then compare and authenticate the related legal arguments for the reference of legal research and pragmatic operation.*

**Keywords:** *Judicial Review, Democratic Principles, Separation of Powers, The Justices, Constitutional Interpretation, Temporary Punishment System*

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I. A SKETCH OF THE ISSUES: SUPREMACY OF THE CONSTITUTION,  
PRINCIPLE OF DEMOCRACY AND SEPARATION OF POWERS

Article 78 of the Constitution of the Republic of China in Taiwan (hereafter the Constitution) states, the Judicial Yuan (“Yuan” is the Chinese phonetic of a government branch) shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders. Also, according to Articles 114, 171 & 173, the power to interpret the Constitution is held by the Judicial Yuan. Whether the laws, orders and ordinances run counter to the Constitution is to be explained by the Judicial Yuan, as well. On this basis, the Constitution grants judicial review power to the Grand Justices of the Judicial Yuan. The Constitution adopts this judicial safeguard pattern to secure its supremacy,<sup>1</sup> hence the so-called “the superior position of the constitution is guaranteed by judicature.”<sup>2</sup> The Grand Justices can be called the “vindicator of the constitution” (Hüter der Verfassung),<sup>3</sup> as it acts under “judicial pattern.”

Under the ideological trend of the modern constitutionalism, the constitution has superiority in the legal system of a country; Taiwan is no exception to this trend. However, there is no fixed scale or set of levels within the constitution order. The maintenance of constitutional supremacy reflects the establishment of democracy, the decentralization of the system, securing people’s basic rights, and providing effective right relief procedures. The core value of a free, democratic, constitutional order is especially represented in securing human dignity and respecting the people’s free development.<sup>4</sup> However, between democracy and the separation of powers, neither is superior to one or another. This thought leads to a basic question in a country with a constitutional government: how to carry out the ideal of safeguarding the people’s basic rights under a democratic and decentralized constitutional state system. In the perspective of democratic

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1. Regarding the relevance of the judicial review system to the supremacy of the constitution, CHRISTIAN STARCK, *Vorrang der Verfassung und Verfassungsgerichtsbarkeit* [Priority of the Constitution and Constitutional Jurisdiction], in DER DEMOKRATISCHE VERFASSUNGSSTAAT: GESTALT, GRUNDLAGEN, GEFÄHRDUNGEN [THE DEMOCRATIC CONSTITUTIONAL STATE: FORM, BASE, DANGER] 33, 33 (1995); Herbert Bethge, *Vorbemerkung* [Prelims], in BVERFGG: KOMMENTAR, para. 3 (Theodor Maunz & Bruno Schmidt-Bleibtreu et al. eds., 1998).

2. Alfred Rinke, *Ist das Bundesverfassungsgericht „Herr seines Verfahrens“?* [Is the Federal Constitutional Court “Mr. Procedure?”], in DEMOKRATIE IN STAAT UND WIRTSCHAFT, FESTSCHRIFT FÜR EKKEHART STEIN ZUM 70. GEBURTSTAG [DEMOCRACY IN STATE AND ECONOMY, FESTSCHRIFT FOR EKKEHART STEIN ON HIS 70TH BIRTHDAY] 411, 411 (Heiko Faber & Götz Frank eds., 2002).

3. YUEH-SHENG WENG, *Hsienfa chih Weihuche* [The Vindicator of Constitution], in Hsingchengfa Yu Hsientai Fachih Kuochia [ADMINISTRATIVE LAW AND CONTEMPORARY RECHTSSTAAT] 475 (3d ed. 2004); YUEH-SHENG WENG, *Hsienfa chih Weihuche—Huiku yu Chanwang* [The Vindicator of Constitution: Retrospect and Prospect], in FACHIH KUOCHIA CHIH Hsingchengfa Yu SsuFA [ADMINISTRATIVE LAW AND JUDICATURE OF RECHTSSTAAT] 389 (1994).

4. J.Y. Interpretation No. 603 (2005).

principle, many constitutional controversies of indirect democratic validity can arise for the judicial organ to examine whether laws that were passed by legislature with positive public support run counter to the constitution. Another focus of this research is whether the power of judicial review drives the core of politics from the democratic congress (with public opinion surveillance) to the judicial organ (without public opinion surveillance). Moreover, given that the judicial organ has the power to give the “last word,” the question whether the judicial review mechanism will affect democratic political operations and cause government affairs to be “solidified” is another point that needs to be examined.<sup>5</sup> In other words, the modern democratic constitutional order should be characterized by overall openness.<sup>6</sup> In constitutionalism, whether the judicial review adapts the dynamic disposition of democratic constitutionalism and agrees with the constitution in relation to politics, economy and social development is of constant crucial concern. A related issue is how to divide the powers and functions among the judicial reviewers and legislators, viz., what kind of affairs should have the judicial or the legislative power make the last decision. This problem of assigning function is one that every modern constitutional country must face: it exists not only in “positive law” but in reflecting on “constitutional procedure,” especially regarding the institutional structure and procedural type of judicial review. Therefore, based on the governing ideas of supremacy of the constitution, democratism and separation of powers, this article discusses the various systems of judicial review and constitutional procedure with a view to compare jurisprudential demonstrations, as a reference for legal study and practice.

## II. THE OPTION OF APPROACH: LEGISLATORIAL THEORY OR LEGAL INTERPRETATION THEORY

The discussions on the legal system usually fall into two types: legislatorial theory and legal interpretation theory. As for the judicial review system, legislatorial theory can be subdivided into constitutional amendment theory and legislative amendment theory. Since the 7th Amendment of Taiwan’s Constitution has raised the threshold of future constitutional amendment almost impossibly high by adding a citizens’ reaction instrument procedure,<sup>7</sup> the study of the evolution of the judicial review system must

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5. Rincken, *supra* note 2, at 412.

6. Roman Herzog, *Ziele, Vorbehalte und Grenzen der Staatstätigkeit* [Aims, Provisions, and Limits of the State Act], in 3 HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND [HANDBOOK OF CONSTITUTIONAL LAW OF REPUBLIC OF GERMANY] 83, ch. 58, para. 28 (J. Isensee & P. Kirchhof eds., 2d ed. 1996).

7. In terms of probable constitutional progression in the future, Chien-Liang Lee, *Mientui Chunghua Minkuo Hsienfa—Ssusoo Taiwan Hsienkai Chihlu* [Face the Constitution of the Republic of

refer to relevant legislations and this amendment.

According to legislative theory, the option and formation of judicial review system basically belong to legislative decisions. The legislature can randomly form and construct any kind of constitutional litigations and procedures as long as they fall within the margins of the constitution. This is not against the law or the constitution; it merely relates to the corresponding purposeful consideration. However, from the viewpoint of legal interpretation theory, legal interpretation is limited by the meaning and normative purposes of law; therefore the judicial review system's option and formation are only concerned with whether the laws in question are against existing laws and the constitution. However, this legal expounding is not totally bound by the letters of articles. The judiciary can assume a role to expound or make up laws when the norm of a law is not definite or even incomplete; and this subject matter is relevant to the issue of "judge making laws" and "the progressive development of laws." According to judicial review system, the constitution stipulates that the Grand Justices have full monopolistic authority to expound on the constitution. The Grand Justices must obey either the margins of constitution (mostly authority clauses) or the legislative act regarding the Judicial Yuan's constitutional interpretation procedure in performing its duty. Therefore, legal interpretation theory identifies two levels in judicial review, i.e., constitutional norm expounding and legal interpretation of laws. Because the Grand Justices are a constitutional body, it has both the duty to maintain the supremacy of the constitution and the power to speak "the last word" (*das letzte Wort*);<sup>8</sup> therefore, the limitation on the Grand Justices in interpreting laws is much less than that on judges of law courts at various grades. Indeed, in interpreting the Constitution, the Grand Justices have a degree of wiggle room for forming judgments. However, Article 82 stipulates that the organization of the Judicial Yuan and of law courts of various grades shall be prescribed by law. That the Grand Justices shall interpret the Constitution does not mean that it absolutely dominates the procedure process. The procedure of judicial review also applies to the principle of "reserved for statutes" (reservation of statutory powers, *Gesetzesvorbehalt*) and thus produces a serious question about expounding the stipulation of judicial review procedure.

This article discusses judicial review and types of constitutional

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*China—Thinking for the Future of Taiwan's Constitutional Progress*], in 5 HSIENFA CHIEHSHIH CHIH LILUN YU SHIHWU [CONSTITUTIONAL INTERPRETATION: THEORY AND PRACTICE] 55, 62-64 (Dennis T.-C. Tang & Fort F.-T. Liao eds., 2007).

8. CHRISTIAN STARCK, *Verfassungsrechtswissenschaft, Normenkontrolle und Verfassungsauslegung* [Constitutional Law, Normative Control and Interpretation of Constitution], in 2 PRAXIS DER VERFASSUNGS AUSLEGUNG [THE PRACTICE OF CONSTITUTION INTERPRETATION] 19, 24 (2006).

litigation procedure from two viewpoints: firstly, from the angle of legislatorial theory, it takes a synthetic look into the possibility of legislation of kinds of judicial review procedure and its pros and cons; secondly, in accordance with legal interpretation theory, it analyzes the possible range and margin of constitutional interpretation or creating procedural mechanisms in Grand Justice's practice. This article stresses the viewpoint of legal interpretation theory because the function of legislation can't cover various problems and is not sufficiently definitive. At the same time, procedural laws can serve as the subject-matter of constitutional interpretation, which relies on the interpretations of the Grand Justices. For this reason, the legal interpretation theory of judicial review will always address the significant issue that constitutionalism and practical affairs should be concerned with how the Judicial Yuan's constitutional interpretation procedure act unfolds in the future.<sup>9</sup>

### III. THE ELEMENTARY ISSUE OF CONSTITUTIONAL LITIGATION

To play the role of constitutional vindicator effectively, the Judicial Yuan's Grand Justices must be given certain powers of legal interpretation. The constitutional interpretation procedure must stand on the formation and specification of law, including the ruling procedure, petition types and petition requirements. The Judicial Yuan's constitutional interpretation procedure, more precisely, the constitutional litigation procedure is aimed at realizing the normative substance, and its importance of constitutional interpretation procedure act equals that of the Constitution itself. Therefore, legal scholars in Germany name it "the independent character of constitutional litigation" (*Eigenständigkeit des Verfassungsprozeßrechts*)<sup>10</sup> to indicate the importance of the constitutional interpretation procedure norm, and advocate that the constitutional litigation Act must be distinguished from other kinds of trial act and be emancipated from application of other procedural laws (*Emanzipation des*

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9. The Judicial Yuan established a Constitutional Interpretation Procedure Act Research Group in March 2005 and the Department of Clerks for the Justices of the Constitutional Court, after collecting materials from various countries and assembling the opinions from the Group, they then submitted the proposal to the Justice Screening Committee in November 2005. After researching on these materials, the Justice Screening Committee produced a Draft Act. The Draft Act was adopted by the Judicial Yuan Conference and brought to the Legislative Yuan by the Judicial Yuan Conference for screening at the beginning of the next year. The Draft Constitutional Litigation Act has been sent to the Legislative Yuan, and it is embroiled in the screening progress still now.

10. Peter Häberle, *Die Eigenständigkeit des Verfassungsprozeßrechts* [*The Independence of Constitutional Procedural Law*], 28 JURISTENZEITUNG 451, 451 (1973); Peter Häberle, *Verfassungsprozeßrecht als konkretisiertes Verfassungsrecht* [*Constitutional Procedural Right as Concretized Constitutional Right*], 31 JURISTENZEITUNG 377, 377 (1976).

Verfassungsprozeßrechts von dem sonstigen Prozeßrecht).<sup>11</sup> Glancing over this claim, it appears that the constitutional litigation procedure is distinct from other procedures and is not bound by strict litigious principle, and furthermore there is the advocacy of “procedural autonomy” principle (Verfahrensautonomie).<sup>12</sup> However, the opposed side holds that the constitutional court for procedural make up has not been granted wide “procedural liberty” and its supplements must be limited to the range of “the law-making of procedural law by judges” (verfahrensrechtliche Rechtsfortbildung).<sup>13</sup> For this reason, the constitutional court shall not be given the title of “the master of procedure” (Herr des Verfahrens).<sup>14</sup>

At first glance, the discord between “procedural autonomy” and “law-making of procedural law” cannot be easily resolved. But, further studies show that the practical result is not much different under “procedural autonomy” or “law-making of procedural law.” Whether the judicature is capable of creating the procedural standard and where the margin lies, should be decided by functionalism. That is, by considering the functions of both mechanisms and the structures their institutions to decide whether the judicature or the legislature is better for making the decision and setting the standard, which can be addressed under the “when in doubt, in favor of function” (in dubio pro functio) principle.

What is fundamental, according to the constitution, is to establish various bodies (constitutional bodies) and separate powers among them, and to standardize their organization and functions. The concern is not only power separation and control, but also to lead the state to make right decisions in marginal possibility, viz., depending on the most appropriate constitutional body to handle respective governmental affairs. The fundamental presumption of functionalism is that the function of each constitutional body must be designed “function-orientedly,” at least in its core. This principle is also what makes the organizational and procedural

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11. Peter Häberle, *Die Eigenständigkeit des Verfassungsprozeßrechts* [*The Independence of Constitutional Procedural Law*], 28 JURISTENZEITUNG 451, 452 (1973).

12. GÜNTER ZEMBSCH, VERFAHRENSAUTONOMIE DES BUNDESVERFASSUNGSGERICHTS [PROCEDURAL AUTONOMY OF THE FEDERAL CONSTITUTIONAL COURT] 84, 151 (1971).

13. Rincken, *supra* note 2, at 415; ECKART KLEIN & ERNST BENDA, VERFASSUNGSPROZESSRECHT: EIN LEHR- UND HANDBUCH [CONSTITUTIONAL PROCEDURAL LAW: A TEXTBOOK AND HANDBOOK], para. 167 (2d ed. 2001); CHRISTIAN PESTALOZZA, VERFASSUNGSPROZESSRECHT: DIE VERFASSUNGSGERICHTSBARKEIT DES BUNDES UND DER LÄNDER, MIT EINEM ANHANG ZUM INTERNATIONALEN RECHTSSCHUTZ [CONSTITUTIONAL PROCEDURAL LAW: THE CONSTITUTIONAL JURISDICTION OF THE FEDERAL AND THE STATES, WITH AN APPENDIX OF LEGAL PROTECTION], §1, para. 3 (3d ed. 1991); KLAUS SCHLAICH & STEFEN KORIOETH, DAS BUNDESVERFASSUNGSGERICHT: STELLUNG, VERFAHREN, ENTSCHEIDUNGEN [THE FEDERAL CONSTITUTIONAL COURT’S POSITION, PROCEDURE AND DECISIONS], para. 51 (2010).

14. In Germany, the Federal Constitutional Court frequently uses a similar “the master of procedure” (Herr des Verfahrens) term. See *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] [Decisions of the German Constitutional Court] 13, 54 (94); 36, 342 (357); 60, 175 (213).



behaviors of each constitutional body legitimate.<sup>15</sup>

Whether the functionalistic viewpoint is a “blank formula” or an “omnipotent spell” depends on how the matter is substantiated. Hence, the relevant factors were specified accordingly:

A. The Constitution establishes the institution of the Judicial Yuan’s Grand Justices and grants it the powers of constitutional interpretation to guarantee that even political decisions must be bound by laws and can be subject to judicial review. Therefore, an absence of constitutional foundation, that is to say, a lack of foundation after sufficiently expounding the constitutional articles and principles, is set as the outer boundary of judicature’s constitutional interpretation power. In interpreting abstract and uncertain constitutional concepts, the Grand Justices are forming and supplementing the law. Therefore, the Grand Justices do take up political issues in some circumstances.<sup>16</sup> However, as an interpretation methodology, the Grand Justices start from the articles of the Constitutional, and only when the literal and systematic meaning of the Constitution is not sufficiently clear, it draws on functionalism to render a law-making of the Constitution.

B. In accordance with the relevant articles of the Constitution, the jurisdiction of the Grand Justices cannot be established by itself. Even so, the Grand Justices are still entitled to some forms of procedural liberty if the subject-matter is relevant to procedural standard and organizational standard, such as the Regulations Governing the Adjudication of Grand Justices Council, which was passed by the Grand Justices on November 16, 1948.

C. The Judicial Yuan is granted dual authorities: a judicature and a constitutional organ.<sup>17</sup> According to Articles 78 & 79 of the Constitution, the Judicial Yuan shall interpret the Constitution; and thereby the Grand Justices can review and resolve conflicts arising within or among other constitutional bodies (the highest government organs) through its power to

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15. Alfred Rinken, *Artikel 93 [Article 93]*, in KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [COMMENTARY ON THE BASIC LAW OF FEDERAL REPUBLIC OF GERMANY], para. 99 (E. Denninger et al. eds., 3d ed. 2001).

16. Ulrich Scheuner, *Der Bereich der Regierung [The Sphere of Government]*, in STAATSTHEORIE UND STAATSRICHT [THE THEORY AND LAW OF STATE] 455, 493 (Joseph Listl & Wolfgang Rübner eds., 1978).

17. Gesetz über das Bundesverfassungsgericht [German Federal Constitutional Court Act] art. 1. “The Federal Constitutional Court is the specified sole federal court to adjudicate other constitutional bodies,” declaring its dual identity as both judicature and constitutional organ. Some German jurists refer to it as “the Duality of Federal Constitutional Court” (“Janusköpfigkeit” des Verfassungsgerichts), Hans Schneider, *Betrachtungen zum Bundesverfassungsgericht [Contemplation on the Federal Constitutional Court]*, 6 NEUE JURISTISCHE WOCHENSCHRIFT 802, 802 (1953). In Taiwan, “Constitutional Body” is not an official legal wording, and it is not common in constitutional theory. However, this term has appeared in the Judicial Yuan’s interpretations recent years, such as Interpretation No. 585. It even became the cornerstone in the reasoning of its interpretation, as in Interpretation No. 632.

interpret the Constitution. It thus participates in the decision making of the State. At this point, the Grand Justices become a genuine constitutional body,<sup>18</sup> and thus it can be inferred that:

1. The Grand Justices are a part of the judicature regarding its status and function; it is a substantial “court” with “constitutional justices.”<sup>19</sup> The procedure, organization and structure of Judicial Yuan constitutional interpretations must match the frame and features of a “court.” That is to say, it must be bounded by law and constitution (Verfassungs- und Gesetzesbindung), exercising its power independently (Unabhängigkeit), impartially (Unparteilichkeit), passively (Passivität) and case-orientedly (Fallbezogenheit).<sup>20</sup>

2. In countries with a specialized constitutional court, the decisions from one constitutional organ can be quashed by another constitutional organ, which shows that the conducts of a constitutional organ to a certain degree can be adjudicated (justiciable). As a constitutional organ, the Grand Justices shall enjoy the power of procedural formation, since the Constitution render the Grand Justices the authority to interpret, form and supplement the Constitution, the power to construct the procedure, which realizes and embodies the substance of the Constitution, shall also be rendered to the same organ.

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18. Gerhard Leibholz, *Berichterstatter des Bundesverfassungsgerichts [Judge Rapporteur of the Federal Constitutional Court]*, 9 JAHRBUCH DES ÖFFENTLICHEN RECHTS 120, 127 (1960); Josef Wintrich, *Die Verfassungsgerichtsbarkeit im Gesamtgefüge der Verfassungs [The Constitutional Jurisdiction in the General Structure of the Constitution]*, 87 BAYERISCHE VERWALTUNGSBLÄTTER 132, 132 (1956).

19. J.Y. Interpretation No. 601 (2005). The reason is: accordingly, under Taiwan’s current judicial system, courts at various levels (including the Commission on the Disciplinary Sanction of Functionaries) are links in the chain of constitutional interpretation when it comes to the application of law to a particular case. And, in the case of the Justices, constitutional review or uniform interpretation of the law or regulations in response to petitions initiated by an individual, a legal entity or a political party, as well as the review or uniform interpretation of the law based on the petition made by a court of law, albeit not directly concerned with the determination of facts in a particular case, *are also links in the chain of trial of a specific case*. With respect to art. 79-II of the Constitution and art. 5-IV of the Amendments to the Constitution, which provide that the Justices have the final authority to interpret and construe the Constitution and laws and regulations, they merely stipulate a division of labor among different courts under the judicial system, which makes no difference given the fact that Justices and judges alike react passively to cases brought to their attention pursuant to statutory procedure and independently and neutrally deliver a final, authoritative opinion as to the Constitution or law in respect of the constitutional, legal or factual issues in a particular case. Consequently, the Justices, like ordinary judges, are also judges in the constitutional context who are mandated to exercise their judicial power. (emphasis added)

20. Rincken, *supra* note 2, at 412.

#### IV. GENERAL TOPICS OF PROCEDURE: THE OPTION OF JUDICIAL REVIEW SYSTEM

##### A. *System Frame and Procedure Types*

The procedure type of judicial review is broadly relevant to the judicial review system. A variety of judicial review systems can be found around the world, each of them carrying divergent content. They can be assorted and identified into each of the four distinct characteristic categories: “centralized review vs. decentralized review,” “abstract review vs. concrete review,” “*ex ante* review vs. *ex post* review,” and “consultative review vs. binding review.”<sup>21</sup>

These types of judicial review system basically are all established on the prerequisite that the judicature functions as the vindicator of the constitution; that is to say the “judicial branch” is the organ which holds authority for constitutional interpretation and for screening whether the acts of the government (especially the legislature) are in accordance with the Constitution. Looking back at the history of legal system and records, however, judicature as a constitutional vindicator, especially with a legal judicial review system, is not the definite result of constitutional theories; rather, it is the product of historical experiences and constitutional practices. Regardless of the disputes over what should be the proper constitutional vindicator in civil law countries in the early 20th century,<sup>22</sup> the fountainhead of the modern judicial review system in recent centuries is generally thought to be the adjudication of **Marbury v. Madison** (1803) by John Marshall (1755-1835), the renowned Justice of the U.S. Supreme Court. But in fact, the idea of judicial review actually arose as early as 1610 in Great Britain.<sup>23</sup>

21. See generally MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* (1989); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 10-15 (1997); Otto Luchterhandt, *Generalbericht: Verfassungsgerichtsbarkeit in Osteuropa* [General Report: Constitutional Jurisdiction in Eastern Europe], in 1 VERFASSUNGSGERICHTSBARKEIT IN MITTEL- UND OSTEUROPA [CONSTITUTIONAL JURISDICTION IN CENTRAL AND EASTERN EUROPE] 295, 311 (O. Luchterhandt, C. Stark & A. Weber eds., 2007).

22. Such as the Weimarer constitution scholar, Carl Schmitt. He held that the exact constitutional vindicator should be the federal president, not the constitutional court. See Shu-Perng Hwang, *Tekuofa Shang Weihsien Shencha Chuanhsien Chengi te Lishih Kuichi: Tsung H. Kelsen yu C. Schmitt te Pienlun Tanchi* [Historical Orbit of the Dispute over Judicial Review Power in Germany: The Debate Between H. Kelsen and C. Schmitt], 5 CHENGCHIH YU SHEHUI CHEHSUEH PINGLUN [POL. & SOC. PHIL. COMMENT] 123 (2003). In recent years, the European Union has also encountered the controversies over who should be the “vindicator of the European Constitution” (Hüter der europäischen Verfassung), Franz C. Mayer, *Wer soll der Hüter der europäischen Verfassung sein?* [Who Should Be the Vindicator of European Constitutional Law?], 129 ARCHIV DES ÖFFENTLICHEN RECHTS [ARCHIVES OF PUBLIC LAW] 411 (2004).

23. JOHN W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 32 (1955); Edward S. Corwin, *The “Higher Law” Background of America Constitutional Law*, 42 HARV. L. REV. 365, 368 (1928). The indicative adjudication is Dr. Bonham’s Case in 1610. Dr. Bonham was fined by

However, the courts were sacrifices in the power struggle between the autocrats and parliament starting in the mid 17th century. Parliament finally took control of the courts from the king; but the loyal justices managed to be independent in order to oppose it.<sup>24</sup> With the rise of parliament, the English legal progression gradually moved toward “parliament superiority” and “supremacy of law” principles, which replaced the common law (justness and rationality) and the levels within laws and orders.<sup>25</sup> Interestingly, the concept of judicial review migrated to North America with Mayflower in 1620, and in turn cultivated the ground for future development of judicial review in the colonies and the U.S. during the following 200 years.<sup>26</sup> As to the *ex ante* review system in France, it was not an institutional necessity but an historical happenstance.<sup>27</sup>

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the Doctor Union, and according to the statutes, half of the fine would be allotted to the president of union. The judge, Sir Edward Coke (1552-1634), held that the applied statutes had contravened the Common Law principle of “no one should judge his own affairs” (*Nemo iudex in causa sua*); thus should be abolished. His reasoning was: “in accordance with my ancient books and records, in many cases the Common Law controls (controul) acts of parliament, usually adjudicates those utterly void: because, when acts of parliament have contravened common right and reason they should be controlled by Common Law, and proclaimed abrogation.”

24. M.J.C. VILE, *CONSTITUTIONALISM AND SEPARATION OF POWERS* 34-36 (2d ed. 1998).

25. Till now, the British House of Lords still functions as the appellate court.

26. Chien-Liang Lee, *Lishih · Kuochia · Hsingcheng · Falu—Ouchou Chintai Chienchi Hsingchengfashih Fanlun [History, State, Administration, and Law: An Introduction of European Administrative Law in Modern Times]*, in MA-HAN PAO CHIAOSHOU PACHIH HUATAN CHUSHOU LUNWENCHI—FALU CHELI YU CHIHTU: KUNGFALILUN [ESSAYS IN HONOR OF THE 80TH BIRTHDAY OF PROFESSOR HERBERT HAN-PAO MA—ON THEORIES AND INSTITUTIONS OF LAW: PUBLIC LAW] 49 (Board of Editors for Essays in honor of the 80th birthday of Professor Herbert Han-Pao Ma ed., 2006).

27. The lateness in the development of French judicial review (law) system took place out of a sense of distrust and defense against the traditional judicature (from which the establishment of French Administrative Court was also originated), also, as a consequence of the constitutional practices after the French Revolution. After the French Revolution in 1798, France promulgated several constitutions. The first constitution, which sustained a constitutional monarchy, was proclaimed on September 14, 1791, but became inefficacious due to the wars with Austria and Prussia for their intervention in French domestic affairs. On January 21, 1793, Louis XVI was decapitated. The first Republican Constitution was born on June 24 of the same year, but was suspended for good since August 13 with the advent of “Reign of Terror,” after the fall of Jacobin dictatorship and decapitation of Maximilien Robespierre. Another new constitution was promulgated on August 22, 1795, and the Five Representative Directory was established. On December 24, 1799, under the lead of Emmanuel-Joseph Siéyès (1748-1836), the so-called “Constitution of Year 8 of the Republic” was established, based on Montesquieu recounted Roman Republic system whereby the government was formed by “Senate” nominations and the “Governmental Affairs Council” appointed by the “First Consul” as its consultative authority. The legislature adopted dual-bodies system: the Tribunate and the Legislative body. The Tribunate resembled the Roman Senate and could discuss laws but not approve them; the Legislative Body, on the contrary, equivalent to the Roman Comitia Tribunate, was empowered to approve or reject laws, but not able to discuss them. All law bills had to be presented to the Senate by the First Consul and its Governmental Affairs Council, and the Senate transmitted bills to the Legislative Body to complete the legislative process. All law bills had to be presented by the First Consul or its Governmental Affairs Council, and only after the discussion of the Tribunate, the approval of the Legislative Body, and the judgment on its constitutionality by the Senate (like the function of Roman Consul and Tribunes), can it be signed and proclaimed by the First Consul. STEWART C. EASTON, *THE WESTERN HERITAGE: FROM THE EARLIEST TIME TO THE PRESENT* 629 (3d

Whether it is centralized or dispersed, abstract or specific, *ex ante* or *ex post*, consultative or restrictive, or even a mixture, cannot be considered a violation of the spirits of constitutionalism or the nature of the judicature. The procedural design of judicial review is not found on certain specific constitutional theory either, even though, a procedural type is highly relevant to the framework of the judicial review system. Among all, particular note should be taken when a centralized or a dispersed system is adopted.

The different types of procedure for judicial review or constitutional litigation in countries around the world are mostly “disputes over constitutional competence,” “*ex ante* abstract review,” “*ex post* abstract review,” “concrete review of statutes” (judge’s petition for constitutional interpretation), “incidental review of laws and orders,” “constitutional complaints for laws and orders,” “constitutional complaints for adjudications,” “constitutional doubt interpretation,” “dissolution of unconstitutional political parties,” “advisory opinions” and “injunction.” Among them, some are the products of particular systems and cannot be arranged randomly.

In the decentralization model of judicial review system of the U.S., the operation pattern focuses on specific cases and the judicature handles only “cases and controversies” with cases (including civil, criminal and administrative cases). Since the courts from various grades handle only “cases and controversies,” they make incidental reviews on the constitutionality of laws and orders, which are applied in the current cases. And their adjudications restrict only the present cases. Thus, the abstract review model without specific cases is not possible under this system. Besides, since courts of various grades hear specific cases and review the applicable abstract laws and orders at the same time, and the superior courts (especially the supreme court) do the same as well, it is not necessary to establish a “constitutional complaint” instrument. The legal advisory opinions (Gutachten) system is even less compatible to the “prosecution-verdict” decentralized review system. On the contrary, under the German centralization judicial review pattern, for the constitutional court’s absence from participating in ordinary case judgments, it is of great necessity to establish a constitutional petition institution in order to reinforce the protection of people’s right to remedy their basic rights. Nevertheless, although abstract review of laws and orders that does not consider specific cases is not a consequential companion, in institutional design it does not conflict with centralized review. Therefore, the organic logical combinations are: **Decentralized Review: *ex post* review of concrete case + (*ex post*)**

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ed. 1970). These historical experiences somehow influenced on France’s adoption of their *ex ante* judicial review system and resulted in some political characteristics owned by the constitutional committee.

**incidental review of valid laws and orders; Centralized Review: abstract review of laws and orders + constitutional complaints (of laws, orders or adjudications).** As to the problems whether the followings: “authority disputes,” “*ex ante* abstract review,” “concrete review of statutes” (judge’s petition for constitutional interpretations), “doubt interpretation,” “unconstitutional political party disbandment,” “advisory opinions” and “injunction,” are compatible to these institutions, and how they can be combined, are to be addressed separately below:

### 1. *Authority Disputes*

A type of litigation between government organs. If the plaintiff draws on his constitutional authority to bring suit (authority dispute), this accords with the requisite of case and controversy requirement in electing for decentralized review, but it can also be reviewed by a specialized constitutional court.<sup>28</sup> That is to say, “authority dispute” is a procedural option for both dispersion or centralization models.

### 2. *Ex ante Abstract Review*

A “preventive review procedure”: it is not contrary to the nature of judicature to have a judicial body take charge of a trial. This can not be discussed abstractly in the same framework but depends on a particular situation to see whether this model infringes on legislative power and violates the principle of the separation of powers. In the case of the U.S., due to the provision of Article 3(II)(i) of the Federal Constitution of the U.S., only “the case or the requisite of controversy” in one specific suit can activate a judicial review procedure. There is a prerequisite prohibition of the *ex ante* review system. If relevant laws are in draft form and not yet valid, they cannot be effective in a specific case; thus no case or controversy exists. However, with the judicial review system of the centralization model, where a specific case is unnecessary, it is rational to allow a particular constitutional court to take *ex ante* review on draft laws or ineffective laws, as exemplified by France. In other words, in legislative theory, the legislature can preset the review procedure for the judicial review system of centralization model. Questions only arise in the legal expounding theory

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28. The initial “Governmental Affairs Court” (prototype of constitutional court) in some continental European countries were generally intended to process authority (jurisdiction) disputes. According to art. 93(i) of the German Basic Law, the so-called “authority dispute” (Organstreit) is mostly about: the interpretation of Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body.

phase, viz., whether intent in disfavor of *ex ante* abstract review can be found when the constitution and the laws are being expounded.<sup>29</sup>

### 3. *Concrete Review of Statutes*

In other words, “judge’s petition for constitutional interpretations.” This is an instrument for judges to petition for constitutional interpretations when judges suspend the pending procedures with firm considerations that applicable laws are in conflict with Constitution in trials. This kind of system is definitely unnecessary in decentralized review. As to the question whether it is indispensable in centralized review, as so Article 100 of the German Basic Law provides, needs further consideration. In legislative theory, this concrete statute review procedure does not necessarily accompany a centralized review system; neither does a need to deprive the power of judicial review owned by courts from various grades (see the following text). Under this consideration, the judicature can adopt a dual-track system, including people’s petitions for constitutional complaints of laws and orders, and justices’ voluntary review of laws and orders.

### 4. *Doubt Interpretation*

As dubious as its title, what it means is of doubt too. If we don’t attempt to grope its meaning literally, it can be understood by distinguishing from “authority disputes.” According to the forgoing, if a strict explanation of an “authority dispute” means a government agency has a dispute over constitutional authority with another agency and accuses the object agency by bringing suit<sup>30</sup> or petitioning for constitutional interpretation,<sup>31</sup> the

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29. BVerfGE 2, 79 (96 f.); CHIEN-LIANG LEE, *Kuochia Kaochuan Hsingwei yu Kungfa Susung Chihitu* [State Sovereign Action and Public Law Litigation System], in 1 HSIENFA TE LILUN YU SHIHCHIEH [CONSTITUTIONAL THEORY AND PRACTICE] 321, 372 (2d ed. 2003). One parliament member initiated an abstract laws and orders review procedure on a statutory draft, but was rejected by the Federal Constitutional Court on the basis of illegal procedure.

30. The characteristics of authority dispute in German legal system, according to their legal theories and practices, can be summarized as the following:

I. The disputed authority (litigant) basically is a “constitutional authority,” such as the Federal House of Representatives, the Federal President, the Federal Government, including “members which are directly empowered by the Constitution or affair regulations of constitutional authorities,” such as parliamentary members and parliamentary parties. Political parties, under certain conditions, can be listed under this category.

II. The disputants must carry certain constitutional relation (verfassungsrechtliches Rechtsverhältnis), and the dispute must occur thereunder.

III. The disputed matters must be relevant to the constitutional rights or duties of disputed authorities.

IV. The procedural subject matter is a “measure” or “omission of act” of disputants, including law enactments, where the content must be relevant to the rights or duties of disputed authority. If the statute or regulation at issue is irrelevant to the rights or duties of the disputed authority, it belongs to

so-called “doubt interpretation” abstractly covers four circumstances:

(a) One government agency accuses another government agency, or brings suit against the relative government agency or petitions for constitutional interpretation; the subject matter under dispute is relevant to the authority of plaintiff (petitioner) agency, while the defendant (relative party) agency does not argue about plaintiff agency’s exercise of authority.

(b) One government agency accuses another government agency, or brings suit against it or petitions for constitutional interpretation; the subject matter under dispute is not directly relevant to the authority of plaintiff (petitioner) agency.

(c) One government agency does not accuse another government agency as a defendant or a relative party but brings suit or petitions for constitutional interpretation with a doubt of whether its exercising of plaintiff agency is against the Constitution.

(d) One government agency neither accuses another government agency, nor questions whether its own exercising of authority is against the constitution. It simply questions whether a certain state act is against the Constitution and brings the suit or petitions.

If we compare the Grand Justices’ previous interpretations with the foregoing four circumstances, three of the situations can be illustrated as follows:

(a) Situation one: the Control Yuan questions whether the Orders of “Precautionary Matters,” announced by the Judicial Yuan and the Ministry of Justice of the Executive Yuan, are against the principle of “reserved for statutes” and petitions for constitutional interpretation (Interpretation No. 530, Judicial Yuan).<sup>32</sup>

(b) Situation two: one third of the legislators question that the Legislative Yuan’s deletion of the budget appropriated as a specialty premium for the Grand Justices is against the Constitution and petition for constitutional interpretation (Interpretation No. 601, Judicial Yuan).

(c) Situation three: constitutional doubt arises because the President’s nominee for the replacement of Grand Justices should be approved by the National Assembly or the Legislative Yuan, and the President petitions for constitutional interpretation to resolve the doubt (Interpretation No. 541,

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the category of “laws and orders review procedure,” instead of authority dispute.

31. Such as J.Y. Interpretation No. 520 (2001). The Executive Yuan Council made a resolution to cease constructing the 4th nuclear power station and adhering to related budgets, thus provoking a constitutional dispute with the Legislative Yuan’s jurisdiction. This case should be classified as an authority dispute, viz., whether the Executive Yuan’s resolution of ceasing 4th nuclear power station construction had infringed on the Legislative Yuan’s policy participating power.

32. CHIEN-LIANG LEE, *Lun Shenpan Tuli yu Ssufa Hsingcheng Minglingchuan chih Kuanhsi—Chiehhsi Ssufayuen Tafakuan Shihtzu Ti WuSanLing Hao Chiehshih* [On the Relationship Between Judicial Independence and Judicial Administrative Ordinances: Analysis Interpretation No. 530], in 3 HSIENFA TE LILUN YU SHIHCHIEH [CONSTITUTIONAL THEORY AND PRACTICE] 287, 292-93 (2004).



Judicial Yuan).

As for the fourth circumstance, there is no record of it in Taiwan, and thus we look to German's abstract review as an example, that is to say, when the federal government or any the federal state government questions whether federal laws or laws of the federal states (Länder) are either nominally or substantially consistent with the German Basic Law, and petition to the Federal Constitutional Court for interpretation.

In a decentralized review system, none of the foregoing circumstances would agree. Though both parties, plaintiff and defendant, are present in the first and second circumstances, since the subject matters do not involve plaintiff (petition agency) constitutional authorities, neither circumstance is an utter dispute or case. The third and fourth circumstances need no defendant (relative party) but only subject matters; hence they can be called specific dispute cases. However, in a centralized review system, the foregoing circumstances are all constitutional disputes or doubts. And their highly political character makes them improper to be judged by ordinary courts. Therefore, from the perspective of legislative policy concern, it is reasonable to have the foregoing circumstances tried by a specialized constitutional court. In Germany, for example, abstract doubt interpretations aim to construct a hierarchical legal system to uphold the objective normative order. This institutional establishment does not originate only from legal reasoning, but also from reflections on the historical experiences (Nazi tyranny). By inspecting foreign systems, we can learn and excogitate more possible approaches of institutional design for Taiwan's need.

##### 5. *Advisory Opinions*

Ostensibly similar to "doubt interpretation," advisory opinions differ in their legal effectiveness; that is, legal consultations provided by judicature organ are not legally binding. Although it is not unimaginable that the judicature organ provides legal consultations without legal force,<sup>33</sup> as have been documented in the record of comparative law,<sup>34</sup> it is contrary to the

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33. JEAN BRISSAUD, *A HISTORY OF FRENCH PUBLIC LAW* 432 (James W. Garner trans., 1969). In the Middle Ages in Europe, the major function of the courts, mostly exercised at gatherings of vassals, was to provide opinions to the Kings for policies. The court in France was named "Parlement" (equivalent to "Parliament" in English) before the French Revolution.

34. At the beginning of the establishment of the German Federal Constitutional Court, the later repealed art. 97 of the Federal Constitutional Court Act mandated an institution of petitioning for provision of a "Legal Opinion Statement" from the Constitutional Court. In 1952, due to the dispute over whether the Draft Act of European Mutual Defense Treaty conflicted with the Basic Law, the Federal President petitioned for a Legal Opinion Statement from the Federal Constitutional Court on the ground of the Draft's suspect conflict with art. 24 of the Basic Law. The Federal Constitutional Court ruled that its Legal Opinion Statement was effective to bind every Room of the Federal Constitutional Court. The President thereupon withdrew the petition for the reason that "the opinion of

function of modern courts and the independent character of judiciary. It is inconsistent with decentralized review as well as centralized review system.

#### 6. *Injunction*

This is an important link in the judicial relief chain and is applicable to all litigation procedures in centralized review and decentralized review. It is aimed to secure the effectual enforcement of a judgment as well as to safeguard rights of the people. In the view of legislative theory, establishing or reinforcing preventive measures for irrecoverable damage is a legal system of goodwill; however, it must be executed with severe, definite conditions to prevent the consequence of prejudgment or even substitution of substantial judgment efficacy. The difficult and controversial topic is, if the injunction instrument is incomplete or without legislative foundation, can a judicial review organ be found or a supplement for the instrument itself, or can the legislative power have monopoly “priority” over the instrument? This issue is associated with legal expounding theory which will be taken up in the subsequent chapter.

#### 7. *Unconstitutional Political Party Disbandment*

Substantially an “invalidating procedure”: since a political party has vital status and functions under the democratic constitutional framework,<sup>35</sup> whether a political party can be judged unconstitutional and then be forced to disband, is a sensitive political topic that relates to the sophisticated constitutional issue: whether unconstitutional political party disbandment procedure shall be a matter “reserved for the constitution” or “reserved for the statutes.” Therefore, unconstitutional political party disbandment is exactly an issue of the substantive law of constitution. Even if there were a legal procedure for unconstitutional political party disbandment, the procedure would be least useful if the substantial issue (constitutional legitimacy) or the prerequisite issue (constitutional policy) were not clarified. Thus, the procedure is rarely exercised in Germany and that is the reason we never find any example in Taiwan.

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court for the efficacy and nature of Legal Opinion Statement is apparently different from what I imagined.” LEE, *supra* note 29, at 372. Owing to the controversy over Legal Opinion Statement’s binding efficacy, this institution had been invoked only once by the Federal Constitutional Court in 1954, before being abolished. See BVerfGE 3, 407 (on the incident whether the Federal Government had the power to institute the Federal Development Act).

35. BVerfGE 1, 208 (223 f.); 4, 27; 24, 260 (263); 24, 300 (329); 44, 125 (137). Art. 21 of the German Basic Law even incorporates political parties and renders them semi-constitutional authorities, therefore empowering them to initiate authority dispute litigations. The opposition party can initiate an authority dispute litigation on the ground of violation of political party equality principle if the Federal Government advertises during elections.

### B. *System Option and Procedural Elements*

Observing decentralized review and centralized review from the perspective of petition (indictment) elements, the major difference between them is that the former one is designed for the protection of particular right or jurisdiction; while the latter, except that the constitutional complaints and authority disputes are attributed to “subjective litigations,”<sup>36</sup> other procedure types, for example procedure of abstract review or specific review of laws and orders, are characterized by “objective litigation,” which aims to activate an objective procedure (Veranlassung eines objektiven Verfahrens).<sup>37</sup> This difference widely affects the practical exercises and efficacy of judicial review.

In subjective litigations, the plaintiff (petitioner) must make a claim that an infringement of right or authority has taken place, viz., the plaintiff (petitioner) must have the standing or competence to institute the legal proceedings, and the judicial review organ must be strictly limited by the motion of proceedings (motion of petition). On the other hand, an objective litigation is aimed to retain the scale of legal norms and the objective constitutional order. In such case, the plaintiff (petitioner) needs no claim on an infringement of right or authority, and the judicial review organ would not necessarily be limited by the motion of petition.<sup>38</sup>

Comparing both systems, one would expect the number of cases in centralized review system to be higher than that in the decentralized system, but the fact reflects the contrary.<sup>39</sup> In a country with decentralized review

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36. The reasoning of J.Y. Interpretation No. 445 (1998), “in respect to the system under which the people petition for a constitutional interpretation, the purposes thereof are not only to protect the fundamental rights of the parties concerned, but also to elaborate on the genuine intent of the Constitution so as to safeguard the constitutional order,” holds that constitutional complaints have twofold purposes, objective litigation and subjective litigation.

37. W. Meyer, *Artikel 93 [Article 93]*, in 3 GRUNDGESETZ, KOMMENTAR [CONSTITUTION: COMMENTARY], para. 38 (Ingo von Münch & Detlev C. Dicke et al. eds., 5th ed., 2000).

38. The reasoning of J.Y. Interpretation No. 445 (1998): “the scope of constitutional interpretation is not always limited to the purport of a petition,” hereof showing the tendency of an objective litigation.

39. DENNIS T.-C. TANG, *Chuanli Fenli yu Weihsien Shencha—Tafakuan Chouhsiang Shihhsienchuan chih Shangchueh [The Doctrine of Separation of Powers and the Limits of Judicial Review: Reconsidering the Legitimacy of Constitution Interpretation in the Abstract by the Council of Grand Justices]*, in CHUANLI FENLI HSINLUN [SEPARATION OF POWERS REVISED] 133, 171 (2d ed. 2000). Scepticism from some domestic legal scholars frequently arises, questioning the appropriateness and constitutionality of abstract laws and orders review procedure. They think judicial review thereby is very much similar to a legislative act, which oversteps the legislature power and violates the principle of separation of power, Dennis T.-C. Tang, Chwen-Wen Chen & Shin-Hua Wu, *Lun Weihsien Shencha Chihtu te Kaichin—You “Toyuen Tokui” tao “Iyuen Tankui” te Kaichih Fangan [Discussion Of Judicial Review System Progress—The Improvement Proposal from “Several Courts with Several Chambers” to “a Single Court with a Chamber”]*, in 4 HSIENFA CHIEHSHIH CHIH LILUN YU SHIHWU [CONSTITUTIONAL INTERPRETATION: THEORY AND PRACTICE] 523, 540 (Dennis T.-C. Tang ed., 2005).

model, i.e., the U.S., its operation is based on specific cases, but since no distinguishments are made between civil, criminal, administrative cases and constitutional cases, all litigations at various levels of courts are theoretically cases of judicial review (including judicial review of laws), and all cases can theoretically follow grades of remedy procedure to appeal to the Supreme Court. Therefore the number of constitutional cases might be theoretically huge. Since the enforcement of the Judiciary Act of 1925, most cases cannot be appealed to the Supreme Court as a matter of right. A party who wishes the Supreme Court to review a decision of a federal or state court, shall file a “petition for writ of certiorari”<sup>40</sup> in the Supreme Court. If the Court grants the petition, the case is scheduled for the filing of briefs as well as oral arguments. That is why the Supreme Court must develop the “rule of four”<sup>41</sup> standard in order to loosen the restriction on the petitions for certiorari. However, in centralized review countries, such as Germany, the constitutional litigations (especially abstract review of laws and orders) generally do not attach to specific cases. The constitutional court, in theory, can accept cases without margin. In practical exercise, however, the Federal Constitutional Court developed a rule, “the effectiveness of laws and orders should be expounded with the prerequisite of the public welfare interest” in screening cases.<sup>42</sup> Thus, the critical difference between decentralized review and centralized review lies probably not in the number of cases but in relative substantive viewpoints (issues of positive laws) under the systems.

To put it briefly, the provisions in the constitution can generally be sorted into government institutions and people’s basic rights. The function of constitutional litigations can also be sorted into settlement of jurisdictional controversies between government agencies and safeguarding people’s basic rights. From the perspective of the petitioner (plaintiff) in decentralized review system, the plaintiff (petitioner) must have the standing or competence to institute a legal proceeding. For this reason, the constitutional litigation of authority dispute must be petitioned by a government agency which has been granted particular jurisdiction by the constitution; only

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However, in dispersion review, the constitutionality of a law is scrutinized by the courts as “incident review” only in a specific case. But once the law is held unconstitutional by the terminal court, based on the principle of “stare decisis,” the law is practically sentenced to death. In this regard, incident review model is also suspect of overstepping legislative power and violating separation of power principle. In fact, as long as the court is empowered to proceed judicial review and promulgate laws inefficacious or invalid (either de jure or de facto), it could not escape from being questioned of overstepping legislative power (the so-called “plight of anti-majority”) in either centralized or decentralized review models. The underlying difference between the two systems is rather to what degree a petition procedure is restricted.

40. “Certiorari” is a Latin word, a litigant terminology of Roman Law, which means “to be searched” or “be more fully informed.”

41. Namely, requiring consent of 4 out of 9 Grand Justices in order to accept a petition.

42. See SCHLAICH & KORIOH, *supra* note 13, at para. 122.

people (natural persons or legal persons) can petition for a constitutional litigation for people's basic rights. This petition mechanism agrees with the juristic logic of "right and remedy."<sup>43</sup> However, in the centralized review system, except for a constitutional complaint or an authority dispute, a foundation of right of instituting legal proceedings (the foundation of right of petition for legal proceedings) is unnecessary for the plaintiff (petitioner) to petition for the proceedings of review on abstract laws and orders. For this reason, the government agencies can petition for a constitutional interpretation for laws concerning the organization of government agencies. They can even petition for judicial review on laws concerning basic rights of the people. This idea has dismantled the concept of "right and remedy" and has been developed to retain the constitutional order, further to the preservation of the basic value of the constitution.

As for the judicial review of government organizations, it is relevant to how the separation of powers principle is embodied, as well as how the conflict between this principle and democraticism is balanced. Therefore, the design of procedural institution for jurisdictional disputes or authority disputes is a realization of the principle of separation of powers itself. On the other hand, the procedural standard of authority dispute must be subject to the principle of separation of powers. It not only overloads the function of judicial review mechanism but also violates the principle of separation of powers if the organ eligible to petition interpretations on authority disputes is not properly limited. For this reason, the "competent authorities" are more eligible to petition concerning constitutional disputes rising from their organization or authorities. It is better not to establish a "representative mechanism," which means that the petitions of constitutional disputes are represented by an incompetent authority, for the litigation of constitutional disputes.

Regarding the judicial review of basic rights safeguarding, a logical and consistent assumption is to follow the principle of "right and remedy," and make the subject of remedy appeal the same as the subject (people) enjoying the basic rights. The decentralized review is more reasonable than the centralized review in this regard. However, further investigation will show that the context and scope of the issue concerning basic rights protection are not so simple. Detailed discussions on this subject would fall beyond the scope of this article, but two points can briefly be made here. Firstly, not all kinds of basic rights are sufficient for instituting a constitutional proceeding. For example, an embryo cannot protect its rights by litigation; especially when an infringement is caused by the parent (abortion), it is impossible to

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43. It must be pointed out that the "cases or controversies" requirement in the U.S. is not limited to the "rights" cases only. Even the "power" cases are subject to it as well.

anticipate that the mother would make a claim for him (conflict between rights). Secondly, the constitution guarantees people's basic rights not only by preventing infringements by public authority passively, but also by granting people the right to claim the state's protection of their rights from infringements by others (right of basic rights guarantee). That is where the state obligation to guarantee peoples' basic rights comes from. Consequently, a remedy institution that fulfills the will of the constitution for safeguarding people's basic rights should be established correspondingly. If the basic rights are the objective fundamental value that are guaranteed by the constitution, the basic rights have an objective safeguarding function. It is then not unimaginable to have an "objective litigation" in a basic-rights constitutional litigation, including judicial review of laws.

So far, we have considered that basic-right litigations can be "objective litigations" actually depends on how the content and function of basic rights are defined by substantive constitutional theories (a substantial constitutional issue). Furthermore, they vary with the different developments of the constitutional progressions, histories and understandings of human rights in various countries (constitutional experiences and historical memories). Article 1(I) of the German Basic Law, which proclaims that human dignity is inviolable, is to introspect and respond to the historical experience of autarchy, the trampling of human rights and dignity. Therefore, the German Basic Law can be called "a value-oriented constitution,"<sup>44</sup> which then develops an objective value of basic rights and government guarantee obligation of basic rights<sup>45</sup> in constitutional interpretation affairs and constitutional theories. Whereas the U.S. Constitution has no "objective viewpoint" on basic rights. The U.S. Constitution merely establishes the framework and outline of the government organizations to define the range and margin of the public authority, and never positively requires the state to take the responsibility of safeguarding peoples' rights,<sup>46</sup> and even denies that people are entitled the constitutional right to request the government to render that responsibility.<sup>47</sup> These previous different "viewpoints of

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44. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 967 (1998).

45. CHIEN-LIANG LEE, *Chipen Chuanli yu Kuochia Paohu Iwu [Fundamental Rights and State Protection Obligation]*, in 2 HSIENFA TE LILUN YU SHIHCHIEH [CONSTITUTIONAL THEORY AND PRACTICE] 59, 62-101 (2007).

46. Eberle, *supra* note 44, at 967, 969.

47. For example, in 1983, the Justice of Federal Circuit Court of Appeals, Richard Posner, holds that whether a public servant (policeman) omits to protect people's lives, is not important to fundamental rights, because "the writers of right bills were concerned about whether the Government would do too much to people rather than whether the Government would do too little to people. The Additional Article 14 of the Constitution, enacted on the basis of laissez-faire thought in 1868, is purposely to guarantee people of U.S. they would not be infringed on by state government, but not to provide basic government service." *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

constitutional human rights” would not be meaningless in the systematic development of judicial review. They would also be reflected in practical operations, producing an interesting dialogue between the legal system and practical affairs. Take abortion as an example. The U.S. and German courts diverge greatly in their reasoning.<sup>48</sup> Besides their different understandings of right to life and personal right, the difference of judicial review systems also plays an important role.

Consequently, if there is no apparent critical flaw, then the objective litigation of abstract review on laws and orders as a mechanism for safeguarding peoples’ rights is not totally indiscriminate. Its system function should not be banished simply for the reason that it is against the separation of powers principle. In other words, **from the standpoint of safeguarding peoples’ basic rights, the objective abstract review of laws and orders and concrete review of laws and orders are still necessary, and the representative mechanism of basic rights is conceivable.** At the same time, in order to prevent an excessive amount of litigations, to relieve of the constitutional court of overloading, to prevent the review procedure of abstract laws and orders from becoming the “last screening procedure,”<sup>49</sup> and to prevent it from becoming a political tool, the solution for working out the function of constitutional court in Taiwan is either to take an instrument like the certiorari of the Federal Supreme Court of the U.S. to control it or to establish such a mechanism on the foundation of “need of right preservation”<sup>50</sup> such as “unaccomplished amendment” (meaning that in exercising their authority of amending a law, more than one third of the incumbent members of the Legislative Yuan, in exercising their authority of amending a law, must believe that the existing and valid law may be unconstitutional but fail to amend it).

### C. *Overview of Present Procedure Types and Estimation: Controversial Expounding and Doubt Expounding as the Core*

The jurisdiction of the Grand Justices of the Judicial Yuan in Taiwan is stipulated in Article 78 of the Constitution: the Judicial Yuan shall interpret

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48. Eberle, *supra* note 44, at 967, 1034-48 (1998). In a word, in Germany, fetuses are regarded subjects of right to life; thus an abortion act is principally unconstitutional for infringing on the embryo’s right to life. Whereas in the U.S., abortion is women’s privacy (personal right) and the embryo enjoys no right to life; thus an abortion act is not principally unconstitutional.

49. TZONG-LI HSU, *Chichung · Chouhsiang Weihsien Shencha te Chiyuen · Fachan yu Chengkung Tiaochien* [The Origin, Development, and Prerequisite of centralization and Abstract Review], 2 FA YU KUOCHIA CHUANLI [LAW AND STATE POWER] 1, 12-13 (2007).

50. Cf. ZEMBSCH, *supra* note 12, at 118. The so-called “need of right preservation” (Rechtsschutzbedürfnis) is an ordinary juristic theory in litigation system, and needs no proclamation in writing.

the Constitution and shall have the power to unify the interpretation of laws and orders. Article 5(I) of the Constitutional Interpretation Procedure Act sets forth the grounds on which petitions for interpretation of the Constitution may be submitted as follows:

1. when a government agency, in carrying out its function and duty, has doubts about the meaning of a constitutional provision; or, when a government agency has a dispute with other agencies over the application of a constitutional provision; or, when a government agency has questions on the constitutionality of a statute or regulation at issue;

2. when an individual, a legal entity, or a political party, whose constitutional right was infringed upon and remedies provided by law for such infringement have been exhausted, has questions on the constitutionality of the statute or regulation relied thereupon by the court of last resort in its final judgment; or

3. when one-third of the Legislators or more have doubt about the meaning of a constitutional provision governing their functions and duties, or question on the constitutionality of a statute at issue, and have therefore initiated a petition.

The second of the previous grounds is called “constitutional complaint” and its purpose is to safeguard the basic rights that are guaranteed by the Constitution. Therefore, constitutional complaints are most commonly brought by “a subject of basic rights” instead of “an agency.” Since it is not a procedure for solving authority disputes, when a political party’s right is infringed, such as by bias of poll, the party should follow this procedure to petition for constitutional interpretation, instead of an authority dispute procedure.<sup>51</sup>

Compared to “constitutional complaint,” the other two forms can be called “government agency’s petitions procedures for constitutional interpretation procedure.” And in accordance with the difference of “petition agency,” it can be sorted into “**central and local government agencies’ petitions for constitutional interpretation**” and “**one-third of the Legislators’ or more petition for constitutional interpretation.**” The former can be subdivided into three types: “**doubt interpretation of a**

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51. As for the question whether the so-called “legal person” includes “public legal person” is controversial. The negative standpoint, such as Tzong-Li Hsu, *Chipenchuanli: Tisanchiang—Chipenchuan Chute* [Fundamental Rights: Lesson Three—On the Subjects of Fundamental Rights], 4 YUEHTAN FAHSUEH CHIAOSHIIH [TAIWAN JURIST] 86 (2003). The supportive viewpoint nevertheless believes that a public legal person should initiate its complaint as a basic right subject, instead of an authority, see Chien-Liang Lee & Shwu-Fann Liou, “Kungfajen” *Chipen Chuanli Nengli chih Wenti Chutan—Shihchieh Chipen Chuanli “Penchih” chih Itao Nanti* [Trying to Answer the Question of the Nature Underlying Fundamental Right—The Initial Exploration for the Fundamental Right Competence of “Public Legal Person”], in 4 HSIENFA CHIEHSHIIH CHIH LILUN YU SHIHUWU [CONSTITUTIONAL INTERPRETATION: THEORY AND PRACTICE] 291 (Dennis T.-C. Tang ed., 2005).



**constitutional provision** in carrying out its function and duty,” “disputes interpretation between government agencies **in the application of a constitutional provision** when carrying out its function and duty” and “doubt interpretation of **the constitutionality of a statute or regulation** in carrying out its function and duty.” The latter can be subdivided into “**doubt interpretation of a constitutional provision** in carrying out its function and duty” and “doubt interpretation of **the constitutionality of a statute** in carrying out its function and duty.” Thus, when a government agency has disputes with other agencies in the application of a constitutional provision, such disputes shall be solved according to the “central and local government agencies’ petition procedure.” As to whether the so-called “doubt interpretations about the meaning of a constitutional provision” are in accordance with an “authority dispute” is still difficult to determine simply from the wording of the stipulation.

Among all of the interpretations of the Grand Justices petitioned by central or local government agencies according to Article 5(I)(i) of the Constitutional Interpretation Procedure Act, only few of them fall into the category of “disputes interpretation between government agencies in the application of a constitutional provision when carrying out its function and duty.” To name an example: No. 520.<sup>52</sup> The other interpretations mostly are in the category of “disputes interpretation between government agencies in the application of a constitutional provision when carrying out its function and duty” or “doubt interpretation of the constitutionality of a statute or regulation in carrying out its function and duty” as the foundation to petition for a constitutional interpretation. As to the petitions by one-third (or more) of the Legislators, they are all brought up in the name of “constitutional doubt interpretations” due to the wording of the article.

However, interpretations can cover a wide variety of subject matters of authority disputes, such as:

1. No. 264, Judicial Yuan interpretation: the Legislative Yuan’s Resolution: “we request the Executive Yuan to grant the military, civil, and teaching personnel a year-end bonus in the amount of half of their monthly pay in the current year (79) in order to boost their morale. The budget shall be consequently augmented.” The Executive Yuan questioned the constitutionality of the Legislative Yuan’s Resolution and petitioned for constitutional interpretation. This case was a dispute of powers of presentation and approval of the budgetary bill between the Legislative Yuan and the Executive Yuan, which is a typical authority dispute.

2. No. 278, Judicial Yuan interpretation: the Legislative Yuan amended

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52. Some think it also includes constitutional “doubt interpretation.” Other than J.Y. Interpretation No. 520 (2001), No. 613 (2006) can also be filed as a “dispute interpretation” pursuant to art. 5(I)(i) of the Constitutional Interpretation Procedure Act.

Article 21 of the Educational Personnel Appointment Act: “qualification for employment as school staff, with the exception of technical personnel, accounting personnel, human resource personnel and currently employed persons selected for employment prior to enactment of this Regulation shall be governed by their relevant regulations, shall be based on passing the School Administrative Personnel Examination or the Senior and Junior Examinations of comparable subjects.” The Examination Yuan questions the regulation: currently employed persons selected for employment prior to enactment of this Regulation shall be governed by their relevant regulations, and those who need not to have been duly qualified through examination, have been against Article 85 of the Constitution, and therefore petition for constitutional interpretation. According to the jurisdiction of the Examination Yuan, the power of examination belongs to the Examination Yuan and thus whether the foregoing regulation infringes upon the jurisdiction of the Examination Yuan is the key point of this case. Therefore this case should be sorted to authority dispute procedure. The same as Interpretation No. 405 of the Judicial Yuan. The Examination Yuan questions whether Article 21, Paragraph 2 of the Educational Personnel Appointment Act, as amended and promulgated on July 1, 1994, the language “may additionally be transferred among schools” has violated what the Grand Justices provided: “may only remain employed at their original schools” in No. 278, Judicial Yuan interpretation, and petitions for constitutional interpretation. It should be sorted as an authority dispute procedure as well.

3. No. 405, Judicial Yuan interpretation: although this interpretation is petitioned by the Legislative Yuan, what was at issue was who had been granted the investigative power. However, the petition for this interpretation was because of the amended enactment of Organic Act of Legislative Yuan by the Legislative Yuan to stipulate that the Legislative Yuan has been granted the power to request document review from administrative agencies, and the Executive Yuan based on “obstructive and difficult” as the reason to apply for a renewed discussion, and thus the Legislative Yuan petitioned for constitutional interpretation (this petition is included one-third of the legislators initiating petition at the same time). Therefore, this case is exactly an authority dispute procedure between the Executive Yuan and the Legislative Yuan.

4. No. 371, Judicial Yuan interpretation: because the Judicial Yuan screens and approves the legal expounding of “in trying cases where judges at different levels have the power to screen whether the statutes applicable to the cases are unconstitutional. Judges can refuse to apply the statutes if they hold the statutes are unconstitutional as the reason.” The Legislative Yuan holds that legal expounding would cause unconstitutional application of Article 80 and Article 170 of the Constitution, and thus petitions for

constitutional interpretation. Probing into the purpose of the petition, this case concerns the dispute of constitutional interpretation organ and jurisdictional range, and it is relevant to judicial power and legislative power; thus it should be an authority dispute procedure.

5. No. 435, Judicial Yuan interpretation: the speech or conduct by a member of the Legislative Yuan can be investigated and adjudicated by judicial agency. Whether such principle has infringed upon the Legislative Yuan's jurisdiction and is contrary to the immunity of legislative speech in Article 73 of the Constitution becomes a doubt for interpretation. As to the legislative conduct of a legislator, can it be directly adjudicated by court or alternatively be adjudicated after the report of the Legislative Yuan? And whether the legislative conduct of a legislator only includes speech, discussion and voting, or includes related legislative boycott conduct? Whether the immunity of legislative speech of a legislator is bound in questioning administrative officers? Those questions should be clarified. The issue of this case is: disputes between judicial power and legislative power; thus it should be an authority dispute procedure. Nonetheless, the important point is the relative party of the dispute is ordinary courts, not constitutional organ.

6. No. 453, Judicial Yuan interpretation: Article 5(IV) of the Business Accounting Act provides that: "Business accounting matters may be engaged by accountants or business accounting bookkeepers certified by the central governing authority; the rules for their certification and supervision shall be stipulated by the central governing authority." Since those business accounting bookkeepers are professional persons, they are subject to the jurisdiction of the Examination Yuan. The legislative organ's amending the Act and delegating the power to certify business accounting bookkeepers to the central governing authority are thus in violation of Article 86(ii) of the Constitution: the qualifications for professional services shall be determined through examinations held under the relevant laws. The consequence is the Grand Justices announce that Article 5(IV) of the Business Accounting Act a violation of the constitutional provision and shall no longer be applied.

The above-mentioned six samples are constitutional interpretations of authority disputes that are petitioned by central governing agencies. Nonetheless, some petitions of constitutional interpretation initiated by one-third of the Legislators or more belong to authority dispute procedure. For example:

1. No. 329, Judicial Yuan interpretation: the Legislative Yuan has made resolutions from time to time to request administrative departments to send international agreements to the Legislative Yuan for deliberation. But the administrative departments never really follow to the resolutions. In addition, the Ministry of Foreign Affairs stipulates the "Guidelines for

Process of Treaties and Agreements,” where Article 9(I) provides: “Agreements shall be submitted to the Executive Yuan for verification and record after conclusion; with the exception of the classified content or diplomatic misgiving, shall be sent to the Legislative Yuan for note after validity.” The said Article excludes the screening power of the Legislative Yuan. Therefore eighty-four legislators petition for constitutional interpretation. The issue of this case is obviously relevant to the authority dispute of treaty conclusion power of administrative department and screening power of the Legislative Yuan.

2. No. 387, Judicial Yuan interpretation: this case at issue is whether the Premier (President of the Executive Yuan) shall submit his resignation to the President prior to the first session of each new Legislative Yuan. According to the constitutional provision (former), the Premier is nominated by the President with the consent of the Legislative Yuan. Therefore, whether the Premier resigns is considerably relevant to the consent power of Legislature Yuan, and thus it essentially belongs to an authority dispute procedure. As to the subject matter of its dispute, it is the Premier’s “omission of act” (omission of resignation) that is under dispute.

Nonetheless, the foregoing authority dispute should exist within the Executive Yuan and the Legislative Yuan, but not within the Executive Yuan and one-third of legislators, thus it should not be an authority dispute but can be addressed as “constitutional interpretation on the basis of authority dispute as the subject matter.” Viewing the accumulated constitutional interpretations of the Grand Justices in Taiwan over the years, one can draw two conclusions:

1. The eligible “organ” to initiate constitutional interpretation includes central and local government organs. However, that so-called “organ” is not involved with the personnel members and organic units; thus no committee of the Legislative Yuan, no legislator, party of the Legislative Yuan and political party is eligible to be a government organ to petition for constitutional interpretation.

2. Probing the essence of organ (including minority legislators) petition for constitutional interpretation cases, they can be subdivided into three types: “authority dispute procedure,” “procedure of constitutional review on abstract laws and orders” and “pure constitutionality interpretation procedure.” Because these three types are not seriously different in practical exercise, viz., the Grand Justices never make the previous differentiation for procedure type when such case model is in processing. Therefore, the interpretations should be viewed case by case to determine the procedure type.

Tentatively disregarding how to differentiate the foregoing three procedure types, from the viewpoint of legislative policy and function of

constitutional interpretation, the main point to take into consideration is adjustment and existence of “doubt interpretation.” Doubt interpretation is the product of centralized review; it not only arises from hierarchical legal standard theory, but also has the purpose of adjusting and corresponding the system design and division operation of the traditional judicial frame (especially the civil law countries). It also reflects and responds to historical experiences. It and decentralized review are equally characteristic and featured. However, the applicable range of doubt interpretation is as doubtful as its title. Lacking severe differentiation, it not only paralyzes the operation of judicial review mechanism, but also drags the constitutional interpretation organ into political trouble and malfunctions in dispute solving. There are two solutions: one is to establish a petitionary organ, the second is to narrow the boundary of petitionary subject matter; especially the latter is the key point. Viewing the German judicial review system, one discovers that although the procedure of petition for abstract review on laws and orders in Germany has the condition of “different opinions” (Meinungsverschiedenheiten), it can also be on the basis of “doubt” (Zweifeln) to petition for interpretation.<sup>53</sup> Thus it can be called as “doubt interpretation of laws and orders review.” However, the doubt interpretation system in Germany merely exists in “reviews of laws and orders,” other matters should belong to the range of authority dispute, the relation between the parties should be a constitutional connection (verfassungsrechtliches Rechtsverhältnis), and the dispute should be under this connection. According to the opinion of German Federal Constitutional Court, the “minority members of voting” (Stimm-Minoritäten) of the German Federal House of Representatives, that is to say one-third or more of Parliament members, do not belong to the party of authority dispute, especially since the minority members can’t exercise the “veto”<sup>54</sup> through that authority dispute mechanism over the approval bills of majority vote in the Federal House of Representative. Because the purpose of authority dispute procedure is to preserve constitutional jurisdiction (right); therefore, except when the subject bill has infringed upon minority members’ constitutional rights, the minority members should not use an authority dispute procedure to claim that a majority voting bill is unconstitutional.<sup>55</sup> They can only petition for

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53. According to art. 93(I)(ii) of the German Basic Law, the Federal Constitutional Court shall rule: “in the event of disagreements (Meinungsverschiedenheiten) or doubts (Zweifeln) respecting the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land government, or of one third of the Members of the Bundestag.”

54. BVerfGE 2, 143 (164); 90, 286 (313 f., 341 f.).

55. HANS LECHNER & RÜDIGER ZUCK, *Artikel 63 [Article 63]*, in *BUNDESVERFASSUNGSGERICHTSGESETZ, KOMMENTAR [LAW OF FEDERAL CONSTITUTIONAL COURT, COMMENTARY]*, para. 13 (4th ed. 1996); SCHLAICH & KORIOTH, *supra* note 13, at para. 81a.

constitutional interpretations on the basis of “procedure of abstract review of laws and orders.”

Nonetheless, in Taiwan, there is not only “doubt interpretation of review of abstract laws and orders,” but also “doubt interpretation of review beyond laws and orders” (or call “pure doubt interpretation”), which may produce the defect of “wide range coverage.” As in the foregoing discussion, without a particular relative party (defendant), the petition of doubt interpretation looks a lot like legal consultation.<sup>56</sup> The Grand Justices not only insist that its interpretation “shall be binding upon every institution and person in the country,”<sup>57</sup> but never narrow the boundary of its doubt interpretation. If the application standard is without any control, the inefficacious consultation and the efficacious doubt interpretation will be mixed and confused, and even more to weaken the authority of the Grand Justices in doubt interpretation. Because of the loose application standard, the case number of constitutional interpretations petitioned by one-third of the legislators is increasing. The Grand Justices have been concerned about this development, and established an application standard of “doubt interpretation” for one-third of the legislators or more.<sup>58</sup> However, the standard is unavoidably irregular when the Grand Justices screen applications and causes the result of

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56. For one instance, see J.Y. Interpretation No. 541 (2002). The President petitioned for judicial interpretation when constitutional doubt occurred: to which organ, the National Assembly or the Legislative Yuan, shall the President present the nominations for filling the vacancies of Grand Justices? The interpretation of the Grand Justices is equivalent to a provision of legal consultation for the President to exercise the nominating power.

57. Interpretation No. 115 (1966); Interpretation No. 177 (1982); Interpretation No. 183 (1983); Interpretation No. 185 (1984); Interpretation No. 188 (1984); see also Yueh-Sheng Weng, *Ssufayuen Tafakuan Chiehshih Hsiaoli chih Yenchiu* [A Research of the Effectiveness of Constitutional Interpretations], in KUNGFASUEH YU CHENGCHIH LILUN: WU-KENG TAFKUAN JUNG TUI LUNWENCHI [PUBLIC LAW AND POLITICAL THEORY: ESSAYS IN CELEBRATION OF THE HONORABLE RETIREMENT OF GRAND JUSTICE KENG WU] 1, 5-21 (Board of Editors for essays in celebration of the honorable retirement of Grand Justice Keng Wu eds., 2004).

58. The Grand Justices of the Judicial Yuan made a resolution at the 1298th Conference of Dismissal on January 25, 2007, dismissing a petition concerning criminal immunity of the President. It was initiated by 84 legislators, and dismissed for not conforming to the conditions set in art. 5(I)(iii) of the Constitutional Interpretation Procedure Act. Its reasoning: “the Legislative Yuan is the national supreme legislature, which has the power to resolve law bills (referring to arts. 62 and 63, of the Constitution), thereby the Legislative Yuan is empowered to monopolize the enactment and amendment of statute. In accordance with the duty for safeguarding constitutionalism and legal order, the legislators, while enacting and amending statutes, should deliberate on the purpose of the Constitution by themselves. Accordingly, if those approval laws after certain days are questioned unconstitutional by legislators, who basically must submit the amendment bills beforehand to recover those laws back to constitutional form. If legislators think those practical laws unconstitutional but never perform their duties to make amendments before petitioning judicial interpretation, or draft amendment bills are still in question and happening unconstitutional doubts, but legislators petition for judicial interpretations in advance to enquire this Yuan’s opinions, are not coordinative to art. 5(I)(iii) of the Constitutional Interpretation Procedure Act, prerequisite condition of having doubt about the meaning of a constitutional provision governing their functions and duties (referring to Interpretation 603 of this Yuan, 1123rd Conference of the Grand Justices of this Yuan and 1269th Conference of the Grand Justices this Yuan, resolutions on the issue of legislators’ petitions).”

contradiction.<sup>59</sup> Accepting applications of one-third of the legislators indeed has the purpose of protecting the minority. But, whether the protection will be metamorphosed into a political tool is a serious issue. For this reason, the solution is to learn from Germany to narrow down the boundary of the doubt interpretation of review on laws and orders, to abrogate “pure doubt interpretation,”<sup>60</sup> and to take severe authority dispute procedure, if the doubt interpretation system is still worth preserving in Taiwan. Such a solution is made by preserving the result and experience of constitutional interpretation over the years, or by saving the function of constitutional interpretation and judicial authoritative from ruins.

#### V. SPECIFIC TOPICS OF PROCEDURE: JURISPRUDENTIAL DISCRIMINATION AND AUTHENTICATION OF VARIOUS SYSTEMS

The jurisdiction and procedure of the Grand Justice is stipulated by elementary standards in the Constitution and Constitutional Interpretation Procedure Act, but imperfectly; thus giving the Grand Justices a lot of discretionary space to make supplement and formation. Glancing at the interpretations over the years, the Grand Justices have performed the duty of constitutional progressive development with many supplements of jurisdiction and procedure for judicial review. Nonetheless, whether this practice is consistent with the principle of lawmaking (*Rechtsfortbildung*) by judges needs to be deliberated. Next, we focus on justice petition of constitutional interpretation, constitutional complaint system and injunction mechanism for analysis and discussion.

##### A. *The Expansion and Practice of Judge’s Petition for Constitutional Interpretation*

###### 1. *Present Laws’ Institutional Boundary and Breakthrough*

According to Article 5(II) of Constitutional Interpretation Procedure Act, as amended and promulgated on February 3, 1993, when the Supreme Court or the Supreme Administrative Court opines in good conscience that a

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59. An apparent instance is J.Y. Interpretation No. 632 (2007) (causing the “internal dispute” between the Grand Justices).

60. See TZONG-LI HSU, *Tafakuan Shihhsienchuan Hsingshih te Chenghsu chi Fanwei—Tsong Tafakuan Shenli Anchienfa yu Hsiucheng Tsaoan chih Chienshih Tanchi* [The Discussion on the Observation of Constitutional Interpretation Procedure Act and its Amendment Bill—The Procedure and Scope of Grand Justice’s Interpretation Power], in HSIENFA YU FACHIHKUNO HSINGCHENG [CONSTITUTION AND ADMINISTRATION OF RECHTSSTAAT] 87 (1999); Chen-Shan Li, *Lun Ssufayuen Tafakuan Hsienfa “Ii Chiehshih” yu “Chengi Tsaipan” chih Chushuli* [The Discussion on the Binding of Constitutional “Doubt Interpretation” and “Dispute Interpretation” of Grand Justices Council], 28(3) HSIENCHENG SHIHTAI [CONST. REV.] 80, 130 (2003).

statute or regulation at issue before court is in conflict with the Constitution, the court may adjourn the proceedings sua sponte and petition the Justices to interpret the Constitution. Such provision is similar to Article 100(I) of German Basic Law,<sup>61</sup> “specific laws and orders review” procedure (konkrete Normenkontrolle). Firstly, the court may adjourn the proceedings and petition the Justices to interpret the Constitution; this covers not only the statute or regulation at issue before the court, but also includes “ordinances.” In fact, courts at various levels shall have the power to review the applicable ordinance, and shall have the capacity to opine whether the applicable ordinance is inefficacious and refuse to apply it.<sup>62</sup> However, the previous provision stipulates that only the Supreme Court or the Supreme Administrative Court has the capacity to petition the Justices to interpret the Constitution; the courts at various levels do not have the capacity to opine whether the applicable ordinance is inefficacious during each proceeding and refuse to apply it.

Secondly, as to the portion of the statute at issue that is in conflict with the Constitution, the foregoing provision supplies a solution when a justice is facing a situation in which the applicable statute at issue is in conflict with the Constitution, but merely allows with the exception of courts at various levels; hence, “the Supreme Court or the Supreme Administrative Court” has the capacity to petition to the Justices to interpret the Constitution. In probing their intention, the lawmakers appear to have given the Supreme Court the monopoly of “statute review,” and who can petition for constitutional interpretation is unclear. In fact, the lower level courts not only process fact matters but also apply laws. If the petition of constitutional interpretation shall be claimed until people have appealed to the Supreme Court, it is tantamount to putting lower level courts in a dilemma (unless we allow lower level courts to refuse to apply laws). Meanwhile to delay the opportunity of constitutional interpretation mechanism to guarantee peoples’ rights is another way to burden people’s right of appeal, and does not adequately safeguard peoples’ rights or preserve constitutional order.

The Grand Justices of the Judicial Yuan made No. 371 interpretation on January 20, 1995: “in trying a case where a judge, with reasonable assurance, has suspected that the statute applicable to the case is

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61. Art. 100(1) of the German Basic Law: “If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.”

62. See YUEH-SHENG WENG, *Lun Mingling Weifa chih Shencha* [On the Review of Unlawful Regulations], in Hsingchengfa yu Hsientai Fachih Kuochia [ADMINISTRATIVE LAW AND RULE OF LAW] 109, 122-29 (3d ed. 2004).



unconstitutional, he shall surely be allowed to petition for interpretation of its constitutionality. In the above-mentioned situation, judges at different levels may suspend the pending procedure on the ground that the constitutionality of the statute is a prerequisite issue. At the same time, they shall provide concrete reasons for believing the unconstitutionality of the statute, and petition to the Grand Justices of the Yuan to interpret its constitutionality.” The Grand Justices thereby announce: “The provisions of Article 5(II) & (III) of the Constitutional Interpretation Procedure Act which are inconsistent with the above decision shall no longer be applied.” On this ground, the so-called “procedure of specific review of laws and orders,” similar to Article 100(1) of German Basic Law, is officially established.

## 2. *The Deliberation over No. 371 of the Judicial Yuan Interpretation*

The consequence of Interpretation No. 371 is not only to prevent courts from opining by themselves whether a statute or regulation is unconstitutional and refusing to apply it, but also to supply judges a way to petition for constitutional interpretation, to avoid the dilemma of facing unconstitutional laws. The operation so far has been positive in safeguarding people’s rights and preserving constitutional order. Some important constitutional interpretations that were petitioned by judges, such as No. 392,<sup>63</sup> No. 476 and No. 618, were good interpretations. However, from the viewpoint of legal expounding, whether the Grand Justices went beyond the margin of progressive development of law is an open question and must be clarified.

The petition of this interpretation arose because the 2nd Department of the Judicial Yuan screened and approved the resolution of a juristic meeting, held by Taiwan Appellate Court and Tainan District Court in March 1992. The conclusion was: “In trying cases judges at different levels have the power to screen whether the statutes applicable to the cases are unconstitutional. Judges can refuse to apply the statutes if they hold the statutes are unconstitutional as the reason, and transmits documents (No. 6474, Word 1, Criminal Department, 81) to lower level courts, Department of Prosecutorial Affairs and related divisions for note.” The 11 members of the Legislative Yuan hold that resolution of “in trying cases where judges at different levels have the power to screen whether the statutes applicable to the cases are unconstitutional. Judges can refuse to apply the statutes if they hold the statutes are unconstitutional as the reason,” delegates ordinary justices “substantial power of judicial review,” would cause unconstitutional application of Article 80 and Article 170 of the Constitution, bringing about

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63. This petition was initiated by one third of the legislators at the same time.

the dispute of constitutional interpretation organ and jurisdiction range with Articles 171, 173 of the Constitution, Article 3 of Organic Act of Judicial Yuan and Articles 2, 3 of Grand Justices Council Adjudication Act, therefore for preserving juristic review, preventing the discredit of legal stability and respecting the legislative power, on the basis of Article 4 and Article 7 of Council of Grand Justices Adjudication Act initiated the petition, and resolved the motion by the Legislative Yuan on June 30, 1992. The Grand Justices accepted the application and produced the interpretation on January 20, 1995.

The subject matter of constitutional interpretation is the “legal expounding” of Judicial Yuan, viz., the opinion whether justices shall have the capacity to review a statute and refuse to apply it, between the Legislative Yuan and the Judicial Yuan is controversial and contradictory. When the petition was initiated (June 30, 1992), not only was the “Constitutional Interpretation Procedure Act” not amended or promulgated (February 3, 1993), but the “Council of Grand Justices Adjudication Act” lacked a provision for judges’ petition. Seriously, Article 5(II)(III) of Constitutional Interpretation Procedure Act was not the subject matter of the Legislative Yuan’s petition. Therefore, the abolition announcement of the foregoing provision in Interpretation No. 371 went suspiciously beyond the margin of subject matter, in violation of petition principle (Antragsprinzip) and principle of no trial without complaint.

Tentatively disregarding the procedural issue, the matter of concern was whether the Justices went beyond the margin of constitutional interpretation power because of the expansion of judges’ petition for constitutional interpretation. According to Articles 171(I) of the Constitution, laws that are in conflict with the Constitution shall be null and void. Because inefficacious law is not applicable, a justice should review whether the applicable statute is unconstitutional and ineffective before trial. If justices ensure that the applicable statute is in violation of the Constitution, then the statute shall not be applied. In another words, all justices have the capacity to review laws and regulations and refuse to apply them. The difference of judicial review power between justices at various levels of courts and the Justices is that justices merely review the constitutionality of the applicable statute or regulation during an individual case; the Justices review power covers over all cases, and produce general and efficacious announcements. Nevertheless, according to meaning of No. 371 interpretation, the Justices monopolize the judicial review power of laws, and overrule the position that justices at various courts have “incidental review power” of laws. In other words, the establishment of judges’ petition for constitutional interpretation (specific laws review) system is exactly the Justices’ monopolization of judicial review power over laws. The issue is whether or not the Constitution entitles

the Justices to monopolize judicial review power over laws on the basis of jurisdiction of constitutional interpretation.

From the viewpoint of comparative law, the specific law review system is founded on Article 100 of German Basic Law (Constitution). In another words, the option and practice of judges' petition for constitutional interpretation is based on the decision of the Constitution-Makers. In contrast, the Constitution in Taiwan is without a provision similar to Article 100 of German Basic Law. Of course, Article 171(II) of the Constitution, "When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan." Nonetheless, the Constitution does not clearly provide how to exercise such constitutional interpretation power, not to mention the monopolistic interpretation power of the Judicial Yuan.

Objectively, the key issue is the Judicial Yuan's orientation and the frame and model of the judicial review system, and opinions are widely divided.<sup>64</sup> The Justices are well aware of the issues, and therefore explain the reasoning as follows:

"Based on the constitutional principle of separation of powers, modern countries with a written constitution and rule of law have set up a judicial review system. Those which do not have a special judicial tribunal for judicial review delegate this power to their ordinary courts through precedents, as the United States does, or through explicit constitutional provisions, as Japan does (Article 81 of the 1946 Constitution). In those countries which have special judicial tribunals for judicial review, the constitutionality of statutes is reviewed by the special judicial tribunals, such as the Constitutional Courts of Germany (Articles 93 and 100 of the 1949 Basic Law), Austria (Articles 140 and 141-1 of the 1929 Constitution), Italy (Articles 134 and 136 of the 1947 Constitution), and Spain (Articles 161 and 163 of the 1978 Constitution). Different countries with different situations could not be expected to have the same systems and applications. Nonetheless, their purposes are all to protect the constitution's highest authority in law, as well as to maintain a judge's independence in exercising his duties, in order that in trying a case, a judge shall obey nothing but the constitution and statutes without any interference. Because our legal system mainly adopted the statutes of continental countries, the development of our judicial review system has been very similar to those of the abovementioned continental countries since our Constitution went into effect."

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64. See Tzung-Jen Tsai, *Wokuo Hsienfa Shenpan Chih tu chih Chientao* [A Review of Constitutional Trial System in ROC], 98 YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.] 49 (2003); Jau-Yuan Hwang, *Ssufa Weihsien Shencha te Chih tu Hsuantse yu Ssufayuen Tingwei* [Choosing a New System of Judicial Review for Taiwan: Some Reflections on the Status of Judicial Yuan], 32(5) KUOLI TAIWAN TAHSUEH FAHSUEH LUNTSUNG [NTU L.J.] 55 (2004).

Since the Justices have said, “different countries with different situations could not be expected to have the same systems and applications,” how can they go on to classify the power of one authority through their interpretation; if the purpose of the judicial review system is “to protect the constitution’s highest authority in law, as well as to maintain a judge’s independence in exercising his duties,” then why can’t a judge refuse to apply the statute that is been considered unconstitutional by him independently in exercising his duties? This is the so-called, “because our legal system mainly adopted the statutes of continental countries, the development of our judicial review system has been very similar to those of the above-mentioned continental countries since our Constitution went into effect.” Hence, the foundation of constitutional norms, system orientation of law or self-development of constitutional interpretation affairs have not been clearly defined, and it is difficult to determine the truth and anticipation of judicial review system with certainty in Taiwan. If the Constitution has never chosen any particular model, then the jurisdiction of “system option” should belong to the range of legislative power. This point can be identified from the judicial reform that began in 1994. As is commonly known, judicial reform in Taiwan takes “a single court with several chambers” as the short term goal and “a single court with a single chamber” as its ultimate destination. The so-called “a single court with a single chamber” is where the Judicial Yuan establishes 13 to 15 the Grand Justices to take the authority of Civil Litigations, Criminal Litigations, Administrative Remedies, Disciplinary Sanctions of Public Functionaries, Constitutional Interpretation and Unconstitutional Political Party Disbandment.<sup>65</sup> In this type of system, the ultimate destination is largely like the U.S. judicial review system, viz., “separation style.” Under such a system, either the Federal Supreme Court or Federal Courts at various grades have the capacity to review the constitutionality of statutes and regulations. Although the day of reaching the ultimate destination is unknown, it will reflect the model of judicial review system (especially judicial review of laws) which is not classified to one authority; otherwise, the foregoing judicial reform (from centralized review to decentralized review) could not be done without amending the Constitution.<sup>66</sup> According to the idea of this article, the judges’ petitions for constitutional interpretation institution are reserved for statutes and the target is the legislature; but this could not be appropriately established by the Justices’ own will, and at least it should not weaken the powers of judicial

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65. See JUDICIAL YUAN, CHUANKUO SSUFA KAIKE HUII CHIEHLUN CHUTI TSOSHIH CHI SHIHCHIENPIAO [MEASURES AND SCHEDULES OF NATIONAL JUDICIAL REFORM CONFERENCE] 6-7 (1999).

66. See Hwang, *supra* note 64, at 55.

review of laws and applicable statutes refusal of justices at various levels.<sup>67</sup>

### 3. *Procedural Conditions of Justice Petition for Constitutional Interpretation*

Despite the critical discussion of the logic and meaning of Interpretation No. 371, the judge's petition for a constitutional interpretation institution has been implemented for eighteen years (to 2010), and during this period the Grand Justices went on to produce Interpretations No. 477,<sup>68</sup> 572 and 590 to supplement No. 371. The latter two interpretations are relevant to the "procedural conditions" of judges' petition for constitutional interpretation which relates to the operation of specific laws and orders review, and therefore these interpretations have to be studied.

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67. The interesting thing is, Interpretation No. 371 (1995) proclaims: "Art. 80 of the Constitution clearly provides that judges shall only try cases in accordance with law. In trying a case, a judge shall base his decision on statutes that have been promulgated and effective in accordance with the legal procedure." Based on art. 80 of the Constitution, the Grand Justices hold that judges shall decide based on statutes, once they have been promulgated and become effective in accordance with the legislative procedure. It then follows that, the Grand Justice are different from the justices who are covered in art. 80 of the Constitution. However, while the judicial personnel professional allotments of the Grand Justices were canceled by the Legislative Yuan, the Grand Justices soon faced the dilemma of justifying themselves, since in Interpretation No. 601 (2005) they made, they expounded themselves equivalent to the justices covered by art. 80 of the Constitution. Interpretation No. 601 proclaims: "The Justices are nominated by the President of the Republic and appointed by the same upon confirmation by the Legislative Yuan, and are judges under art. 80 of the Constitution, as has been made clear by past opinions delivered by this Court, including J.Y. Interpretations No. 392, 396, 530 and 585." While No. 371 is omitted here, it appears in the Reasoning: "Art. 80 of the Constitution expressly provides, among other things, that judges shall, in accordance with law, hold trials independently. However, since the force and effect of the Constitution prevails over that of laws, judges shall be obligated to follow the Constitution over all laws. As such, in a trial over a particular case, a judge shall always interpret and construe the applicable law as dictated by the constitutional intent so that the application of the law will fit in with the fundamental values of the Constitution in its entirety, and shall, further, review the constitutionality of the law and, once he or she firmly believes that the law is unconstitutional, the court at various levels may regard the constitutionality, or unconstitutionality, of the law as a prerequisite issue, and decide to suspend the litigation procedure and then petition this Court for constitutional interpretation pursuant to art. 5-II of the Constitutional Interpretation Procedure Act, as well as J.Y. Interpretations No. 371, 572 and 590. The court hearing the case at issue may not resume the procedure to try the case based on the prerequisite issue until the Justices reach a binding, constitutional judgment on such issue." From this paragraph alone, one cannot understand the logic and train of thought of the Justices, and that is the reason why people question the Justices irrationally justifying their allotment. The Grand Justices would not have faced such an embarrassing situation, if they hadn't limited judges' power to refuse to apply laws at the time they were establishing the institution of justice constitutional petitions in Interpretation No. 371.

68. The reasoning of Interpretation No. 477 (1999): "In the event this Yuan accepts a petition for constitutional interpretation and that petition is filed by any of the lower courts in accordance with Interpretation No. 371, if we should rule that the related law in question is inconsistent with the meaning or purpose of the Constitution, to avoid a prolonged delay in resolving the pending case at hand and recognizing that it may be difficult, as a matter of fact, for the related governmental body to complete the legislative process in a short period of time, this Yuan may [first] decree that the certain content of the Interpretation is deemed constitutional so that lower courts may apply the [constitutional] rules in time (see J.Y. Interpretation No. 471)."

Firstly, Interpretation No. 572 is the follow-up of No. 371. The statement of No. 572<sup>69</sup> is aimed to dilute the meaning of so-called “prerequisite issue” in No. 371; but, the real aim is to burden justices with higher explanatory responsibilities. This interpretation is a “supplement” in name only; in fact, it is a “rejective interpretation” of the petition that initiated by the judge of Fifth Court of Keelung District Court, who questioned the applicable statute (Article 33(iii) of Criminal Code, the fifteen years limitation of imprisonment) as unconstitutional. The Grand Justices exist because of the institutional essence of specific laws and orders to burden justices’ explanatory responsibilities. Although judges’ petitions for constitutional interpretation rely on the need of trying particular cases, the subject matter is still law, so there is no need to require the Justices to intervene in the case. Therefore, strictly speaking, it is still an “abstract review of laws and orders,” or more precisely, it is an “abstract review of laws and orders that is petitioned by justices.” Because this constitutional interpretation procedure is not relevant to petitioner’s (judge) personal rights, it is necessarily controlled to prevent the excessive petitions that increase the Justices’ work load.

Secondly, the background of No. 590 (February 25, 2005) is that a Miaoli County Government social worker, pursuant to Article 15(II) of the Law to Suppress the Sexual Exploitation of Children and Juveniles (hereinafter the Law), placed a child at the Emergency Accommodation Centre who was at risk of being involved in sexual exploitation, and pursuant to Article 16 of the Law, submitted a report to the court for an order within 72 hours of the placement. While the court was trying this case, which questioned the constitutionality of applicable Articles 9, 15(II) and 16 and its related provisions in the Law with reasonable assurance, then petitioned for judicial interpretation according to Interpretations No. 371. However, because the child had been placed at the Emergency Accommodation Centre, the presiding judge held that if ordering the

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69. The Holding reads: “when deciding a case, if the judge reasonably believes that the applicable statute may conflict with the Constitution, each instance of court should regard this as a prerequisite issue, suspend the litigation procedures, provide concrete reasoning of its objective belief that the statute violates the Constitution, and petition the Grand Justices for constitutional interpretation pursuant to J.Y. Interpretation No. 371. The matter, when the court presiding over the pending case believes that the law at issue violates the Constitution and may clearly affect the ruling of the case, is called the ‘prerequisite issue.’ ‘To provide concrete reasons for objectively believing the unconstitutionality of the statute’ signifies that in the petition, the petitioning court is required to describe in detail its interpretation of the statute that violates the Constitution, explain the standard used to interpret the Constitution, and accordingly, provide evidence that it believes the statute is unconstitutional and is objectively without obvious mistakes. If the petitioner only has doubts about whether the statute is unconstitutional or the statute may possibly be reconciled with the requirement for requesting a constitutional interpretation, this is not sufficient to constitute concrete reasons for objectively believing that the statute is unconstitutional. This Yuan hereby provides supplemental interpretation for J.Y. Interpretation No. 371.”

suspension of the procedure beforehand and processing this case after the interpretation would cause the child to be disposed at the Emergency Accommodation Centre continuously and unbeneficial to whose right, thus applied Article 16 of the Law to order the placement in advance, then petitioned for judicial interpretation, meanwhile, in accordance with “whether or not the prerequisite course of action for a judge to suspend the trial procedure to petition for judicial interpretation” petitioned for supplementary interpretation of No. 371. Basically, this petition case contains two questions: one is whether or not the petition conforms to the procedural conditions of constitutional interpretation, viz., whether a judge can petition for constitutional interpretation who has made the final judgment in the trial (not order the suspension)? The other is the substantial question of whether Articles 9, 15 and 16(II) of the Law contravene Articles 8 and 23 of the Constitution. The former question is the prerequisite condition of the latter one. If the former answer is in the negative, then it is unnecessary to discuss the latter question. Strangely, now that “supplement” is a kind of interpretation, then what should be required to conform to the petition conditions. In other words, the Justices should deliberate about whether the first question shall be given the supplementary interpretation (whether or not the case of supplement matches petition conditions); but the vital point is whether the interpretation petition (including supplement) should be accepted while the judgment has been made in the trial. Consequently, there is an intriguing logical dilemma: the Grand Justices holds that a judge should not petition for constitutional interpretation if he has made the final judgment in the trial; but then all petitions (including supplement) should be made rejective resolutions if cases are no longer pending, and hence the Grand Justices should not make any supplementary interpretation.<sup>70</sup> Nonetheless, the Justices made a supplementary interpretation for the petition rather than a rejective resolution, and rejected the petition of substantial part on account of the supplementary interpretation.

Objectively, juristic expounding and application are not totally logical

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70. See J.Y. Interpretation No. 590 (2005) (Lin, J., dissenting): “Since the incident of this case has concluded as the foregoing put it, any matter concerning ordering suspension of the proceeding does not exist here. After dismissing the petition, how can the Justices make up a ‘supplementary interpretation?’ Supplementary interpretation is a kind of interpretation. If the Grand Justices should not judge on the issue of ‘ordering suspension of proceedings,’ how can they make a supplementary interpretation for a derived matter? The majority opinion might intent to make clarifications, but the result is the reverse. If such idea is acceptable, the provision of ‘accepting application’ would be mere formality. Although supplementary interpretations are not forbidden while judicial interpretation petitions have been declined, it should only be exercised on the issue of rejection, not on other issues. Otherwise, the Justices could randomly make supplementary interpretations on any previous cases without any restraint. Such practice seemed convenient to the Justices, but the law will no longer be the law.”

deductions, but often intended to solve practical problems. As to this supplementary interpretation petition case, there was no difference whether the Justices make interpretation or rejective resolution. Even if the Justices made a rejective resolution on the supplementary interpretation petition for the above-mentioned reasons, the supplement (*viz.*, suspending the litigation procedure before petition) had been made in a different way. The key point is the dilemma that the presiding judges faces: if ordering the suspension of the trial conforms to the procedural conditions of petition, but meanwhile the involved party is in a disadvantageous situation, there could be a risky situation of late reaction if the decision shall be made after the Grand Justice's deliberation. But, there is no way to petition for constitutional interpretation if applying the suspicious unconstitutional statutes for giving instant protection to the involved party. The Justices were aware of this dilemma, so they added: "nevertheless, after the suspension of a trial or non-trial procedure, a judge shall, in urgent circumstances, look into legislative purposes, balance the rights and welfare of parties with public interests, and consider all related matters of the case so as to maintain necessary safeguards, protection or take other appropriate measures." The problem is whether judges should perform the so-called "necessary safeguards, protection or take other appropriate measures" if such is without any legal provision (by judge-made law)? Such were the wordings that were mentioned in reasoning of this interpretation, "returning the child in question to the custody of the parent or guardian, or where the family is considered unfit, referring the child or juvenile to a suitable social welfare institution for guidance and nurturance," are not clearly stipulated in the Law. Therefore, the Justices should clarify whether judges are allowed to create preventive measures or other appropriate dispositions.

From the standpoint of applicant judges,<sup>71</sup> the major unconstitutional points of the relevant stipulations are, the Law does not provide that authority by law which makes necessary investigation before deciding the urgent placement of protected child or juvenile, and provides within 72 hours

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71. The presiding judge held those applicable statutes unconstitutional on the ground that: "when related authority or personnel reports to the competent authority that a child or a juvenile involves in, or at risk of involving in sexual exploitation, the competent authority shall, after proceeding necessary investigations, decide the urgent placement; or otherwise the said child or juvenile would not be protected. The placement authority shall inform the said child or juvenile and his or her custodian with reasons for placement, and report to the in charging court for an order within 24 hours. The said child or juvenile and his or her custodian can also petition the eligible court to order the authority making the placement for interrogation within 24 hours. The court shall not reject the said petition, nor shall it in advance order the authority concerned to make an investigation and report. The concerned placement authority shall not refuse or delay the interrogation from the court. The said statutes which are not in accordance with the preceding discussions, are against the purpose in guaranteeing people's physical freedom of art. 8 of the Constitution and the provided conditions in art. 23 of the Constitution, and shall be invalid within 2 years from the day of proclaiming interpretation."



of the placement, submits a report to the court for an order, but not within 24 hours.

A particular case would not be against Article 8 of the Constitution if the authority submits a report to the court for an order within 72 hours of the placement, thus the jurisdictional court can decide the order of replacement in specific cases. However, the intention of No. 590 is that, while the authority submits a report to the court for an order after 24 hours and before 72 hours, if the presiding judge thinks those applicable stipulations of the Law are in violation of Article 8 of the Constitution, but the judge is not empowered to refuse the application of laws makes the short term order, because the case has been closed since judge has made an order; therefore the applicant judge has no ground to petition for judicial interpretation. The difficulty is, if the presiding judge has a certain belief that those applicable statutes are unconstitutional and thus refuses to make the measure of short term placement and then orders the suspension of the proceeding, petitions for constitutional interpretation, would face a dilemma at the same time of how to handle the urgent placement of the child or juvenile. About this question, the Justices ruled: “consequently depriving the parent or guardian of his or her custodial right, or failing to secure personal freedom and other procedural rights of the child or juvenile. In such exceptional circumstances, the judge, when ordering suspension of the non-trial procedure, should take appropriate measures, including returning the child in question to the custody of the parent or guardian, or, where the family is considered unfit, referring the child or juvenile to a suitable social welfare institution for guidance and nurturance.”

Such a solution seems appropriate at first glance, but not on consideration; since it leads judges to dilemmas. Since the reason for ordering the suspension of proceeding is because the presiding judge holds with assurance that the authority submitting report to court over 24 hours is unconstitutional, then making decision of referring the child or juvenile to a suitable social welfare institution is controversial under such condition (depriving personal freedom and other procedural rights of the child or juvenile). The “establishment” by the Justices of such “urgent measure power” for judges, is nothing different from judge directly ordering short term placement. Besides, according to the reasoning of No. 443: “For instance, depriving people’s lives or limiting their physical freedom shall be in compliance with the principle of definitiveness of crime and punishment and stipulated by law,” then how can judges make decisions on the basis of judge-make law to deprive people’s physical freedom and to place the child or juvenile to a suitable social welfare institution temporarily? In fact, Article (8)(II) of the Constitution provides: “When a person is arrested or detained on suspicion of having committed a crime, the organ making the

arrest or detention shall in writing inform the said person, and his designated relative or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial.” Besides arrest or detention on suspicion of having committed a crime, if this provision is also applicable to “other” circumstances, then the deprivation of physical freedom over 24 hours is unconstitutional and the arrested or detained person should be released, otherwise the safeguarding meaning of Article 8 of the Constitution would not be fulfilled. Therefore, it is rather allowing judge to order the short term placement and petition for judicial interpretation, and use it as the standard of other subsequent cases.

B. *The Development and Progression of Constitutional Complaints*

“Constitutional complaint”<sup>72</sup> is a remedial institution for people to initiate petitions for constitutional interpretation. It is classified as a kind of “centralized review.” By contrast, in decentralized review, such as in the U.S., courts at various levels can review the human rights infringement issue in a specific case. It is the same in the final court, the Supreme Court, which has the power to review the judgments of lower courts. Therefore, it is unnecessary to create a special “constitutional complaints” system. For this reason, the implementation of constitutional complaint is based on the option of a judicial review system. If the judicial review type is converted to decentralized review from centralized review, there would be no room for such constitutional complaint.

According to Article 5(I)(II) of the Constitutional Interpretation Procedure Act, when an individual, a legal entity, or a political party, whose constitutional right was infringed upon and remedies provided by law for such infringement had been exhausted, questions the constitutionality of the

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72. See YUEH-SHENG WENG, *Hsienfa chih Weihuche [The Vindicator of Constitution]*, in HSINGCHENGFA YU HSIENTAI FACHIH KUOCHIA [ADMINISTRATIVE LAW AND COMTEMPORARY RECHTSSTAAT] 475, 478 (3d ed. 2004). Constitutional complaint (Verfassungsbeschwerde) is a concept in the German legal system. “Beschwerde” was a wording of former German Administrative Remedy Procedure; now the wording has been changed to “Widerspruch” (domestic translation generally is “Appeal”). “Beschwerde” now means appeal against ruling, thus the “Verfassungsbeschwerde” is better translated as “Constitutional (appellant) litigation” or “Constitutional litigation.” See KLAUS KRÖGER, GRUNDRICHTSENTWICKLUNG IN DEUTSCHLAND: VON IHREN ANFÄNGEN BIS ZUR GEGENWART [THE DEVELOPMENT OF BASIC LAW IN GERMANY: FROM ITS BEGINNING TO THE PRESENT] 26 (1998); RÜDIGER ZUCK, DAS RECHT DER VERFASSUNGSBESCHWERDE [THE RIGHT OF CONSTITUTIONAL APPEALS], para. 114 (3d ed. 2006). The fount of the Constitutional complaint System is derived from the art. 126-g of the Constitution of German Empire (Deutsches Reich) {commonly called “Constitution of St. Paul’s Church” (Paulskirchenverfassung )}: The jurisdictions of Imperial Court are as follows: . . . g) the litigations that initiated by nationals of German Empire on the ground that whose rights guaranteed by the Constitution are infringed on. The scope and exercise of indictment rights shall be stipulated by laws of German Empire.”

statute or regulation relied thereupon by the court of last resort in its final judgment, have therefore initiated a petition. This procedure petition by people is a type of “constitutional complaint.” However, the subject matter that people can question regarding its constitutionality concern the applicability of “statutes or regulations” in a trial, and whether judgments and rulings were exceptional. Hence, it can only be called as “constitutional complaint of laws and regulations,” rather than “constitutional complaints of judgments and rulings.”<sup>73</sup> However, through Interpretation No. 153, 154 and 420, the Grand Justices took precedents and decisions of courts into the range of constitutional interpretation. It can be called as “special constitutional complaints of judgments and rulings” (Urteilverfassungsbeschwerde sui generis).<sup>74</sup>

From the point of view of strengthening human rights, what the Grand Justices have done, as mentioned, is appreciated; but it still needs to be deeply questioned when considering whether it is consistent with the principle of separation of powers or not. Beyond the interpretation problem of whether the “precedent” is consistent with the concept of “statute or regulation,” what we need to consider seriously is whether or not the Constitution has pre-set the constitutional complaint system. If the constitutional complaint is not an essential system for human rights remedy, it is the legislative discretion to decide the content of constitutional complaint system and the implementation of this system; in other words, there would be no constitutionality debate if the legislature were to abolish the constitutional complaint system. If so, the expansion of constitutional complaint by the Grand Justices may violate the principle of checks and balances.

The Constitution says that laws that are in conflict with the Constitution shall be null and void. But, when doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan. Yet, there is no practical procedure of judicial review system of law in the Constitution provision. The core problem about constitutional complaint is that “people” are the petitioners, viz., people as the plaintiff in constitutional litigations (litigation of judicial review). In decentralized review countries, like the U.S., it is very natural to ask the court to review

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73. Stefan Koriath, *Bundesverfassungsgericht und Rechtsprechung (“Fachgerichte”)* [Federal Constitutional Court and Judiciary (“Specialist Courts”)], in 1 Festschrift 50 Jahre Bundesverfassungsgericht [Festschrift for 50 Years of Federal Constitutional Court] 55, 59 (Peter Badura & Horst Dreier eds., 2001). The meaning of “Urteil” includes adjudications and rulings, but the precise wording should be “Entscheidungsverfahrenbeschwerde.”

74. Chien-Liang Lee, *Die Verfassungsgerichtsbarkeit und Grundrechtsentwicklung in Taiwan (1949-1999)—im Vergleich mit Deutschland* [The Constitutional Jurisdiction and the Development of the Fundamental Rights in Taiwan (1949-1999)—In comparison with Germany], in *Staat und Individuum im Kultur- und Rechtsvergleich* [State and Individual in Culture—And Law Comparison] 135, 136 (Christian Starck ed., 2000).

the constitutionality of norms. Conversely, this is not certain in a centralized review country, such as Germany.

However, if the ultimate goal of judicial review of norms is to protect fundamental human rights, it is consistent to say that people have the right guaranteed by the Constitution to petition a constitutional litigation. In this way, constitutional complaint can be seen as a “quasi-fundamental human right with procedural characteristics.” It is more important to recognize constitutional complaint as an unwritten fundamental human right, especially when the Grand Justices announced that judges at all level courts have no capacity to review the constitutionality of laws and to refuse such applications.

The subject matter of constitutional complaint remains uncertain even when we recognize the status of constitutional complaint in the Constitution. This question should be clarified and debated with the procedural requirement, “remedies provided by law for such infringement had been exhausted.” According to the Constitutional Interpretation Procedure Act Article 5(I)(ii), “remedies provided by law for such infringement had been exhausted” is a procedural condition of constitutional complaint petition. As a “subsidiary role” of constitutional complaint, this provision shows the relation between the Grand Justices and the other courts in the human rights protection area. The basic consideration of this principle is that the function of human right remedy should be taken up by the other courts, and constitutional interpretation is seen as a special remedy. The main goal of the procedural requirement, “remedies provided by law for such infringement had been exhausted” is to compel people to ask for remedy at all levels of courts, and make them investigate all the facts in this way; thus, the Grand Justices could focus on constitutional issues. Accordingly, the legislature has already considered the problem of power separation and job distribution between the Grand Justices and other levels of courts when making this procedural requirement. Similarly, this procedural requirement, i.e., “remedies provided by law for such infringement had been exhausted,” is the prerequisite condition for the Grand Justices to review the judgments at all levels of courts; otherwise, it would not be necessary to compel people to ask for remedies at all levels of courts before appealing to the Grand Justices. As a result, the Grand Justices created the system of “constitutional complaint of precedents” to fill in a vacancy left by the legislature (die unbewußten Gesetzeslücken).

Regarding the constitutional complaint of laws, this is an unreasonable limitation for people with the condition of “remedies provided by law for such infringement had been exhausted.” Other levels of courts have no power to review the constitutionality of laws, according to Interpretation No. 371. Considering this, the Grand Justices made a decision in committee No.

1125, the same day that Interpretation No. 490 was pronounced on September 10, 1999, proclaiming that if the petition were accepted, then it would not be required that “remedies provided by law for such infringement had been exhausted” when it has basic significance in the Constitution and that basic fact is clear and without dispute. It is a perfect example of “teleological reduction.” Yet, there has been no actual case of this to date.

### C. *The Establishment and Application of Injunction*

The most attractive and conflictive procedural institution that the Grand Justices set up is injunction. Injunction is a kind of preventive proceeding. Namely, the purpose of injunction is to secure the effectiveness and implement of interpretations and to protect rights temporarily.

The main challenge of the creation of injunction is in violation of legal reservation principle and the infringement on the core-area of legislative power, and therefore it crosses the boundary of progressive development of law. Nevertheless, the opinion of this author is, according to the principle of “a majore ad minus,” the Grand Justices have the judicial review power to invalidate unconstitutional norms, thus it should have the power to suspend the validity of the laws which may be deemed unconstitutional. Injunction can be seen as an “ancillary power” (Annexkompeten) of judicial review. In other words, the reason that the Grand Justices can create injunction is based, not on the characteristics of judiciary, but on the status of constitutional organ, viz., the Grand Justices have the power to adjudicate conflicts between the highest national branches, therefore it should have the power to freeze their actions temporarily. As the reasoning of Interpretation No. 585 and 599, “the Grand Justices are empowered by the Constitution to exercise its authority independently to interpret the Constitution and hold constitutional trials. The preventive system used to ensure the effectiveness of the interpretations given or judgments rendered by the judiciary is one of the core functions of judicial power, regardless whether it involves constitutional interpretations or trials, or civil, criminal or administrative litigations.” Obviously, the Justices mainly focus on the judiciary. This raises a further question, including uniform interpretation, whether this preventive system can be exercised over all constitution interpretation procedures.

## VI. CONCLUSION: THE INTELLECTUAL CONTEST BETWEEN CONSTITUTIONAL INTERPRETER AND LEGISLATOR

The Constitution is the basic law of a State, and it provides for the institution of human right Safeguards. The constitutional order is not a fixed and everlasting closed system, but an open, multiple and flexible one. It is a

normal situation that Constitutional norms are lacking. The defect of constitutional interpretation procedure is a perfect example. It requires not only the construction of constitutional theory, but also the cooperation of legislature and judicature to build up the legal system of constitutional interpretation. The judicature should take the responsibility to fill up the loopholes when the legislature is slothful or incapable. However, this doesn't mean that the judicature can create judicial review procedure randomly, even though the weakness of the Constitution and the supplement utility of the judicature. Therefore, the judicature should consider all varieties carefully in practice.

Indeed, unlike the other judicial procedures, it is hard for the constitutional reviewer to avoid interfering in the "political arena" (Bereich der Politik).<sup>75</sup> But, the constitutional reviewer must perform his role and responsibility strictly to serve constitutional interpretation and application rather than review the appropriateness of political activity, or go beyond his duty to make political decision. If the Justice made a decision according to his political position to replace the decision of the legislature that would not only cross the margin of the principle of checks and balances, but also touch the bottom line of legitimacy. Gustav Radbruch, a German legal philosopher, said, "the interpreter has better understanding than the maker in law. Law can, even must, be wiser than the lawmaker." (Der Ausleger kann das Gesetz besser verstehen, als es seine Schöpfer verstanden haben, das Gesetz kann klüger sein als seine Verfasser—es *muß* sogar klüger sein als seine Verfasser.)<sup>76</sup> As the constitutional interpreters, the Justices must be wiser than the legislature. But only by distinguishing the difference between "political tradeoff" and "constitutional requirement" are they wiser than the legislators. Under the disorderly constitutional structure regarding politic leading and frequent contradictions, how justices weigh the various positions and consider all matters is the test of their wisdom. Nonetheless, these dilemmas exist everywhere; they may be mitigated only if the supremacy and binding force of the Constitution is seriously regarded, and if the function of honest judicial review still exists.

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75. Gerhard Leibholz, *Der Status des Bundesverfassungsgerichts* [*The Status of the Federal Constitutional Court*], in *DAS BUNDESVERFASSUNGSGERICHT* [THE FEDERAL CONSTITUTIONAL COURT] 31, 64 (The Federal Constitutional Court of West Germany ed., 1963).

76. Gustav Radbruch, *Die Logik der Rechtswissenschaft* [*The Logic of Legal Science*], in *RECHTSPHILOSOPHIE* [PHILOSOPHY OF LAW] 205, 207 (G. Radbruch, E. Wolf & H. P. Schneider eds., 8th ed. 1973).

## REFERENCES

- Bethge, H. (1998). Vorbemerkung [Prelims]. In T. Maunz & B. Schmidt-Bleibtreu et al. (Eds.), *BVerfGG: Kommentar*. München, Germany: Beck.
- Brissaud, J. (1969). *A history of French public law* (James W. Garner Trans.). South Hackensack, NJ: Rothman Reprints. (Original work published 1915)
- Cappelletti, M. (1989). *The judicial process in comparative perspective*. Oxford, UK: Oxford University Press.
- Corwin, E. S. (1928). The “higher law” background of American constitutional law. *Harvard Law Review*, 42, 365-409.
- Dr. Bonham’s Case, 8 CO. REP. 114 (1610).
- Easton, S. C. (1970). *The western heritage: From the earliest time to the present* (3rd ed.). New York, NY: Holt, Rinehart and Winston.
- Eberle, E. J. (1998). Human dignity, privacy, and personality in German and American constitutional law. *Utah Law Review*, 1997, 963-1056.
- Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Decisions of the German Constitutional Court], 1, 208 (223); 2, 79 (96); 2, 143 (164); 3, 407; 4, 27; 13, 54 (94); 24, 260 (263); 24, 300 (329); 36, 342 (357); 44, 125 (137); 60, 175 (213); 90, 286 (313, 341).
- Gesetz über das Bundesverfassungsgericht [German Federal Constitutional Court Act], art. 1 (1998) (Germany).
- Gesetz über das Bundesverfassungsgericht [German Federal Constitutional Court Act], art. 97 (current revised in 1998) (Germany).
- Gough, J. W. (1955). *Fundamental law in English constitutional history*. Oxford, UK: Oxford University Press.
- GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [FEDERAL CONSTITUTION OF GERMANY], arts. 21, 24, 93(1), 93-1(2), 100.
- Häberle, P. (1973). Die Eigenständigkeit des Verfassungsprozeßrechts [The independence of constitutional procedural law]. *Juristenzeitung*, 14, 451-455.
- Häberle, P. (1976). Verfassungsprozeßrecht als konkretisiertes Verfassungsrecht [Constitutional procedural right as concretized constitutional right]. *Juristenzeitung*, 31, 377-384.

- Herzog, R. (1996). Ziele, Vorbehalte und Grenzen der Staatstätigkeit [Aims, provisions, and limits of the state act]. In J. Isensee & P. Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* [Handbook of constitutional law of Republic of Germany] (2nd ed., Vol. 3, pp. 83-120). Heidelberg, Germany: C.F. Müller.
- Hsu, T.-L. (1999). Tafakuan shihhsienchuan hsingshieh te chenghsu chi fanwei—Tsong tafakuan shenli anchienfa yu hsiucheng tsaoan chih chienhsieh tanchi [The procedure and scope of Grand Justice's interpretation power—The discussion on the observation of constitutional interpretation procedure act and its amendment bill]. In *Hsienfa yu fachihkuo hsingcheng* [Constitution and administration of Rechtsstaat] (pp. 87-129). Taipei, Taiwan: Angle.
- Hsu, T.-L. (2003). Chipenchuanli: Tisan Chiang—Chipenchuan chute [Fundamental rights: Lesson three—On the subjects of fundamental rights]. *Taiwan Jurist*, 4, 80-88.
- Hsu, T.-L. (2007). Chichung · choushiang weihhsien shencha te chiyuen · fachan yu chengkung tiaochien [The origin, development, and prerequisite of centralization and abstract review]. In *Fa yu kuochia chuanli* [Law and state power] (Vol. 2, pp. 1-40). Taipei, Taiwan: Angle.
- Hwang, J.-Y. (2004). Ssufa weihhsien shencha te chihtu hsuantse yu ssufayuen tingwei [Choosing a new system of judicial review for Taiwan: Some reflections on the status of Judicial Yuan]. *Kuoli Taiwan Tahsueh Fahsueh Luntsung* [NTU Law Journal], 32(5), 55-118.
- Hwang, S.-P. (2003). Tekuofa shang weihhsien shencha chuanhsien chenghi te lishih kuichi: Tsung H. Kelsen yu C. Schmitt te pienlun tanchi [Historical orbit of the dispute over judicial review power in Germany: The debate between H. Kelsen and C. Schmitt]. *Chengchih yu Shehui Chehsueh Pinglun* [Political and Social Philosophy Comment], 5, 123-162.
- J.Y. Interpretation No. 115 (1966).
- J.Y. Interpretation No. 177 (1982).
- J.Y. Interpretation No. 183 (1983).
- J.Y. Interpretation No. 185 (1984).
- J.Y. Interpretation No. 188 (1984).
- J.Y. Interpretation No. 371 (1995).
- J.Y. Interpretation No. 445 (1998).
- J.Y. Interpretation No. 477 (1999).



- J.Y. Interpretation No. 520 (2001).
- J.Y. Interpretation No. 541 (2002).
- J.Y. Interpretation No. 601 (2005).
- J.Y. Interpretation No. 613 (2006).
- J.Y. Interpretation No. 632 (2007).
- J.Y. Interpretation No. 585 (2004).
- J.Y. Interpretation No. 590 (2005).
- J.Y. Interpretation; No. 603 (2005).
- Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).
- Judicial Yuan (Ed.). (1999). *Chuankuo ssufa kaike huii chiehlun chuti tsoshih chi shihchienpiao* [Measures and schedules of National Judicial Reform Conference]. Taipei, Taiwan: Judicial Yuan.
- Klein, E., & Benda, E. (2001). *Verfassungsprozessrecht: Ein Lehr- und Handbuch* [Constitutional procedural law: A textbook and handbook]. Heidelberg, Germany: C. F. Müller Verlag.
- Kommers, D. P. (1997). *The constitutional jurisprudence of the Federal Republic of Germany* (2nd ed.). Durham, NC: Duke University Press.
- Korioth, S. (2001). Bundesverfassungsgericht und Rechtsprechung („Fachgerichte“) [Federal constitutional court and judiciary (“specialist courts”)]. In P. Badura & H. Dreier (Eds.), *Festschrift 50 Jahre Bundesverfassungsgericht* [Festschrift for 50 years of Federal Constitutional Court] (Vol. 1, pp. 55-81). Tübingen, Germany: Mohr Siebeck.
- Kröger, K. (1998). *Grundrechtsentwicklung in Deutschland: Von ihren Anfängen bis zur Gegenwart* [The development of Basic Law in Germany: From its beginning to the present]. Tübingen, Germany: Mohr Siebeck.
- Lechner, H., & Zuck, R. (1996). *Bundesverfassungsgerichtsgesetz, Kommentar* [Law of Federal Constitutional Court, commentary] (4th ed.). München, Germany: C.H. Beck.
- Lee, C.-L. (2000). Die Verfassungsgerichtsbarkeit und Grundrechtsentwicklung in Taiwan (1949-1999)—im Vergleich mit Deutschland [The constitutional jurisdiction and the development of the fundamental rights in Taiwan (1949-1999)—In comparison with Germany ]. In C. Stark (Ed.), *Staat und Individuum im Kultur- und Rechtsvergleich* [State and individual in culture—And law comparison] (pp. 135-166). Baden-Baden, Germany: Nomos Verlagsgesellschaft.

- Lee, C.-L. (2003). Kuochia kaochuan hsingwei yu kungfa susung chihtu [State sovereign action and public law litigation system]. In *Hsienfa te lilun yu shihchien* [Constitutional theory and practice] (2nd ed., Vol. 1, pp. 321-394). Taipei, Taiwan: Sharing.
- Lee, C.-L. (2004). Lun shenpan tuli yu ssufa hsingcheng minglingchuan chih kuanhsi—Chiehhsi ssufayuen tafakuan shihtzu ti wusanling hao chiehshih [On the relationship between judicial independence and judicial administrative ordinances: Analysis Interpretation No. 530]. In *Hsienfa te lilun yu shihchien* [Constitutional theory and practice] (Vol. 3, pp. 287-318). Taipei, Taiwan: Sharing.
- Lee, C.-L. (2006). Lishih • kuochia • hsingcheng • falu—Ouchou chintai chienchi hsingchengfashih fanlun [History, state, administration, and law: An introduction of European administrative law in modern times]. In Board of Editors for Essays in honor of the 80th birthday of Professor Herbert Han-Pao Ma (Vol. Ed.), *Ma-Han Pao chiaoshou pachih huatan chushou lunwenchi—Falu cheli yu chihtu* [Essays in honor of the 80th birthday of Professor Herbert Han-Pao Ma—On theories and institutions of law]: Vol.2. *Kungfa lilun* [Public law] (pp. 49-100). Taipei, Taiwan: Angle.
- Lee, C.-L. (2007). Chipen chuanli yu kuochia paohu iwu [Fundamental rights and state protection obligation]. In *Hsienfa te lilun yu shihchien* [Constitutional theory and practice] (Vol. 2, pp. 59-125). Taipei, Taiwan: Sharing.
- Lee, C.-L. (2007). Mientui chunghua minkuo hsienfa—Ssusoo Taiwan hsienkai chihlu [Face the constitution of the Republic of China—Thinking for the future of Taiwan's constitutional progress]. In Dennis T.-C. Tang & Fort F.-T. Liao (Eds.) *Hsienfa chiehshih chih lilun yu shihwu* [Constitutional interpretation: Theory and practice] (Vol. 5, pp. 55-98). Taipei, Taiwan: Institutum Iurisprudentiae (Preparatory Office), Academia Sinica.
- Lee, C.-L., & Liou, S.-F. (2005). “Kungfajen” chipen chuanli nengli chih wenti chuta—Shihchieh chipen chuanli “penchih” chih itao nanti [Trying to answer the question of the nature underlying fundamental right—The initial exploration for the fundamental right competence of “public legal person”]. In Dennis T.-C. Tang (Ed.), *Hsienfa chiehshih chih lilun yu shihwu* [Constitutional interpretation: Theory and practice] (Vol. 4, pp. 291-410). Taipei, Taiwan: Institutum Iurisprudentiae (Preparatory Office), Academia Sinica.

- Leibholz, G. (1960). Berichterstatler des Bundesverfassungsgerichts [Judge rapporteur of the Federal Constitutional Court]. *Jahrbuch des Öffentlichen Rechts*, 9, 120-127.
- Leibholz, G. (1971). Der Status des Bundesverfassungsgerichts 1951-1971 [The status of the Federal Constitutional Court: 1951-1971]. In the Federal Constitutional Court of West Germany (Ed.), *Das Bundesverfassungsgericht* [The Federal Constitutional Court] (pp. 31-57). Karlsruhe, Germany: Müller.
- Li, C.-S. (2003). Lun ssufayuen tafakuan hsienfa “ii chiehshih” yu “chengi tsaipan” chih chushuli [The discussion on the binding of constitutional “doubt interpretation” and “dispute interpretation” of Grand Justices Council]. *Hsiencheng Shihtai* [The Constitutional Review], 28(3), 80-140.
- Luchterhandt, O. (2007). Generalbericht: Verfassungsgerichtsbarkeit in Osteuropa [General report: Constitutional jurisdiction in Eastern Europe]. In O. Luchterhandt, C. Stark & A. Weber (Eds.), *Verfassungsgerichtsbarkeit in Mittel- und Osteuropa* [Constitutional jurisdiction in central and Eastern Europe] (Vol. 1, pp. 295-356). Baden-Baden, Germany: Nomos.
- Mayer, F. C. (2004). Wer soll der Hüter der europäischen Verfassung sein? [Who should be the vindicator of European constitutional law?]. *Archiv des öffentlichen Rechts*, 129, 411-435.
- Meyer, W. (2000). Artikel 93 [Article 93]. In Ingo von Münch & Detlev C. Dicke et al. (Eds.), *Grundgesetz: Kommentar* [Constitution: Commentary] (5th ed., Vol. 3). Munich, Germany: C.H. Beck.
- Pestalozza, C. (1991). *Verfassungsprozessrecht: Die Verfassungsgerichtsbarkeit des Bundes und der Länder; mit einem Anhang zum internationalen Rechtsschutz* [Constitutional procedural law: The constitutional jurisdiction of the federal and the states, with an appendix of legal protection] (3rd ed.). München, Germany: C.H. Beck.
- Radbruch, G. (1973). Die Logik der Rechtswissenschaft [The logic of legal science]. In G. Radbruch, E. Wolf & H. P. Schneider (Eds.), *Rechtsphilosophie* [Philosophy of law] (8th ed., pp. 205-219). Stuttgart, Germany: K.F. Koehler.
- Rinken, A. (2001). Artikel 93 [Article 93]. In E. Denninger et al. (Eds.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* [Commentary on the Basic Law of Federal Republic of Germany] (3rd ed.). Neuwied, Germany: Luchterhand.

- Rinken, A. (2002). Ist das Bundesverfassungsgericht „Herr seines Verfahrens“? [Is the federal Constitutional Court “Mr. Procedure?”]. In H. Faber & G. Frank (Eds.), *Demokratie in Staat und Wirtschaft, Festschrift für Ekkehart Stein zum 70. Geburtstag* [Democracy in state and economy, festschrift for Ekkehart Stein on his 70th Birthday] (pp. 411-426). Tübingen, Germany: Mohr Siebeck.
- Scheuner, U. (1978). Der Bereich der Regierung [The sphere of government]. In J. Listl & W. Rüdner (Eds.), *Staatstheorie und Staatsrecht* [The theory and law of state] (pp. 455-500). Berlin, Germany: Duncker und Humblot.
- Schlaich, K., & Koriath, S. (2010). *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen* [The Federal Constitutional Court's position, procedure and decisions]. München, Germany: C.H. Beck.
- Schneider, H. (1953). Betrachtungen zum Bundesverfassungsgericht [Contemplation on the Federal Constitutional Court]. *Neue Juristische Wochenschrift*, 6, 802-806.
- Ssafayuen tafakuan huii kuitse [The regulations governing the adjudication of Grand Justices Council] (1948) (*repealed in 1958*) (Taiwan).
- Ssafayuen tafakuan shenli anchienfa [The constitutional interpretation procedure act], art. 5-1(1) (1993) (Taiwan).
- Starck, C. (1995). Vorrang der Verfassung und Verfassungsgerichtsbarkeit [Priority of constitution and constitutional jurisdiction]. In *Der demokratische Verfassungsstaat: Gestalt, Grundlagen, Gefährdungen* [The democratic constitutional state: Form, base, danger] (pp. 33-57). Tübingen, Germany: J.C.B. Mohr.
- Starck, C. (2006). Verfassungsrechtswissenschaft, Normenkontrolle und Verfassungsauslegung [Constitutional law, normative control and interpretation of constitution]. In *Praxis der Verfassungsauslegung* [The practice of constitution interpretation] (Vol. 2, pp. 19-26). Baden-Baden, Germany: Nomos.
- Tang, T.-C. (2005). Chuanli fenli yu weih sien shencha—Tafakuan chouhsiang shihhsienchuan chih shangchueh [The doctrine of separation of powers and the limits of judicial review: Reconsidering the legitimacy of constitution interpretation in the abstract by the Council of Grand Justices]. In *Chuanli fenli hsinlun* [Separation of powers revised] (2nd ed., pp. 133-182). Taipei, Taiwan: Angle.

- Tang, T.-C., Wu, S.-H., & Chen, C.-W. (2005). Lun weih sien shencha chih tu te kaichin—You “toyuen tokui” tao “iyuen tankui” te kaichih fangan [Discussion of judicial review system progress—The improvement proposal from “several courts with several chambers” to “a single court with a chamber”]. In Dennis T.-C. Tang (Ed.), *Hsienfa chiehshih chih lilun yu shihwu* [Constitutional interpretation: Theory and practice] (Vol. 4, pp. 523-596). Taipei, Taiwan: Institutum Iurisprudentiae (Preparatory Office), Academia Sinica.
- The Justices of the Constitutional Court, Judicial Yuan, Conference of Case Dismissal, the 1123th Resolution (1999) (Taiwan).
- The Justices of the Constitutional Court, Judicial Yuan, Conference of Case Dismissal, the 1269th Resolution (2005) (Taiwan).
- The Justices of the Constitutional Court, Judicial Yuan, Conference of Case Dismissal, the 1298th Resolution (2007) (Taiwan).
- Tsai, T.-J. (2003). Wokuo hsienfa shenpan chih chientao [A review of constitutional trial system in ROC]. *Yuehtan Fahsueh Tsachih* [Taiwan Law Review], 98, 49-66.
- U.S. CONST. art. III, §2, para. 1.
- Vile, M. J. C. (1998). *Constitutionalism and the separation of powers* (2nd ed.). Indianapolis, IN: Liberty Fund.
- Weng, Y.-S. (1994). Hsienfa chih weihuche—Huiku yu chanwang [The vindicator of constitution—Retrospect and prospect]. In *Fachih kuochia chih hsingchengfa yu ssufa* [Administrative law and judicature of rechtsstaat] (1st ed., pp. 389-410). Taipei, Taiwan: Third Nature Publishing.
- Weng, Y.-S. (2004a). Ssufayuen tafakuan chiehshih hsiaoli chih yenchiu [A research of the effectiveness of constitutional interpretations]. In Board of Editors for essays in celebration of the honorable retirement of Grand Justice Keng Wu (Ed.), *Kungfahsueh yu chengchih lilun: Wu-Keng tafakuan jungtui lunwenchi* [Public law and political theory: Essays in celebration of the honorable retirement of Grand Justice Keng Wu] (pp. 1-36). Taipei, Taiwan: Angle.
- Weng, Y.-S. (2004b). Lun mingling weifa chih shencha [On the review of unlawful regulations]. In *Hsingchengfa yu hsientai fachih kuochia* [Administrative law and rule of law] (3rd ed., pp. 109-129). Taipei, Taiwan: Weng Yueh-Sheng.

- Weng, Y.-S. (2004c). *Hsienfa chih weihuche* [The vindicator of constitution]. In *Hsingchengfa yu hsientai fachih kuochia* [Administrative law and contemporary Rechtsstaat] (3rd ed., pp. 475-80). Taipei, Taiwan: Weng Yueh-Sheng.
- Wintrich, J. (1956). Die Verfassungsgerichtsbarkeit im Gesamtgefüge der Verfassung [The constitutional jurisdiction in the general structure of the constitution]. *Bayerische Verwaltungsblätter*, 87, 132-135.
- Zembsch, G. (1971). *Verfahrensautonomie des Bundesverfassungsgerichts* [Procedural autonomy of the Federal Constitutional Court]. Köln, Germany: Heymann.
- ZHONGHUA MINGUO XIANFA [CONSTITUTION OF THE REPUBLIC OF CHINA] arts. 78, 79, 82, 114, 171 & 173.
- ZHONGHUA MINGUO XIANFA TSENGHSIU TIAOWEN [THE ADDITIONAL ARTICLES OF THE CONSTITUTION OF THE REPUBLIC OF CHINA].
- Zuck, R. (2006). *Das Recht der Verfassungsbeschwerde* [The right of constitutional appeals]. München, Germany: C.H. Beck.