

**UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT IN TAIWAN:
A RETROSPECTIVE ANALYSIS OF JUDICIAL YUAN
INTERPRETATION NO. 499 [2000]**

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Abstract

This article looks back at Judicial Yuan Interpretation No. 499 [2000] twenty years on. It examines the ways in which the legal arguments of unconstitutional constitutional amendment were constructed by the counsels of the appellants and how the Justices ruled accordingly. The main text of the Constitution said nothing about the exercise of constitutional amending power, meaning that it was being misused by the National Assembly—posing a challenge to Taiwan’s political taboo on the extension of terms of office. The disputed constitutional amendments were therefore struck down by the Justices as the guardians of the constitution, thereby founding the principle of limited constitutional amending power in Taiwan.

I. INTRODUCTION

Judicial Yuan Interpretation No. 499 [2000] represents a milestone in the legal history of Taiwan. It proclaimed the Fifth Amendment of the Additional Articles of the Constitution of the

Republic of China¹ as the unconstitutional constitutional amendment² preventing the exercise of the constitutional amending power from “[bringing] down the constitutional normative order in its entirety”³ when the main text of the Constitution⁴ was silent. The Interpretation was filed by Hau Lung-Pin and Cheng Pao-Ching on October 28, 1999, and by Hung Chao-Nan on November 18, 1999.⁵ The Justices heard the case on November 26, 1999,⁶ and expeditiously promulgated their decision on March 24, 2000.⁷

Unlike the German Basic Law (*Grundgesetz*),⁸ there was (and is) “[n]o eternity clause in the Constitution”⁹ of the Republic of China (Taiwan). Consequently, the legal limitations of Taiwan’s

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¹ MINGUO XIANFA amend. (民國憲法增修條文) [Additional Articles of the Constitution of the Republic of China] (1999) (Taiwan).

² SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000) [hereinafter *Shizi No. 499 Jieshi*].

³ SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000) (Official translation) [hereinafter *Shizi No. 499 Jieshi Official Translation*].

⁴ MINGUO XIANFA (民國憲法) [Constitution of the Republic of China] (Adopted on Dec. 25, 1946, by the Constituent National Assembly convened in Nanking; promulgated by the Nationalist Government on Jan. 1, 1947; entered into force on Dec. 25, 1947) (Taiwan).

⁵ SHIZI NO. 499 JIESHI YIJIANSHU CHAOBENDENG WENJIAN (釋字第 499 號解釋意見書抄本等文件) [Judicial Yuan Interpretation No. 499 Appendix] (2000) [hereinafter *Judicial Yuan Interpretation*].

⁶ JUDICIAL YUAN, CONSTITUTIONAL COURT, R.O.C., <http://cons.judicial.gov.tw/jcc/zh-tw/categories/milestonelist/y21lmta1> [<https://perma.cc/9JQT-CD6P>] (last visited Aug. 16, 2020).

⁷ SHIZI NO. 499 JIESHI, *supra* note 2.

⁸ GRUNDGESETZ [GG] [BASIC LAW], § 79 ¶3, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/PBP4-5G3S>] (1949).

⁹ SHIZI NO. 499 JIESHI OFFICIAL TRANSLATION, *supra* note 3, at ¶ 9.

constitutional amending power remained open to argument.¹⁰ However, the Justices ruled in accordance with the German theory of limited constitutional amending power¹¹ originated by Carl Schmitt,¹² holding that some constitutional provisions “are [not] open to change through constitutional amendment,”¹³ because such provisions—despite not being explicitly stated—“are integral to the essential nature of the Constitution and underpin the constitutional normative order.”¹⁴ Any constitutional amendment which contradicts these provisions is therefore considered an unconstitutional constitutional amendment.¹⁵

Accordingly, the Fifth Amendment of the Additional Articles of the Constitution of the Republic of China¹⁶ was considered unconstitutional for three main reasons: that it violated the principles of popular sovereignty,¹⁷ due process,¹⁸ and the *nemo dat* rule.¹⁹ However, what really angered Taiwanese citizens²⁰ was the extension of the terms of office of the members of the National Assembly by two years and forty-two days,²¹ and of the members of the Legislative Yuan by five months.²² The Chinese political tradition of lifelong

¹⁰ See, e.g., JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Tseng, H., dissenting).

¹¹ See generally AOIFE O’DONOGHUE, CONSTITUTIONALISM IN GLOBAL CONSTITUTIONALISATION 54–86 (Cambridge Univ. Press, 2014).

¹² CARL SCHMITT, VERFASSUNGSLEHRE [CONSTITUTIONAL THEORY] 75–87 (Duncker & Humblot 1928); see also ULRICH K. PREUB, CARL SCHMITT AND THE WEIMAR CONSTITUTION, in THE OXFORD HANDBOOK OF CARL SCHMITT 477–479 (Jens Meierhenrich & Oliver Simons eds., Oxford Univ. Press 2016).

¹³ SHIZI NO. 499 JIESHI OFFICIAL TRANSLATION, *supra* note 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ MINGUO XIANFA amend. (民國憲法增修條文) [Additional Articles of the Constitution of the Republic of China] (1999) (Taiwan).

¹⁷ See generally DANIEL LESSARD LEVIN, REPRESENTING POPULAR SOVEREIGNTY: THE CONSTITUTION IN AMERICAN POLITICAL CULTURE 1–194 (State Univ. New York Press, 1999).

¹⁸ See generally DENNIS D. RILEY & BRYAN E. BROPHY-BAERMANN, BUREAUCRACY AND THE POLICY PROCESS: KEEPING THE PROMISES 298 (Rowman & Littlefield 2006) (indicating that “[b]y definition, due process is a matter of procedure”).

¹⁹ See generally ALASTAIR HUDSON, EQUITY AND TRUSTS 790 (Cavendish Publishing, 4th ed. 2005).

²⁰ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

²¹ MINGUO XIANFA amend. § 1 (1999) (Taiwan).

²² MINGUO XIANFA amend. § 4 (1999) (Taiwan).

tenure²³ was already a political taboo in Taiwan, and it had been since the legendary *Judicial Yuan Interpretation No.261* [1990], which stated that no one could extend any term of office for any reason from this point onwards, unless the country was once again put into a state of emergency.²⁴

II. HISTORICAL INSIGHTS

The Fifth Amendment of the Additional Articles of the Constitution of the Republic of China was revised by the National Assembly on September 3, 1999 and promulgated by the President on September 15, 1999.²⁵ However, this Amendment was a surprise to Taiwanese citizens, because it comprised an extension of the terms of office of members of the National Assembly by two years and forty-two days,²⁶ and of members of the Legislative Yuan by five months.²⁷ Furthermore, it transformed the role of members of the National Assembly from representatives of the people²⁸ to representatives of political parties,²⁹ apportioning the seats of members of the new National Assembly only in accordance with the “votes that the candidates nominated by each political party and all the independent candidates receive in the parallel election for the Members of the Legislative Yuan.”³⁰ In other words, the Fifth Amendment came as a political, legal and constitutional shock to the Republic of China (Taiwan) as a young democracy at the time. Nigel N.T. Li, who was one of the participants in this historical event

²³ MEIRU LIU, *INTELLECTUAL DISSIDENTS IN CHINA* 58 (Edwin Mellen Press 2001) (indicating that the Chinese “traditional rule [was] lifetime tenure for the ruler”).

²⁴ Compare SHIZI NO. 31 JIESHI (釋字第 31 號解釋) [Judicial Yuan Interpretation No. 31] (1954), with SHIZI NO. 261 JIESHI (釋字第 261 號解釋) [Judicial Yuan Interpretation No. 261] (1990), and SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000).

²⁵ MINGUO XIANFA amend. (民國憲法增修條文) [Additional Articles of the Constitution of the Republic of China] (1999) (Taiwan).

²⁶ MINGUO XIANFA amend. § 1 (1999) (Taiwan).

²⁷ MINGUO XIANFA amend. § 4 (1999) (Taiwan).

²⁸ Compare MINGUO XIANFA §§ 25–34 (1947) (Taiwan), with MINGUO XIANFA amend. § 1 (1997) (Taiwan).

²⁹ MINGUO XIANFA amend. § 1 (1999) (Taiwan).

³⁰ SHIZI NO. 499 JIESHI OFFICIAL TRANSLATION, *supra* note 3, ¶ 10; see also MINGUO XIANFA amend. § 1 (1999) (Taiwan).

concluded in his constitutional law textbook that the Amendment provided an opportunity to consider the merits of democratism and constitutionalism³¹ through the event and its subsequent judicial review,³² i.e., *Judicial Yuan Interpretation No. 499* [2000]. Li stated that:

This review determined the limits of constitutional amending power whilst enlightening us to ponder two fundamental questions regarding democratism and constitutionalism: How to prevent the majority from becoming tyrannical in the name of democracy, [i.e. the tyranny of the majority], and how to deter representatives from betraying the electorate.³³ — Nigel N.T. Li (2007)

Judicial Yuan Interpretation No. 499 [2000] answered both questions. In terms of democratism, the Interpretation declared that “[s]ome constitutional provisions are integral to the essential nature of the Constitution and underpin the constitutional normative order. If such provisions are open to change through constitutional amendment, adoption of such constitutional amendments would bring down the constitutional normative order in its entirety.”³⁴ And in terms of constitutionalism, it declared that “the legitimacy of representative democracy lies in the adherence of elected political representatives to their social contract with the electorate. Its cardinal principle is that the new election must take place at the end of the fixed electoral term.”³⁵ In other words, the Justices in *Judicial Yuan Interpretation No. 499* [2000] were warning the National Assembly of the limits of democracy, stating that “a democratic decision . . .

³¹ Nigel N.T. Li’s original phrasing is “democratism and republicanism.” However, Justice Su Jyun-Hsiung, as a mentor of Li, referred to the same concept using the phrase “democratism and constitutionalism” in his concurring opinion. In order to avoid misconstruction, the phrase “democratism and constitutionalism” is therefore chosen.

³² See generally NIGEL N.T. LI, AN LI XIAN FA I: XIAN FA YUAN LI YU JI BEN REN QUAN GAI LUN [CONSTITUTIONAL CASE STUDIES I: AN INTRODUCTION TO THE FUNDAMENTAL PRINCIPLES OF THE CONSTITUTION AND THE FUNDAMENTAL RIGHTS] 91–100 (San Min Books 2007).

³³ *Id.* at 97 (Authors’ translation).

³⁴ SHIZI NO. 499 JIESHI OFFICIAL TRANSLATION, *supra* note 3.

³⁵ *Id.*

cannot derogate or even destroy democratism *per se*.”³⁶ “This is what is called the problem of tyranny of the majority,”³⁷ under which democratic decisions are “so unjust that they undermine the legitimacy of democracy.”³⁸ However, the Justices also reaffirmed the importance of democracy for the performance of constitutionalism, stating that “constitutionalism is only a piece of decoration . . . unless and until it embraces democracy.”³⁹ This is the problem of constitutionalism, under which representative democracy is a necessity, but “[m]en of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people.”⁴⁰ Essentially, this means that some decisions cannot be made by majority vote,⁴¹ and constitutional safeguards against the representatives’ betrayal are indispensable too.⁴²

Perhaps *Judicial Yuan Interpretation No. 499* [2000] shows how impractical it is of a young democracy attempts to constrain its legislative or constitutional amending power only through political means.⁴³ “Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights The constraints upon its exercise by Parliament are ultimately political, not legal.”⁴⁴ Even if we consider that political constraint works perfectly in the United Kingdom, it is totally

³⁶ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

³⁷ THOMAS CHRISTIANO, INTRODUCTION, IN *PHILOSOPHY AND DEMOCRACY: AN ANTHOLOGY* 10 (Thomas Christiano ed., Oxford Univ. Press 2003).

³⁸ *Id.*

³⁹ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

⁴⁰ JAMES MADISON, THE FEDERALIST: No.10, in *THE FEDERALIST* 47 (George W. Carey & James McClellan eds., Liberty Fund 2001) (1788).

⁴¹ *See generally* THOMAS CHRISTIANO, INTRODUCTION, in *PHILOSOPHY AND DEMOCRACY: AN ANTHOLOGY* 10–12 (Thomas Christiano ed., Oxford Univ. Press 2003).

⁴² *See generally* JAMES MADISON, THE FEDERALIST: No.10, in *THE FEDERALIST* 47 (George W. Carey & James McClellan eds., Liberty Fund 2001) (1788).

⁴³ *Compare* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3–4 (8th ed., Macmillan 1915), with *R v. Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 (appeal taken from Eng.) (Lord Hoffmann elaborating the constraints upon legislative power shall be “political, not legal”).

⁴⁴ *R v. Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 (appeal taken from Eng.)

impractical in Taiwan. Instead, Carl Schmitt's theory⁴⁵ of limited constitutional amending power⁴⁶ is indispensable. And this was the lesson the citizens of Taiwan learned from *Judicial Yuan Interpretation No. 499* [2000]—no politics should lie beyond the reach of judicial review, i.e., the judicialisation of politics⁴⁷ or megapolitics.⁴⁸

When looking back on *Judicial Yuan Interpretation No. 499* [2000] in its twentieth anniversary year, it is no exaggeration to say that the hard work of at least three generations brought an end to the Chinese political tradition of lifelong tenure.⁴⁹ The Interpretation set a milestone marking Taiwan's progress towards democratisation and constitutionalisation, because no politician in this country dare to extend his or her term of office from that point onward. In all truth, it was unlikely that Taiwanese citizens fully understood the theory of limited constitutional amending power,⁵⁰ or the principles of popular sovereignty⁵¹ and due process.⁵² However, it is a matter of record that citizens were angered by the National Assembly's decision to self-extend of the term of office,⁵³ albeit with limited knowledge of the *nemo dat* rule.⁵⁴ If the members of the National Assembly could extend their term of office again,⁵⁵ it would be no different from the restoration of Chinese political tradition.

Forty-six years before *Judicial Yuan Interpretation No. 499* [2000], first generation Justices ruled that “our state has been undergoing a severe calamity, which makes re-election of the second

⁴⁵ SCHMITT, *supra* note 12, at 75–87; *see also* PREUB, *supra* note 12, at 477–479.

⁴⁶ *See generally* O'DONOGHUE, *supra* note 11, at 54–86.

⁴⁷ RAN HIRSCHL, THE JUDICIALIZATION OF POLITICS, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE 253–274 (Robert E. Goodin ed., Oxford Univ. Press 2011).

⁴⁸ Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANNU. REV. POLITICAL SCI. 93, 93–118 (2008).

⁴⁹ LIU, *supra* note 23, at 58 (indicating that the Chinese “traditional rule [was] lifetime tenure for the ruler”).

⁵⁰ *See generally* O'DONOGHUE, *supra* note 11, at 54–86.

⁵¹ *See generally* LEVIN, *supra* note 17, at 1–194.

⁵² *See* RILEY & BROPHY-BAERMANN, *supra* note 18, at 298 (indicating that “[b]y definition, due process is a matter of procedure”).

⁵³ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

⁵⁴ *See generally* HUDSON, *supra* note 19, at 790.

⁵⁵ MINGUO XIANFA amend. § 1 (1999) (Taiwan).

term of both Yuans *de facto* impossible.”⁵⁶ Hence, all of the first-term members of Congress “shall continue to exercise their respective powers”⁵⁷ before new members of both chambers “are elected, convene and are convoked in accordance with the laws.”⁵⁸ This decision was made in 1954, during the Cold War.⁵⁹ It was at this time that the Government of the Republic of China “continued to declare its intention to retake mainland China”⁶⁰ after state secession in 1949,⁶¹ asserting its constitutional legitimacy to represent all of China.⁶² Against such a background, the Justices “came to this decision pragmatically: compared to having no legislators representing the entire China, it would be wiser to retain the old one.”⁶³ However, “the decision offered further hints at the National Assembly’s desire for legislative power expansion,”⁶⁴ granting *de facto* lifelong tenure to members of Congress before national reunification.⁶⁵

Twenty-three years before *Judicial Yuan Interpretation No. 499* [2000], members of the National Assembly with *de facto* lifelong tenure attempted to transform the *de facto* lifelong tenure granted by the Justices in *Judicial Yuan Interpretation No. 31* [1954] into the *de jure* lifelong tenure according to the Temporary Provisions of the Constitution.⁶⁶ This is laid out in *Judicial Yuan Interpretation*

⁵⁶ SHIZI NO. 31 JIESHI (釋字第 31 號解釋) [Judicial Yuan Interpretation No. 31] (1954) (Official translation).

⁵⁷ *Id.* (Official translation).

⁵⁸ *Id.* (Official translation).

⁵⁹ See generally DENNY ROY, TAIWAN: A POLITICAL HISTORY 105–151 (Cornell Univ. Press, 2003).

⁶⁰ LARS SCHERNIKAU, ECONOMICS OF THE INTERNATIONAL COAL TRADE: WHY COAL CONTINUES TO POWER THE WORLD 191 (Springer, 2nd ed. 2016).

⁶¹ See generally MICHAEL DILLON, CHINA: A MODERN HISTORY 228–255 (I.B. Tauris 2012).

⁶² ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 1451 (David S. Clark ed., SAGE Publications 2007) (indicating that “[i]n 1972, the United Nations (UN) rejected the Taiwan government’s claim to represent China in favor of the People’s Republic of China (PRC), governed by the Chinese Communist Party”).

⁶³ DAVID K.C. HUANG, JUDICIAL SUPREMACY IN TAIWAN: STRATEGIC MODELS AND THE JUDICIAL YUAN, 1990–1999 237 (GRIN 2019) (2016).

⁶⁴ *Id.*

⁶⁵ *Id.* at 236–238.

⁶⁶ Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion § 6II (1948/1972) (Adopted on Apr. 18,

No.150 [1977],⁶⁷ but Justices of the second generation frustrated the political attempts of the National Assembly, holding that “[p]aragraph 6 of the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion does not alter the term of elected central representatives under the Constitution.”⁶⁸ In other words, members of Congress were judicially allowed to “continue to exercise their respective powers”⁶⁹ only because “there were no vacancies to fill.”⁷⁰ The *de facto* lifelong tenure was simply a *pis aller* in the eyes of the Justices, and the demand for *de jure* lifelong tenure was never a possibility.⁷¹

Ten years before *Judicial Yuan Interpretation No. 499* [2000], members of Congress with *de facto* lifelong tenure were dismissed by the Justices of the second generation in *Judicial Yuan Interpretation No.261* [1990] on the basis of *clausula rebus sic stantibus*.⁷² This judicial decision opened the gate for Taiwan’s peaceful democratisation,⁷³ which was aimed at ending the Chinese political tradition of lifelong tenure⁷⁴ in Taiwan, under which the Government was ordered that it “[should] schedule, in due course, a nationwide election of the next members of Congress.”⁷⁵ The Justices also ordered that “those members of the First Congress who have not been re-elected shall cease exercising their powers no later than December 31, 1991.”⁷⁶ The Justices ruled that:

[P]eriodic election of members of Congress is a sine qua non to reflect the will of the people and implement

1948 by the National Assembly; entered into force on May 10, 1948; abolished on May 1, 1991 by the President in line with the constitutional court order issued by the Judicial Yuan in *Judicial Yuan Interpretation No. 261* [1990]).

⁶⁷ See generally HUANG, *supra* note 63, at 238–239.

⁶⁸ SHIZI NO. 150 JIESHI (釋字第 150 號解釋) [Judicial Yuan Interpretation No. 150] (1977) (Official translation).

⁶⁹ SHIZI NO. 31 JIESHI, *supra* note 56 (Official translation).

⁷⁰ SHIZI NO. 150 JIESHI, *supra* note 68, at ¶ 2 (Official translation).

⁷¹ SHIZI NO.150 JIESHI, *supra* note 68.

⁷² HUANG, *supra* note 63, at 245–247.

⁷³ See generally HUANG, *supra* note 63, at 221–262.

⁷⁴ LIU, *supra* note 23, at 58 (indicating that the Chinese “traditional rule [was] lifetime tenure for the ruler”).

⁷⁵ SHIZI NO. 261 JIESHI (釋字第 261 號解釋) [Judicial Yuan Interpretation No. 261] (1990) (Official translation).

⁷⁶ *Id.* (Official translation).

constitutional democracy. Neither *J.Y. Interpretation No. 31*, nor Article 28, Paragraph 2 of the Constitution, nor Section 6, Paragraphs 2 and 3 of the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion allow the members of the First Congress to exercise powers indefinitely. None of these provisions was intended to change their terms of office or prohibit election of new members of Congress.⁷⁷

In a nutshell, *Judicial Yuan Interpretation No. 499* [2000] can be seen as the final instalment of the tetralogy of anti-lifelong tenure in Taiwan. It summarises the hard work of at least three generations of Chinese (or Taiwanese) jurists.

III. METHODOLOGY

This article looks back at *Judicial Yuan Interpretation No. 499* [2000] from a perspective of twenty years. It analyses the way on which the legal arguments of unconstitutional constitutional amendment were constructed by the appellants' counsels and how the Justices ruled accordingly.⁷⁸ Unlike the German Basic Law (*Grundgesetz*),⁷⁹ the main characteristic of this case lies in the absence of an "eternity clause in the Constitution,"⁸⁰ which meant that the case turned into a fierce debate on the spirit of the Constitution⁸¹ because the main text of the Constitution was (and still is) silent. In other words, the merit of this case to the international world lies in its doctrinal debate over the issues of constitutional

⁷⁷ *Id.* (Official translation).

⁷⁸ Compare SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000), with SHIZI NO. 499 JIESHI YIJIANSHU CHAOBENDENG WENJIAN (釋字第 499 號解釋意見書抄本等文件) [Judicial Yuan Interpretation No. 499 Appendix] (2000).

⁷⁹ GRUNDGESETZ [GG] [BASIC LAW], § 79 ¶3, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/PBP4-5G3S>] (1949).

⁸⁰ SHIZI NO. 499 JIESHI OFFICIAL TRANSLATION, *supra* note 3, at ¶ 9.

⁸¹ MINGUO XIANFA (民國憲法) [Constitution of the Republic of China] (Adopted on Dec. 25, 1946, by the Constituent National Assembly convened in Nanking; promulgated by the Nationalist Government on Jan. 1, 1947; entered into force on Dec. 25, 1947) (Taiwan).

amending power, popular sovereignty, due process and the *nemo dat* rule. The political controversy behind this case, it is beyond the remit of this article, although it is worth considering separately.

IV. HAU LUNG—PIN'S INSTRUMENT OF APPEAL

The fundamental hypothesis of constitutionalism is that power tends to corrupt [and will always be used] abusively. It would therefore be irrational to rely entirely on the self-restraint of the designated organ *per se* for our constitutional amendments. [If there is no legal limit to] constitutional amending power, [it will become] a power that can ruin the constitution to the extent that no remedy will be available.⁸² —Nigel N.T. Li and Yeh Ching-Yuan (1999)

The first instrument of appeal enshrined in *Judicial Yuan Interpretation No. 499* [2000] was filed by Congressman Hau Lung-Pin⁸³ with Nigel N.T. Li,⁸⁴ Esq. (as lead counsel) and Yeh Ching-Yuan,⁸⁵ Esq. (as counsel).⁸⁶ It was submitted to the Judicial Yuan on October 28, 1999 with the signatures of 112 congressmen and congresswomen of the Legislative Yuan.⁸⁷ With the benefit of hindsight, it outweighs the other instruments of appeal because it is no exaggeration to state that the majority opinion of the *Judicial Yuan Interpretation No. 499* [2000] approved all of the principal assertions made in this instrument in line with the legal-constitutional theories provided therein.⁸⁸

⁸² JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors' translation).

⁸³ *Id.*

⁸⁴ LL.B. (Soochow University 1977), LL.M. (National Taiwan University 1980), and LL.M. (Harvard 1983).

⁸⁵ LL.B. (National Chengchi University 1994), LL.M. (National Taipei University 1997), LL.M. (UPenn 2002), J.D. (UPenn 2004), and S.J.D. (UPenn 2005).

⁸⁶ TITAN ATTORNEYS-AT-LAW, <http://www.titanlaw.com.tw/blog/?p=2458> [<https://perma.cc/U72F-H4VW>] (last visited 2 February 2020).

⁸⁷ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

⁸⁸ *Compare* SHIZI No. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000), *with* SHIZI No. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] App'x (2000).

The *alma mater* of Nigel N.T. Li is Harvard,⁸⁹ whilst Yeh Ching-Yuan obtained his S.J.D. degree at the University of Pennsylvania in 2005.⁹⁰ However, their argument was based on the German theory of limited constitutional amending power⁹¹ originated by Carl Schmitt,⁹² who asserted that no constitutional amendment should be deemed constitutional if it was incompatible with the fundamental framework⁹³ of the Constitution⁹⁴ because “the constitutional amending power is a constituted power.”⁹⁵ This meant that according to Li and Yeh, if a constitutional amendment raises serious doubts about its constitutionality because of “manifest and gross flaws”⁹⁶ (Gravitaets-bzw. Evidenztheorie⁹⁷), Carl Schmitt’s concept of the guardian of the constitution,⁹⁸ i.e., der Hüter der Verfassung,⁹⁹ should be applied to render the amendment judicially reviewable¹⁰⁰ (Prüfungsmaßstab¹⁰¹).

⁸⁹ LEE AND LI ATTORNEYS-AT-LAW, <http://www.leeandli.com.tw/EN/Professions/3/116.htm> [<https://perma.cc/FE9X-SJQF>].

⁹⁰ TITAN ATTORNEYS-AT-LAW, http://www.titanlaw.com.tw/blog/?page_id=634 [<https://perma.cc/KGM3-7SDB>].

⁹¹ See generally O’DONOGHUE, *supra* note 11, at 54–86.

⁹² SCHMITT, *supra* note 12, at 75–87; see also PREUB, *supra* note 12, at 477–479.

⁹³ Compare GRUNDGESETZ [GG] [BASIC LAW], § 79 ¶3, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/PBP4-5G3S>] (1949), with U.S. Const. art. V (1789), and MINGUO XIANFA § 1 (1947) (Taiwan).

⁹⁴ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

⁹⁵ *Id.* (Authors’ translation); see also SCHMITT, *supra* note 12, at 91–99 (arguing that the constitutional amending power is a constituted power rather than a constituent power. The former is the power originated in the constitution and the latter is the power that constitutes the constitution. Hence, the former is limited by the constitution, but the latter is not).

⁹⁶ SHIZI No. 499 JIESHI OFFICIAL TRANSLATION, *supra* note 3, at ¶ 1.

⁹⁷ SHIZI No. 419 JIESHI (釋字第 419 號解釋) [Judicial Yuan Interpretation No. 419] ¶ 13 (1996).

⁹⁸ Compare CARL SCHMITT, DER HÜTER DER VERFASSUNG [THE GUARDIAN OF THE CONSTITUTION] 1–11 (Verlag Von J.C.B. Mohr 1931), with SHIZI No. 499 JIESHI YIJIANSHU CHAOBENDENG WENJIAN (釋字第 499 號解釋意見書抄本等文件) [Judicial Yuan Interpretation No. 499 Appendix] (2000).

⁹⁹ See DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 70–85 (Oxford Univ. Press 1997).

¹⁰⁰ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁰¹ See generally WU GENG, XIAN FA DE JIE SHI YU SHI YONG [THE INTERPRETATION AND APPLICATION OF THE CONSTITUTION] 408–419 (on-file with

Li and Yeh therefore asserted that it was unconstitutional to transform the National Assembly from a legislative chamber whose members should be elected by the people¹⁰² into a legislature in which seats were apportioned only according to the “votes that the candidates nominated by each political party and all the independent candidates receive[d] in the parallel election for the Members of the Legislative Yuan.”¹⁰³ They asserted that such a constitutional amendment would contradict the principle of popular sovereignty¹⁰⁴ provided by the Constitution,¹⁰⁵ arguing that the principle must take priority over the amendment because the principle made up part of the fundamental framework of the Constitution.¹⁰⁶ Accordingly, they pointed out that the amendment would transform the Republic of China (Taiwan) from “a democracy of the people”¹⁰⁷ into “a democracy of political parties,”¹⁰⁸ violating the constitutional equality clause¹⁰⁹ by stopping people from voting for independent candidates henceforth.¹¹⁰

Li and Yeh also recalled the legendary *Judicial Yuan Interpretation No.261* [1990], in which the Justices affirmed that “periodic election of members of Congress is a sine qua non to reflect the will of the people and implement constitutional democracy.”¹¹¹ Using *Judicial Yuan Interpretation No.261* [1990] the Justices directly “[dismissed] the authoritarian congress and [forced] fresh and immediate elections,”¹¹² and Li and Yeh asserted accordingly

author) (2004) (Justice Wu Geng providing the standard of judicial review in Taiwan).

¹⁰² Compare MINGUO XIANFA §§ 25–34 (1947) (Taiwan), with MINGUO XIANFA amend. § 1 (1997) (Taiwan).

¹⁰³ See MINGUO XIANFA amend. § 1 (1999) (Taiwan). SHIZI No. 499 JIESHI OFFICIAL TRANSLATION, *supra* note 3, at Reasoning ¶ 10. JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁰⁴ See generally DANIEL LESSARD LEVIN, REPRESENTING POPULAR SOVEREIGNTY: THE CONSTITUTION IN AMERICAN POLITICAL CULTURE 1–194 (State Univ. of New York Press 1999).

¹⁰⁵ MINGUO XIANFA § 2 (1947) (Taiwan).

¹⁰⁶ See MINGUO XIANFA §§ 1–2 (1947) (Taiwan). JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁰⁷ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

¹⁰⁸ *Id.* (Authors’ translation).

¹⁰⁹ MINGUO XIANFA § 7 (1947) (Taiwan).

¹¹⁰ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹¹¹ SHIZI No. 261 JIESHI, *supra* note 75 (Official translation).

¹¹² HUANG, *supra* note 63, at 221.

that the terms of office of the members of Congress could not be self-extended¹¹³ unless the country “has been undergoing a severe calamity, which makes re-election . . . *de facto* impossible.”¹¹⁴ They asserted that it was unconstitutional to extend the terms of office of National Assembly members by two years and forty-two days¹¹⁵ and of the members of the Legislative Yuan by five months.¹¹⁶ If the members of the National Assembly were allowed to alter the lengths of their terms through a constitutional amendment¹¹⁷ this time, there would be no reason to prohibit them from doing it again,¹¹⁸ and the spirit of social contract developed by John Locke¹¹⁹ and Jean-Jacques Rousseau¹²⁰ would thus be ruined.¹²¹ Li and Yeh further asserted that Article 8 of the Additional Articles of the Constitution¹²² embodied the spirit of social contract, prohibiting the members of the National Assembly and the Legislative Yuan from increasing their remuneration or wages.¹²³ “[I]ndividual regulations on increase of remuneration or pay shall go into effect starting with the subsequent National Assembly or Legislative Yuan.”¹²⁴ Accordingly, Li and Yeh asserted that this rule—based upon the spirit of social contract—must also apply to attempts to alter the term of office.¹²⁵ They stated:

The principle of democracy is based on the spirit of social contract, and the term of office provided by the Constitution specifies [our] people’s authorisation.

¹¹³ JUDICIAL YUAN INTERPRETATION, *supra* note 5; *see also* MINGUO XIANFA amend. § 1 (1999) (Taiwan).

¹¹⁴ SHIZI NO.31 JIESHI, *supra* note 56.

¹¹⁵ JUDICIAL YUAN INTERPRETATION, *supra* note 5; *see also* MINGUO XIANFA amend. § 1 (1999) (Taiwan).

¹¹⁶ JUDICIAL YUAN INTERPRETATION, *supra* note 5; *see also* MINGUO XIANFA amend. § 4 (1999) (Taiwan).

¹¹⁷ MINGUO XIANFA amend. § 1 (1999) (Taiwan).

¹¹⁸ *See* JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹¹⁹ *See generally* JOHN LOCKE, TWO TREATIES OF GOVERNMENT 1–401 (Whitmore Fenn & C. Brown eds., 1821) (1690).

¹²⁰ *See generally* JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 10–153 (George D.H. Cole trans., Augustine Press 2018) (1923).

¹²¹ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹²² MINGUO XIANFA amend. § 8 (1997) (Taiwan).

¹²³ JUDICIAL YUAN INTERPRETATION, *supra* note 5; *see also* MINGUO XIANFA amend. § 8 (1997) (Taiwan).

¹²⁴ MINGUO XIANFA amend. § 8 (1997) (Taiwan) (Official translation).

¹²⁵ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

Apart from in a state of emergency, under which it is necessary to *de facto* extend the term of office for the sake of [our] constitutionalism, no delegate shall have power to alter the authorisation without positive instruction by [our] people.¹²⁶—Nigel N.T. Li and Yeh Ching-Yuan (1999)

Li and Yeh finally asserted that the disputed constitutional amendments¹²⁷ were passed by the National Assembly in undue process.¹²⁸ The second and third readings were both rigged by secret ballot, which violated the Self-Stipulated Rules of Assembly of 1999.¹²⁹ The Justices affirmed their general respect to the Legislative Yuan,¹³⁰ ruling that parliamentary privilege was applied under circumstances in which the bills were passed when “the congressmen/women were busy with ‘legislative brawling’ in the Legislative Yuan”¹³¹ “unless it is in clear contravention to the Constitution.”¹³² Li and Yeh asserted that rigging a constitutional amendment by secret ballot was by its nature¹³³ “in clear contravention to the Constitution”¹³⁴ because it constituted legislative unaccountability.¹³⁵ They cited the concurring opinion of Justice David Souter in *Nixon v. United States*,¹³⁶ in which Souter argued that “[n]ot all [judicial] interference is inappropriate or disrespectful”¹³⁷ depending on “how importunately the occasion demands the answer.”¹³⁸ Accordingly, “if a secret ballot is allowed, how can the members of the National Assembly be accountable to the people in

¹²⁶ *Id.* (Authors’ translation).

¹²⁷ MINGUO XIANFA amend. §§ 1, 4 (1999) (Taiwan).

¹²⁸ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹²⁹ Guomindahuiyishiguize (國民大會議事規則) [Rules of Assembly of the National Assembly] art. 38II (1948 & 1999).

¹³⁰ *See generally* SHIZI NO. 342 JIESHI (釋字第 342 號解釋) [Judicial Yuan Interpretation No. 342] (1994).

¹³¹ HUANG, *supra* note 63, at 291.

¹³² SHIZI NO. 342 JIESHI, *supra* note 132 (Official translation); *see also* SHIZI NO. 419 JIESHI, *supra* note 97.

¹³³ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹³⁴ SHIZI NO. 342 JIESHI, *supra* note 132.

¹³⁵ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹³⁶ *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, D., concurring).

¹³⁷ *Id.*

¹³⁸ *Id.*

accordance with *Judicial Yuan Interpretation No. 401* [1996],”¹³⁹ and why should the Justices show their general respect¹⁴⁰ to the National Assembly in such an *importunate* occasion?

V. CHENG PAO—CHING’S INSTRUMENTS OF APPEAL

Three instruments of appeal were filed by Congressman Cheng Pao-Ching,¹⁴¹ and according to Justice Sun Sen-Yen,¹⁴² Dennis T.C. Tang¹⁴³ (who was to become a Justice in 2011) was the author. The first instrument was co-signed by 79 congressmen and congresswomen of the Legislative Yuan,¹⁴⁴ and there were 80 signatures for the second and third instruments.¹⁴⁵ All of these were submitted to the Judicial Yuan on October 28, 1999.¹⁴⁶ Meanwhile, it is interesting to note that Tang reminded the then Justices of the people’s anger (*Min-Yuan*) repeatedly throughout the instruments.¹⁴⁷

The first argument proposed by Dennis T.C. Tang was that fundamental rights and popular sovereignty set the legal boundary for constitutional amendments, although it was arguable whether the constitutional amending power should be legally limited or not.¹⁴⁸ Tang would have been surprised by Lord Hoffmann’s famous dictum: “Parliament can, if it chooses, legislate contrary to fundamental principles of human rights,”¹⁴⁹ because the model of unlimited constitutional amending power, including the British¹⁵⁰ and Weimar

¹³⁹ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

¹⁴⁰ See generally SHIZI NO. 342 JIESHI, *supra* note 132.

¹⁴¹ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁴² SHIZI NO. 499 JIESHI, *supra* note 2 (Sun S-Y, partial concurring).

¹⁴³ LL.B. (National Taiwan University 1978), LL.M. (National Taiwan University 1981), LL.M. (Harvard 1984), and S.J.D. (Tulane 1989).

¹⁴⁴ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ R v. Secretary of State for the Home Department ex p Simms [2000] 2 AC 115 (appeal taken from Eng.).

¹⁵⁰ See ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3–4 (8th ed., Macmillan 1915).

German¹⁵¹ models, supported the idea that “[t]he constraints upon its exercise by Parliament are ultimately political, not legal.”¹⁵² In other words, Tang probably undervalued the gravity of unlimited constitutional amending power, but he was keenly aware of the importance of the core arguments of fundamental rights and popular sovereignty.¹⁵³ Like Nigel N.T. Li and Yeh Ching-Yuan, he recalled the legendary *Judicial Yuan Interpretation No.261* [1990], which asserted that periodical re-election was a fundamental right (the right to vote¹⁵⁴) and the concretisation of popular sovereignty.¹⁵⁵ As such, it was unconstitutional for the National Assembly to self-extended their term of office retrospectively.¹⁵⁶

Unlike Nigel N.T. Li and Yeh Ching-Yuan, Tang was not opposed to secret ballots¹⁵⁷ and offered no opinion about the transformation of the National Assembly.¹⁵⁸ But he was very sensitive to the concept of self-extending the term of office.¹⁵⁹ His second argument was aimed at the Justices, persuading them into believing that judicial interference was the solution provided by the Constitution¹⁶⁰ under such a scenario. According to Tang, “apart from the Justices’ judicial review power over the legal boundary of constitutional amendments, no political power can constrain the National Assembly to power expansion, constitutional derogation and the destruction of liberal democracy in reality.”¹⁶¹ Hence, he asserted that “the Justices are the final guardians of [our] Constitution, with the sanctified responsibility of protecting the spirit of [our] Constitution,”¹⁶² and they “should not dismiss the case in accordance

¹⁵¹ GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS VOM 11 AUGUST 1919 [The Constitution of the German Reich from August 11, 1919] 351–352 (Georg Stilke ed., 1929).

¹⁵² R v. Secretary of State for the Home Department ex p Simms [2000] 2 AC 115 (appeal taken from Eng.).

¹⁵³ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁵⁴ MINGUO XIANFA § 17 (1947) (Taiwan).

¹⁵⁵ MINGUO XIANFA §§ 1–2 (1947) (Taiwan). JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁵⁶ *Id.*

¹⁵⁷ SHIZI NO. 499 JIESHI, *supra* note 2 (Sun S-Y, partial concurring).

¹⁵⁸ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁵⁹ *Id.*

¹⁶⁰ MINGUO XIANFA §§ 171–173 (1947) (Taiwan).

¹⁶¹ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

¹⁶² *Id.* (Authors’ translation).

with the political question doctrine or gerichtsfreier Hoheitsakt.”¹⁶³ In a nutshell, his argument covered the notion of judicial supremacy¹⁶⁴ or judicialisation of politics,¹⁶⁵ supporting the Justices to become substitute lawmakers, i.e., Ersatzgesetzgeber.¹⁶⁶

VI. HUNG CHAO—NAN’S INSTRUMENT OF APPEAL

A democratic decision shall be respected even though it is inappropriate or ineffective, but it cannot derogate or even destroy democratism *per se*.¹⁶⁷—Su Yeong-Chin (1999)

The final instrument of appeal enshrined in *Judicial Yuan Interpretation No. 499* [2000] was filed by Congressman Hung Chao-Nan,¹⁶⁸ and was written by Su Yeong-Chin,¹⁶⁹ who went on to become Vice-Chief Justice in 2010. The instrument was delivered to the Judicial Yuan on November 18, 1999,¹⁷⁰ bearing the signatures of 102 congressmen and congresswomen of the Legislative Yuan.¹⁷¹ Public opposition (*Min-Zhong-Fan-Dui*) was also mentioned in this instrument of appeal.¹⁷²

The first argument proposed by Su Yeong-Chin was based upon the *nemo dat* rule, i.e., *nemo dat quod non habet*,¹⁷³ by which

¹⁶³ *Id.* (Authors’ translation).

¹⁶⁴ See generally HUANG, *supra* note 63, at 33–385.

¹⁶⁵ See generally Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE 253–274 (Robert E. Goodin ed., Oxford Univ. Press 2011).

¹⁶⁶ See generally Christine Landfried, *The Judicialization of Politics in Germany*, 15(2) INT. POL.SCI. REV. 113, 113–124 (1994).

¹⁶⁷ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

¹⁶⁸ *Id.*

¹⁶⁹ LL.B. (National Taiwan University 1972) and Dr.Iur. (München 1981).

¹⁷⁰ This *last* submission represented the general attitude of the congressmen/women of the Legislative Yuan of the ruling Nationalist Party of China. Perhaps this is the reason why it was submitted 21 days later than the other submissions. JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See generally ALASTAIR HUDSON, EQUITY AND TRUSTS 790 (4th ed., Cavendish Publishing 2005).

he asserted¹⁷⁴ that it was unconstitutional for the National Assembly to self-extend their term of office because “one cannot give that which one does not have.”¹⁷⁵ Applying this English legal rule implies the notion of limited constitutional amending power¹⁷⁶ *per se*. However, the merit of the *nemo dat* argument lies in Su’s excellent interpretation of the legitimacy of the ruling power.¹⁷⁷ He stated:

The spirit of democracy indicates that “the ruler shall rule by the consent of the ruled.” Election, therefore, is the necessary procedure of collective trust, authorising the legitimacy of exercising state power to the ruler. The purpose of re-election when the term of office is due is to reconfirm the democratic legitimacy of the ruler.¹⁷⁸—Su Yeong-Chin (1999)

In other words, Su argued that the legitimacy of the members of the National Assembly in attempting to exercise constitutional amending powers was rooted in holding periodical elections of the chamber at the due time. The National Assembly could not therefore extend their term of office by two years and forty-two days,¹⁷⁹ because “one cannot give that which one does not have.”¹⁸⁰ Su asserted that the legendary *Judicial Yuan Interpretation No.261* [1990] affirmed the *nemo dat* rule,¹⁸¹ “drawing the line between democracy and autocracy.”¹⁸²

The second argument proposed by Su was based upon popular sovereignty,¹⁸³ by which he asserted that it was unconstitutional to hold secret ballots for constitutional amendments, because the process would deliberately disconnect the people from their

¹⁷⁴ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁷⁵ HUDSON, *supra* note 173, at 790.

¹⁷⁶ See generally O’DONOGHUE, *supra* note 11, at 54–86.

¹⁷⁷ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁷⁸ *Id.* (Authors’ translation).

¹⁷⁹ *Id.*

¹⁸⁰ HUDSON, *supra* note 173, at 790.

¹⁸¹ Compare ALASTAIR HUDSON, EQUITY AND TRUSTS 790 (4th ed., Cavendish Publishing 2005), with SHIZI NO. 499 JIESHI YIJIANSHU CHAOBENDENG WENJIAN (釋字第 499 號解釋意見書抄本等文件) [Judicial Yuan Interpretation No. 499 Appendix] (2000); see also SHIZI NO. 261 JIESHI, *supra* note 75.

¹⁸² JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

¹⁸³ MINGUO XIANFA §§ 1–2 (1947) (Taiwan).

representatives.¹⁸⁴ “Popular sovereignty would become parliamentary sovereignty if a constitutional amendment could be passed by secret ballot. Regardless of the *bona fide* motive as well as the desirable outcome, [the transformation] itself is incompatible with the framework of the Constitution.”¹⁸⁵ Su argued that the disputed constitutional amendments passed by the National Assembly in undue process¹⁸⁶ were judicially reviewable *in toto*, because their amending “procedures contained manifest and gross flaws”¹⁸⁷ “which could otherwise never be redressed at all.”¹⁸⁸

Su’s final argument was that liberal democratism provided the boundary for constitutional amendments, which reflected the commonly held opinion of legal-constitutional scholarship in Taiwan.¹⁸⁹ However, it is interesting to note that he—as a legal counsel of the congressmen and congresswomen of the Legislative Yuan from the ruling Nationalist Party of China—expressed no opinion about the transformation of the National Assembly.¹⁹⁰ It is therefore puzzling as to how Su defined popular sovereignty and liberal democratism if the transformation of the National Assembly was allowed.¹⁹¹ Perhaps, as a legal counsel, he was not in a good position to illustrate his opinion freely. Consequently, he chose to make implications instead, reaffirming liberal democratism as the fundamental framework of the Constitution, whether or not the ban against altering it was written in the Constitution.¹⁹²

VII. JUDICIAL YUAN INTERPRETATION NO. 499 [2000]

Judicial Yuan Interpretation No. 499 [2000] was a typical separation of powers game.¹⁹³ The Interpretation came about after

¹⁸⁴ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁸⁵ *Id.* (Authors’ translation).

¹⁸⁶ MINGUO XIANFA amend. §§ 1, 4 (1999) (Taiwan).

¹⁸⁷ SHIZI NO. 499 JIESHI OFFICIAL TRANSLATION, *supra* note 3, at Reasoning ¶ 1.

¹⁸⁸ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (Su Yeong-Chin arguing as to whether the “inappropriateness” of the transformation constituted a violation of the Constitution).

¹⁹² *Id.* (Su Yeong-Chin elaborating the German concept of *Verfassungsdurchbrechung*).

¹⁹³ *See generally* HUANG, *supra* note 63, at 274–287.

differences between the Legislative Yuan (appellant organ) and the National Assembly (respondent organ) “in terms of allegations of unconstitutionality by the appellant organ, seeking a judicial decision that could constitutionally force the respondent organ to back down from its original position.”¹⁹⁴ It was filed by Hau Lung-Pin (The New Party) and Cheng Pao-Ching (Democratic Progressive Party) on October 28, 1999,¹⁹⁵ and by Hung Chao-Nan (Nationalist Party of China) on November 18, 1999.¹⁹⁶ The *en banc* decision¹⁹⁷ was heard by the Justices on November 26, 1999¹⁹⁸ and promulgated on March 24, 2000.¹⁹⁹ According to Chief Justice Weng Yueh-Sheng,²⁰⁰ the late Justice Wu Geng²⁰¹ was the main author representing the majority opinion.²⁰² Six judicial opinions were submitted, comprising two partial concurring opinions,²⁰³ two concurring opinions,²⁰⁴ one concurring and partial dissenting opinion²⁰⁵ and one dissenting opinion.²⁰⁶ The case was a remarkable one in Taiwan’s legal history because the Justices struck down the Fifth Amendment of the Additional Articles of the Constitution of the Republic of China.²⁰⁷ The Justices ruled that:

¹⁹⁴ *Id.* at 270.

¹⁹⁵ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

¹⁹⁶ *Id.*

¹⁹⁷ SHIZI NO. 499 JIESHI, *supra* note 2 (recording the signatures of all the sixteen Justices).

¹⁹⁸ R.O.C JUDICIAL YUAN, <http://cons.judicial.gov.tw/jcc/zh-tw/categories/milestonelist/y21lmta1> [<https://perma.cc/6P7R-QFDM>] (last visited Sept. 18, 2020).

¹⁹⁹ SHIZI NO. 499 JIESHI, *supra* note 2.

²⁰⁰ A.A. (Tainan Normal School 1956), LL.B. (National Taiwan University 1960), and Dr.Iur. (Heidelberg 1966).

²⁰¹ LL.B. (National Taiwan University 1962), M.A. (National Taiwan University 1966), and Dr.Iur. (Wein 1977).

²⁰² See Weng Yueh-Sheng, *Mian Huai Da Fa Guan Wu Meng Geng Xian Sheng* [In Memory of the Late Justice Wu Geng], 22 *ZHONG YAN YUAN FA XUE QI KAN* [ACADEMIA SINICA LAW JOURNAL] i, iii (2018).

²⁰³ SHIZI NO. 499 JIESHI, *supra* note 2 (Lin Y-M & Sun S-Y, partial concurring).

²⁰⁴ SHIZI NO. 499 JIESHI, *supra* note 2 (Su J-H & Lai I-J, concurring).

²⁰⁵ SHIZI NO. 499 JIESHI, *supra* note 2 (Chen C-N, concurring and partial dissenting).

²⁰⁶ SHIZI NO. 499 JIESHI, *supra* note 2 (Tseng H-S, dissenting).

²⁰⁷ MINGUO XIANFA amend. §§ 1, 4, 9–10 (1999) (Taiwan).

[T]he disputed Articles 1, 4, 9, and 10 of the Additional Articles shall be null and void from the date of announcement of this Interpretation. The Additional Articles promulgated on July 21, 1997, shall continue to apply. It is so ordered.²⁰⁸

VIII. DECISION ONE: DER HÜTER DER VERFASSUNG

At the intersection of constitutionalism and democratism, no freedom (or power) shall be *de jure* unlimited. When the Constitution is amended, it shall comply with democratism *per se*. However, this does not mean that it is free from the limit of constitutionalism.²⁰⁹ —Justice Su Jyun-Hsiung (2000)

Whether a constitutional amendment is judicially reviewable²¹⁰ is always a theoretical dilemma,²¹¹ and the first decision made by the majority of the Justices in *Judicial Yuan Interpretation No. 499* [2000] was that the Justices are empowered by the Constitution²¹² not only to interpret the Constitution in general²¹³ but also to govern “the enforcement and amendment of the Constitution.”²¹⁴ This meant that “[d]oubts or ambiguities arising therefrom are also subject to interpretation by [the Judicial Yuan].”²¹⁵ It is interesting to note that the Justices recalled *Judicial Yuan Interpretation No. 261* [1990] through a contradictory proposition,²¹⁶

²⁰⁸ SHIZI NO. 499 JIESHI OFFICIAL TRANSLATION, *supra* note 3.

²⁰⁹ SHIZI NO. 499 JIESHI, *supra* note 2 (Su J-H, concurring) (Authors’ translation).

²¹⁰ See generally KEMAL GÖZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY 3–103 (Ekin Press 2008).

²¹¹ Compare Sri Shankari Prasad Singh Deo v. Union of India and State of Bihar (and Other Cases) (1952) SCR 89 (India), with Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 SCC 225 (India).

²¹² MINGUO XIANFA § 173 (1947) (Taiwan).

²¹³ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 2.

²¹⁴ *Id.* (Official translation).

²¹⁵ *Id.* (Official translation).

²¹⁶ See generally B.P. BAIRAN, AN INTRODUCTION TO SYLLOGISTIC LOGIC: WITH SELECTED HISTORY, THEORIES AND READINGS IN WESTERN ETHICS 197 (Katha Publishing 2005).

suggesting that the National Assembly should not apply for judicial review when it demanded the Court's authority²¹⁷ and challenging the Court's judicial review power when it did not want to be interfered with.²¹⁸ The Justices ruled that:

As indicated above, the Constitutional Court has jurisdiction over constitutional interpretation in cases of doubts or ambiguities arising with respect to the procedure of amendment. The constitutionality of the internal procedures of the authority concerned, such as the scope of parliamentary autonomy and its limits, involves the choice of various standards of review by the Constitutional Court.²¹⁹

The above decision was obviously based upon Carl Schmitt's concept of the guardian of the constitution,²²⁰ i.e., *der Hüter der Verfassung*.²²¹ Although this argument can be found on the instrument of appeal submitted by Nigel N.T. Li and Yeh Ching-Yuan,²²² the credit is probably not theirs, because it was the then Chief Justice Weng Yueh-Sheng who introduced this concept into Taiwan.²²³ The main author of the majority opinion,²²⁴ Justice Wu Geng, was also a well-known expert on the scholarship of Schmitt.²²⁵ Unlike the German Basic Law (*Grundgesetz*),²²⁶ there was "[n]o eternity clause in the Constitution"²²⁷ of the Republic of China (Taiwan). However, the Justices still ruled in line with the German

²¹⁷ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 2.

²¹⁸ *Cf. id.*

²¹⁹ *Id.* at ¶ 7 (Official translation).

²²⁰ See generally CARL SCHMITT, *DER HÜTER DER VERFASSUNG* [THE GUARDIAN OF THE CONSTITUTION] 1–11 (Verlag Von J.C.B. Mohr 1931).

²²¹ See DYZENHAUS, *supra* note 99, at 70–85.

²²² JUDICIAL YUAN INTERPRETATION, *supra* note 5.

²²³ See generally Weng Yueh-Sheng, *Xian Fa Zhi Wei Hu Zhe* [The Guardian of the Constitution], 17 *XIAN ZHENG SI CHAO* [THOUGHT OF CONSTITUTIONALISM] 146, 146–148 (1972).

²²⁴ See Weng, *supra* note 202, i, iii.

²²⁵ See WU, *supra* note 101, at 607 (Yen Chueh-An sharing his opinion about the influence of Carl Schmitt upon Justice Wu Geng).

²²⁶ GRUNDGESETZ [GG] [BASIC LAW], § 79 ¶3, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/PBP4-5G3S>] (1949).

²²⁷ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 9 (Official translation).

theory of limited constitutional amending power²²⁸ originated by Carl Schmitt²²⁹ and held that:

[I]f a constitutional provision, which is integral to the essential nature of the Constitution and underpins the constitutional normative order, is open to change through a constitutional amendment, permitting such a constitutional amendment would bring down the constitutional normative order in its entirety. Such a constitutional amendment in and of itself should be denied legitimacy [I]n the event that a constitutional amendment contravenes the constitutional order of liberal democracy, as emanating from the said foundational principles, it betrays the trust of the people, shakes the foundation of the Constitution, and thus must be checked by other constitutional organs. Such a check on the designated body that makes amendments is part of the self-defense mechanism of the Constitution.²³⁰

In other words, the majority opinion in *Judicial Yuan Interpretation No. 499* [2000] had no intention of invalidating parliamentary privilege,²³¹ but was instead designed to highlight the criterion of the abuse of legislative power in accordance with the principle of gravity defect control (Gravitaets-bzw. Evidenztheorie²³²). The Justices therefore reminded the members of the National Assembly of their “oath of allegiance to the Constitution, whereby they are to be loyal to the Constitution,”²³³ lecturing them that “[c]onstitutional loyalty also applies when the National Assembly exercises its amending power.”²³⁴ This meant that the

²²⁸ See generally O’DONOGHUE, *supra* note 11, at 54–86.

²²⁹ SCHMITT, *supra* note 12, at 75–87; see also PREUB, *supra* note 12, at 477–479.

²³⁰ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 9 (Official translation).

²³¹ Compare SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000), with SHIZI NO. 342 JIESHI (釋字第 342 號解釋) [Judicial Yuan Interpretation No. 342] (1994), and SHIZI NO. 381 JIESHI (釋字第 381 號解釋) [Judicial Yuan Interpretation No. 381] (1995).

²³² SHIZI NO. 419 JIESHI, *supra* note 97, at Reasoning ¶ 13.

²³³ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 9 (Official translation).

²³⁴ *Id.* (Official translation).

Justices would not endorse all the legislative activities “[falling] within the scope of parliamentary autonomy, and thus ... [avoiding] the legal effects of manifest and gross procedural flaws.”²³⁵ In the eyes of the Justices as the Guardians of the Constitution of the Republic of China,²³⁶ they would sustain the National Assembly’s legal claim for parliamentary privilege (or autonomy) when it “[deals] with a constitutional amendment bill . . . in conformity with the constitutional order of liberal democracy.”²³⁷

The constitution is [not only] the supreme law of the land [. . .] [but also] the law of politics by nature.²³⁸—
Justice Su Jyun-Hsiung (2000)

The way in which the majority opinion in *Judicial Yuan Interpretation No. 499* [2000] evaluated the political question doctrine²³⁹ was thus formulised. The Justices would and could, if they choose,²⁴⁰ intervene in political questions. The Constitution is “the law of politics by nature,”²⁴¹ which meant that the Guardians of the Constitution of the Republic of China would not allow political decisions “[bringing] down the constitutional normative order in its entirety,”²⁴² although they would respect political decisions in general.²⁴³

²³⁵ *Id.* at ¶ 7 (Official translation).

²³⁶ See generally VINCENT SZE & ROBERT H.C. TSAI, THE GRAND JUSTICE’ ROLE IN PROCESS OF THE R.O.C. DEMOCRATIC CONSTITUTIONALISM, in THE REPUBLIC OF CHINA CONSTITUTIONAL COURT REPORTER: INTERPRETATIONS NO. 1–233 (1949–1988) 699–720 (ROC Judicial Yuan ed., ROC Judicial Yuan 2007).

²³⁷ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 7 (Official translation).

²³⁸ *Id.* (Su J-H, concurring) (Authors’ translation).

²³⁹ See generally DAVID K.C. HUANG, THE POLITICAL QUESTION DOCTRINE IN TAIWAN: A CRITICAL ANALYSIS OF TAIWAN’S JUDICIAL REVIEW AND JUDICIAL YUAN INTERPRETATION NO. 328 [1993] 4–39 (GRIN 2019) (2012).

²⁴⁰ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 7 (ruling that the constitutionality of politics, including parliamentary privilege, “involves the choice of various standards of review by the [Justices]”).

²⁴¹ *Id.* (Su J-H, concurring) (Authors’ translation).

²⁴² *Id.* (Official translation).

²⁴³ *Id.*; see also SHIZI NO. 342 JIESHI, *supra* note 130; SHIZI NO. 381 JIESHI (釋字第 381 號解釋) [Judicial Yuan Interpretation No. 381] (1995). It is important to note that the Judicial Yuan has remained a very powerful court since the 1990s. It even dismissed the authoritarian congress and opened the gate for Taiwan’s

Although they did not disagree with the majority opinion, Justices Su Jyun-Hsiung and Chen Chi-Nan were concerned about it.²⁴⁴ They both asserted that the Justices could behave much more respectfully towards the legislative power by ordering the National Assembly to re-amend the Constitution in accordance with *Judicial Yuan Interpretation No. 499* [2000], instead of striking down disputed constitutional amendments arbitrarily.²⁴⁵ Their argument was that as the guardians of the constitution, the Justices could decide what was constitutional and what was not (constitutionalism), but they were not entitled to make political decisions (democratism).²⁴⁶ This meant that the Justices could *suspend* any unconstitutional constitutional amendment, but not *invalidate* it completely.²⁴⁷ Whilst the outcome may be the same, the attitude is very different.

The only dissenting opinion in *Judicial Yuan Interpretation No. 499* [2000] was submitted by Justice Tseng Hua-Sun,²⁴⁸ who asserted that there was “[n]o eternity clause in the Constitution”²⁴⁹ of the Republic of China, and therefore he found no reason why the constitutional amending power was limited.²⁵⁰ He did not oppose Schmitt’s theory in general,²⁵¹ but considered that it must be amended into the Constitution before being applied.²⁵²

IX. DECISION TWO: POPULAR SOVEREIGNTY

Our country had undergone the periods of party-led military control and of party-led political tutelage since its establishment, and the ruling

peaceful democratisation via the legendary *Judicial Yuan Interpretation No. 261* [1990]. See generally HUANG, *supra* note 63, at 221–262.

²⁴⁴ Compare SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000) (Su Jyun-Hsiung, concurring), with SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000) (Chen C-N, concurring and partial dissenting).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ SHIZI NO. 499 JIESHI, *supra* note 2 (Chen C-N, concurring and partial dissenting).

²⁴⁸ *Id.* (Tseng H-S, dissenting).

²⁴⁹ *Id.* at Reasoning ¶ 9 (Official translation).

²⁵⁰ *Id.* (Tseng H-S, dissenting).

²⁵¹ SCHMITT, *supra* note 12, at 91–99.

²⁵² SHIZI NO. 499 JIESHI, *supra* note 2 (Tseng H-S, dissenting).

political party and the Government were politically fused. Hence, equality amongst all political parties is a distinctive doctrine embodied in the Constitution by our *Pater Constitutio* [. . .] The demand for equality amongst all political parties includes not only its literal meaning but also the demand for equal rights to political participation amongst all independent candidates.²⁵³—Nigel N.T. Li and Yeh Ching-Yuan (1999)

Whether it is constitutional to transform the members of the National Assembly²⁵⁴ from representatives of the people²⁵⁵ to representatives of political parties,²⁵⁶ the majority of the Justices in *Judicial Yuan Interpretation No. 499* [2000] affirmed the principle of popular sovereignty²⁵⁷ and declared this transformation unconstitutional.²⁵⁸ It is important to note that the Justices appeared impatient as they lectured the National Assembly that “[n]o such an electoral system can be found among advanced democracies.”²⁵⁹ In the eyes of the Justices as the Guardians of the Constitution, this unprecedented system was totally “incompatible with the protection of political rights under the Constitution”²⁶⁰ because “individual independent candidates would not be elected based on their own ideas and policies pitched at the electors.”²⁶¹ The Justices held that:

Article 1 of the Additional Articles adopted by the Third National Assembly on September 4, 1999, stipulates that, from the Fourth National Assembly on, the seats of the Delegates shall be apportioned according to the popular votes that the candidates

²⁵³ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

²⁵⁴ *Id.* (asserting that the Republic of China would be transformed from “a democracy of the people” into “a democracy of political parties”).

²⁵⁵ *Compare* MINGUO XIANFA §§ 25–34 (1947) (Taiwan), *with* MINGUO XIANFA amend. § 1 (1997) (Taiwan).

²⁵⁶ MINGUO XIANFA amend. § 1 (1999) (Taiwan).

²⁵⁷ MINGUO XIANFA §§ 1, 2 (1947) (Taiwan).

²⁵⁸ SHIZI NO. 499 JIESHI, *supra* note 2.

²⁵⁹ *Id.* at Reasoning ¶ 10 (Official translation).

²⁶⁰ *Id.* (Official translation).

²⁶¹ *Id.* (Official translation).

nominated by each political party and all the independent candidates receive in the parallel election for the Members of the Legislative Yuan, which differs from the National Assembly in function and competence. The Delegates who are to be selected pursuant to the challenged apportionment method but not directly elected by the people, are merely the representatives appointed by respective political parties according to their share of seats in the Legislative Yuan. Accordingly, this amendment is incompatible with the spirit of Article 25 of the Constitution, which provides that the National Assembly, on behalf of the people, exercises sovereign rights. It leads to a conflict between two constitutional provisions. All the powers conferred by Article 1 of the Additional Articles are presupposed to be exercised by the Delegates elected by the people. Should the Delegates, selected pursuant to the challenged apportionment method, be allowed to exercise the powers of the said Article 1, the fundamental principles of constitutional democracy would be thereby violated. Hence, the disputed Additional Article amending the method of election for the Delegates is incompatible with the constitutional order of liberal democracy.²⁶²

The fundamental disagreement between the Justices and the National Assembly on this transformation lies only in what kind of decisions can and cannot be made democratically. For example, could a specific person be chosen to pay all the bills for the rest of the people democratically, i.e., as a tyranny of the majority?²⁶³ If the answer is no, how could the members of the National Assembly “merely representatives appointed by individual political parties, rather than representatives of the people”²⁶⁴ be allowed to “[exercise] sovereign

²⁶² *Id.*

²⁶³ See generally DONALD L. BEAHM, CONCEPTIONS OF AND CORRECTIONS TO MAJORITARIAN TYRANNY 1–102 (Lexington Books 2002).

²⁶⁴ SHIZI No. 499 JIESHI, *supra* note 2, at Reasoning ¶ 10 (Official translation).

[powers] on behalf of the people”²⁶⁵ simply because the disputed constitutional amendment²⁶⁶ was passed democratically?²⁶⁷ In other words, could the decision to terminate democracy be legitimately made democratically, as Adolf Hitler’s Enabling Act of 1933, i.e., *Das Ermächtigungsgesetz vom 24. März 1933*,²⁶⁸ or the Coronation of Napoléon in 1804 were?²⁶⁹ In *Judicial Yuan Interpretation No. 499* [2000], the Justices said no and ruled:

[I]f they continue to hold the following powers to alter the state territory (Article 4 of the Constitution), to elect the Vice President when the said office becomes vacant, to initiate a recall of the President or the Vice President, to vote on the impeachment of the President or the Vice President, to amend the Constitution, to approve constitutional amendment proposals put forth by the Legislative Yuan, and to confirm presidential appointments to the Judicial, Examination, and Control Yuans (Article 1 of the Additional Articles), which, by nature, should be vested in elected political representatives, it will not only result in evident normative conflict with Article 25 of the Constitution but also contravene the fundamental principle of the democratic state under Article 1 of the Constitution. Hence, the disputed Additional Articles concerning the allocation of the seats of the National Assembly are incompatible with the constitutional order of liberal democracy.²⁷⁰

Justice Tseng Hua-Sun was the only Justice who approved.²⁷¹ He argued in line with the Preamble to the Additional Articles of the

²⁶⁵ *Id.* (Official translation).

²⁶⁶ MINGUO XIANFA amend. § 1 (1999) (Taiwan).

²⁶⁷ SHIZI NO. 499 JIESHI, *supra* note 2.

²⁶⁸ Gesetz zur Behebung der Not von Volk und Reich [Law to Remedy the Distress of People and Reich], Mar. 24, 1933, RGBL I at 141 (Ger.).

²⁶⁹ See generally STEVEN ENGLUND, NAPOLEON: A POLITICAL LIFE 243–247 (Harvard Univ. Press 2004).

²⁷⁰ SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] Reasoning ¶ 10 (2000) (Official translation).

²⁷¹ SHIZI NO. 499 JIESHI, *supra* note 2 (Tseng H-S, dissenting).

Constitution of the Republic of China,²⁷² asserting that this transformation was “[t]o meet the requisites of the nation prior to national unification”²⁷³ only.²⁷⁴ He therefore blamed the majority opinion for pedantry and dogmatism.²⁷⁵

X. DECISION THREE: NEMO DAT QUOD NON HABET

In *Judicial Yuan Interpretation No.261* [1990], [the Justices] went out of their way to reiterate the necessity of periodical re-elections to democracy and constitutionalism. The truth expounded therefrom is self-evident to the extent that no additional interpretation is needed.²⁷⁶—Dennis T.C. Tang (1999)

For historical reasons,²⁷⁷ the idea of whether it was constitutional to extend the terms of office of the then members of the National Assembly by two years and forty-two days²⁷⁸ and of the then members of the Legislative Yuan by five months²⁷⁹ was a political taboo in Taiwan.²⁸⁰ Anyone who attempted to do such a thing would anger the public immediately.²⁸¹ *Judicial Yuan Interpretation No. 499* [2000] was the last attempt in the Republic of China’s (Taiwan) political history to end the Chinese political tradition of life tenure forever.²⁸² The Justices ruled:

²⁷² MINGUO XIANFA amend. pmbl. (1997) (Taiwan).

²⁷³ *Id.* (Official translation).

²⁷⁴ SHIZI NO. 499 JIESHI, *supra* note 2 (Tseng H-S, dissenting).

²⁷⁵ *Id.*

²⁷⁶ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors’ translation).

²⁷⁷ See generally SHIZI NO. 31 JIESHI, *supra* note 56; SHIZI NO. 150 JIESHI, *supra* note 68; SHIZI NO. 261 JIESHI, *supra* note 75.

²⁷⁸ MINGUO XIANFA amend. § 1 (1999) (Taiwan).

²⁷⁹ MINGUO XIANFA amend. § 4 (1999) (Taiwan).

²⁸⁰ See generally HUANG, , *supra* note 63, at 221–262.

²⁸¹ *E.g.*, JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Dennis T.C. Tang and Su Yeong-Chin stating public anger in their instruments of appeal respectively).

²⁸² The merit of *Judicial Yuan Interpretation No. 499* [2000] is that if the extension of the term of office by two years and forty-two days was prohibited, there would have been no possibility of life tenure.

Pursuant to the principle of popular sovereignty, the power and authority of political representatives originate directly from the authorization of the people. Hence, the legitimacy of representative democracy lies in the adherence of elected political representatives to their social contract with the electorate. Its cardinal principle is that the new election must take place at the end of the fixed electoral term unless just cause exists for not holding the election. Failing that, representative democracy will be devoid of legitimacy. *J.Y. Interpretation No. 261* held that “periodic election of members of Congress is a sine qua non to reflect the will of the people and implement constitutional democracy” to that effect. The just cause for not holding the election alluded to above must be consistent with the holdings of *J.Y. Interpretation No. 31*, which stipulated, “The State has been undergoing a severe calamity, which has made the election of both the Second Legislative Yuan and the Second Control Yuan *de facto* impossible.” In this case, no just cause for not holding re-elections can be found to justify the disputed extension of the terms of both the Third National Assembly and the Fourth Legislative Yuan. Such an extension of the terms as effectuated by amending the said two provisions of the Additional Articles is not in conformity with the principle set out above. Furthermore, the self-extension of its own term by the Third National Assembly contravenes the principle of conflict of interest and is also incompatible with the constitutional order of liberal democracy.²⁸³

It is important to note that the concept of a term of office contradicts the Chinese tradition originated in the mandate of heaven.²⁸⁴ This tradition states that “rulers are empowered by

²⁸³ SHIZI NO. 499 JIESHI, *supra* note 2 (Official translation).

²⁸⁴ See generally JOHN S. MAJOR & CONSTANCE A. COOK, *ANCIENT CHINA: A HISTORY* 121 (Routledge 2017).

Heaven,”²⁸⁵ which means that “[t]he leader enjoys lifelong tenure of office.”²⁸⁶ In Taiwan, the change to this was made by the Justices²⁸⁷ in *Judicial Yuan Interpretation No.261* [1990], ruling *per incuriam* that the “periodic election of members of Congress is a sine qua non to reflect the will of the people and implement constitutional democracy.”²⁸⁸ So when the National Assembly extended its term of office,²⁸⁹ the act was politically construed as the restoration of the old tradition,²⁹⁰ which nobody accepted. If the National Assembly was permitted to extend its term this time, there would be no reason to prohibit its members from doing so again.²⁹¹ The Justices therefore ruled that:

The authority concerned further argues that the self-extension of the term of office of the Third National Assembly is part of parliamentary reform [. . .] parliamentary reform is always underpinned by structural or functional alteration. Yet, in the disputed constitutional amendment, no change has been made as to the functions of the National Assembly. Granted, changes in the method of election are part of structural alteration, but leaving aside the question as to whether the “derivative” type of proportional representation in the method of election of the National Assembly, which the disputed Additional Articles adopt in the place of the multi-member district electoral system, can be considered a genuine election, the change in the method of election of the National Assembly does not

²⁸⁵ *Id.*

²⁸⁶ ORVILLE SCHELL, *MANDATE OF HEAVEN: THE LEGACY OF TIANANMEN SQUARE AND THE NEXT GENERATION OF CHINA’S LEADERS* 69 (Simon & Schuster 1994) (criticising the political leaders of the People’s Republic of China, *China*, although the situation was exactly the same in the Republic of China, Taiwan, before *Judicial Yuan Interpretation No. 261* [1990] was promulgated).

²⁸⁷ See generally HUANG, *supra* note 63, at 221–262.

²⁸⁸ SHIZI NO. 261 JIESHI, *supra* note 75 (Official translation).

²⁸⁹ MINGUO XIANFA amend. § 1 (1999) (Taiwan); MINGUO XIANFA amend. § 4 (1999) (Taiwan).

²⁹⁰ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (showing that all the instruments of appeal referred to this argument and none of which read it without malice).

²⁹¹ *Id.*

necessarily lead to the disputed extension of the term. Even assuming the argument of the authority concerned that the disputed extension of the term will be conducive to parliamentary reform, there is no sound fit between the means and the end.²⁹²

In other words, the Justices ruled in line with the *nemo dat* rule, i.e., *nemo dat quod non habet*,²⁹³ holding that no term of office could be extended because no state organisation was authorised by the Constitution to do so,²⁹⁴ unless the country was “undergoing a severe calamity, which makes re-election . . . *de facto* impossible.”²⁹⁵ If the terms of office of the members of Congress had to be altered, the alteration “shall go into effect starting with the subsequent National Assembly or Legislative Yuan.”²⁹⁶ The Justices ruled:

Article 8 of the Additional Articles provides: “The remuneration or pay of the Delegates of the National Assembly and the Members of the Legislative Yuan shall be regulated by statute. Except for general annual adjustments, individual regulations on the increase of remuneration or pay shall go into effect starting with the subsequent National Assembly or Legislative Yuan.” What this provision sets out is more than the principle that all political representatives shall avoid conflict of interest in carrying out their powers. It a fortiori (*a minore ad maius*) stipulates: In light of the provision that the increase of remuneration or pay shall not apply until the subsequent National Assembly, the disputed self-extension of the term of office is evidently incompatible with the principle of conflict of interest as set out in the Constitution. In sum, the petitioners’ claim that the disputed extension of the term of the

²⁹² SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 11 (Official translation).

²⁹³ See generally ALASTAIR HUDSON, EQUITY AND TRUSTS 790 (4th ed., Cavendish Publishing 2005).

²⁹⁴ SHIZI NO. 499 JIESHI, *supra* note 2.

²⁹⁵ SHIZI NO. 31 JIESHI, *supra* note 56 (Official translation).

²⁹⁶ MINGUO XIANFA amend. §8 (1997) (Taiwan) (Official translation). SHIZI NO. 499 JIESHI, *supra* note 2.

Third National Assembly contravenes the constitutional order of liberal democracy and results in a normative conflict with Article 8 of the Additional Articles is sustained.²⁹⁷

In Justice Chen Chi-Nan's concurring and partial dissenting opinion, he argued that he would barely accept the disputed extension of the terms of office to be constitutional even if the people as the sovereigns were to ratify it in an *ex post facto* referendum.²⁹⁸ However, Justice Tseng Hua-Sun disapproved.²⁹⁹ He argued that the Justices had no power to review the quality of political decisions,³⁰⁰ thus implying his preference over unlimited constitutional amending power.³⁰¹ Furthermore, he considered the disputed extension of the terms of office to be part of the constitutional reform "[meeting] the requisites of the nation prior to national unification,"³⁰² insofar as "it is difficult to conclude that it is incompatible with the Constitution."³⁰³

XI. DECISION FOUR: DUE PROCESS OF LEGISLATION

As a constituted state organisation, the National Assembly is empowered to amend the Constitution [exclusively]. If the due process of amending the Constitution is determined by the main text of the Constitution only, no state power can check the National Assembly [And] if the National Assembly has the parliamentary privilege to violate its Self-Stipulated Rules of Assembly, it will put itself above the Constitution

²⁹⁷ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 11 (2000) (Official translation).

²⁹⁸ *Id.* (Chen C-N, concurring and partial dissenting).

²⁹⁹ *Id.* (Tseng H-S, dissenting).

³⁰⁰ *Id.*

³⁰¹ *See generally* R v. Secretary of State for the Home Department *ex p* Simms [2000] 2 AC 115 (appeal taken from Eng.) (Lord Hoffmann asserting that "[t]he constraints upon . . . Parliament are ultimately political, not legal").

³⁰² MINGUO XIANFA amend. pmbl. (1997) (Taiwan) (Official translation).

³⁰³ SHIZI NO. 499 JIESHI, *supra* note 2 (Tseng H-S, dissenting) (Authors' translation).

and how can liberal democratism and constitutionalism be established under such a system?³⁰⁴—Nigel N.T. Li and Yeh Ching-Yuan (1999)

Whether it was constitutional for the National Assembly to amend the Constitution by secret ballot, violating the Self-Stipulated Rules of Assembly of 1999,³⁰⁵ depends on how far the National Assembly can take its parliamentary privilege.³⁰⁶ In the Judicial Yuan's previous decisions,³⁰⁷ the Justices respected the Congress's³⁰⁸ claim for parliamentary privilege³⁰⁹ “unless it is in clear contravention to the Constitution.”³¹⁰ However, amending the Constitution by secret ballot represented a step too far, despite the fact that the main text of the Constitution was (and is) silent.³¹¹ The Justices ruled:

The Constitution is the supreme law of the land. Constitutional amendment greatly affects the stability of the constitutional order and the welfare of the people and must be therefore faithfully carried out by the designated body in accordance with the principle of due process. Constitutional amendment is a direct embodiment of popular sovereignty. The amendment process requires openness and transparency, which enable democratic deliberation through rational communication and thus lay the foundation for the

³⁰⁴ JUDICIAL YUAN INTERPRETATION, *supra* note 5 (Authors' translation).

³⁰⁵ GUOMINDAHUIYISHIGUIZE (國民大會議事規則) [Rules of Assembly of the National Assembly] art. § 38II (1948 & 1999).

³⁰⁶ *E.g.*, SHIZI NO. 342 JIESHI, *supra* note 130; SHIZI NO. 381 JIESHI, *supra* note 243.

³⁰⁷ *Id.*; *see also* SHIZI NO. 419 JIESHI, *supra* note 97.

³⁰⁸ *See generally* DAVID K.C. HUANG, SUN YAT-SEN AND THREE NOTABLE CHINESE CHARACTERISTICS WITHIN THE CHINESE CONSTITUTIONS 20–22 (GRIN 2019) (2009).

³⁰⁹ *Compare* SHIZI NO. 342 JIESHI (釋字第 342 號解釋) [Judicial Yuan Interpretation No.342] (1994), *with* SHIZI NO. 381 JIESHI (釋字第 381 號解釋) [Judicial Yuan Interpretation No. 381] (1995).

³¹⁰ SHIZI NO. 342 JIESHI, *supra* note 130 (Official translation); *see also* SHIZI NO. 419 JIESHI, *supra* note 97.

³¹¹ SHIZI NO. 499 JIESHI, *supra* note 2.

legitimacy of a constitutional state. [. . .] In the enactment and amendment of the Additional Articles, the process of the National Assembly shall be open and transparent. It shall abide by Article 174 of the Constitution and the Rules of Procedure of the National Assembly (hereinafter “Rules of the National Assembly”) so as to live up to the reasonable expectations and the trust of the people. Accordingly, Article 38, Paragraph 2 of the Rules of the National Assembly concerning the secret ballot, as enacted by the National Assembly pursuant to Article 1, Paragraph 9 of the Additional Articles promulgated on August 1, 1994, shall be interpreted in a restrictive way, when applied to the readings of any constitutional amendment bill. [. . .] The amendment process for the disputed Additional Articles, which passed the third reading by the National Assembly on September 4, 1999, contravenes the principle of openness and transparency as set out above and is not in conformity with Article 38, Paragraph 2 of the Rules of the National Assembly.³¹²

Why was it unconstitutional to vote on a constitutional amendment by secret ballot? To cope with this question when the main text of the constitution is silent, Anthony Stephen King provided a theoretical insight into the compass of constitutions: “Constitution . . . are never—to repeat, *never*—written down. They might possibly in principle be written down, but in practice they never are.”³¹³ That is, there are connotative and extensive³¹⁴ constituents of constitution and “in practice they [are] never [written down].”³¹⁵

³¹² *Id.* (Official translation).

³¹³ ANTHONY S. KING, DOES THE UNITED KINGDOM STILL HAVE A CONSTITUTION? 3 (Sweet & Maxwell 2001).

³¹⁴ STÉPHANE P. DEMRI & EWA S. ORLOWSKA, INCOMPLETE INFORMATION: STRUCTURE, INFERENCE, COMPLEXITY 15 (Springer 2002) (indicating that “[a] concept is determined by its extension (or denotation) and intension (or connotation). The extension of a concept consists of the objects that are instances of this concept and the intension of a concept consists of the properties that are characteristic for the objects to which this concept applies”).

³¹⁵ KING, *supra* note 313, at 3.

Parliamentary privilege will not therefore be respected when its exercise “is in clear contravention to the Constitution,”³¹⁶ even if the main text of the constitution is silent.³¹⁷ The Justices ruled:

Under the principle of popular sovereignty (Article 2 of the Constitution), the communication processes in which public opinion is freely expressed and the will of the people is freely formed are the safeguard of popular sovereignty. In other words, the exercise of popular sovereignty, when expressed in a constitutional system and its operation, requires openness and transparency, which enable democratic deliberation through rational communication and thus lay the foundation for the legitimacy of a constitutional state. Considering that constitutional amendment is the direct embodiment of popular sovereignty, the fact that the National Assembly never used a secret ballot in the previous nine rounds of constitutional amendments, including during the enactment and amendment of the Temporary Provisions and the Additional Articles, speaks to the principle of popular sovereignty. When the Delegates and their political parties are accountable to their constituents through such open and transparent amendment process, the constituents are able to hold them accountable through recall or re-election. Thus, the provision for the secret ballot in Article 38, Paragraph 2 of the Rules of the National Assembly shall not be applied to voting on any constitutional amendment. Not only must the readings for the adoption of a constitutional amendment comply with the Constitution strictly, but their procedures also need to conform to the constitutional order of liberal democracy (see *J.Y. Interpretation No. 381*).³¹⁸

³¹⁶ SHIZI NO. 342 JIESHI, *supra* note 130 (Official translation).

³¹⁷ *E.g.*, SHIZI NO. 342 JIESHI, *supra* note 130; SHIZI NO. 381 JIESHI, *supra* note 243; SHIZI NO. 419 JIESHI, *supra* note 97; and SHIZI NO. 499 JIESHI, *supra* note 2.

³¹⁸ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 5 (Official translation).

In the eyes of the Justices, “openness and transparency”³¹⁹ were “the foundation for the legitimacy of a constitutional state,”³²⁰ because the Constitution³²¹ “explicitly provides that political representatives at all levels are recallable.”³²² “[T]he National Assembly, on behalf of the people, is the sole constitutional organ that has the power to amend the Constitution,”³²³ and its constitutional amending power does not “require the approval of a bicameral parliament or the ratification of a parliamentary-adopted constitutional amendment bill by either a national referendum or state legislatures.”³²⁴ In other words, if a secret ballot is deemed constitutional in the event of constitutional amendment under such a framework, popular sovereignty³²⁵ would become a dead letter.³²⁶ Hence, the Justices ruled that “the use of a secret ballot is a manifest and gross [flaw].”³²⁷ Even though the main text of the Constitution is silent, the use of a secret ballot “is in clear contravention to the Constitution.”³²⁸

However, there was a variety of different opinions amongst the Justices. Justice Lin Young-Mou argued that the Justices might deliver a wrong message via the use of secret ballot, and that judicial interference could take place only when “manifest and gross flaws”³²⁹ were found in constitutional amendments.³³⁰ He suggested a stricter and broader review.³³¹ Justice Lai In-Jaw argued that recalling Judicial Yuan’s previous decisions³³² should not in itself lead to the conclusion that “the use of a secret ballot is a manifest and gross

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ MINGUO XIANFA § 133 (1947) (Taiwan); *see also* SHIZI NO. 401 JIESHI (釋字第 401 號解釋) [Judicial Yuan Interpretation No. 401] (1996).

³²² SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 8 (Official translation).

³²³ *Id.* Reasoning ¶ 5 (Official translation).

³²⁴ *Id.*

³²⁵ MINGUO XIANFA § 2 (1947) (Taiwan).

³²⁶ SHIZI NO. 499 JIESHI, *supra* note 2, Reasoning ¶¶ 5–6.

³²⁷ *Id.* Reasoning ¶ 6 (Official translation).

³²⁸ SHIZI NO. 342 JIESHI, *supra* note 130 (Official translation).

³²⁹ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 1 (Official translation).

³³⁰ *Id.* (Lin Y-M, partial concurring).

³³¹ *Id.*

³³² SHIZI NO. 342 JIESHI, *supra* note 130; SHIZI NO. 381 JIESHI, *supra* note 243; SHIZI NO. 419 JIESHI, *supra* note 97.

[flaw],”³³³ and he also suggested a stricter and broader review.³³⁴ On the other hand, Justice Sun Sen-Yen argued against the idea that the use of a secret ballot is unconstitutional, citing the fact that the main text of the Constitution was silent in the subject.³³⁵ He argued that Dennis T.C. Tang as counsel admitted that “it is hard to say whether the use of a secret ballot in the event of constitutional amendment should be banned by the Constitution.”³³⁶ Tang’s acknowledgement was shared by Justices Su Jyun-Hsiung³³⁷ and Chen Chi-Nan,³³⁸ despite the fact that Su upheld the principle of “openness and transparency”³³⁹ unquestionably.³⁴⁰

XII. CONCLUSION

Both authors of this article were witnesses to the Fifth Amendment of the Additional Articles of the Constitution of the Republic of China³⁴¹ and the following *Judicial Yuan Interpretation No. 499* [2000], although one of the authors was only a law school student at the time, whose law school was located next to the chamber of the National Assembly. As Dennis T.C. Tang and Su Yeong-Chin outlined in their instruments of appeal³⁴² respectively, both authors witnessed the anger of the public (Tang: *Min-Yuan*; Su: *Min-Zhong-Fan-Dui*³⁴³) towards the National Assembly’s self-extension of its term of office.³⁴⁴ Of course the National Assembly did more than this, but it was this that really angered the Taiwanese citizens³⁴⁵ the most in political terms.

³³³ SHIZI NO. 499 JIESHI, *supra* note 2, at Reasoning ¶ 6 (2000) (Official translation).

³³⁴ *Id.* (Lai I-J, concurring).

³³⁵ *Id.* (Sun S-Y, partial concurring).

³³⁶ *Id.* (Authors’ translation).

³³⁷ *Id.* (Su J-H, concurring).

³³⁸ *Id.* (Chen C-N, concurring and partial dissenting).

³³⁹ *Id.* Reasoning ¶ 5 (Official translation).

³⁴⁰ *Id.* (Su J-H, concurring).

³⁴¹ MINGUO XIANFA amend. (民國憲法增修條文) [Additional Articles of the Constitution of the Republic of China] (1999) (Taiwan).

³⁴² JUDICIAL YUAN INTERPRETATION, *supra* note 5.

³⁴³ *Id.*

³⁴⁴ MINGUO XIANFA amend. § 1 (1999) (Taiwan).

³⁴⁵ JUDICIAL YUAN INTERPRETATION, *supra* note 5.

Judicial Yuan Interpretation No. 499 [2000] was not a single incident in politics. Instead it represented the final instalment of the tetralogy of anti-lifelong tenure in Taiwan.³⁴⁶ Although it also involved in the scope of judicial review (versus parliamentary privilege) and restraints on the constitutional amending power,³⁴⁷ the extension of the term of office³⁴⁸ was always the main factor.³⁴⁹ Consequently, no jurist involved—apart from Justice Tseng Hua Sun, who submitted the only dissenting opinion³⁵⁰—expressed agreement about extending the term of office in *Judicial Yuan Interpretation No. 499* [2000] despite disagreeing with each other regarding the application of due process.³⁵¹ The Chinese political tradition of lifelong tenure³⁵² was (and remains) a political taboo in Taiwan, and no one has the power to extend any term of office for any reason in

³⁴⁶ Compare SHIZI NO. 31 JIESHI (釋字第 31 號解釋) [Judicial Yuan Interpretation No. 31] (1954), with SHIZI NO. 150 JIESHI (釋字第 150 號解釋) [Judicial Yuan Interpretation No. 150] (1977), SHIZI NO. 261 JIESHI (釋字第 261 號解釋) [Judicial Yuan Interpretation No. 261] (1990), and SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000).

³⁴⁷ SHIZI NO. 499 JIESHI, *supra* note 2.

³⁴⁸ MINGUO XIANFA amend. § 1 (1999) (Taiwan); MINGUO XIANFA amend. § 4 (1999) (Taiwan).

³⁴⁹ JEAN-PIERRE CABESTAN, CONSTITUTIONAL DEVELOPMENTS IN TAIWAN AND DEMOCRATISATION OF THE REPUBLIC OF CHINA: A MODEL OR A PRECEDENT FOR THE PEOPLE'S REPUBLIC OF CHINA?, in TAIWAN IN THE 21ST CENTURY: ASPECTS AND LIMITATIONS OF A DEVELOPMENT MODEL 221 (Robert Ash & J. Megan Greene eds., Routledge 2007) (indicating that “the extension of the term of the National Assembly was initiated by a DPP deputy (Law I-tieg), this version provoked immediate condemnation by most political leaders and the majority of the public”).

³⁵⁰ SHIZI NO. 499 JIESHI, *supra* note 2 (Tseng H-S, dissenting).

³⁵¹ Compare SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000), with SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000) (Lin Y-M & Sun S-Y, partial concurring), SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000) (Su J-H & Lai I-J, concurring), SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000) (Chen C-N, concurring and partial dissenting), SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000) (Tseng H-S, dissenting), and SHIZI NO. 499 JIESHI YIJIANSHU CHAOBENDENG WENJIAN (釋字第 499 號解釋意見書抄本等文件) [Judicial Yuan Interpretation No. 499 Appendix] (2000).

³⁵² LIU, *supra* note 23, at 58 (indicating that the Chinese “traditional rule [was] lifetime tenure for the ruler”).

future, unless the country finds itself in a state of emergency once more.³⁵³

³⁵³ Compare SHIZI NO. 31 JIESHI (釋字第 31 號解釋) [Judicial Yuan Interpretation No. 31] (1954), with SHIZI NO. 261 JIESHI (釋字第 261 號解釋) [Judicial Yuan Interpretation No. 261] (1990), and SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000).