

Student Note

Judicial Impacts on Social Change: A Study on Anti-hooligans Cases of Taiwan's Constitutional Court

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ABSTRACT

The reporting of liumang, or hooligans, was an administrative measure implemented by the criminal investigation police to crack down on gangs and maintain social order in Taiwan. The Act for Eliminating Liumang provided the definition of liumang, the process of reporting and punishment involved reformatory training. The Act was in effect for almost twenty-five years starting in 1985, and was abolished in 2009 due to its infringement of human rights. The Act was challenged three times by Taiwan's Constitutional Court, and parts of it were declared unconstitutional in Judicial Yuan Interpretations No. 384, No. 523 and No. 636.

As defined in the Act, "liumang" and "liumang behavior" are too vague to be understood as having a accurate meaning. Also, the process of liumang reporting and the use of a deliberation committee were overly preemptory. It is important to follow due process when reporting or processing suspect for liumang behavior as well as to protect the suspect's fundamental right of physical freedom.

This note investigates the function and impact of Taiwan's Constitutional Court through a close examination of the liumang interpretations. It is found that the Court played not only the role of active listener while facing the administrative bodies in charge of reporting work, but also functioned as a coordinator in the face of issue referring to the social order maintenance after the act's abolition.

Keywords: *Liumang Regulation, the Act for Eliminating Liumang, the Council of Grand Justices, Due Process of Law, Court Function*

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I. INTRODUCTION

Taiwan's Constitutional Court, the Council of Grand Justices, has been regarded as one of the most progressive in a new democracy. As of May 2010, seven terms of Grand Justices had delivered 676 decisions.¹ More than two thirds of these were made during the sixth term and the succeeding Justices assumed office from 2003, that is, after democratization began in the late 1980s.² Some important issues relating to the protection of human rights were contained therein, included in cases related to liumang, or hooligans.

In terms of methodology, this note adopts an approach concerned primarily with constitutional change, i.e. changes in the constitutional order. Along with democratization and legalization, changes in the constitutional order represent milestones in Taiwan's social and political development. Particularly significant cases related to labor rights, the handicapped, female sex workers and other issues, reflect the diversity of Taiwanese culture, and suggest the impact on society the Council of Grand Justices has had through its issuing of Judicial Yuan Interpretations. This note focuses on three important decisions, Interpretations No. 384, No. 523 and No. 636, because they all address a sort of person considered to be engaging in pernicious behavior as defined under the Act for Eliminating Liumang (hereinafter referred to as the Act).

Historically speaking, this act has been criticized as a political measure used by the former authoritarian Kuomintang (hereinafter referred to as KMT) regime to suppress dissidents. While it was in effect from December 1, 1985 to December 9, 2009, 50,713 gangsters were reported and 12,012 of them committed to reformatory training. The constitutionality of some articles of the Act were suspect at the time, and the Act's implementation was also thought to be at odds with the principles of legal explicitness and due process of law. In addition to the articles of the Act that were ruled unconstitutional by the three interpretations, some content of other articles has also been criticized as unconstitutional by criminal law scholars³. This is because of an overly vague definition of liumang behavior, the lack of a requirement to notify suspects in writing, the opacity of the deliberation committee, and the deprivation of liumang's due process rights of confrontation and cross-examination, among others.

This paper aims to investigate administrative abuse of the Act and the

1. According to MINGUO XIANFA art. 78 and art. 79, the Grand Justices, who comprise Taiwan's constitutional court, are granted the exclusive power to render constitutional interpretations. MINGUO XIANFA arts. 78, 79 (1947) (Taiwan).

2. Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracies: The Case in Taiwan*, 2 ASIA L. REV. 73, 74 (2005).

3. See, e.g., Jaw-Perng Wang, *Yike Tiaoli, Pachu Weihsien [One Act, eight Unconstitutional]*, 155 YUEHTAN FAHSUEH TSACHIH [TAIWAN L.J.] 121 (2008).

unconstitutional inquiry into it. By examining Taiwan's social context, including the stages of gang formation and past criminal operations taken by administrative bodies to combat hooligan activity, this paper attempts to analyze and understand the function of Taiwan's Constitutional Court in liumang cases, be it via dynamic or conservative processes. At issue is whether or not the Court played an active role in promoting significant social change and protecting the human rights of liumang.

A. *Issues*

1. *Three Liumang Cases*

(a) A Hundred Days of a "Chiaotou"⁴

In January of 2003, the Taiwanese legislator Fu-Chu Lo,⁵ nicknamed "Big Cat," got into trouble when he was reported as a liumang. Lo was notable for his violent outbursts during parliament sessions,⁶ Operation of illegal businesses,⁷ and his identity as a founder of the Celestial Alliance.⁸ Lo was accused of seriously undermining social order by the Taipei District Prosecutors Office. Meanwhile, the prosecutor searched for concrete facts and evidence to accuse him of violating provisions of the Act, and delivered him to the Public Security Tribunal. Lo objected to these secret deliberations and extraordinarily hasty prosecution, claiming that he might have been set up as political revenge. Furthermore, he prepared to petition the Grand Justices for an interpretation. It only took one hundred days from the report to the end of the tribunal. It was considered too harsh to accuse one of being a liumang. Justice in use of the anti-liumang act required reconfirmation and discussion.⁹

(b) Taiwan's Gangs Go Global

"It isn't often that the dark, slimy world of organized crime gets exposed to the light of day, but on May 29, 2005 more than 10,000 gangsters from

4. The term *chiaotou* may refer to the leader of a local group similar to, though is often more loosely defined than, a gang. It can also be the name of an area or a person, similar to a *laota*, a powerful man in the community with often questionable if not outright illicit connections.

5. Lo was a third and fourth consecutive term legislator (1995-2002) and a convener serving on the transportation and the judiciary committees of Legislative Yuan. He was also a chairman of the Dragon Boat Association of R.O.C. More information about Lo Fu Chu, *Brief Introduction of Lo Fu Chu*, LEGIS. YUAN REPUBLIC OF CHINA, http://www.ly.gov.tw/en/03_leg/legIntro.action?lgno=00223&stage=4 (last visited Sept. 24, 2011).

6. Both a female legislator Ching-An Lee on the education committee and Lo had their committee privileges suspended for six months.

7. These are under judicial investigation for money laundering and excessive loans.

8. A powerful gang consisting mainly of native Taiwanese.

9. Hung-Lin Lu, *Hsu Chihming Pi Chientiao Chengchih Pohai Chin Chiehfa Neimu* [*Zhi-Ming Hsu Criticize Prosecutors' Political Persecution by Unveiling Insider Perspective*], MINCHUNG JIHPAO [COMMONS DAILY], Oct. 25, 2001, at 6.

dozens of crime syndicates from across Asia gathered in Taipei. They came to pay their respects at a memorial for one of Taiwan's most well-known and "respected" gang bosses. Even gangsters, it seems, get sentimental and wax nostalgic. The gangster's name was Hsu Hai-ching, but everyone knew him as "Wen Ke" which means "Mosquito Brother."¹⁰

In fact, many high-profile and internationally wanted gangsters from the Bamboo Union¹¹ flee to or retire in Southeast Asia or China. One such gangster is Bai Lang, or the 'White Wolf,' who was connected with the assassination of Taiwanese dissident author Henry Liu in Daly City, California, in 1984, and was charged in Taiwan with involvement in narcotics smuggling. Bai Lang now lives in Cambodia.¹²

(c) Young Men from Monga¹³

On July 4, 1990, an eighteen-year-old boy surnamed Zeng was arrested and transferred to a confinement house by the Taipei County Police Bureau. Zeng had destroyed a video game arcade in Wanhua district, an act which was considered to be liumang behavior. He was reported as a liumang because of the severity of the circumstances. He had been eighteen for just four days, and had no previous criminal record.

According to the Act, there is an age limit on punishment and other specific requirements for liumang behavior. The liumang suspect must be over the age of eighteen, and his liumang behavior must be "continuing." After investigation, the Public Security Tribunal found that the police might have reported Zeng in haste, and thought that what he had done was an "accident" rather than an instance of "continuing" behavior. Consequently, the tribunal dismissed his sentence of reformatory training.¹⁴

2. Core Research

We may identify several core research questions related to trends in

10. Mac William Bishop, *Taiwan's gangs go global*, ASIA TIMES, June 4, 2005, www.atimes.com/atimes/China/GF04Ad06.html.

11. A major gang consisting mainly of people of Mainland heritage, as opposed to native, pre-1949 Taiwanese.

12. Bishop, *supra* note 10.

13. Monga is an area in the Wanhua District of Taipei City. In the 1980s, a master stream gathering in front of the local temple dominated Monga gangs. Lots of juveniles were in gangs at that time, and were potential suspects in cases involving organized crime and violent crime.

14. Chao-Chun Lin & Chih-Jung Kuo, *Liumang Pienlitieh-Chiensu Liumang Tiaoli te Chienshih Chinsheng* [*Liumang Label-The Past and Present of the Act for Eliminating Liumang*], in TAIFAKUAN, KEIKE SHUOFA! [GRAND JUSTICES, GIVE US AN EXPLANATION!] 134,135-36 (Jud. Reform Found. ed., 2003).

constitutional change in both these three liumang-related interpretations' holdings and the Court's interaction with other institutions. In the wake of these decisions, the Act underwent revision three times before it was finally abolished by Taiwan's legislature, the Legislative Yuan. As for the decisions' ramifications for administrative bodies, namely the police and security apparatus, National Police Administration (hereinafter referred to NPA) under the Ministry of Interior (MOI), it is clear that the Grand Justices challenged the use of administrative control in combating gang activity. Reviewing this case, then, we find there is a sort of power wrestling taking place.

We naturally want to know whether the Grand Justices may be deemed pioneers—or at least promoters—in protecting the human rights of liumang. We are furthermore curious as to whether the Court's functioning represents a dynamic mode which leads to social change.¹⁵ Second, we care about the reported persons' rights to defend themselves. It is important to examine if the procedure of liumang reporting follows due process of law, from the compulsory appearance (i.e. appearing at a police station for questioning) to reformatory training. Third, the definition of liumang is vague, and so is that of liumang behavior. The following discussion shows how the Court handles the principle of legal clarity in regards to indefinite concepts of law when challenging the Act.

Finally, the social context during the implementation period of the Act cannot be ignored. The establishment and development of gangs in Taiwan while the government was under the control of the KMT regime and during the period of martial law and afterwards may be broken into multiple qualitatively different stages, and the transitions between these stages may furthermore be correlated to political forces. Examined close up, the political and legal issues at play during this period serve as a brief historical overview of Taiwan's democratization and process of becoming a regulatory state.

B. *Methodology: Constitutional Change*

The initial step in understanding the relationship between law and social change is conceptual. What is social change?¹⁶ Social change is the product of a multitude of factors and, in many cases, the interrelationships among them. In addition to law and legal cultures, there are many other mechanisms of social change, such as technology, ideology, competition, conflict, and political and economic factors.¹⁷ Constitutional reform may be related to changes in aspects as foundational the constitutional regime as a nation's

15. *See infra* part. III.

16. STEVEN VAGO, *LAW AND SOCIETY* 331 (9th ed. 2009).

17. *Id.* at 332.

power structure and the protection of fundamental rights. Alternatively, it may be related only to a reorientation of the regulatory system.¹⁸

This paper's focus on constitutional change is required to analyze important changes in the constitutional order. In Taiwan, constitutional change has been carried out not only in the seven rounds of constitutional amendments, but also through the text of Judicial Yuan Interpretations. Focusing on a single condensed issue may be helpful when observing constitutional change. In this paper attention is directed toward the liumang cases, which span three relevant interpretations. We hope to delineate significant changes and describe the forms of change taking place. The paper attends to a series of factors behind change, including social context, rather than concerning itself solely with a technical discussion of legal regulation.¹⁹ This method of research based on contextual reasoning promises to yield insight into Taiwanese constitutional issues over the years as well as the evolution of interpretations, as indeed this approach connects the R.O.C. Constitution with the site of its de facto power—Taiwanese society.

II. TAIWANESE CONSTITUTIONAL CHANGE RELATED TO THE PROTECTION OF LIUMANG'S HUMAN RIGHTS

A. *Constitutional Change in Three Interpretations*

This paper attempts to delineate and depict constitutional change. Through a close reading of statements of the Grand Justices, it seeks to determine whether their interpretations have resulted in any impact on society or response from the legislature. It is thus that we may conceptualize the structure of Taiwanese constitutional change. We may divide the social impact of Constitutional Court interpretations into three types. Interpretations serve either to promote the democratic development of Taiwan society, to make no impact, or to obstruct Taiwan's democratization. This categorization allows for a clearer representation of the interaction between the judiciary and society.

At the same time, the ways in which the legislature responds to interpretations is significant as well. We may call this legislative response, which includes the revision or repeal of laws, "feedback." By examining both judicial impact and the legislative feedback, we are able to envision the course of Taiwanese constitutional change.

18. Jiunn-rong Yeh, *Changing Forces of Constitutional and Regulatory Reform in Taiwan*, 4 COLUM. J. CHINESE L. 83, 83 (1990).

19. Some qualitative study was undertaken to investigate opinions of police toward the Act.

1. *Controversial Issues*

Regarding the three interpretations, this paper analyzes not only the Grand Justices' holdings but also some articles at issue, points of controversy, and declared results. These are set out in Table I below.

Table I: Legal Analysis of J.Y. Interpretations No. 384, No. 523 and No. 636

Interpretation No. & Declaration Date	Articles for Application	Infringement of Liutiang's Human Rights?	Controversial Points	Declaration of Unconstitutional Articles	Result
No. 384 (1995/7/28)	Art. 5、6、7、12、21	1. Appear before the police without any warrant 2. Secret witness system	Deprive the right to confront witnesses	Art. 5、6、7、12、21	The Articles shall become null and void no later than 1996/12/31 after the declaration date
No. 523 (2001/3/22)	Art. 11(1)	The tribunal's confinement Decision	Vague Requirements of confinement	Art. 11(1)	It shall become void and null within one year from the date of this Interpretation
No. 636 (2008/2/1)	Art. 2、6、7、9-11、12-15、19、21、22、23 & Art. 5、46 of the implementing rules of the Act	1. Principle of legal clarity 2. Due process of law	1. Vague definition of liutiang behavior 2. Excessive restriction on liutiang suspect's rights: A. Deprive the right to defend themselves before the court B. Breach principle of proportionality (Art. 23 of R.O.C. Constitution)	Art. 2 <3>、<5> & Art. 12(1)	It shall become null and void no later than one year from the date of this Interpretation

* “()” i.e., “paragraph”. “<>” i.e., “section”.

* The table was compiled by the author.

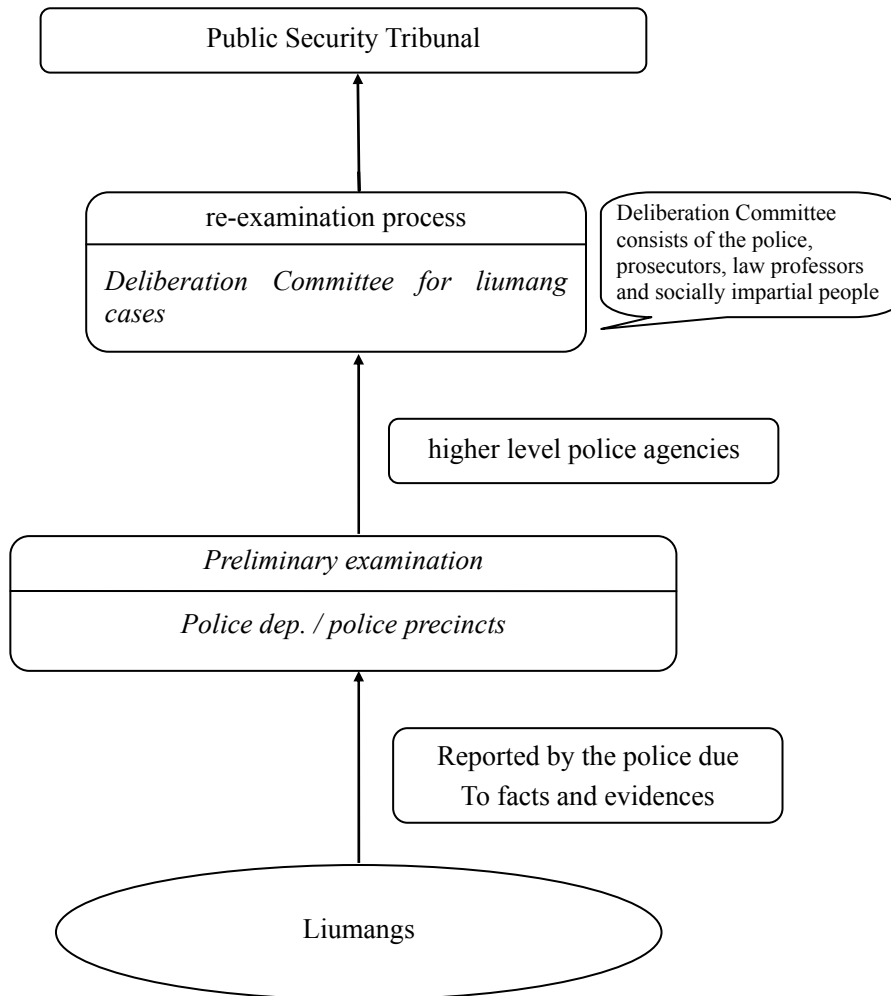
As shown in Table I, some articles of the Act had the potential of leading to serious infringement of liumang's human rights, and in particular, the right of physical freedom (insomuch as the law authorizes forcible appearance and confinement) and the right of the accused to confront witnesses and defend himself in court. In addition to the *de jure* articles addressed in interpretations, as legal scholar Jaw-Perng Wang has indicated, eight parts of the act in all may be inconsistent with the R.O.C. Constitution.²⁰ These include the vague description of liumang behavior, the lack of a requirement that the accused be notified in writing, the secrecy of the deliberation committee, the absence of due process for liumang insomuch as they may not confront or cross-examine witnesses, a lack of statutory regulation of *onus probandi* from the decision stage, multiple punishments for the same act, and lastly, a lack of statutory regulation covering the carrying out of criminal penalty or reformatory training in sequence.

2. *Infringement of Human Rights*

(a) Process of Liumang Reporting

As can be seen in the cases of Lo and Zeng discussed above (A. *a.* and *c.*), the stage of determination was highly controversy because of its peremptory examination for liumang suspects. Chart I is a flowchart of the liumang reporting process:

20. Wang, *supra* note 3 (The article was published before the announcement of J.Y. Interpretation No.636).

Chart I: Flowchart of Liumang Reporting

* The chart was compiled by the author.

Lo's case draws our attention to the Act's threat to the rights of the accused. The Act was a useful measure for cracking down on crime, and used by the public security agency as a means of searching for concrete facts, collecting evidence and investigating the crimes laid out in Taiwan's criminal code. As we can see from the flowchart, the process included an initial stage which required a reasonable examination of whether a liumang case was needed, so that suspects need not wait until the entrance of the Public Security Tribunal for belated justice.

(b) Personal Liberty under the Constitution

A criminal suspect, as defined in the code of criminal procedure in Taiwan, is completely different from a liumang, though a liumang may be a potential criminal. Fundamental rights are inalienable, and cannot be deprived by even a ruling political regime. Similarly, there is no prejudice against criminal suspects and liumang when it comes to the protection of fundamental rights guaranteed under the R.O.C. Constitution. Personal liberty is an essential prerequisite for people to enjoy their various other rights and freedoms under the Constitution. The phrase “the procedure prescribed by law” in first paragraph 1st of Article 8²¹ of the Constitution means that the procedure by which the government imposes any measure to restrain a person’s liberty, “whether he or she is a criminal defendant or not,” must not only have a statutory foundation, but must also be conducted in accordance with the necessary judicial procedures and due process of law. These procedures fall within the scope of constitutional reservation, so even the legislature cannot limit them by statute. However, the restrictions imposed on the personal freedom of a criminal defendant and a non-criminal defendant are, after all, different in nature, and therefore the relevant judicial procedures or other forms of due process of law need not be identical.²²

Before Judicial Yuan Interpretation No. 384 was issued in 1995, a reported person might suffer a temporary detention during the determination stage. In one empirical study, nearly fifteen criminal police officers (located in Taipei, Taichung and Kaohsiung) who had handled liumang reporting were interviewed and answered questionnaires, yielding some impressive qualitative results.²³ For example, one of the police who served in Taipei County, Beitou district, talked about the police’s practical tactics for forcing a liumang suspect to “appear.” At first, the police might go to the suspect and coax him, perhaps pretending to have a casual chat with him to have him let down his guard. Then, the police officer would present the suspect with a prepared paper, the notice to appear. The spaces for “appear date” and “appear time” on the notice would be blank. Right after finishing the leisurely chat, the police officer would suddenly fill in the blanks with the current time and date. This “coaxing” strategy was problematic, as it could be considered to be a *de facto* measure that deeply

21. MINGUO XIANFA art. 8, para. 1 (1947) (Taiwan) (“Physical freedom shall be guaranteed to the people. In no case except that of flagrante delicto, which shall be separately prescribed by law, shall any person be arrested or detained other than by a judicial or police organ in accordance with the procedure prescribed by law. No person shall be tried or punished other than by a court in accordance with the procedure prescribed by law. Any arrest, detention, trial or punishment not carried out in accordance with the procedure prescribed by law may be resisted.”).

22. J.Y. Interpretation No. 588 (2005), available at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=588.

23. See *infra* note 51 and accompanying text.

infringed liumang's right of self-decision to appear. It was inconsistent with the spirit of personal liberty guaranteed by Constitution.

As clarified in Interpretation No. 588, "custody" refers to the confining of a person to a bounded area for a certain period of time, which in turns falls within the meaning of "detention" as prescribed in Article 8-I of the Constitution. Therefore, it is essential that certain proceedings be carried out before the decision of whether or not to take a suspect into custody is made. The matter must be heard by an impartial and fair third party, i.e. a court, and the accused must appear at and participate in the proceedings so as to both ascertain whether the legal requirements and necessity of the custody are satisfied, and also to enable him or her to have an opportunity to defend himself or herself by producing evidence in his or her favor for the court to investigate. Only then may the constitutional guarantee of personal freedom be realized.²⁴

The measures of custody, confinement²⁵ and reformatory training,²⁶ all limit one's personal freedom in similar ways, but nevertheless, possess different objectives and functions. In Interpretation No. 523, the Grand Justices' statement references confinement when discussing Article 11, Paragraph 1 of the Act, which reads, "The court may confine the accused for a period of no more than a month. If necessary, the court may extend the confinement for a period of one month. The extension shall be limited to one time only." In comparison with custody, confinement is also a compulsory measure for keeping the accused in a certain place. The objective of confinement, however, is to ensure an orderly procedure before a court issues its final decision. This also constitutes a serious restraint to the people's physical freedom.²⁷ In addition, reformatory training is a measure in the spirit of rehabilitation. It focuses on social behavior adjudication, and the accused does not bear criminal responsibility.

(c) Double Jeopardy

Double jeopardy, that is, punishing the same act twice, is another controversial part of the Act, this time having to do with the law's execution.

24. *Id.*

25. See Chiensu Liumang Tiaoli [The Act for Eliminating Liumang], art. 11 (1985) (repealed 2009) (Taiwan), available at <http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=D0080051> (There were two amendments of Art. 11 in 2002 and 2006 respectively).

26. See *id.* art. 13, para. 2 (This provision was also considered as infringing liumang's personal freedom, and has been challenged by the applicants of J.Y. Interpretation No. 636). See also J.Y. Interpretation No. 636 (2008), available at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=636 (held that Art. 13 para.2 remain constitutional) ("The proviso of Article 13, Paragraph 2, of the Act, which provides that court rulings need not specify the term of reformatory training, leads to concerns that the physical freedom of the person receiving reformatory training might be excessively deprived of. The relevant authorities shall re-examine and revise this proviso.").

27. J.Y. Interpretation No. 523 (2001), available at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=523.

After a criminal had completed his term of imprisonment, the police might take advantage of the Act and the criminal's past liumang behavior, and try to transfer him as immediately as possible to the Public Security Tribunal. An American report on the protection of human rights (Compilation of the U.S. Department of State Country Reports on Human Rights Practices for 1990) criticized the administrative abuses of Taiwan's anti-hooligan law, including the lack of due process and lack of legal aid for liumang in confinement, as well as the lack of opportunities for redress in the face of a decision mandating reformatory training.

B. *Impact and Feedback*

To better understand the dynamic relationship between the functioning of the Constitutional Court and society, the impact of interpretations may be categorized based on which constitutional principles were used to construct the relevant test of constitutionality. This paper divides the degree of impact into three outcomes: promotion of democratization and of the regulatory progress in Taiwanese society, no impact on society, and obstruction of the development of society.

To analyze the interaction between the functioning of the Court and the legislature, this paper attends to possible reactions the Legislative Yuan have in response to the Judicial Yuan Interpretations. The possible reactions include the revision of a law, the repeal of a law, the drafting of a new bill, and relocation of the original norms by inserting the original problematic provision into another law.

The following analysis combines the above categories of impact and feedback to trace the process of Taiwan's constitutional change.

1. *Impact of the Three Liurang Decisions*

The judicial system played an important role in the history of Taiwan's democratization and emergence as a rule of law and regulatory state. Taiwan's Constitutional Court initially began to operate in the late 1940s, and continued to do so throughout the authoritarian period. Before the 1980s, however the Court hardly exercised meaningful constitutional supervision, in part due to the three-fourths vote threshold required to render constitutional interpretations, as well as in response to the larger political environment.²⁸ The Court, as a subordinate institution to the party-state regime, tended to deliver interpretations in the political leaders' favor. Seldom were milestone interpretations rendered. The Court served as an agent of politicians' will and

28. Chang, *supra* note 2, at 73, 74-75; Yeh, *supra* note 18.

rarely interacted with society. It even issued decisions restraining the fundamental rights of civilians. As a result, Taiwan's democratization progress might have been obstructed.

1987 was a watershed year in the history of Taiwan. It was the year when the Martial Law Decree was lifted, political liberalization began, and cross-straits contacts were reopened. Parallel to these profound changes in the political sphere, Taiwan also underwent a transition from a developmental state to a more open regulatory state despite some degree of disorientation.²⁹ The history of Taiwan's Constitutional Court also turned a new page in October 2003, when for the first time, the Democratic Progressive Party (DPP), the long-time opposition party that since May 2000 had controlled the presidency and remained the largest party in the Legislative Yuan, enjoyed the opportunity to determine the members of the Court.³⁰ In many ways, this new court was record-breaking. In terms of political legitimacy, it was the first court to be formed and based upon a fully democratic foundation.³¹

Interpretations No. 523 and No. 636 were issued during this time of many changes. In order to examine the impact of these decisions on society, we could employ methods based on several constitutional principles to provide conceptual clarity. The tests of constitutional standards employed in this paper are based on the principle of proportionality, the principle of legal clarity and due process of law. They are used to speculate as to the different kinds of impact (promoting, no impact, obstructing) which characterize each decision. Analysis is focused on the Court's statements found in the text of interpretations. The first test (Test 1) was to see whether the Court utilized the principle of proportionality in the holding. The second (Test 2) determined whether the Court used indefinite legal concepts. Finally, the third test (Test 3) asked if the Court placed emphasis on due process of law.

In No. 384, there were few statements relating to indefinite legal concepts (Test 2). No. 384 mentioned that the secret witness system might violate the principle of proportionality (Test 1). In No. 523, the court reviewed the vague conditions for "confinement," used the proportionality principle (Test 1), and mentioned the principle of legal clarity (Test 2). Finally, in No. 636, there was a very delicate elaboration of indefinite legal concepts (Test 2) aimed at the vague definition of liumang behavior. The Court also touched upon the principles of Test 1 and Test 3³² as well.

Using these tests to evaluate the impact of these decisions, it was

29. Jiunn-rong Yeh, *Democracy-driven Transformation to Regulatory State: The Case of Taiwan*, NTU L. REV. 32, 40 (Sept. 2008).

30. Chang, *supra* note 2, at 76.

31. *Id.*

32. *See supra* tbl.I.

determined that the three decisions' influence on society might relate to the efforts of the Court and the strength of the court's democratic foundations. Interpretation No. 636 was the most sophisticated decision of the three. It diligently and firmly supported the protection of liumang's human rights, even more ambitiously than the other two interpretations. However, all three decisions had a great impact on Taiwanese society as shown by the above tests. Therefore, we could conclude that they might be in accordance with (Result 1) the promotion of democratization and regulatory progress in Taiwanese society. The three differed, however, in the intensity of impact. Consequently, we discover the Court taking a positive attitude towards the protection of liumang's human rights, and might reject a standstill or situation marked by obstruction of Taiwanese democratization and development of regulatory process.

2. *Feedback from the Legislature*

Feedback, the legislature's response to the Court's interpretations, can be analyzed in light of the various actions the Legislative Yuan has taken toward laws ruled unconstitutional. The Legislative Yuan responds to the Judicial Yuan's interpretations via its meetings, and alternately adopts the measures of revising the unconstitutional articles of the law, abolishing the whole law, drafting bills for a new law, and relocating the original articles into the criminal code or other related laws. The Legislative Yuan encounters pressure created by the Grand Justices, and might be given a period of time during which it may take legislative action in response to an interpretation. The Grand Justices urge the legislature to deal with a law deemed unconstitutional as soon as possible, but allow it time to carry out lawmaking or other actions. The different forms of legislative feedback observable in the wake of the three interpretations are shown in the table below.

As may be seen in TABLE II above and from the Court's statements, the Grand Justices of the sixth term (1994-2003) exhibited an attitude of optimistic promotion vis-à-vis the Legislative Yuan, and seemed to expect progressive action on the part of that body. Nevertheless, the legislative action was not especially positive during the initial stage.

In response to Interpretations No. 384 and No. 523, the Legislative Yuan engaged in the revision of laws. That is, it corrected "unjust" errors by modifying those articles deemed unconstitutional by the court instead of abolishing the whole act. By attending to many correlated factors here, we may seek to address what lead to this conservative outcome and why. Relevant factors include the unstable social atmosphere at the time,³³ the

33. 1995 was after the lifting of martial law (1987).

Table II: The Legislative Yuan's Response to the Three Interpretations

Feedback From the Legislative Yuan	The Interpretation Number & Proclaiming Date	No. 384 (1995/7/28)	No. 523 (2001/3/22)	No. 636 (2008/2/1)
Revise	V *1996/12/30 Revision of Art. 5-8、12、16、21	V *2002/4/4 Revision of Art.11, and the new addition of Art. 11-1&11-2	X	
		V *2006/5/30 Revision of Art. 25 & the re-revision of Art. 11		
Repeal	X	X	V *2009/1/6 Repeal of the Act (no later than 1 year from the date of No.636)	

* Compiled by the author

gangs (see Chart II in Part III, based on the fourth stage of organized crime, the gangs were rampant at the time), the dissenting opinions from administrative bodies,³⁴ the limited nature of constitutional rights,³⁵ the limited relevance of the articles applied, the lack of motivation to engage in legislative action with foresight, civil society's limited awareness of human-related issues as human rights issues, and the complex legislative procedure required for amendment.

Fortunately, the legislature was able to respond to other voices, and individual's and civil society group's attention toward legislative action was much greater than before. The January 6, 2009 repeal of the Act came no later than one year after No. 636 was issued. In light of the contrast between

34. NPA (under the MOI) and MOJ used this act as a powerful measure to implement their missions in cracking down on the criminal underworld.

35. Parts II and IV of this article discuss the Combined Test suggested by Gerald N. Rosenberg.

the slow pace in the initial stage and the sudden abolition before the interpretation, it is difficult to precisely ascertain the role of each of the aforementioned key influential factors from the legislature's presumed timing and motivation. However, the actions of the legislature, taken at face value, would seem to confirm that the body expressed spontaneous self-determination in its decision to repeal the "evil act," and that it was attuned to trends in social change and human rights protection.

III. SOCIAL CONTEXT AND COURT FUNCTION

A. *Social Context*

In addition to sketching a conceptual outline of constitutional change in Taiwan, this paper also attempts to highlight to connection of this change to the particularities of the Taiwanese social context. Attention to history allows us to understand a changing society. The terms of Grand Justices, the chronology of gang formation, and the political and administrative operations all require attention.

Men and women across the globe are pushing for greater personal and political freedoms and for the establishment of democratic institutions.³⁶ Despite personal risk against great odds, courageous individuals and nongovernmental groups expose human rights abuses. They seek to protect the rights of ethnic and religious minorities, workers, and women, and to stop the trafficking of human beings. They work to build vibrant civil societies, ensure free and fair elections, and establish accountable, law-based democracies.³⁷

The Universal Declaration calls upon "every individual and every organ of society to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."³⁸

Law is both a dependent and independent variable in change. The relationship between law and change is still controversial. Some maintain that law is a reactor to social change; others argue that it increasingly is an initiator of change. These two views represent the extremes on a continuum of the relationship between law and social change. In modern society, law does play a large part in social change, and vice versa.³⁹ Qualitative research

36. TAIWAN FOUND. FOR DEMOCRACY, HUMAN RIGHTS PRACTICES IN TAIWAN AND CHINA: A COMPILATION OF THE U.S. DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2006 3 (2007).

37. *Id.*

38. *Id.* at 5.

39. VAGO, *supra* note 16, at 362.

is valuable in that it investigates complex and sensitive issues in ways that documentary research cannot. Qualitative research helps us discover whether the Act's infringement of liumang's human rights was connected to the duties performed by administrative bodies. The research for this paper included an interview with the criminal police in charge of reporting work and the staff of the Organized Crime Affairs Division (under the CIB). Although it would have been meaningful to also interview the judges of the Public Security Tribunal as well as released liumangs to better understand social context, limited by time and other practical restrictions, the study left these directions for future research.⁴⁰

1. *The Terms of Grand Justices*

The Act was initially implemented on the eve of the lifting of martial law in 1987.⁴¹ Taiwan's period of martial law, from 1949 to 1987, was the longest in the world.⁴² Between 1985 and 1995, there were no petitions to the Grand Justices to render interpretations relating to liumang cases. It was not until 1995 (during the court's sixth term, 1994-2003) that the human rights of liumang were taken seriously by civil society. Significantly, during the sixth term, great contributions were made to the freedom of the person in Interpretations No. 384 and No. 392.⁴³ In No. 384, the Grand Justices affirmed substantive due process of law in writing for the first time. Six years later, Interpretation No. 523 was issued. Then after another seven years, No. 636 was delivered by the Justices assumed office from 2003 in 2008. The reasoning of No. 636 is very detailed and long, and three of the Grand Justices issued partially concurring opinions. We might hypothesize that waves of constitutional change related to the protection of liumang's human rights had emerged during the key sixth term and the succeeding Grand Justices assumed office from 2003.

40. The research was difficult in part of contacting sources. I owe a special thanks to the staff providing helpful data of the National Archives Administration, the staff of the Organized Crime Affairs Division, and the enthusiastic police personnel from the Taipei and Kaohsiung County Government Police Departments.

41. It was also during the fifth term of the Grand Justice.

42. Martial law was declared by both the Taiwan Garrison Command and the Taiwan Provincial Government. The point is when it was issued in 1949, Taiwan was still a Japanese territory under the occupation of the Allies. The timing proved itself nothing more than a military decree. Until the lifting of martial law in 1987, the 228 Incident was a forbidden topic.

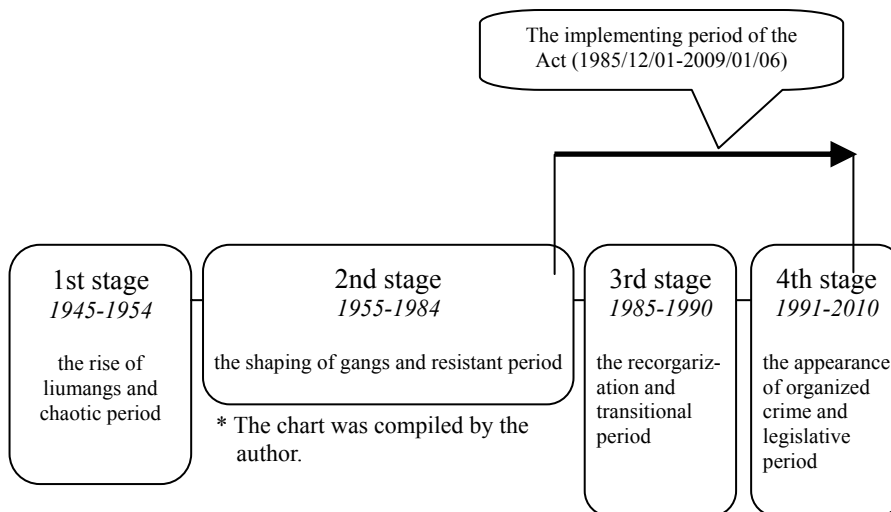
43. Jiunn-rong Yeh, *Tsung Kuochia Fachan yu Hsienfa Pienchien Lun Tafakuan te Shihhsien Chineng: 1949-1998* [*The Function of Constitutional Interpretations by Council of Grand Justice: 1949-1998*], TAITA FAHSUEH LUNTSUNG [NAT'L TAIWAN U.L.J.], Jan. 1999, at 1.

2. Gangs

A Taiwanese gangster movie, *Monga*, tells a classic gangster tale. The film, set in Taipei's Wanhua district in the 1980s, evokes a sense of nostalgia for a not so distant past. The film outlines a time of innocence, a world on the cusp of old and new. The plot revolves around a power struggle between an established gang Temple Front (the master stream of the Monga gangs) and outside gangs seeking to move in and change things.⁴⁴ Historically, the gangs in Taiwan went through transition stages and reacted to Taiwan's democratization and regulation process as well.

The 23-year period of the Act's implementation may be displayed in chart-form such as to reveal four stages of formation of local gangs and organized crime⁴⁵ for the sake of social context analysis. These are shown in Chart II below.

Chart II: Four Stages of the Local Gangs and Organized Crime in Taiwan



We can see the rise and decline of the gangs, and that the period that the Act was in effect corresponds with the third and fourth stage of the gangs' transition (the reorganization period and formation of organized crime).

44. MONGA INT'L OFFICIAL WEB SITE, <http://www.mongathemovie.com/> (last visited Sept. 23, 2011).

45. The data of the four stages was acquired from the National Police Administration's (NPA) actions for cracking down on crime.

3. *Administrative Bodies*

In the American country reports⁴⁶ on human rights practices released by the Bureau of Democracy, Human Rights, and Labor, materials relating to Taiwan outline the role of the police and security apparatus, and seek to determine whether arrests and detentions were made in accordance with the Universal Declaration of Human Rights. The National Police Administration (NPA) of the Ministry of Interior (MOI) has administrative jurisdiction over police units in Taiwan.⁴⁷ The police profession is categorized into administrative police, traffic police, foreign police, specialized police, and criminal investigation police.

The primary duties of the criminal investigation police (CIB) are to prevent and detect crimes. Crime prevention aims to prevent the occurrence of crimes by thoroughly carrying out preventive measures and raising citizens' awareness. The investigation of crimes, which is conducted based on the rule of law and human rights, is meant to ensure a secure society by following the legal procedures to execute searching, attaching, detaining and arresting in accordance with the laws, and to collect evidence. It also includes working with perseverance to detect crimes by employing scientific approaches.⁴⁸ In the past, the "seizing" of liumang was one of the heavy responsibilities of police. In order to be comply with the government's policy of "cracking down on crime,"⁴⁹ the criminal investigation police were pressured to present their "liumang reporting achievements."⁵⁰

46. Yeh, *supra* note 43, at 20.

47. City mayors and county magistrates appoint the city and the county police commissioners from candidates recommended by the NPA. Mayors and magistrates are responsible for maintaining order and assessing the performance of the police commissioners within their jurisdiction. See NAT'L POLICE AGENCY, MINISTRY OF THE INTERIOR, <http://www.npa.gov.tw/NPAGip/wSite/mp?mp=4> (last visited Sept. 23, 2011).

48. *Criminal Investigation Police*, NAT'L POLICE AGENCY, MINISTRY OF THE INTERIOR (Sept. 2, 2009), <http://www.npa.gov.tw/NPAGip/wSite/ct?xItem=26869&ctNode=11691> (last visited Sept. 28, 2011).

49. Including the Operation of Yi-Qing (1984 Cleansweep), the Operation of Xun-Lei (1988 Thunderbolt) and the Operation of Chih-ping (1996).

50. The emphasis on "achievements of crackdown against crime" has been a part police culture for a long time in Taiwan. In order to improve performance, competition between police colleagues and evaluation reports made in the higher-level police agencies were everywhere to be found. The keen competition resulted in unbelievable pressure on police. The media often reported false data or performance statistics, and this might have resulted in a compliant citizenry and a bad influence on police reputation. See Shan-Yin Cheng & Ju-Tai Hsieh, *Chingcha Chikuan Chihshiao Chihitu Chih Yenchiu* [*The Study of Achievements of Police Institution*], KUOCHENG YENCHIU PAOKAO [NPF RES. REP.] (Apr. 27, 2005), <http://old.npf.org.tw/PUBLICATION/1A/094/1A-R-094-005.htm> (last visited Sept. 23, 2011).

4. *Qualitative Research*⁵¹

During an interview, an ex-brigade commander of the Kaohsiung County government police department talked about some memorable liumang cases he had participated in. In his opinion, “It’s ridiculous to join a competition to report liumang, and the reexamination institution⁵² is on the police’s side.” He also mentioned that, “Due to the rate of ‘control and training’ decisions of the Public Security Tribunal, almost half the reports were dismissed. So, there was really a kind of ‘report abuse’ in the liumang cases. The police had lots of pressure to score a good enough performance.” With respect to the abolition, he said, “As we heard the good news of the abolition, everybody was smiling because it relieved us of our work pressure!”

But in contrast, the interviewed criminal police from the New Taipei City Police Department had different opinions toward the abolition, stating, “We were worried about the gangs taking advantage of the abolition and standing up again from the past crack downs.” He further remarked that, “Gangs are smart enough to take advantage of the law, and now they will adopt some new ways to harass local people or do something bad while avoiding violation of Social Order Maintenance Law or Criminal Code.⁵³ We police may face obstacles in our attempts to control this, and can only use the weaker method of persuasion.”

5. *A Brief Historical Overview*

The legislation behind the Act can be traced back to 1955. This was during the authoritarian period when the R.O.C. government continued to claim sovereignty over all of “China.” From this period through the 1980s, Taiwan was governed under a state of martial law. During this era, citizens were denied the rights to free assembly, association, demonstration and to petition. The R.O.C. government (led by a single party, the KMT) controlled

51. Five questions designed for the criminal police were related to: 1. new methods adopted to deal with previous liumang cases after the law’s abolition; 2. their knowledge of the three J.Y. interpretations; 3. their awareness of and attitudes toward the human rights protection of liumang; 4. The present and past condition of local gangs; and 5. the most remarkable liumang case in their experience.

52. The “deliberation committee for liumang cases” consisted of a majority of police in the past. In order to give the liumang more protection, there had been an appeal calling for the addition of the prosecutor as a member after J.Y. Interpretation No. 384 (1995), *see* J.Y. Interpretation No. 384 (1995), *available at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=384.

53. After the abolition of the Act, there are now three ways to deal with the previous liumang cases: 1. the Criminal Code; 2. the Social Order Maintenance Law; and 3. the Police’s Application for Rehabilitation Measures from the Prosecutor.

“speech, teaching, newspapers...pictures and other publications.” Religious activities and union activities were closely watched and restricted. Mail was censored; personal property was inspected.

Taiwan’s was the longest period of martial law in modern history. The Administrative Yuan promulgated “Measures for Repressing Liumang During the Period of Martial Law” with the aim of maintaining social order and regulating liumang. Some scholars believe that these measures originated from the 1906 Japanese colonial period regulations pertaining to vagrants⁵⁴ the “Taiwan Rules for Repressing Vagrants.” The measures permitted the public security agency’s use of expedient procedures to punish liumang. Consequently, the measures might have resulted in serious infringement of civil rights.

After the Act had been in effect for thirty years, the Administrative Yuan thought it was necessary to enact a law for liumang due to social change. In 1985, a draft of the “Act for Eliminating Liumang During the Period of Communist Rebellion” was sent to the Legislative Yuan for deliberation. The Legislative Yuan passed the third reading of the Act and it was promulgated on July 19 and implemented on December 1 of that same year. The measures for regulating liumang that were originally in the form of administrative orders were transformed into an act with the status of statutory law.

Into the period immediately after martial law, in keeping with the trend of amending laws after the termination of the Period of Communist Rebellion, the Administrative Yuan reduced the role of military institutions. Proper procedures for the protection of those who were transferred were reinforced in the new Act for eliminating liumang. Nevertheless, the Act was still a powerful measure allowing for the administrative flexibility to oppress the people, and its malicious potential remained unchanged after numerous amendments. The Act was at odds with the spirit of the constitution inasmuch as it didn’t protect freedom of person or due process. Thus, it is safe to say that these three Judicial Yuan interpretations was not accidental.

6. *Operations Against Gangs*

The operations against gangs conducted by the Taiwan government must be understood in light of the gangs’ changes over time. As may be seen in Chart II, there are four stages of transition that the local gangs and organized crime underwent in Taiwan. These are as follows: (1) the rise of liumang and chaotic period, (2) the shaping of gangs and period of resistance, (3) the reorganization and transitional period, and (4) the appearance of organized crime and legislative period. The three relevant J. Y. Interpretations (No.

54. This was also a repressive measure used on political dissidents during the late 1920s.

384, No. 523 and No. 636) were all promulgated during the fourth stage (1991-2010).

The factors that resulted in the emergence of organized crime in Taiwan include: the NPA Operation of Yi-Chin in 1984,⁵⁵ the lifting of martial law in 1987, the bubble economy of 1988-1989, and the elections for county councilors held in 1990. These were all integrated causes of crime. The gangs came to permeate politics and the economy by taking advantage of the bubble economy and elections. (The elections for county councilors in 1994 was the most serious instance of this.)

The so-called black gold politics became a nightmare in the 1990s. In 1995, due to the continuing expansion of organized crime and links with local factions, the environment for democracy continually worsened. The Operation of Hsun-Lei in 1988 put emphasis on the quantity of liumang reports rather than the “quality” of the reported liumangs.⁵⁶ The Operation of Chih-ping was implemented in 1996 in order to catch the “big brothers” behind less significant liumangs.

From March 1995 to July 1996, the reporting work was handled through cooperation between police and military police. After that, from August 1996 until the end of the Act, the work was incorporated into the prosecutor system. Thus, public security agencies including police, military police and investigators worked together and under the direction of the prosecutor. According to the Criminal Code and the Act, the investigation of crime and liumang reporting could be implemented in parallel. At that time, a policy of “heavy reward and severe punishment” was in practice. The “Green Island policy”⁵⁷ had also been adopted.

The termination of the Period of Communist Rebellion and the advent of Interpretation No. 384 lead to the second term of the Legislative Yuan’s amendments to the Act. Meanwhile, Operation Chih-ping also in part lead to passage of the Act for Preventing Organized Crime and some related laws. Black gold politics had been an obstacle to democracy for a long time. Its existence reflected the combination of various factors in Taiwan including history, politics, the economy, and society.⁵⁸

55. It was an operation against the Bamboo Union, *see* Bishop, *supra* note 10. According to the “Measures for Repressing Liumang During the Period of Martial Law,” the operation resulted in a controversy over whether it harmed the spirit of the R.O.C. Constitution. Nevertheless, it also reset the order of the Taiwan criminal underworld.

56. It didn’t aim to report the notorious big men who controlled the gangs, for instance the *jiaotou*.

57. More information about the history of human rights in Taiwan, *see* GREEN ISLAND HUM. RTS. CULTURE PARK, Human Right’s history, http://gicp.nat.gov.tw/greenisland_english/english_index.html (last visited Sept. 25, 2011).

58. *See* Ta Chia, *Feature: Gangsters Have Big Say in Local Politics*, *TAIPEI TIMES*, May 29, 2010, at 3 (“By one estimate, 15 to 30 percent of the lawmakers in Taiwan’s 15 counties-roughly equivalent to U.S. states-have criminal backgrounds.”).

B. *The Role of the Grand Justices: Pioneers of Social Reform?*

1. *The Court and Significant Social Reform*

Gerald N. Rosenberg's *The Hollow Hope* discusses the role of courts in producing major political and social change in the middle and latter half of the twentieth century. Rosenberg attempts to determine whether the American Supreme Court has really played a fundamental role in shaping modern society.⁵⁹

Rosenberg conducts empirical research of cases to understand the role of the court. He seeks to determine whether or not courts have been able to help produce liberal change. In order to better understand the role of courts in social change,⁶⁰ he limited his research on the American Supreme Court because of its representativeness. In particular, he focused on milestone cases such as *Brown*⁶¹ and *Roe*⁶² due to their reputations as having produced major change. The essence of his inquiry is whether or not there is really a connection between the actions of the Supreme Court and significant social reform? Two different views may be identified.

2. *The Dynamic Court*

Some believe that when the other branches of government are inactive or opposed to attempts at social reform, litigation activity uses the courts to strive for significant social reform. "Americans look to activist courts, then, as fulfilling an important role in the American scheme."⁶³ This view of the courts, although informed by recent historical experience, is essentially functional. It sees courts as powerful, vigorous, and potent proponents of change."⁶⁴ Rosenberg referred to this view as the "Dynamic Court" view. This theory might, however, overinflate the importance of the judiciary.⁶⁵

3. *The Constrained Court*

The Dynamic Court view has a well-established functional and

59. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

60. *Id.* at 2.

61. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

62. *Roe v. Wade*, 410 U.S. 113 (1973).

63. ROSENBERG, *supra* note 59, at 2 (arguing that some take such liberal judicial activism is a good thing).

64. *Id.*

65. *Id.* at 3.

historical competitor. In fact, in America there is a long tradition of scholarship of the federal judiciary. In Alexander Hamilton's language, as the "least dangerous" branch of government,⁶⁶ the judiciary lacks both budgetary and physical powers. This is because, to use Hamilton's words, the judiciary lacks power over both the "sword" and the "purse." That is, its ability to produce political and social change is limited.⁶⁷ Thus, contrary to the Dynamic Court view, in this view the "least dangerous" branch can do little more than point out how actions have fallen short of constitutional and legislative requirements, and hope that appropriate action is taken. "The strength of this view, of course, is that it leaves Americans free to govern themselves without interference from non-elected officials."⁶⁸ Rosenberg argues that under this Constrained Court view, courts are weak, ineffective, and powerless.

4. *Questions for Reflection*

The potential conceptual utility of these two theories of court behavior outlined in *The Hollow Hope* lead this study to examine the role of Taiwan's Constitutional Court. We are lead to reflect upon several questions. Was the Taiwan Constitutional Court heralded as having produced major change? Did the Court play a key role in the Act's repeal? Furthermore, should the Court be lauded as a pioneer that promoted significant social reform? Or, to the contrary, was the Court simply reacting to the pressure created by inevitable social change?

IV. CONCLUSION

Examining the result of the three key interpretations related to the Act (Table I), we find that the unconstitutional articles didn't become "null and void" immediately upon their dates of issue. For a period of time, the unconstitutional articles of the Act were still "alive," and the human rights of liumang were probably threatened. If as the oft-quoted maxim suggests, "justice delayed is justice denied," why did the Court allow the unjust articles to remain in effect for a time? An extra year is not a short period of time. Should we conclude that the Court was not particularly proactive in dealing with the liumang cases? What conditions might the Court have taken into consideration?

The Grand Justices clearly condemned the Act in the three liumang interpretations, and emphasized the protection of the human rights of

66. *Id.*

67. *Id.*

68. *Id.*

liumang. Judging from both the Court's attitude and the text of the decisions, we can ascertain that the Court probably held a proactive attitude.⁶⁹ This was most obvious when the Court interacted with the executive (the NPA and CIB under MOI) and the Legislative Yuan.

Rosenberg has proposed a "combined test" for the two classical views of court behavior (Dynamic and Constrained). This test allows us to determine whether or not the Court had the wisdom and boldness to embark on a push for reform. Each of these different views of court behavior represents its own considerations in different ways. To be brief, the thrust of the above discussion is that the conditions enabling courts to produce significant social reform are seldom attendant because courts are subject to various constraints such as the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's lack of powers of implementation built into the structure of the political system.⁷⁰ The Court is unable to act as a crusader, since it is restrained by the so-called political question doctrine. What the Court can do is proceed at the pace of a tortoise that steadily makes the changes happen.

Under a much different set of circumstances, however, the Court may be active. Rosenberg maintains that when certain conditions are met, courts can be effective producers of significant social reform. These conditions obtain when there is ample legal precedent for change, support for change from substantial numbers in the legislature and from the executive, and either support from some citizens, or at least low levels of opposition from all citizens.⁷¹ These conditions can overcome the various aforementioned constraints that limit the court.

Empirical concerns lead us to apply Rosenberg's test to the case of interpretations related to liumang, and draw our attention to the question of whether the Court changed society, or to the contrary, society and other factors changed the court. Statements in No. 384, No. 523 and No. 636 in fact represent similar outcomes: "The Articles shall become null and void no later than one year from the date of this Interpretation." In No. 636, the Court reaffirmed that, "in light of the fact that amending the law requires a

69. In psychology, "proactive" means that an individual tends to have self-initiated behavior and act in advance of a future situation rather than just react. Here it means that the court could be self-initiated when it came to the protection of human rights, including those related to liumang. Meanwhile, the court sought mutual advantages from other relevant bodies before issuing interpretations. It also coordinated efforts with and received plurality opinions from those institutions.

70. There are lots of similarities to be found between the combination of social movements and judicial and political effects in the American context as described in *THE HOLLOW HOPE* and the Taiwan example. Suffice it to say that the American experience may supply us with a set of possible functions with which to examine the Grand Justices' role vis-à-vis significant social reform. See ROSENBERG, *supra* note 59, at 35 (arguing that the "system" is based on the American political system).

71. *Id.* at 35-36.

certain period of time—and so that the relevant authorities can conduct a comprehensive analysis of the Act by taking into consideration both the need to protect people’s rights and the need to maintain social order....” In a word, in each case the Court deferred in part to the opinions of other relevant authorities, including the key administrative bodies (MOJ, MOI, NPA, CIB) related to social order maintenance and the legislature.

Following NPA orders, the CIB took an active role in liumang reporting efforts, and thus represented the first site of administrative control. People were defined as liumang at the discretion of the criminal police, and they did not have any opportunity to defend themselves when the measures were implemented. Although liumang could pursue judicial redress afterwards, their fundamental rights ought to have been respected at the initial stage of administrative control. The Act was a powerful executive measure that had been used by the security authority for decades, and the relevant authorities couldn’t be without it all at once.

The Judicial Yuan was not the main agent behind the abolition of the law. The Grand Justices took the role of a guide instead of that of a leader or crusader. We found the Court was highly limited by its natural functions and shaped its behavior to the other constraints. Nevertheless, the wave of activity surrounding the impending abolition of the Act created by other relevant institutions was a key factor behind change. This wave also provided the set of conditions that made the Court active, because the support of other institutions could help the Court overcome its constraints. The Judicial Yuan held some committee sessions during which this issue was discussed before the interpretations were issued, and it invited the relevant institutions including the NPA and the Ministry of Justice (MOJ) to participate. The Court represented an “assistant” director in the process, supplying a platform for the executive and legislature to convey their opinions in parallel. Although the process might have been blocked or reversed, the Court appreciated the value of creating a power balance and facilitating smooth dialogue. The Judicial Yuan deeply understood the fears of the administrative bodies, including their distrust of possible substitute measures and the exposure of the secret witness system. However, the Court still deserves praise for establishing this platform and facilitating civil dialogue among concerned institutions.

One looks forward to a court that functions as a leader in significant social change—a court that could be a guide for society. The Taiwanese experience differs from that of the U.S. in many important ways, including what sorts of cases are milestones of social change and the Constitutional Court’s attitude. Taiwan steps forward from its past democratization experiences having gone through economic development, seven rounds of constitutional revision, long-term executive control by the KMT, and the

political upheaval since the year 2000. The Constitutional Court is the “historical witness” to this wave of democratization and judicialization. The Court assumed a proactive attitude because it could be self-initiated in light of the global trend of valuing the protection of human rights, including, but not limited to those related to liumang. Meanwhile, the Court was attentive to mutual advantages vis-à-vis relevant institutions to be identified before it issued each of the three interpretations. The Court coordinated efforts and worked to obtain plurality opinions from those institutions.

(According to Table I, the violent crime rate didn’t increase between 2007 and 2009. The rate even decreased for categories of violent crime shown in Table II.)

APPENDIX

Table I: Violent Crime in Taiwan 2007-2009

year	Offenses Known to the police (cases)	Index 2005 yr. = 100	Offenses Cleared (cases)	Offenders (persons)	Cleared Rate (%)	Offender Rate Per 100,000 Population
2007	9,534	67	7,154	7,529	75.04	41.60
2008	8,117	57	6,493	6,843	79.99	35.29
2009	6,764	47	5,726	6,139	84.65	29.31

Source: *Violent Crime*, NAT'L POLICE AGENCY, MINISTRY OF THE INTERIOR (Apr. 20, 2011), <http://www.npa.gov.tw/NPAGip/wSite/ct?xItem=30119&ctNode=11500&mp=4>.

Table II: Offenders Known to the Police in Taiwan and Fuchien Area, Jan. - Oct., 2009 VS. Jan. - Oct., 2010

Item	Offenders											
					Child Offenders and Juvenile Offenders				Adolescent Offenders and Adult Offenders			
	Jan. Oct., 2010	Jan. Oct., 2009	VS. with Last period	VS. with Last period	Jan. Oct., 2010	Jan. Oct., 2009	VS. with Last period	VS. with Last period	Jan. Oct., 2010	Jan. Oct., 2009	VS. with Last period	VS. with Last period
	(persons)	(persons)	(persons)	(%)	(persons)	(persons)	(persons)	(%)	(persons)	(persons)	(persons)	(%)
Crime Volume	228,598	220,607	7,991	3.62	9,851	9,675	176	1.82	218,747	210,932	7,815	3.70
Violent Crime	4,578	5,226	-648	-12.40	609	732	-123	-16.80	3,969	4,494	-525	-11.68
Murder and Nonnegligent	1,231	1,218	13	1.07	165	150	15	10.00	1,066	1,068	-2	-0.19
Kidnapping	54	73	-19	-26.03	1	5	-4	-80.00	53	68	-15	-22.06
Robbery	1,037	1,307	-270	-20.66	107	154	-47	-30.52	930	1,153	-223	-19.34
Forceful Taking	612	801	-189	-23.60	24	56	-32	-57.14	588	745	-157	-21.07
Serious Injury	30	55	-25	-45.45	2	17	-15	-88.24	28	38	-10	-26.32
Intimidation	5	11	-6	-54.55	-	-	-	-	5	11	-6	-65.55
Forcible Rape	1,609	1,761	-152	-8.63	310	350	-40	-11.43	1,299	1,411	-112	-7.94
Larceny Theft and Automobile Theft	33,075	30,304	2,771	9.14	3,892	3,628	264	7.28	29,183	26,676	2,507	9.40
Serious Theft	180	269	-89	-33.09	11	3	8	266.67	169	266	-97	-36.47
Common Theft	26,673	24,254	2,419	9.97	2,474	2,299	175	7.61	24,199	21,955	2,244	10.22
Automobile Theft	2,090	1,685	405	24.04	55	50	5	10.00	2,035	1,635	400	24.46
Motorcycle Theft	4,132	4,096	36	0.88	1,352	1,276	76	5.96	2,780	2,820	-40	-1.42

Source: *Offenders Known to the Police in Taiwan and Fuchien Area*, NAT'L POLICE AGENCY, MINISTRY OF THE INTERIOR (Sept. 20, 2011), <http://www.npa.gov.tw/NPAGip/wSite/ct?xItem=30133&ctNode=11500&mp=4>.

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司法對社會變革的著力 ——從臺灣檢肅流氓案例 的憲法法庭解釋觀之

盧 一 婷

摘 要

「檢肅流氓條例」中詳細規範了流氓之定義、提報過程與相關懲治措施。本法中的「流氓提報措施」乃是過去刑事警察有效抑制地方幫派與維持社會秩序之行政手段。然而，本法於1985年施行以來，三度被司法院大法官以大法官解釋第384號、523號及636號宣告部份條文違憲。該閹害人權至深的立法也由立法院於2009年宣告廢止。

「檢肅流氓條例」中以「白吃白喝之人」或「欺壓善良鄉里之人」等不確定法律概念定義「流氓」與「流氓行為」的作法過於模糊，有違法律明確性原則。再者，本法中未經縝密行政審查程序即可提報流氓嫌疑人的提報措施、流程與流氓審議委員會之運作也被認為過於匆促、粗糙。流氓或流氓嫌疑人在憲法上的人身自由權在本法中並未受到重視。

本文嘗試以憲法變遷之觀點，檢驗臺灣憲法法院在本案中發揮的功能與影響層面。本文主張，司法院大法官於此案中，不僅積極扮演維護流氓人權的守護者角色，更在行政權因為錯失過去維護社會秩序的利器而面臨如何有效繼續維護社會安全的壓力時，發揮傾聽與協調意見的功能。

關鍵詞：關鍵字：流氓管制、檢肅流氓條例、司法院大法官、正當法律程序、法院功能