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The Judicialization of Politics in Taiwan

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Abstract
The judicialization of politics in Taiwan is particularly evident in three domains: the expansion of judicial power, a shift in political equilibrium, and litigation for social change. Yet it is not altogether clear why politicians and social groups are willing to transfer decision-making powers from the political branches to the judiciary, particularly the Constitutional Court. This paper endeavours to fill this academic lacuna by suggesting that the judicialization of politics occurs in Taiwan because both politicians and citizens choose the judiciary as another agent to implement their preferred policies. Nevertheless, Taiwan does not become a juristocracy and, indeed, the pace of the judicialization has slowed down since the second party turnover. The development of the judicialization of politics in Taiwan may shed new light on many old topics, such as judicial supremacy and the relationship between judicial power and political uncertainty.

Keywords: Taiwan's Constitutional Court, juristocracy, judicial review, judicial empowerment, judicialization of politics

1. INTRODUCTION

Since World War II, judicial power has expanded considerably and rapidly around the world.[1] The power of judicial review has precipitated fierce debates on the tension between democratic accountability and judicial power. Even in some countries that have typically emphasized legislative sovereignty, the idea of judicial supremacy is lurking.[2] Yet judicial review is by no means the only power vested in the judiciary; in addition to judicial review, many courts now possess many ancillary powers,[3] including the power of policy-making. This expansion of judicial power has blurred the line between legal and political issues: politicians are more willing to delegate their powers to the judiciary[4] and judges have become

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1. Tate & Vallinder (1995), p. 515.
2. Stone Sweet (2000), p. 1.
3. Garoupa & Ginsburg (2015), pp. 75–97.
4. Whittington (2005), pp. 586–93.

more willing to render political decisions. It is no longer surprising that judges have the final say over what the law is; now they are even authoritative in political decision-making. The development of judicial power is called "the judicialization of politics."[5] *Bush v. Gore*,[6] described as a constitutional coup launched by five conservative justices,[7] is the most prominent example of this paradigm shift.

Students of law and politics have endeavoured to explore what has led to the global trend of the judicialization of politics. Theories that explain the origin of judicial review—including the institutional-economic model,[8] the insurance model,[9] the hegemonic-preservation model,[10] and the rights hypothesis[11]—are often advanced as part of an explanation of this phenomenon. In Asia, moreover, internationalization and modernization also become drivers that spur the judicialization.[12] Among all these arguments, both the insurance and hegemonic-preservation theories, despite their nuanced differences, argue that politicians will transfer some political powers to a sympathetic judiciary if they foresee an electoral defeat, hoping that the judiciary can check their political opponents. Namely, this transfer would render the judiciary an insurance mechanism or a repository of elitist values. This conventional argument is persuasive in explaining the origin of judicial review in many democracies, but it does not tell the whole story about the judicialization of politics.

This paper endeavours to refine the conventional argument by suggesting that, first, the judicialization of politics in Taiwan takes places because the judiciary serves not only as an insurer, but also, perhaps more importantly, as an agent of both politicians and the public. As will be detailed below, structural factors, political dynamics, and the judiciary itself are all important drivers that galvanize the judicialization of politics,[13] but the most crucial explanation is that the judicialization is beneficial to either politicians or the public, sometimes both. Second, the judicialization of politics in Taiwan is manifest in three domains: judicial empowerment beyond judicial review, the shift of political equilibrium, and litigation for social change. Third, the judicialization in Taiwan facilitates democratic transition, spurs political dialogue, and solves thorny constitutional issues. Based on the three points, the judicialization of politics in Taiwan is majoritarian, rather than counter-majoritarian.

Specifically, this paper analyzes the judicialization of politics in Taiwan—a process which has never been elaborated comprehensively, focusing mainly but not exclusively on Taiwan's Constitutional Court (hereinafter "the Court"). Structurally, Taiwan transformed itself from an autocracy into a democracy in the late 1980s. Before democratization, political power in Taiwan was highly monopolized, and judges were generally deferential to dictators. Even after democratization, judicial independence has not been completely entrenched, and the Court is still subject to political attack from time to time. Nonetheless, due to the need to legitimate its reign in Taiwan, the Kuomintang (KMT) regime relied on the Court even

5. Hirschl (2008), pp. 121–4.
6. *Bush v. Gore*, 531 U.S. 98 (2000).
7. Balkin & Levinson (2001), p. 1050.
8. McCubbins & Schwartz (1984), p. 166.
9. Ginsburg (2003), pp. 22–33; Finkel (2008), pp. 29–37; Stephenson (2003), p. 84.
10. Hirschl (2009), pp. 43–9.
11. Shapiro (1999), pp. 194–207.
12. Harding & Nicholson (2010), pp. 2–4.
13. Kapiszewski et al. (2013), pp. 18–30.

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during the authoritarian periods, let alone after political liberation. Politically, ideological conflicts have become increasingly intense, especially during the period from 2000 to 2008 when the executive and the legislative powers were held by different parties. Because of the political dynamic, the Court was asked to solve issues regarding constitutional politics frequently. Furthermore, the change of personnel and procedural rules also rendered the justices more willing to step in the political thicket.[14] After 2008, the KMT took back both the presidency and the legislature. Understood against this background, the development of the judicialization of politics in Taiwan may shed new light on the research of judicial politics.

There are several factors that make the study of the judicialization of politics in Taiwan potentially fruitful. First, courts in new democracies may face unique challenges and issues, such as restorative justice, that are not prominent in established democracies. Moreover, separation of powers is particularly vulnerable in new democracies, since the small-c Constitution has not yet been fully entrenched. On the one hand, the judiciary may have more opportunities to expand its own power by (re)demarcating the boundaries of each branch. On the other hand, courts in new democracies lack the authority and capability to tame charismatic politicians and thus have to be more cautious when they try to step into the political arena. If politicians refuse to constrain themselves, the judicialization of politics may backfire and hurt the judiciary, if not the nascent democracy itself.

The rest of this paper proceeds as follows. Part 2 articulates the development of the judicialization of politics in Taiwan from these three perspectives: (1) the expansion of judicial power, (2) the delegation and deference of the political branches to the judiciary, and (3) a novel function of the courtroom as a public forum for policy lobbying. Part 3 explores why the judicialization of politics has taken place in Taiwan, a young democracy in which the judiciary was not considered trustworthy in the past. Part 4 offers some normative reflections on current mainstream interpretive models, and Part 5 concludes.

2. THE JUDICIALIZATION OF POLITICS IN TAIWAN

In Taiwan, the Court, also known as Council of the Grand Justices,[15] is responsible for interpreting the Constitution of the Republic of China. Founded in mainland China, the Court served mostly as a means by which President Chiang Kai-shek sought to legitimize his rule in Taiwan after the end of the Chinese Civil War in 1949. The relative lack of judicial autonomy during this period, however, does not mean that the judicialization of politics was not occurring at this time. Contrarily, the Court did deliver three decisions of political salience, legitimizing, *inter alia*, the suspension of national elections during the authoritarian era.

After democratization in 1987, the judicialization of politics has made great strides in Taiwan. Judicial power has expanded quickly and considerably at the expense of the political branches. During the process of judicial empowerment, judicial authority and popularity have increased to the extent that the Court has asserted its authority in some areas that were previously the exclusive preserve of the elected branches. The two major parties—the long-time ruling party, KMT, and the opposition party, DPP (Democratic Progressive Party)—have faced different political difficulties and have chosen to judicialize politics for varying

14. Ginsburg (2013), p. 56.

15. Chang (2014), p. 147; Lo (2011), p. 103.

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reasons. Furthermore, politicians have not been the sole actors in this process. From a bottom-up perspective, the Taiwanese people, with the assistance of cause lawyers, have also contributed to the judicialization of politics as well.

2.1 Expansion of Judicial Power

The Court has monopolized and exercised the power of judicial review since its founding, and its decisions have *erga omnes* effect. Formally, judicial review in Taiwan has proceeded as an "abstract review," meaning that the Court can examine the constitutionality of statutes and regulations enacted by the political branches, but not concrete decisions handed down by other courts. Although the power of judicial review is nothing new to the Court, statistics demonstrate that the actual exercise of this authority has changed dramatically over time. During the authoritarian regime, judicial review was a means for autocrats to legitimate their rule. It did not function as a mechanism to check and balance the political branches. This role of the Court during this period is clearly demonstrated by the fact that the Court ruled against the government in only one case during its first four terms (from 1948 to 1985). Aside from being subservient to the government, the Court was also relatively inaccessible to the public; indeed, only 24 decisions were appealed by citizens in the 40 years before democratization. The situation changed remarkably after democratization in 1987. The fifth-term justices rendered 110 interpretations appealed by citizens; moreover, the court ruled against the government in roughly 30% of these cases. The sixth-term justices delivered 151 decisions in cases appealed by citizens and ruled in favour of citizens in about 38% of the decisions. As for the justices nominated after 2003, about 50% of the cases were decided in favour of the public. Obviously, both the number of cases and the percentage of decisions made against the government have increased substantially.

Judicial empowerment in Taiwan has been implemented mainly through three approaches: constitutional amendments, statutory revisions, and constitutional interpretations issued by justices themselves. In terms of the first approach, the 1992 Constitutional Amendment vests the Court with the power to dissolve unconstitutional political parties. Although the Court has never exercised this power, the existence of such a power does increase the political capital of the judiciary vis-à-vis the other branches. The subsequent 1997 Constitutional Amendment further strengthens judicial independence by prescribing that "The proposed budget submitted annually by the Judicial Yuan may not be eliminated or reduced by the Executive Yuan."[16] This amendment does not directly contribute to the expansion of judicial power, but it makes such a development more likely, as the judicialization of politics occurs more frequently when the judiciary is independent. Finally, the 2005 Constitutional Amendment vests the Court with the power to adjudicate motions to impeach the president and the vice president. The transfer of this power from the National Assembly to the Court demonstrates one feature of the judicialization of politics—judicial empowerment at the expense of the elected branches.

Compared with amending the Constitution, statutory revision is a less dramatic but equally consequential way to judicialize politics. One of the most notable examples is the revision of the Constitutional Interpretation Procedure Act in 1993, whereby the Court's standing

16. The Additional Articles of the Constitution of the Republic of China, art. 5, § 6, online <http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=98> .

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requirements were broadened significantly. From the perspective of judicial politics, this revision is critical, since the rules of standing and jurisdiction are "designed to limit the occasions for judicial interference with political processes."[17] Before this revision, the Court could only exercise the power of judicial review in narrowly delimited circumstances, and people had only limited access to the Court. As a result of the revision, congressional minorities became able to challenge the constitutionality of laws by petitioning the Court. This gives the Court many more opportunities to intervene in the process of law-making and policy-making, since legislators usually bring controversies of political salience to the Court. Also, the Court is essentially legislating, rather than adjudicating, when it undertakes abstract judicial review. For these reasons, the 1993 revision has proven crucial for the judicialization of politics in Taiwan, given that the congress has always been controlled by the KMT until 2016. Additionally, the fact that the act lowers the quorum for a constitutional decision from three-quarters to two-thirds of the justices makes it easier for the Court to function actively.

Other statutory revisions have also enlarged the jurisdiction of the Court and lower courts. To name but a few examples, the Civil Servants Election and Recall Act and Presidential and Vice Presidential Election and Recall Act were enacted, respectively, in 1980 and 1995. In both acts, courts are made responsible for ballot counting, recounting, and electoral disputes. In addition, the overhaul of the Administrative Litigation Act in 1987 and the enactment of the Administrative Procedure Act in 1999 marked a further significant shift in the balance between executive power and judicial control. Both acts impose more legal constraints upon the executive and thereby further expand judicial power at the expense of executive discretion. Moreover, in 1999, the Local Government Act prescribed that local governments may petition the Court whenever there is a vertical separation-of-powers issue between different levels of governments. Finally, the Referendum Act, enacted in 2003, also prescribed that referendum disputes regarding the vertical separation of powers should be settled in accordance with the Court's constitutional decisions. Owing to these revisions, the Court has more opportunities to step into the political arena.

In addition, the Court has also rewritten standing rules and expanded its jurisdiction through its own constitutional interpretations. In the past, only judges of the Supreme Court and Administrative Supreme Court could petition the Constitutional Court. In 1995, the Court expressly nullified part of the aforementioned Constitutional Interpretation Procedure Act; in doing so, it allowed judges of lower courts to seek constitutional interpretation if they believe the law in question is unconstitutional.[18] This has been extolled as the most important decision the Court has ever made in terms of judicial empowerment, since "it definitively declares that the [Court], not the Legislative Yuan, is the ultimate determiner of its own jurisdiction."[19] Furthermore, the Court has repeatedly stressed that it can scrutinize the constitutionality of precedents issued by the Supreme Court and that of "the laws and orders adopted to reach the final verdict and those closely related requested for interpretation in the petition,"[20] even if such laws and orders are not directly challenged by the petitioners.

17. Sunstein (2001), p. 39; Guarnieri & Pederzoli (2002), pp. 98–120.

18. J.Y. Interpretation No. 371 (1995) (Taiwan), online <http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371> .

19. Ginsburg, *supra* note 9, pp. 138–9.

20. J.Y. Interpretation No. 576 (2004) (Taiwan); J.Y. Interpretation No. 644 (2008) (Taiwan); J.Y. Interpretation No. 664 (2009) (Taiwan).

Finally, the judicialization of politics reached its apex when the Court struck down the 1999 Constitutional Amendment in 2000.

As a result of judicial expansion, the executive can no longer control the judiciary as it did during the authoritarian period. When martial law was lifted in 1987, the Court announced that judges of lower courts are not bound by administrative regulations, strengthening judicial independence vis-à-vis the executive.[21] The increase in judicial control over the executive is also reflected in a series of cases in which the so-called "principle of special-power relations" was contentiously debated. The principle prohibited certain people, such as inmates, soldiers, and students, from suing the state, which obviously infringed upon their right to petition. Namely, executive discretion in certain fields is beyond the scope of judicial examination—a remnant of the authoritarian regime that persists after democratization. Starting with Interpretation No. 266, the Court has continually declared that the principle is inconsistent with the rule of law and should be struck down, forcing the executive to be more accountable to the judiciary.

2.2 Shift of Political Equilibrium

During the authoritarian period, the Court was quite obedient to the executive. Despite its impotence, however, the Court did render three cardinal decisions that demarcated the boundaries between the executive, the legislature, and the judiciary. The first one was Interpretation No. 31,[22] in which the issue was whether the national representatives elected in mainland China should remain in office after the expiration of their terms when re-elections were thwarted by national calamity, namely the Chinese Civil War. The KMT could have just unilaterally prolonged the terms of these representatives, but it chose to resort to the Court. In its opinion, the Court transformed such political expediency into a constitutional necessity, emphasizing the necessity of the prolongation. The second decision was Interpretation No. 76,[23] in which the Court was asked which department counted as the congress in Taiwan. Up to that point, legislative powers in Taiwan had been divided into three parts and exercised, respectively, by the Legislative Yuan, the Control Yuan, and the National Assembly. The Court found that all three institutions en masse constituted the congress.[24] The third was Interpretation No. 86.[25] During the party-state period, all high courts and district courts were subordinate to the Executive Yuan, instead of the Judicial Yuan. Located at the apex of the judiciary, the Court ruled in Interpretation No. 86 that all courts, without exception, should be subordinate to the judiciary. This is the most important decision with respect to judicial independence. In ruling against the executive, the judiciary tried to take back control of the lower courts. Nevertheless, this interpretation was not implemented for decades, and judicial intervention in politics did not effectively constrain the executive at that time.

21. Ginsburg, *supra* note 9, pp. 140–1.

22. J.Y. Interpretation No. 31 (1954) (Taiwan), online <http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=31> .

23. J.Y. Interpretation No. 76 (1957) (Taiwan), online <http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=76> .

24. *Ibid.*

25. J.Y. Interpretation No. 86 (1960) (Taiwan), online <http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=86> .

Since democratization, the expansion of judicial power has gradually shifted the balance between the judiciary and its co-ordinate branches, in that both the legislature and the executive have been more obedient to the judiciary. In terms of executive deference to the judiciary, this change can be observed in three respects: judicial control over political conflicts, heightened scrutiny of executive discretion, and judicial intervention in policy-making and mega politics. Specifically, with the expansion of judicial power, politicians now rush to the Court for judicial decisions whenever there is a political conflict, despite the existence of other constitutional solutions. Even though they may not be completely satisfied with the outcomes, few challenge the authority of judicial decisions. The paradigmatic example is Interpretation No. 520, in which the Court was engulfed in an energy policy issue, namely whether the executive could refuse to implement the budget of the Fourth Nuclear Power Plant without notifying the congress beforehand. This was politically controversial, since the Fourth Nuclear Power Plant was one of the most high-profile disputes in the presidential campaign of 2000. Instead of issuing a clear-cut opinion, the Court asked both parties to negotiate further and, if that failed, to look for other resolutions. Both parties were dissatisfied with the decision, but it successfully unravelled the political gridlock. In addition, in both Interpretation Nos. 613 and 645, one common issue was whether positions of independent Commissions could be awarded in proportion to the percentages of seats in the congress. This was controversial, since the KMT wanted to maintain its control over personnel of the executive even after it lost the presidency. In Interpretation No. 627, in which the president and his wife were accused of venality, embezzlement, and other misconduct, the president refused to testify and invoked the presidential criminal immunity and state secret privileges. In Interpretation No. 632, the KMT congress refused to consent to the appointment of Control Yuan commissioners nominated by the DPP president. In vertical separation-of-powers cases, conflicts mostly occur between the central government and Taipei City. In Interpretation No. 550, for instance, the Taipei City and the central government disagreed over who should pay for implementing certain national health insurance programmes, while, in Interpretation No. 553, the central government revoked a decision made by the Taipei City government to postpone a local election.

For the purpose of this article, the holdings in these cases are not that important. What is more noteworthy is that these cases show that political conflicts are now often solved not in the congressional hall, but in the courtroom. This was especially true from 2000 to 2008, since the executive and the legislature were controlled by different parties. Due to mutual distrust, almost every political fight between the ruling party and the opposition party was eventually addressed by the Court. By solving these political conflicts, the Court became the *de facto* policy-maker. What is more, politicians now take potential judicial reactions into account during the formation of national policies, since they know opponents may try to use the judiciary to undo these policies.

This shift in political equilibrium is also reflected in heightened judicial control over executive discretion. Politically, the executive could do no wrong during the authoritarian period. Economically, Taiwan was a developing state that "favor[ed] technocrats for public governance and [found] the legal regime and its main players—lawyers—hostile or at least unfriendly."[26] Because of this, the executive enjoyed vast discretionary power beyond the

26. Yeh (2008), p. 35.

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reach of judicial scrutiny, and its regulations were binding upon judges. After 1987, Taiwan transformed itself not only from an autocracy to a democracy, but also from a developmental state to a regulatory state.[27] Since then, executive regulations are no longer binding upon judges; the ruling of special-power-relations cases further constrains the executive; and the enactment of two Administrative Acts has not only greatly reduced the room for executive discretion, but has also made the executive more accountable to the rule of law. All of these developments are reflected in the docket records of the Administrative Courts, which have begun to invalidate administrative regulations and rule against the government more aggressively in recent years.[28]

Finally, the Court has gone one step further and started to make policy through abstract judicial review. In Interpretation No. 400, an eminent domain case, the appellants asked for just compensation. Instead of delivering a minimalist opinion that focused only on the concrete facts of the case, the Court made a general policy decision which suggested that the government should compensate owners of expropriated land in all similar situations. This decision imposes an untenable financial burden on the government, and has not been fully implemented to date. Interpretation No. 603 is another example in which the Court had the final say over national policy. In this case, the DPP government had tried to collect the fingerprints of every citizen, claiming that the policy was consistent with several public interests and endorsed by most people. The Court first suspended the implementation of the policy by issuing a preliminary injunction; three months later, it prohibited the government from implementing this policy. The executive submitted to this decision, and the fingerprint collection project was aborted. Although the Court based its decision on privacy concern, it does not change the fact that it was the Court, rather than the executive, that determined the fate of this policy.

Moreover, the reach of judicial policy-making encompasses the mega politics—"questions concerning the very definition of the polity"[29]—that relates to the nationhood and national identity of Taiwan. As described earlier, Taiwan for much of the latter half of the twentieth century was a party-state in which the KMT, a Leninist party, controlled the military, the media, and all government apparatuses. The influence of this authoritarian legacy manifested in Taiwan's post-democratization mega politics in the form of both institutional and ideological problems. The issue in terms of the former was the separation of the party (KMT) from the state, while the latter issue was seen in the fantasy of recovering mainland China. As to the entanglement of the party and the state, the Court had delivered several decisions about whether concurrent occupation of different offices is constitutional. These decisions occupied the lion's share of the Court's docket in its early days. The ideological problem relates to the legitimacy of the KMT government in Taiwan. After the KMT retreated to Taiwan in 1949, it still claimed to be the only legitimate government in China. Hence, Taiwan was regarded not as a sovereign state, but as one province of China. To maintain the formal distinction between the Republic of China and Taiwan province, there was, in addition to the central government, a Taiwan provincial government before 2000, even though the population and territory of both governments overlapped significantly.

27. *Ibid.*

28. *Ibid.*

29. Hirschl, *supra* note 10, p. 172.

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After democratization, the Court issued several decisions that aimed to dismantle this ideology. In Interpretation No. 261, the Court required that "national" elections should be held in Taiwan, thus implicitly recognizing that mainland China was no longer part of the Republic of China. In Interpretation No. 467, the Court ruled that the aforementioned Taiwan provincial government "shall not be recognised as a legal public legal person of local self-government." In Interpretation No. 479, the Court struck down related regulations that prohibited the China Society of Comparative Law from registering its name as "Taiwan Law Society."[30] In Interpretation No. 618, the law at issue prohibited Chinese people who have moved to and registered their household in Taiwan for less than ten years from serving as government employees. The issue is essentially a question of national identity: who counts as Taiwanese? Even though this statute is in effect discrimination based on national origin, the Court upheld the law, arguing that "it is not unreasonable to give discriminatory treatment to such a person [with Chinese national origin] ... with respect to the qualifications to serve as a governmental employee."[31] In making this ruling, the Court took the position that some of the most suspicious discriminations can be justified because Chinese people per se are not regarded as Taiwanese people. Other decisions dealing with the relationship between Taiwan and China include Interpretation Nos. 497, 558, 710, and 712. None of these decisions clearly articulates the relationship between China and Taiwan, but all implicitly recognize that these two jurisdictions are separate and are controlled by different sovereign governments.

Finally, with respect to the issue of restorative justice, the legislature enacted the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law to deal with the so-called torturer problem. Despite the act's lofty name, progress in implementing restorative justice in Taiwan has been quite slow. The KMT government had been reluctant to face this issue, since it was the ruling party that committed these crimes; the DPP government had been unable to tackle this issue because it was paralyzed by political stalemate. Perhaps due to the political atmosphere, the ruling of the Court in this matter was conservative as well. In general, the Court struck a balance between seeking restorative justice and tolerating the crimes committed during what it deemed the "exceptional circumstances." In Interpretation No. 272, for example, the Court, in order to maintain social stability, ruled that "those who are not in active military service may not appeal the final court decisions with respect to criminal cases adjudicated in the military tribunals during the period of the Martial Law."[32]

Not only the executive, but also the legislature has become more submissive to the judiciary. Regarding the change of the legislature–judiciary relationship, the heightened scrutiny in judicial review is the first step to contain legislative power. Second, the Court also gradually expanded the scope of judicial review by examining issues that formerly pertained

30. Chang (2010), p. 145.

31. J.Y. Interpretation No. 618 (2006) (Taiwan), online <http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=618> .

32. J.Y. Interpretation No. 272 (1991) (Taiwan), online <http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=272> . In fact, cases concerning restorative justice vividly demonstrate how the insurance theory works in Taiwan, given that many of these decisions are made by justices appointed by the KMT. The Court has delivered several decisions on this issue, but no one has been held responsible for the crimes committed during the authoritarian period in which the KMT ruled.

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to legislative self-governance. Finally, the Court began to replace laws that it ruled unconstitutional with its own ruling without waiting for further statutory amendments.

To begin with, the increase in the percentage of constitutional decisions against the government clearly shows that judicial control over the legislature has strengthened. Given this fact, whether a law can survive the gauntlet of judicial review has become one important concern that legislators take into account. This is particularly evident after the revision of the Constitutional Interpretation Procedure Act, which allows congressional minority to challenge the constitutionality of laws passed by the majority. The significance of this sort of challenge may be best seen in the case of the Shooting Act cases, in which the Court decisively ruled against the KMT. When President Chen was running for re-election in 2004, he and Vice President Annette Lu were shot the day before the election. Since Chen and Lu won by a razor-thin margin of 0.2%, the KMT congress enacted the Shooting Act to investigate the shooting. Outvoted by the KMT, the DPP legislators petitioned the Court, trying to "veto" the act; the Court struck down the act twice on constitutional grounds in Interpretation Nos. 585 and 633. It is worth noting that the infuriated KMT congress curtailed the judicial budget unconstitutionally between the promulgation of the two decisions as revenge. Still, the Court declared the revised Shooting Act unconstitutional and void.

Moreover, the judiciary has gone one step further, examining whether legislators have followed specific rules when legislating—an area putatively within the self-governance domain of the legislature.[33] At the beginning, the Court was deferential to the congress in this regard. In Interpretation No. 342, for example, the Court cited a US Supreme Court decision,[34] arguing that whether the congress was in compliance with its procedural rule falls into the realm of parliamentary autonomy that lies beyond judicial scrutiny. In Interpretation No. 381, the Court once again emphasized that the National Assembly had ultimate discretion in determining what procedures were needed to effect a resolution of a constitutional amendment. These two decisions held that procedural requirements fall into the domain of congressional self-governance and do not generate constitutional concerns. Notwithstanding the two precedents, the Court was considerably bolder in Interpretation No. 499, wherein it argued that "not all parliamentary proceedings that are clearly and grossly flawed may take the pretext of being internal, self-regulatory matters and evade their legal consequences."[35] The Court thus declared the 1999 Constitutional Amendment unconstitutional partly because of procedural deficiencies.[36]

Finally, legislative deference to the judiciary is most evident when the Court expressly usurps the power to legislate after striking laws down. In the past, the Court would simply ask the legislators or related governmental agencies to promptly revise the annulled laws in accordance with its constitutional decisions. This state of affairs has changed recently—the Court now tends in its decisions to prescribe solutions to replace the laws it has nullified. To name a few, in Interpretation No. 624, the Court designated an alternative mechanism for petitioners to file suits against the government even before allowing time for any statutory revision. In Interpretation No. 627, the Court unilaterally expanded the scope of the Criminal

33. Ferejohn (2002), p. 43.

34. *Field v. Clark*, 143 U.S. 649 (1890).

35. J.Y. Interpretation No. 499 (2000) (Taiwan), online <http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499> .

36. Cooney (2004), pp. 424–5.

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Table 1. Significant Steps in the Judicialization of Politics in Taiwan

Year	Type	Constitutional amendments	Statutory revisions	Judicial interpretations
1982	Expansion of jurisdiction			Interpretation No. 177
1987	Expansion of jurisdiction		Administrative Litigation Act	
1990	Expansion of jurisdiction (special-power relationship)			Interpretation No. 266
1992	Power to dissolve political parties	Constitutional Amendment		
1993	Standing requirements loosened		Constitutional Interpretation Procedure Act	
1995	Standing requirements loosened			Interpretation No. 371
1995	Expansion of jurisdiction		Presidential and Vice Presidential Election and Recall Act	
1997	Independence of judicial budget	Constitutional Amendment		
1999	Expansion of jurisdiction		Administrative Procedure Act	
1999	Power to adjudicate vertical separation-of-powers (SOP) conflicts		Local Government Act	
2000	Power to nullify constitutional amendments			Interpretation No. 499
2005	Power to impeach president/vice president	Constitutional Amendment		
2005	Judicial policy-making			Interpretation No. 603
2007	Judicial law-making			Interpretation No. 624
2007	Judicial law-making			Interpretation No. 627
2010	Judicial law-making			Interpretation No. 677
2014	Power to nullify constitutional amendments			Interpretation No. 721

Source: Author.

Procedure Code, and designated a five-judge special tribunal. In Interpretation No. 677, the Court decisively prescribed when prisoners should be released without any legislative response. In each of these instances, the legislature simply accepted the ruling without any dissent, and no one seriously questioned the legitimacy of judicial law-making.

Another category of judicial (con)law-making is the creation of new rights through constitutional decisions. Formally, the participation of the congress as well as the public was required to amend the ROC Constitution. Nevertheless, the Court has created many new rights by interpreting broadly Article 22 of the Constitution, which is similar to Article 9 of the US Constitution. To name a few, the Court has recognized the right to marry, the right to choose one's own name, freedom of sexual behaviour, freedom of contract, information privacy, and the right to reputation. Likewise, no one has seriously challenged the Court's right to grant such rights.

2.3 Litigation for Social Change[37]

Whether the judicialization of politics results from the decisions of political elites or the impetus of grassroots forces is a hotly debated issue.[38] In fact, the judicialization of politics

37. Epp (1998), pp. 17–23; Kapiszewski et al., *supra* note 13, p. 5.

38. Sieder et al. (2005), pp. 3–9.

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can occur without widespread social movements in some countries, but not in others. In Taiwan, the Court has become another forum for policy-making, not only for politicians, but also for lay people. Interest groups, public-interest lawyers, and non-governmental organizations (NGOs) have widely adopted litigation as another strategy to pursue their preferred policies.[39] Several factors may account for this social mobilization in the context of Taiwan.

First, in a situation similar to that in South Korea,[40] the society in Taiwan has become increasingly polarized after democratization. The clash between the KMT and the DPP reached its zenith in 2000, when the long-time opposition party won the presidential election. Moreover, some politically sensitive policies have further aggravated the mutual distrust between the two parties. The resulting political gridlock has not only affected politicians, but also influenced civil society, as it closed off the most likely political avenue for social change. With the political branches paralyzed, the third branch with its newly acquired powers thus has become a reasonable option to effect social change. In the meantime, with the flourishing of civil society, many controversial issues have gradually emerged as topics of concern. Politicians have been reluctant to tackle these issues, since it can be politically risky to deal with them in a morally conservative society. As a result, the Court, rather than the elected branches, has become the agent of the people. In this sense, litigation may be regarded as a delegation of policy-making power. The revision of the Civil Code in Taiwan proves that sometimes it is more efficient to change the status quo through unelected justices than through elected representatives, since many statutory revisions are actually required by the Court first.

Second, in the development of social movements, public-interest cause lawyers play an influential, if not leading, role in almost every NGO. In addition, the biggest law firm in Taiwan, Lee and Li Attorneys at Law, regularly petitions the Court on behalf of disadvantaged people. Since lawyers are more familiar with laws, precedents, and procedures than with protests, demonstrations, and sit-ins, and since they are good at rephrasing their policies in legal jargon in a courtroom setting, they are more likely to use litigation as a strategy to effect social change through the Court. Some cause lawyers, such as Yu Mei-Nu (current DPP Legislator) and Wang Ju-hsuan (former Minister of Council of Labor Affair in the KMT cabinet), have become politicians themselves, which demonstrates the close co-operation between politicians of both parties and public-interest groups. Meanwhile, the number of NGOs has grown exponentially in Taiwan since political liberalization. As reflected in Figure 1, the number of such organizations has increased more than sevenfold in the past two decades; as of 2012, there are more than 10,000 registered interest groups. To be sure, not all of these groups would actively participate in social movements, but the number still indicates a gradually maturing civil society, which is one crucial condition for the judicialization of politics from the bottom.

Finally, litigation may be the only viable strategy for some groups that do not have adequate representation in the parliament. The issue of the death penalty is the best example of this dynamic. According to public opinion polls in recent years, about 70% of Taiwanese people consistently support the death penalty. Given the tenor of public opinion on this topic, few politicians will commit political suicide by publicly supporting the abolition of the death penalty. The judiciary thus becomes the only official forum by which opponents of the death

39. Kagan (2001), p. 3.

40. Park (2008), pp. 96–7.

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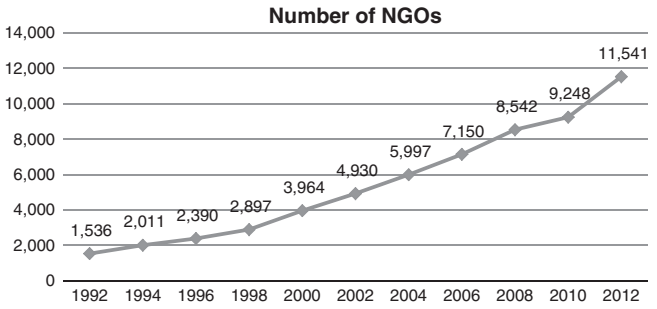

Figure 1. The Increase in NGOs
Source: Ministry of the Interior, online <http://cois.moi.gov.tw/moiweb/web/frmForm.aspx?FunID=e89adb5e8b5b4b81> (data after 2013 are still unavailable).

penalty can pursue their policy goals. For these reasons, social groups in Taiwan have become increasingly litigious over the last few decades.

Interpretation No. 261 is one paradigmatic example of how a social movement can result in a judicial decision that eventually precipitates fundamental social change. At the time that Interpretation No. 261 was promulgated, the Taiwanese government had suspended the validity of the Constitution and not allowed national elections for 40 years. The national representatives even unilaterally (and unconstitutionally) prolonged their own terms. On 16 March 1990, the so-called Wild Lily student movement burst out, crying for fundamental constitutional reform. Some legislators thereupon petitioned the Court; within three months, the Court issued this pivotal decision, in which it clearly required the executive to hold national elections.

In addition, other public-interest groups, such as the Awakening Foundation and the Judicial Reform Foundation, have also contributed to several decisions that are of seminal importance.[41] It seems fair to say that, with the progress of the judicialization of politics, many significant social reforms have been implemented through judicial decisions first, and are only later followed by congressional and executive action. The revision of the Civil Code, which used to be rife with gender discrimination, is the most remarkable example of this phenomenon. Responding to challenges brought by several women's rights groups, the Court has struck down several articles of the Civil Code on constitutional grounds in decisions including Interpretation Nos. 365, 410, 452, and 587.

2.4 Summary

From Table 1, there is little doubt that the judicialization of politics has made significant strides since democratization in Taiwan. To recap, it is most manifest in three domains: judicial expansion in the political arena, the shift of political equilibrium, and litigation for social change. In terms of its effects, the judicialization of politics facilitates democratic transition,[42] stimulates political dialogue,[43] and prevents constitutional crises.[44] Indeed, the

41. Chang, *supra* note 30, pp. 142–54.
42. Such as J.Y. Interpretation No. 261 (1990).
43. Such as J.Y. Interpretation No. 520 (2001).
44. Such as J.Y. Interpretation No. 499 (2000).

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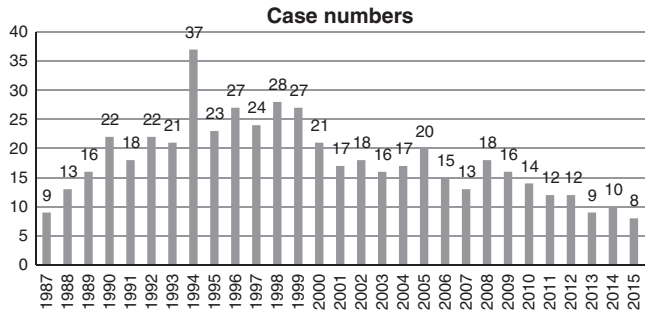

Figure 2. The Number of Constitutional Court Decisions after Democratization
Source: Author.
Note: The first party turnover occurred in 2000 when the DPP won the presidency; in 2008, the KMT's victory in the fourth direct presidential election led to the second party alternation.

judicialization of politics in the three dimensions reinforces each other symbiotically. Specifically, judicial empowerment not only equips the Court with more ancillary powers, but also provides the public with another avenue to bring about social change. Facing an increasingly powerful judiciary, which is sometimes a gift to politicians, politicians will selectively invite judicial intervention and follow its ruling in some circumstances. The compliance of political branches to the judiciary further enhances citizens' confidence in choosing litigation as part of their strategy. On the other hand, the frequent use of the court is translated into either concrete or diffuse support for the judiciary. With the accumulation of political capital—that is, public support—the tolerance intervals increase, and the Court has become more progressive vis-à-vis the co-ordinate branches.

Nevertheless, judicial power ebbs and flows, and so does the Court.[45] Taiwan is far away from becoming a juristocracy[46]; instead, the case of Taiwan suggests that the pace of judicialization of politics slows down when a new democracy becomes more fully fledged—that is, in the context of Taiwan, after the second party turnover in 2008. The Court demonstrates a paradigm shift of judicial philosophy from judicial activism to judicial restraint, relatively speaking.[47] One prominent indicator of this trend is the decrease in the number of constitutional decisions rendered every year. From Figure 2, it is clear that the number of decisions increased rapidly after the lifting of martial law in 1987—a development that is reasonable given all the factors beneficial to the judicialization of politics. Since then, the Court had delivered more than 20 cases per year until the long-time opposition party DPP won the presidential election in 2000. After the first party alternation in 2000, the number of decisions decreased gradually: during this period, the Court never delivered more than 20 decisions in a single year. After the second party alternation in 2008, the number of decisions further decreased to the extent that the Court delivered fewer than 13 cases per year. In 2013, it only promulgated nine decisions—a number equal to the first year after the lifting of martial law. Second, the slowdown of the judicialization

45. Kapiszewski et al., *supra* note 13, p. 1.
46. Hirschl, *supra* note 5, pp. 211–23.
47. Dressel (2014), pp. 6–7.

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of politics can be observed not only quantitatively, but also qualitatively, in the sense that most decisions issued in recent years are politically trivial. Specifically, the Court has delivered 101 cases from Interpretation Nos. 636 to 736 since 2008. Among them, about 40% of the decisions (44 out of 101) are tax law and property cases, which are relatively immaterial to the judicialization of politics, since such cases are politically uncontroversial. One current justice even expressly complained in his dissenting opinion that the Constitutional Court has become a Tax Court![48] At the same time, the Court addressed only three cases with respect to separation of powers—a sharp decline that suggests the political clout of the judiciary is on the wane. Politicians nowadays no longer seek the assistance of the Court for solving political controversies. Third, even in cases that the Court was asked to intervene in, it "departed its predecessor's activist approach to constitutional politics."[49] Instead, it avoided head-on conflicts with the political branches and issued its ruling only when the disputes are settled through other channels. All these indicate the irrelevance of the Court in the political arena and even the de-judicialization in Taiwan.[50]

Two reasons may account for the slowdown of judicialization of politics. On the demand side, it is possible that, after two decades of political transition, Taiwan has become a true democracy that in general respects human rights, follows the rule of law, and provides for its citizens' basic needs through measures such as universal medical insurance and compulsory education. The need to change society through litigation is not as urgent as it was in 1990s. It is difficult to evaluate quantitatively whether, and to what extent, things have changed, but some public-interest groups have changed their strategies, diverting their attention from litigation to lobbying.[51] In the absence of these activist lawyers bringing cases to the Court, the pace of the judicialization of politics will certainly slow down. Also, politicians have less need to further strengthen the Court after the second party alternation, since the political climate is much more stable than it was under the DPP administration. The KMT has retaken and maintained control of both the executive and the legislature since 2008. Because of this, there is simply less political conflict between the executive and the legislature, compared with the situation during the transitional period.

On the other hand, the dominance of the KMT in both branches also affects the supply side of the judicialization of politics in two ways. More than two-thirds of the justices currently on the bench were nominated by the KMT President Ma Ying-jeou and approved by the KMT congress. In other words, the Court is ideologically friendly to the ruling party—a political reality that makes it less willing to intervene in the political process. On the other hand, the concentration of political power also makes the Court more constrained than its predecessors. The Court must be cautious not to be too active in the political field, since it is easy for the elected branches to rein in the Court.

Some may wonder why power concentration slowed down the pace of judicialization after 2008 if judicial expansion had occurred during the authoritarian and transitional periods in which the KMT was equally dominating. Several points are worth noting in this regard. First, the KMT needed to rely on the Court to maintain the veneer of legitimacy of its

48. J.Y. Interpretation No. 713 (2013) (Taiwan) (Justice Tang, dissenting).
49. Kuo (2016), p. 34.
50. *Ibid.*, pp. 34–44.
51. Chang (2010), pp. 149–54.

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governance in exchange for international recognition and foreign economic support; both were indispensable to the KMT regime that was just defeated in the Chinese Civil War. This is particularly crucial during the Cold War era, since the KMT claimed it was the "free China" as opposed to the Communist China. After political transition, it was no longer possible for the KMT to recover mainland China. In order to rebuild its legitimacy and undergird its rule domestically, the KMT needed to tackle the issue of "old thieves,"[52] who continuously occupied congressional seats for several decades. Since most of these representatives were KMT members, the ruling party felt reluctant to force its comrades to retire,[53] and the aforementioned Interpretation No. 261 became the best scapegoat. Namely, judicial intervention became the means for the KMT leaders to solve the thorny issue of its internal factions. Finally, the fact that judicial power did not expand continuously after 2008 does not mean it shrank. Formally speaking, the Court has not been deprived of any power after 2008. To be sure, whether the judicialization of politics will revive after the 2016 presidential election is hard to say in advance, as the DPP won both the presidency and the congress. Before predicting whether the judicial power will wax or wane in the future, one needs first to explain the judicialization of politics in the past.

3. WHAT EXPLAINS THE JUDICIALIZATION OF POLITICS IN TAIWAN?

When one considers the rampant increase in the judicialization of politics in Taiwan, the question of its main impetus arises. Why do politicians and citizens choose to delegate the policy- and law-making powers to the judiciary, but not other institutions? Why do politicians choose not to make decisions themselves? In the context of Taiwan, many leading politicians in Taiwan are lawyers, including current President Ma, former President Chen, former Vice President Lu, and the newly elected presidential candidate Tsai. These legally trained politicians may be more willing to accept judicial expansion, but obviously there must be other elements contributing to the judicialization of politics in Taiwan.

From the perspective of realpolitik, it is relatively easy to understand why the DPP welcomed the judicialization of politics. Given that it was harder for the DPP to control either the executive or the legislature immediately after democratization, the judicialization of politics served at least two functions for the DPP. First, a powerful and independent judiciary can prevent the sitting executive from abusing its power. Second, the judicialization of politics can also turn the Court into another political forum for the party out of power (i.e. the DPP) to challenge unwanted policies. In this sense, the judicialization of politics provided DPP legislators with a second chance to veto any law passed by the KMT majority, since they were usually outvoted. In the event that their challenge of a given law succeeds, the DPP's victory would be longer-lasting, since it is more difficult for the KMT to overrule a constitutional interpretation. In a word, the judicialization of politics rendered the Court an insurance device and another potential veto mechanism. Both helped the DPP fight against the KMT.

52. Ginsburg, *supra* note 9, pp. 145–8.

53. Yang (1998), p. 19.

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On the other hand, given its early dominance, the KMT had lesser incentive to buy insurance by further empowering the judiciary. Consequently, the KMT may have supported the judicialization of politics for a different set of reasons. For example, the power to dissolve political party was vested in the judiciary mainly to check opposition parties. From a cynical perspective, the KMT might have been more inclined to judicialize politics, since all of the justices serving on the Court were nominated by KMT presidents and approved by KMT congresses. In other words, the KMT might reasonably believe that the Court was still its loyal ally even after political liberalization. Furthermore, an efficient judicial system was helpful for the KMT in administering the governmental bureaucracy, since such a judiciary might solve the principal-agent problem.[54] Finally, political competition had become increasingly intense as time had passed since democratization, and party turnover was no longer impossible. It turned out that the KMT did lose the presidential election in 2000 and 2004. That is, it is possible that the KMT also needed to buy political insurance as the gap in public support for the two parties shrank.

In sum, political uncertainty indeed plays a role in motivating the judicialization of politics. Nonetheless, it only tells part of the story. The judicialization of politics has not encountered major resistance in Taiwan because it makes both parties better off. This insight makes it easier to understand why in Taiwan politicians of both parties and social groups have chosen to delegate decision-making power to the judiciary, but not other institutions. The power to dissolve unconstitutional political parties could have been one device for the then-ruling KMT to check the rising opposition party DPP; the need for the KMT to do so would have been even more pressing because the DPP said it would declare the independence of Taiwan and enact a brand new constitution, theoretically creating some tension with the current constitutional framework.[55] Since all justices at that time were nominated by KMT presidents, and since the DPP was garnering more and more seats in congress, it would be better from the perspective of the KMT to vest new power in a still-friendly court, rather than in an increasingly hostile congress. Turning to the DPP's empowerment of the Court, it should be noted that the power of impeachment was granted to the Court in 2005, a year after the DPP had won the presidential election and at a time when all of the justices on the Court had been nominated by the DPP president. Given that, therefore, it was obviously a better option for the DPP to transfer the power of impeachment from the hostile KMT National Assembly to the independent, if not friendly, Court to protect the DPP president. In short, both parties chose to empower the Court because entrusting certain political powers to the judiciary was regarded as less politically risky than other options at the time. The KMT used the Court to counterbalance the surge of pro-independence movement, while the DPP used the Court to prevent its president from being impeached arbitrarily.

Additionally, the same rationale explains the judicialization of politics through statutory enactment and revision. In this regard, the best example in new democracies can typically be seen in judicial intervention in electoral affairs, as the tendency for the ruling party to manipulate elections during authoritarian periods necessitates a neutral third party to administer elections and guarantee their fairness after democratization. For the DPP, the judicialization of electoral affairs could make the election process more public and fair; for

54. Ginsburg (2008), pp. 63–7.

55. Ginsburg (2009), pp. 296–7.

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the ruling KMT, judicial intervention made its rule more legitimate, insofar as this convinced the electorate that election results were trustworthy. In other words, the DPP used the judiciary to monitor elections while the KMT used it to endorse its reign.

As for the Administrative Acts, judicial control over administrative affairs is usually beneficial to the ruling party, since it helps reduce the principal-agent problems that are rampant in bureaucratic systems.[56] This may explain why the ruling KMT wanted to strengthen the judiciary in this regard. The DPP, meanwhile, had few reasons to oppose such judicialization, since a strengthened judiciary is more likely to constrain the executive. In addition to the different incentives motivating the KMT and the DPP, the intense competition between the two parties also accounts for what amounted to a race between them to judicialize administrative control.[57] Since the judiciary in Taiwan enjoys higher popularity among the public than the elected branches, judicialization is generally considered to be an apolitical process and is generally welcomed by Taiwanese people. Given this fact, once the DPP turned to the judicialization of institutional reform to improve its political appeal, the long-ruling KMT had no other option but to further commit to the rule of law in order to "race to the top." As a result, the two acts "inevitably led to a significant increase in judicial control over administrative powers and policy making."[58]

Furthermore, when political compromise cannot be reached, politicians in Taiwan have used the Court to accumulate political capital by legitimizing their appeals for action, shifting potential blame for political failures, and taking credit for political accomplishments. The nuclear power plant case is a perfect example of such a political use of the judiciary. Given that the KMT had just lost the presidential election at that time, constitutional litigation became its best strategy, no matter the result of the appeal. If it won the litigation, the KMT could force the incumbent DPP to execute its preferred policy; even if it lost, the KMT still would have demonstrated its determination to keep its campaign promise to its supporters. Moreover, in this scenario, the KMT could blame the DPP and the Court for the suspension of the power plant project. As for the DPP camp, if it won the litigation, it could legitimatize its political preferences on constitutional grounds; if it lost and was obligated to implement the budget, the Court's decision would be the best excuse for the DPP to shift blame for not being able to keep its campaign promise. In this way, both parties maximized their interests and minimized their potential damages when they turned to the Court. It turned out that the Court's decision was obeyed, albeit somewhat reluctantly, by the DPP.

Interpretation No. 585, in which the outvoted DPP legislators used the Court to veto the Shooting Act and secure its hold on the presidency, is another example. In light of the suspicious shooting during the presidential election, negotiation between the two parties was impossible at that time. The DPP could only petition the Court and judicialize this political controversy, hoping that the Court would invalidate the Shooting Act on constitutional grounds. It turned out that the strategy succeeded. Even though the KMT revised the Shooting Act after Interpretation No. 585, the revised version was also nullified in Interpretation No. 633. The KMT congress eventually accepted the two constitutional decisions. On the one hand, this controversy demonstrates how fruitful the judicialization of

56. Baum (2005), p. 365.

57. Yeh, *supra* note 26, p. 136.

58. *Ibid.*, p. 133.

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politics can be for politicians in some circumstances; on the other hand, it also demonstrates how authoritative the Court has become in the field of electoral conflict.

Finally, the Court is at times more efficient, responsive, and sympathetic to the people precisely because it is institutionally insulated from politics. The judiciary is less likely to be paralyzed by political deadlock, collective action problems, and endless bargaining. It is also less costly in terms of time and money—constitutional litigation is free of charge in Taiwan, and the Court cannot refuse to delay its decisions indefinitely. More importantly, courts are fora for deliberations and debates in which social groups supported by progressive scholars, lawyers, and activists have more room to manoeuvre. In fact, the relationship between social groups and the Court is symbiotic: the Court needs social groups to bring cases to the courtroom, and social groups rely on the Court to alter current policy in the name of human rights. In this sense, justices become the agents selected by social groups, and the courtroom is just another assembly hall. Also, the judicialization of politics may be the only hope for social groups that are constrained by limited resources and lack the support of mainstream society.[59]

4. SOME NORMATIVE IMPLICATIONS

The ebb and flow of judicial power in Taiwan shed new light on several theoretical theses regarding political jurisprudence,[60] particularly those concerning why the judicialization of politics emerges in the first place and why this process varies across different countries. In particular, it shows that insurance theory faces the following challenges which suggest that political instability may not be the most pivotal factor that contributes to this phenomenon.

First, the argument of political instability cannot explain why the judicialization of politics sometimes occurs when the political environment is stable. Politicians may empower the judiciary not because they are losing, but precisely because they are in power and control the composition of the judiciary.[61] In addition, it cannot explain the judicialization of politics in autocracies, which are often quite stable for decades. In authoritarian regimes, dictators sometimes still rely on courts to solve political issues. To fully elucidate the judicialization of politics under these stable circumstances, democratic or not, arguments other than insurance theory are required. This challenge is particularly intriguing in the context of Taiwan for two reasons. First, the Court did render three decisions of political salience during the authoritarian era when political powers were highly concentrated. The KMT could have made these decisions itself, but chose to delegate to the Court. Second, democratization in Taiwan was mainly launched by political elites of the KMT regime—a process that is called "transformation."[62] One feature of transformation is that former political elites in these countries usually remain in power even after democratization; Taiwan's transition follows this pattern. Indeed, the KMT politicians had sole control over not only the agenda of political liberation, but also the content of constitutional reform, at least in the first three rounds of constitutional amendments. In other words, the DPP politicians may have preferred to transfer political

59. Rosen (2006), p. 5.
60. Shapiro & Stone Sweet (2002), pp. 19–54.
61. Mazmanyan (2015), p. 202.
62. Huntington (1993), pp. 113–14; Diamond (2008), p. 52.

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power to the judiciary because they were not going to attain power in the near future anyway, but such reasoning would not have compelled the KMT. The KMT politicians judicialized politics not because they thought that they would be replaced immediately, but because the judicialization of politics provides a more legalistic way to check the opposition party when iron-fisted disbandment is no longer constitutional.

The second problem is revealed when we consider whether the judiciary functions as independently as insurance theorists assume in practice. Courts are generally in line with mainstream society and seldom rule against the majority for a long period of time, since politicians in power may wield a variety of weapons to tame a wayward court. Due to its lack of control over the sword and the purse, it is hard for a court to stick to its original stance under political pressure.[63] Insurance arguments also fail to explain the judicialization of politics when the judiciary is an ally of the rising majority instead of the previous one.[64] Indeed, the new majority would not tolerate the judicialization of politics, let alone juristocracy, if the judiciary was conceived of as wooden and outdated. To be sure, insurance theorists do not assume that courts will always side with the minority.[65] Nevertheless, the fact that courts are generally majoritarian is enough to challenge the core argument of insurance theories. Admittedly, the insurance strategy may work for a short period of time: it took Roosevelt some time to get rid of the four horsemen. Nevertheless, it is questionable whether the judiciary can resist the winning party for an extended period of time; in other words, it is unclear how effective the insurance strategy actually is.

The third question relates to the judicialization of politics from the bottom. Unlike politicians, judges more often than not are not accountable to the electorate. Why, then, do people go to the court, instead of the congress, hoping to bring about social change? Are they haunted by "the myth of rights"?[66] As mentioned earlier, the judicialization of politics in Taiwan should be attributed in part to the efforts of lay people, cause lawyers, and NGOs. By petitioning the Court, these parties have successfully brought more political controversies into the courtroom. This has happened not only in Taiwan, but in other democracies as well. Despite this fact, insurance arguments concentrate on the interaction and calculation among political elites without paying attention to the social mobilization that forms a substantial part of judicialization of politics.

The last challenge focuses not on the validity of the theory itself, but on the concept of juristocracy inherent in some insurance arguments. Scholars have worried that, with the continual expansion of judicial power, democracy would gradually become a juristocracy in which jurists, instead of demos, rule.[67] Moreover, judges in many countries enjoy life tenure and cannot be removed from office except under some rare circumstances. Insomuch as judges are not accountable to the public, critics proclaim, a government of judges is anti-democratic and should not be tolerated. Nevertheless, the case of Taiwan vividly demonstrates that this worry about a juristocracy is based on an exaggerated, if not illusory, understanding of the potential extent of judicialization. In fact, judicial empowerment usually occurs with either the

63. Tushnet (2006), pp. 764–5.
64. Helmke (2005), pp. 20–40.
65. Ginsburg, *supra* note 9, p. 29.
66. Scheingold (1974), pp. 5–6.
67. Davis (1987), p. 562.

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explicit support or implicit acquiescence of the political branches. After all, the judiciary holds neither the sword nor the purse.[68] Given the structural weakness of the judiciary, it is unlikely that judges can resist public will for too long.

Therefore, the judiciary is more like a political agent than a political insurer in the context of the judicialization of politics.[69] Specifically, politicians pursue a variety of goals, including but not limited to regime consolidation, social control, and blame shifting. To achieve these goals, incumbent politicians possess many tools, including legislation, administrative guidance, and judicialization. While each approach has its own pros and cons, the judicialization of politics is chosen because its benefits most heavily outweigh its costs in some scenarios.[70] In fact, scholars have argued that politicians enact and maintain constitutions, constitutionalism, and constitutionalization out of instrumental rationality.[71] In a similar vein, politicians strengthen the judicial branch at the expense of their own power not because they wish to submit to judicial supremacy, but because judicialization best serves their own interests. The same rationale also explains judicialization from below: the judiciary provides another opportunity for citizens who fail to achieve their goals through political channels. In sum, the judicialization of politics is usually majoritarian in essence, since it is consistent with the interests of both citizens and politicians.

The dynamic may be better understood through a typology of judicialization of politics with two dimensions shown in Figure 3: the degrees of political support and of public support.[72] Specifically, lay people go to court when human rights issues emerge and the political channel is jammed either because these issues are politically risky or because they are not politically rewarding. In Taiwan, issues concerning gay rights and environmental protection fall into this category. This does not mean that the judicialization of politics from below will not succeed. Family-law cases mentioned above are the best examples in which democratic forces work with courts to change the Civil Code. Under the leadership of public-interest lawyers and social activists, the NGOs chose cases carefully and strategically in order to persuade the justices.[73]

By contrast, most citizens pay less attention to separation-of-powers issues, such as the nomination of Control Yuan or National Communications Commission members. These issues, nevertheless, are of political salience to politicians because they directly affect the wax and wane of political powers of a certain party. Third, some issues regarding high law-making will attract the attention of both the public and the politicians. Interpretation Nos. 261 and 499 are the paradigmatic examples, in which the controversies relate to the constitutionality of constitutional amendments—an issue that cannot be solved by normal politics. Hence, both the public and politicians can do nothing but rely on the Court, which functions as the last bastion of constitutionalism. Finally, some decisions are counter-majoritarian in the sense that they are supported neither by the public nor by politicians. It rarely occurs, but does. Interpretation No. 603 is such an example in which a small group of legal elites petitioned the Court, challenging and successfully changing a national fingerprint

68. The Federalist No. 78 (Hamilton).
69. Shapiro & Stone Sweet, *supra* note 60, pp. 21–2.
70. Vanberg (2008), pp. 103–12.
71. Yeh & Chang (2011), pp. 816–20.
72. This figure is inspired and adapted from Dressel (2014), p. 6.
73. Chang, *supra* note 51.

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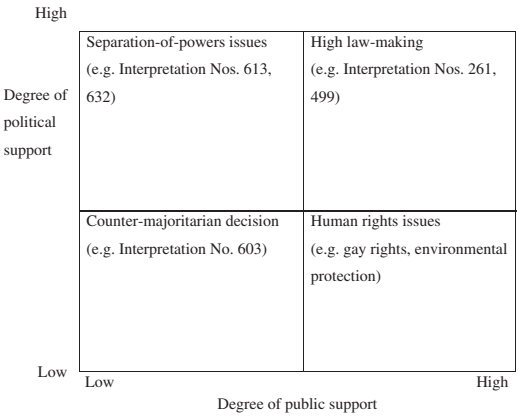

Figure 3. Judicialization of Politics in Taiwan

policy that are endorsed by the majority of people. In short, it is clear from Figure 3 that the judicialization of politics results from either public or political support under most circumstances.

This argument, in which the judiciary is an agent of politicians and citizens, may be less vulnerable to two traditional yet still powerful critiques of judicial expansion. The first critique contends that the judicialization of politics will inevitably lead to the politicization of the judiciary and thereby undermine the neutrality and legitimacy of judicial decisions.[74] The second holds that judicial intervention in the political arena will damage the electoral accountability of the government, because judges are seldom popularly elected and, because they are life-tenured, cannot be removed from office except for some grave misconduct.

To begin with, there is no denying that the judicialization of politics and the politicization of the judiciary are indeed two sides of the same coin.[75] As the judiciary becomes increasingly influential in the political field, it is natural that politicians will pay more attention to who will serve on the bench. It follows that, some scholars argue, justices appointed in this way will be more partisan. When the judiciary as a whole is perceived by the public as politically biased, its legitimacy and authority will seriously be tainted. In Taiwan, nonetheless, this critique is not well grounded.[76] For one thing, presidents cannot nominate candidates for the Court at will, since the Judicial Yuan Organization Act expressly stipulates five criteria that candidates must meet. These qualifications endeavour to diversify the composition of the bench so that judges, prosecutors, lawyers, professors, and politicians can all be potential candidates. Moreover, the Act prescribes that "the number of Justices with a qualification as prescribed ... shall not exceed 1/3 of the total number of Justices."[77] Both limit the president's discretion in choosing candidates. Second, a politicized process of nomination does not mean that judges will vote along partisan lines.[78] Ideological drift does

74. Gibson & Caldeira (2009), p. 2.
75. Ferejohn, *supra* note 33, pp. 63–5.
76. Peretti (1999), pp. 161–88.
77. Art. 4 of Judicial Yuan Organization Act (Taiwan) (2015).
78. Posner (2008), pp. 9–10.

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occur, and many justices have surprised their nominating presidents from time to time. In Taiwan, it requires a super-majority of votes to pass a constitutional decision. Given this high threshold, it is less likely to issue any clearly biased decision since the minority of justices can easily boycott. Third, personal ideology or policy outcomes may not be the most important goal justices take into consideration. The esteem of other audiences, such as social and professional groups, may sometimes affect a judge's decision.[79] One justice who was law professor before appointment admits that he does put much emphasis on scholars' opinions.[80] Finally, positivity bias[81] seems to exist in Taiwan: although half of Taiwanese people did not know the exact authority of the Court,[82] more than 90% of the interviewees believed that its decisions should be obeyed by both the public and politicians; moreover, according to the same poll, the Court is regarded as the most trustworthy branch among the three whenever a significant policy controversy occurs.

The second critique overstates judicial finality or supremacy[83] on the one hand, and undervalues the role of majoritarianism in the process of the judicialization of politics on the other. Many opponents of judicial review and the judicialization of politics contend that it is undemocratic for unelected judges to have the final say over constitutional controversies, let alone issues of political salience. Nevertheless, it is questionable whether the courts really have the final word even after issuing their decisions. In fact, "reports of the finality of judicial decisions are greatly exaggerated."[84] Litigation is usually not a single-round game; indeed, more often than not "a court ruling triggers new legislation, which triggers further litigation, which triggers more legislation."[85] In other words, the political branches may refuse to implement decisions, revise statutes, or even rewrite constitutions to resist the judiciary. From this perspective, the concept of judicial supremacy resulting from judicial finality is an exaggeration if not an illusion. Furthermore, "prominent political scientists are increasingly rejecting the counter-majoritarian difficulty as the proper framework for studying and evaluating judicial power"[86]; many legal scholars are doing the same.[87] This is because not all decisions that strike laws down on constitutional grounds should be labelled as counter-majoritarian.[88] It is possible that the law declared unconstitutional no longer represents the majority. It is also possible that the issue crosscuts existing political alliances so that there is no majority at all.[89] Admittedly, the judicialization of politics, either from above or from below, is not equivalent to popular constitutionalism.[90] This does not mean, however, that the public plays no role in the process of judicial expansion. In Taiwan,

79. Baum (2006), pp. 88–117.

80. Former Justice Tzu-Yi Lin once admitted in a faculty workshop that he did pay attention to constitutional law scholars' responses when he served on the bench.

81. Gibson & Caldeira, *supra* note 74, pp. 7–14.

82. Judicial Yuan (2015), Judicial Statistics, online <http://www.judicial.gov.tw/juds/u104.pdf>.

83. Keck (2014), p. 253.

84. Lovell & Lemieux (2006), pp. 109–10.

85. Silverstein (2009), p. 38.

86. Graber (2008), p. 361.

87. Balkin (2011), pp. 287–93; Dahl (1957), pp. 283–6, 291–4; Law (2009), pp. 728–30; Levinson (2011), pp. 733–45; Marshall (2008), pp. 153–62; McCloskey (2010), pp. 260–1.

88. Barnum (1993), pp. 278–80.

89. Graber (1993), p. 37–9.

90. Kramer (2001), pp. 16–74; Kramer (2004), pp. 207–27; Post & Siegel (2007), p. 373.

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empirical study has demonstrated that the Court rules in line with political majority most of the time.[91] It follows that the judicialization of politics, which usually takes place with the acquiescence, if not invitation, of the ruling politicians, is similarly in line with public opinion. From this perspective, it would be misleading to label the judicialization of politics as either counter-majoritarian or anti-democratic.

Finally, the judiciary may not be more counter-majoritarian than the elected branches. Nowadays, corporations and conglomerates have disproportionate influence on the policy-making process through campaign financing and political donations. In fact, the situation has deteriorated to the extent that democracy is now branded "moneyocracy," in which the rich, rather than the public, rule. Furthermore, political polarization renders the political branches less majoritarian.[92] Under these circumstances, the expansion of the judiciary provides "the 99%" another avenue to make politicians more accountable to the people. From the perspective of public choice theory, judicialization is a more financially accessible way for the public to influence the political system.[93] Given the decision-making process of the judiciary, it is possible that the judicialization of politics can make the political system more consonant with public opinion. In Taiwan, the KMT is one of the richest political parties in the world, and the society has become more and more polarized in the past two decades.[94] Both of these facts may distort the democratic process and thwart public will. In light of this, the judicialization of politics, particularly when it proceeds from below, is "better understood as a form of democratic politics than as an effort to subvert such politics."[95] This point is evidenced by the fact that the ruling KMT, the DPP, and many NGOs have repeatedly resorted to the Court whenever there is a political stalemate. In other words, the judicialization of politics takes place with the consent of both parties and the public in Taiwan.[96]

To clarify, the paper does not suggest that every social movement that spurs the judicialization of politics can prevent the judiciary from being politicized. Indeed, public-interest litigations that focus on human rights issues are usually irrelevant to the politicization of the judiciary. The lack of standing in separation-of-power cases is another hurdle difficult to overcome. This does not mean, however, that the judicialization of politics from below cannot prevent the politicization of the judiciary in a less straightforward way. Specifically, the bottom-up judicialization can raise people's consciousness about law and the Court. This may prevent the Court from being overly biased, as the justices know they are being watched. In fact, some empirical studies have suggested the Court is not as ideological as its American counterpart.[97] The Interpretation No. 627, which related to

91. Lin (2014), pp. 103–60.

92. Graber, *supra* note 86, pp. 372–81.

93. Merrill (1997), pp. 222–6.

94. Yeh (2010), pp. 915–20, 931–8.

95. Keck, *supra* note 83, p. 255.

96. To be sure, one recent poll demonstrates that there is a sharp decrease in citizens' trust with the judiciary. However, the poll concentrates on people's attitude toward ordinary courts, instead of the Constitutional Court. To my knowledge, the most recent poll on the trustworthiness of te Court was done in 2010, in which the Court is regarded as more trustworthy than the president and the legislature. In the same poll, more than 95% of interviewees believe the Court's decisions should be followed. It is unclear, however, to what extent people still trust the Court today unless there are more polls that focus specifically on its performance and popularity. Nevertheless, at least most, if not all, of the Court's recent rulings are obeyed by the political branches. That is, the danger of the so-called low equilibrium of judicial review seems not so urgent. See Ginsburg, *supra* note 9.

97. Garoupa et al. (2011), p. 1.

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former President Chen's criminal immunity, may be one of the best examples that vividly demonstrate the neutrality of the Court even in a politically divided society. All of the justices at that time were appointed by President Chen. Instead of issuing a partisan decision, the Court delivered a decision that is generally regarded as disinterested. Moreover, no justice issued any personal opinion—a rare occurrence in recent years. To be sure, this decision is not petitioned by citizens, but it was a high-profile case that attracts many people's attention at that time.

5. CONCLUSION

After the third wave of democratization and constitutionalization around the world, the judicialization of politics has become the next global trend that can be observed in young democracies. In Taiwan and elsewhere, the judicialization of politics is particularly evident in three domains: the expansion of judicial power, the shift of political equilibrium, and the use of litigation to effect social change. On the supply side, the Court, with all of its newly acquired powers, becomes more capable and willing to intervene in policy-making. On the demand side, politicians and citizens increasingly look to the Court for help for divergent reasons. Despite this clear history of the judicialization of politics in Taiwan over the last few decades, the pace of this process has slowed down since the second party turnover. Taiwan has not become a state in which "the judiciary could control economic, social and political growth."[98] The reason for this development is not yet crystal clear, but changes in Taiwan's social and political environment may account for the ebb and flow of the judicialization of politics. In particular, since 2008, political power in Taiwan has been concentrated in the hands of the KMT. In addition, statutory revision in the past three decades has provided social groups with more channels to pursue their preferred policies, making them less likely to petition the Court. This paper suggests that the judicialization of politics in Taiwan occurs not only because politicians want to buy political insurance, but also because they try to achieve different goals, such as facilitating democratic transition, encouraging political dialogue, and solving constitutional crises, when they are in power. Deciding to let the judges decide may sometimes be a better option.

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98. Davis, *supra* note 67, p. 562.

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