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MARCHING TOWARDS CIVIC CONSTITUTIONALISM WITH SUNFLOWERS



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In March 2014, Taiwanese students occupied Taiwan's Congress for several weeks over the legislature's fast-track approval of a service trade agreement with China. Recently, there were calls and actions to occupy the Central in Hong Kong over the controversial rules of choosing the Chief Executive of the special region. Some have hailed mass movement or civil disobedience, inter alia, as the triumph of civil society, while some lamented it as the death of mature democracies and a threat to the rule of law and liberal constitutionalism. This essay analyses the Sunflower Movement from the prospects of representative democracy and the changing landscape of constitutionalism, arguing that the Sunflower Movement has demonstrated a model of marching towards civic constitutionalism, in that civil groups compete with their representative agents and the courts in shaping and defining the constitutional order.

1. Introduction

Constitutional change in Taiwan has occurred in tandem with a fascinating process of democratic transformation. Incremental and fragmented as it may seem, Taiwan's constitutional change since democratisation in the late 1980s could be summarised as a process of representation-reinforcing, as reflected in the seven rounds of constitutional revisions, in the more representative legislature, in the general and direct presidential elections and also in the larger participatory state apparatus.¹ This level of progress in building representative democracy, albeit miraculously successful, did not stop the civil society from increased engagement with the constitutional order. In fact, following democratic transition and constitutional reform, the civil society stayed vigilant and active with the realisation of full suffrage and better representation in the government, including for the legislature and also the President. More than two decades since the legislative overhaul in 1992, the Sunflower Movement consolidated an

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¹ Jiunn Rong Yeh, "Democracy-Driven Transformation to Regulatory State: The Case of Taiwan" (2008) 3 *National Taiwan University Law Review* 31–59.

ongoing move from representative democratic constitutionalism to a more civic-centric constitutional order, which can be considered “civic constitutionalism”.

Often, constitutionalism is viewed from the perspective of the constitution and the adjudications of a Supreme or Constitutional Court, and how they construct or understand the constitution in a rights-based or power-centric disposition. Often, the President, the legislature and the state apparatus are the foci of constitutional order, and this thinking has driven a general concern for the diminishing of civic democratic engagement and the stifling social society.²

Some new democracies in East and Central Europe have begun to reflect the so-called crisis of the new democracies, which operates under the shadow of rigid constitutionalism and activist Constitutional Courts.³ Conversely, Taiwan has demonstrated a continuous civil engagement in the process of democratic constitutional reform, all amidst an evolving constitutional rule of law and judicial review. The civil society “punished” their representatives in the 2005 constitutional revisions by halving the number of Legislative Yuan seats. In that same effort, the distrusted National Assembly that exercised monopolistic power to amend the constitution was abolished altogether, mainly driven by strong public outcry against it. Recently, students even physically occupied the Legislative Yuan building because of irresponsible legislative deliberation on the Cross-Strait policy. This civic uprising not only posed a threat to the ruling Kuomintang (KMT) regime but also humiliated the opposition Democratic Progressive Party (DPP).

This essay argues that the Sunflower Movement is not the downfall of Taiwan’s maturing democracy nor is it a threat to the embraced values of liberal constitutionalism. Rather, it is a strong confirmation of the march towards civic constitutionalism; a march which is discontent with representative democracy and the judicial constitutional dispositions enshrined in the flux of democratic and constitutional reform. This transformation has been driven and will be further fuelled by the ambiguous Cross-Strait policies that put Taiwan’s political institutions and civic structure through serious tests.

² See, eg, David C Williams, “Civic Constitutionalism, the Second Amendment, and the Rights of Revolution” (2004) 79 *Indiana Law Journal* 379, 380–381.

³ Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Oxford, UK: Routledge, 2014).

2. The Legacy of Transition: Representative Democracy, Courts and Civil Society

In the flux of democratic transitions (such as in East and Central Europe, South Africa or East Asia), a system of periodical elections and levels of representative bodies were established with full suffrage, so that the public could build up a legitimate representative democracy. Often courts and constitutional courts, in particular, are entrusted with mandates for protection of rights and the resolution of political disputes in the course of transition.⁴ The legislature and the courts gradually take charge of the constitutional issues, as increasing institutionalised capacity-building ensues. On the surface, this may seem to be a perfect result as regards democratic transition and corresponding constitutional reform for the new democracies. Along this line of constitutional institutionalisation, however, the role of the populace has ironically become an intriguing area for many scholars: after the installation of representative democracy, should they stay active and watchful or be more passive? This, thus, creates post-transitional concerns on many levels.

2.1. *The Post-Transitional Concern: The Ambivalent Role of the Civil Movement*

Democratic transition often coincides with constitutional reform, focusing on building democratic institutions and competitive electoral mechanisms. This institutional reform, if successful at all, may stifle the civil society and reduce civic engagement, posing a crisis to even vibrant democracies.

After the collapse of Iron Curtain, post-Soviet states formed new constitutional democracies in Central and East Europe – Czech Republic, Hungary, Poland, Romania and Slovakia drew up their own constitutions and established political systems of democracy. Two decades later, however, these new democracies are considered in crisis in terms of constitutional democracy.⁵ Overemphasised formal institutions for the rule of law have resulted in the neglect of civic participation within these constitutional systems. The lack of dynamic political participation from the society, and even some legal resentment, can be seen in these years. For example, independent constitutional courts and judicial review by constitutional

⁴ Jiunn Rong Yeh and Wen Chen Chang, "Introduction: Asian Court in Context: Tradition, Transition, and Globalization" in Jiunn Rong Yeh and Wen Chen Chang (eds), *Asian Courts in Context* (Cambridge: Cambridge University Press, 2014) 14–15.

⁵ Paul Blokker (n 3 above).

experts holds absolute power regarding constitutional interpretation. Such “juristocracy”, one-sided institutional legal formalism, discourages wider public debates over constitutional issues. Also, it damages the core value of democracy, leading to questions about the legitimacy of the democratic system. If the crisis of democracy observation is correct, then a change to a more robust public engagement in terms of civil constitutionalism should result. An institutional design to increase the possibility of constitutional dialogue among the civil society, political and legal departments should be introduced, even without a strong tradition of civic constitutionalism.

Conversely, in a similar context of democratic transition, Taiwan presents an example of heightened civic engagement that is, allegedly, non-existent in the East and Central European states after democratic constitutional reform. The Sunflower Movement exemplifies this scenario, as autonomous students occupied the legislative building and altogether paralysed the legislature, thus resulting in a plethora of constitutional ramifications. Therefore even after the institutional establishment of representative bodies, one may see disobedient social movements in defiance of representative democracy.

Indeed, in the outbreak of the event, commentators spared no time to lament this happening as a setback to the maturing democracy. Is this the beginning of democratic failure? It turned out that the student groups exercised a high degree of discipline and, not long after their occupation, won social support through impressive dialogue with both the general public and government authorities. The student groups argued in constitutional terms about rights infringement, due process and the boundaries of congressional oversight and public monitoring in concluding the trade pact with China. Passionate lectures about contemporary constitutional law topics were offered in the occupied legislature and even in the surrounding streets. With general concern regarding the accountability of the President and the legislature, the student/civic groups continued to discuss and propose issues for constitutional reform.

Not long after the occupation, the group had morphed into a large social movement with increasing social support. Again, is this a threat to democracy? The answer by the general public in Taiwan was an unequivocal “no”. In fact, it is indeed the practice of civic constitutionalism, after a democratic constitutional transition, that is missing from the Eastern and Central European context.⁶

⁶ *Ibid.*

2.2. Towards Civil Constitutionalism

The lack of recognition of the role of civic engagement in constitutional order could be attributed to two possible supremacies: judicial and legislative. Judicial supremacy of constitutional interpretation has been advanced through a court-centric reading of the constitution. Many believe that judges have the last word when it comes to constitutional interpretation and court decisions that determine the meaning of the constitution, leaving the general public little role in the evolving constitutional order.⁷ Under general notions of representative democracy, citizens are supposed to be more passive regarding public affairs after electing their representatives. Aside from the courts, people's representatives exercise a public mandate, which includes embracing the constitutional order. In a presidential system, the directly elected president is also entrusted with a mandate to protect the constitution for the general public. Yet, in the Westminster tradition, the embedded notion of parliamentary supremacy could further exemplify this tension.

The idea of finding a civic role in constitutional founding, interpretation or dialectic engagement is not innovative and, in fact, has been argued in different social contexts and in different terms. The constitutional moment's higher law-making, as articulated by Bruce Ackerman, has given recognition to the normative significance of popular mobilisation through the lens of direct voting for the President or Congress during transformative moments.⁸ However, popular constitutionalism advocates asserting a significant role for public interpretation of the constitution, against judicial supremacy (which places opinions of judges as final and absolute in the shaping of constitutional order and rights recognition).⁹ A more sophisticated civic constitutional argument places civic engagement within the dialectic shaping of the constitution during founding and other crucial junctures of constitutional transformation, such as the adoption of a bill of rights, the abolition of slavery, women's suffrage and the passage of national civic rights legislation.¹⁰

During a time of profound change, who actually shapes the contours of the reform agenda and constitutional order? Aside from the key figures usually noted, such as founding fathers, renowned politicians

⁷ Robert Post and Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy" (2004) 92 *California Law Review* 1027.

⁸ Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991).

⁹ Larry Kramer, "Popular Constitutionalism, circa 2004" (2004) 92 *California Law Review* 959 (2004); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2005).

¹⁰ Elizabeth Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy* (Oxford: Oxford University Press, 2014).

or intellectuals, often ignored are the constitutional views, debates and activities of civic groups and engaged citizens in interpreting the constitution, refashioning democratic citizenship and constructing civic scaffoldings for new constitutional rights and commitments.¹¹ Thus, it is not unusual to see the engaged citizen take an active and ongoing role in the interpretation and enforcement of constitutional law. Even in a world of judicial dominance, judges interpret the constitution according to their best judgment, but with the awareness that citizens are the higher authority, with the power to overturn their decisions.¹² By the same token, even legislatures have a public mandate with regard to constitutional underpinnings, as they constantly face the reality that the public, their higher authority, may overturn them.

Civic constitutionalism could thus be articulated through the following accounts. First, civil society stayed critical and engaged Congress by enhancing representative democracy through a series of constitutional reforms. Civil society thus engaged in the understanding, interpretation and shaping of the constitution through the direct or indirect impact on their representatives. Second, after democratisation, civil society remains vigilant and active, even with an increasingly trusted Constitutional Court. On the one hand, civil society remains a motivation for judicial review with regard to rights protection and government integrity, as they often bring issues to the courts for resolution, thus pushing forward the consolidation of constitutional principles and values. On the other hand, while weaving the fabric of the constitution, the court remains watchful of public views on matters concerning constitutional adjudication. Third, engaged citizens and civic groups play a pivotal role in launching, deliberating and steering the agenda of constitutional reform in spite of the institutionalised form of constitutional amendments. These features have enriched the way we see constitutions, and how they operate in post-democratised societies.

3. Civic Perspectives of Constitutionalism: Discovering Civil Constitutionalism through and beyond the Sunflower Movement

The journey of Taiwan's constitutional development has been characterised by the historical legacies of foreign occupations and colonisation, externally imposed constitutions, constitutional manipulation and authoritarian governance and, finally, the incremental constitutional indigenisation and democratic reforms. We see constitutional change through institutional betterment or enhanced government performance,

¹¹ *Ibid.*, p xv.

¹² Post and Siegel (n 7 above), p 1028.

such as government integrity, congressional oversight or judicial review. Civic roles in the making of a constitutional order, however, are often overlooked in the modern constitutional landscape.

In fact, engaged citizen and civic groups have played a crucial role at many critical junctures of constitutional transformation in Taiwan, thus presenting a strong mode of civic constitutionalism. Even with the increasingly creditable periodical elections, representative institutions and courts, the civil society has stayed vigilant and engaged in shaping a democratic constitution that they fought over for decades during the transition era. In the path of Taiwan's constitutional change, the Sunflower Movement is the pinnacle of development.

3.1. The Sunflower Movement and Civic Constitutional Discourse

On 18 March 2014, Taiwan was shocked when a group of university students broke into the Legislative Yuan to protest against the way their representatives handled the Cross-Strait Service Trade Agreement (CSSTA). Thousands of citizens soon followed, rallying on the streets outside the building in support of the occupation. At that time, no one was able to predict that the Movement could last for almost a month, only to come to an "end" on 10 April 2014.

The major cause of the Movement was the hasty signing of the CSSTA. Before, during and after the signing of the agreement, the public was not properly informed. While the legislature should be the organ to give a comprehensive review, some partisan legislators of the ruling KMT managed to smuggle the agreement through the process, in order to avoid such a review.

Students and civil groups argued that the pact was negotiated secretly, without proper public oversight and were worried that some sections included in the CSSTA might allow for China to gain more political control over Taiwan.¹³ In their campaigns, students and activists demanded for a piece of legislation to guarantee legislative oversight and to enhance greater public supervision of such trade agreements with China, including that the CSSTA should not pass before the enactment of such legislation.

Opposing such demands, the KMT government argued that the legislative oversight of the Cross-Strait negotiations proposed would be a legislative encroachment on executive power,¹⁴ and thus preferred to

¹³ "Sunflower Sutra" *The Economist* (8 April 2014), available at <http://www.economist.com/blogs/banyan/2014/04/politics-taiwan>.

¹⁴ Yen Tu Su, "Translating Protest into Law Test for Sunflowers" *Taipei Times* (4 May 2014), available at <http://www.taipeitimes.com/News/editorials/archives/2014/05/04/2003589509>.

pass the CSSTA in its original form. Given their deep disappointment with the government, on 23 March, protesters broke into the Executive Yuan and were later forcibly evicted by riot police, an episode that caused serious human rights concerns. This “incident” brought public resentment to an even higher level, leading to a demonstration on 30 March, which was joined by half-a-million citizens.

The deadlock between the government and the protesters was slightly resolved when on 6 April, the Parliamentary Speaker, Wang Jin Pyng, pledged to halt the review of CSSTA until the “supervising” legislation was enacted. Thus, the protesters finally left the parliament on 10 April 2014, with a general recognition that the CSSTA review would be contingent on the successful passage of a legislative framework regulating the oversight of Cross-Strait agreements.

Regardless of the viewpoint one may take in observing the Movement, it is undeniable that the Sunflowers turned the CSSTA and the failing government oversight mechanisms into a national issue. Also, the Movement has rejuvenated civil society in Taiwan.¹⁵ These facts bear significant meaning from the lens of civic constitutionalism.

There is little doubt that the current constitution serves as the normative basis for the exercise of powers, and the checks and balances among them. However, when it comes to constitutional interpretation, there is always a civic deference to government authority, be it the executive, the legislature or the court. The constitutional process of concluding the CSSTA exemplified this, as the executive often exerts its power of interpreting the constitution so as to legitimise its monopoly over the negotiations (even at the sacrifice of the necessary legislative oversight). Bearing this in mind, we can see the Sunflower Movement as more than just a protest against government, but as the exercise of civic views on the constitutional requirements of Cross-Strait negotiations. Because of this Movement, the general populace no longer sees the constitution as out-of-touch. Indeed, the Movement reminded society of their duty not only to establish the constitution, but also to maintain the constitution by strengthening or reshaping it.

There were at least four instances that can be drawn from the Movement to demonstrate the trend towards civic constitutionalism. First, the Movement allowed civic groups to present their definition on the concept of “separation of powers”. The legislative oversight debate on the CSSTA indeed shows very different understandings between government and the people regarding what the legislature should and should not do.

¹⁵ J Michael Cole, “Was Taiwan’s Sunflower Movement Successful?” *The Diplomat* (1 July 2014), available at <http://thediplomat.com/2014/07/was-taiwans-sunflower-movement-successful/>.

Second, the Sunflower Movement empowered the public through knowledge on both policy and the constitution, which is a significant tool in the practice of civic constitutionalism. During the Movement, scholars voluntarily went on the streets and gave public lectures on “constitutional law”, “analysis of the CSSTA” and other topics. The knowledge transferred on the street spurred further discourse, enabling the public to strengthen their arguments and to compete with their representatives in the legislature as regards redefining the constitution. Third, the Movement established a level of transparency long-forgotten by the current government. Because the Taiwanese government did not inform the public about the CSSTA’s details, throughout the Sunflower Movement a number of citizen-initiated websites were created to explain the agreement and its potential impact on various sectors and vulnerable groups. These explanations were often strengthened with statistics and sound analysis.¹⁶ Last, the “Executive Yuan incident” following the occupation of the Legislative Yuan reminded the public of the significance of human rights protection against police power. This time, the protestors’ rights were argued on a constitutional level. Also, the legality and legitimacy of such state violence was seriously questioned by the public. Although there have been other incidents and court decisions defining the boundaries between law and public order when it comes to citizen demonstrations,¹⁷ the high profile and complex questions brought about by the Sunflower Movement with regard to rule of law and civil disobedience demands further constitutional reflection.

Post-Sunflower Movement developments show that the journey of civic constitutionalism did not essentially end on 10 April. Civic groups, scholars and students managed to form a forum group called “Civil Constitutional Conference”. This “conference” intends to establish a forum to foster public discussion regarding the deficits in the constitution and to brainstorm possible amendments. Thus, it is expected that the group could provide a valuable input for civil society when lobbying their representatives in the future.¹⁸

¹⁶ “How Technology and Citizen Media Shaped Taiwan’s Sunflower Movement” *Global Voices* (20 April 2014), available at <http://globalvoicesonline.org/2014/04/20/how-technology-and-citizen-media-shaped-taiwans-sunflower-movement/>.

¹⁷ J.Y. Interpretation No.718 (2014).

¹⁸ The arrangement of the forum began from September 2014. First, it seeks the opinions about constitutional reform from citizens. Second, they will have conversations with non-governmental organisations and scholars, to further organize the opinions. Finally, the forum hopes to influence both political parties and the current government before the 2016 presidential election.

3.2. Civic Struggle for Better Representation: The People and Their Representatives

Some have argued that the Sunflower Movement resembles a new “moment” for Taiwan’s constitutional order. Yet, it should be noted that civic constitutionalism did not begin with the Sunflowers and nor will it end with them. For instance, not long ago, a few major media deals spurred the anti-media monopoly movement in Taiwan. If we trace this a bit earlier, to the beginning of Taiwan’s democratic transition, we also find civic groups exerting their influence over the reform agenda, when the legislature was filled with representatives they never voted for. In fact, along the lines of civic engagement with their representatives in the legislature, the Sunflower Movement was in fact the sequel to the Wild Lily Movement, which coincided with the beginning of Taiwan’s democratisation.

The pinnacle of Taiwan’s democratisation has been the autonomous citizen uprisings – the student movements, in particular – in contrast to the partisan debates within and outside of the legislature. The most celebrated of these has been the Wild Lily Student Movement. On 16 March 1990, students started to gather in front of the Chiang Kai Shek monument, chanting for political reform. Eventually, this contingent formed the largest student movement in Taiwan’s history. The students requested a reform agenda with four foci: (1) dissolving the National Assembly, (2) abolishing the Temporary Provisions, (3) calling for a national affairs conference and (4) providing a timeline for political and economic reforms. At about the same time, proposals to reform the Legislative Yuan were debated within the KMT and with other opinion leaders.

Confronting an increasing outcry for reform, President Lee decided to hold out an olive branch to the students. He invited student leaders into the presidential office and vowed for reform. Many requests from the students were met with positive feedback from the President. A National Affairs Conference convened by the President and attended by 141 representatives, chosen from corners of society, was held three months later and entrusted with deliberation over a political and constitutional reform agenda. A major consensus was reached during the National Affairs Conference that paved the way for a series of incremental constitutional reforms. This consensus included the total demolition of the Temporary Provisions, which also put an end to the mobilisation period. As for the legislature’s reorganisation, the Constitutional Court issued interpretations that requested total re-election before any resolution reached the National Affairs Conference. Together, these measures provided legitimacy for a series of constitutional reforms in

the following decade. Thus, it is fair to say that landmark constitutional interpretation No. 261 was fuelled by and through this mass social movement.

Following the Wild Lily Movement, a series of constitutional revisions were undertaken to develop a legislature fully seated by elected representatives. Engaged citizens continue to monitor the representatives they have voted for in constitutional terms. Before the Sunflower Movement, the general public mobilised to push forward a constitutional amendment that downsized the number of legislature seats from 226 to 113 as a way to “punish” their representatives for poor governance.

All things considered, the 1990 Wild Lily Movement and the 2014 Sunflower Movement are iconic moments of civic engagement in their respective eras. While the Wild Lily Movement pushed for constitutional reform towards full suffrage and representation, the engaged Sunflower Movement students exercised their constitutional rights by holding their chosen representatives in the legislature accountable in constitutional terms.

3.3. Civic Engagement in Rights Discourse: People and Their Courts

Civic constitutionalism presents a place where citizens and civic groups can engage in rights discourse in their words and deeds, both inside and outside the courts. The rights discourse in Taiwan has primarily been championed by civic groups, which has burgeoned since the 1980s. As economic growth reached an apex, a more vibrant civil society was made possible with the rise of a middle class. Also, free association that had been prohibited by the Martial Law Decree in 1949 was now legal, with the ban lifted in 1987.

There have been two major waves regarding the establishment of non-governmental organisations: one in the early 1980s and the other in the late 1980s.¹⁹ For instance, a rice oil incident in 1979 led to the creation of the first consumer group one year later. Thereafter, the Awakening Foundation, a group of female lawyers, was established in 1982. The Taiwan Association for Human Rights, composed primarily of human rights lawyers, was founded in 1984 (even before the first opposition political party, the DPP, was established in 1986).²⁰ The second wave of founding for non-governmental groups came upon the lifting of the

¹⁹ Wen Chen Chang, “Public-Interest Litigation in Taiwan: Strategy for Law and Policy Reforms in Course of Democratization” in Po Jen Yap and Holning Lau (eds), *Public Interest Litigation in Asia* (New York: Routledge, 2011) 138–139.

²⁰ Po Jen Yap and Holning Lau (eds), *Public Interest Litigation in Asia* (New York: Routledge, 2011) 138–139.

Martial Law Decree in July 1987. The Taiwan Environmental Protection Union and the Humanistic Education Foundation were both formed in 1987, followed by the Homemaker's Union and Foundation, a female environmental group. In the 1990s, further democratisation saw the establishment of social groups for the advocacy of rights, social justice and political reform. Particularly impactful groups include the Judicial Reform Foundation (created by a group of human rights lawyers), the Gender/Sexuality Rights Association (advocating for gay rights) and the Wild at Heart Legal Defense Association (the first environmental lawyers group).²¹

These human rights organisations and social groups vigorously participated in political and constitutional reforms throughout the 1990s and 2000s. They advanced a wide array of rights agendas, including discussion about constitution-making or constitutional revision. When attempts at pushing through the incorporation of additional rights and freedoms in the course of constitutional reform failed, these groups have turned their attention to the enactments of quasi-constitutional statutes²² or to the accession of international human rights conventions (such as the ICCPR). Finally, the other way for these non-governmental organisations to advance rights is to seek constitutional interpretations by the Constitutional Court.²³

Adjudication sought in the courts by human rights groups and social organisations has been namely undertaken with the Constitutional Court in two particular types of litigation. First, the undertaking of constitutional petitions by these groups often challenges statutes that encroach upon fundamental rights and freedoms already written into the constitution. This line of litigation burgeoned at the beginning of democratisation in the late 1980s and early 1990s. Second, constitutional petitions are made to request the Constitutional Court to construe new rights not already written in the constitution. This happens especially through Art 22, which accords constitutional protection to “all other freedoms and rights that are not detrimental to social order or public welfare”.²⁴ On occasion, such judicial construction of new rights and freedoms has been

²¹ *Ibid.*, pp 139.

²² Jiunn Rong Yeh and Wen Chen Chang, “A Decade of Changing Constitutionalism in Taiwan: Transitional and Transnational Perspectives” in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014) 150–152; Jiunn Rong Yeh and Wen Chen Chang, “The Changing Landscape of Modern Constitutionalism: Transitional Perspective” (2009) 4 *National Taiwan University Law Review* 145, 156–157.

²³ Wen Chen Chang (n 19 above), pp 138–139.

²⁴ Constitution of the Republic of China (1947), Art 22.

channelled through the reference to international human rights and comparative constitutional law.²⁵

The petitions brought before the Constitutional Court in the beginning of the democratic transition entailed a wide array of rights. One of the first petitions challenged the constitutionality of the mandatory death penalty imposed on three young men involved in a widely known kidnapping case. The Taiwan Association for Human Rights – formed in 1984 – was the first human rights organisation to publically criticise the mandatory death penalty. Although the Constitutional Court in Judicial Yuan (J.Y.) Interpretation No. 263 upheld the constitutionality of the mandatory death penalty, it nevertheless urged judicial caution in such impositions.²⁶ This petition – albeit a failed one – helped at least to generate public awareness on the numerous problems with the mandatory death penalty.

The next successful line of constitutional petitions was made by women lawyers and women's organisation such as the Awakening Foundation – established in 1982 – to challenge statutes violating sex and gender equality. In 1990, several women's groups were working on a three-year project to propose a revision of the Civil Code respecting the equal rights of women with families. They not only tried a test case in the court but also lobbied the newly elected Legislative Yuan to overhaul the Civil Code. Joined by a number of legislators, women's groups made petitions to the Constitutional Court challenging the constitutionality of a provision in the Civil Code which privileged the fathers in cases of parental disagreements over child custody. In J.Y. Interpretation No. 365, the Constitutional Court found such a violation, and demanded that the impugned provision be amended two years before being made null and void.²⁷ This victory was followed by even more successful petitions, such as J.Y. Interpretation No. 410 and J.Y. Interpretation No. 452, in which provisions of the Civil Code disadvantageous to women were found unconstitutional.²⁸

The success of constitutional litigation by women's groups triggered even more litigation by other human rights organisations and social groups. These groups began to see constitutional litigation as an effective way to advance their rights agendas. To illustrate, scholarly associations asserted their freedom of association in J.Y. Interpretation No. 479, which held the

²⁵ Wen Chen Chang and Jiunn Rong Yeh, "Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan" in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013) 373-392.

²⁶ J.Y. Interpretation No 263 (1990).

²⁷ J.Y. Interpretation No 365 (1994).

²⁸ J.Y. Interpretation No 410 (1996); J Y Interpretation No 452 (1998).

certain restrictions on the naming of associations as unconstitutional.²⁹ The right of free speech for gay and lesbians was further expanded with J.Y. Interpretation No. 617.³⁰

The variety of rights agendas pushed forward by social groups or concerned individuals have substantially enriched the docket of the Constitutional Court. Judicial construction of fundamental rights and freedoms has not been merely a reflection of judicial preference, but rather, a response to ongoing social and political demands in a society that has been undergoing profound transformations.³¹

4. Towards Civic Constitutionalism after the Sunflower Movement

Taiwan has demonstrated a mode of civic constitutionalism beyond representative democracy that has been built upon during democratic transition, exemplified by the Sunflower Movement and the follow-up landslide change in the recent nine-in-one local elections. Civic constitutionalism honours the existing constitutional institutional framework but puts engaged citizens and civic groups in a more visible place in the constitutional order in relation to the state apparatus, namely the representative bodies and the courts that exert constitutional power and political mandates.

The increased recognition of civic constitutionalism in Taiwan indicates first the failing of parliamentary supremacy, which stands as the backbone to several parliamentary democracies in the Westminster tradition. The court has continued to exert judicial review as a check on the legislature, but the legitimacy and level of judicial scrutiny might have scaled up. Constitutional adjudication, in political conflict resolution or rights protection, will continue to be pro-dialogue and leave much room and time for resolution by the political branches.³² But the tendency of judicial rulings will be even more receptive to social consensus and keen to be in dialogue with the civic society. With this civic orientation, courts will be more inclined to deal with inter-generational justice concerns in terms of financial stability, welfare distribution and environmental justice.

In the scope of civic constitutionalism, engaged citizens and civic groups exert much influence in public matters under the constitutional order but

²⁹ J.Y. Interpretation No 479 (1999).

³⁰ J.Y. Interpretation No 617 (2006).

³¹ Jiunn Rong Yeh and Wen Chen Chang, "The Emergence of East Asian Constitutionalism: Features in Comparison" (2011) 59(3) *American Journal of Comparative Law* 805–840.

³² Jiunn Rong Yeh, "Presidential Politics and Judicial Facilitation of Political Dialogue between Political Actors in New Asian Democracies: Comparing the South Korean and Taiwanese Experiences" (2011) 8(4) *International Journal of Constitutional Law* 911–949.

also engage with the constitution through dialectic interpretation and formation. The general public still values each election by going to the ballot box and honouring the electoral results, thus creating representative bodies and formal state apparatus. These functions still operate in constitutional terms but are keen to involve citizen participation and face continuous civic oversight. More institutional measures facilitating transparency and deliberation in law-making functions such as legislation, budgeting and policy resolution are in even greater demand. Civic groups engage not only in all facets of constitutional transformation but also in constitutional maintenance and interpretation. Accordingly, the recent landslide losses by the ruling KMT in the 2014 Taiwanese local elections have aroused very strong civic views of constitutional matters relating to transparency, the monitoring of Cross-Strait deals and the legitimacy of the presidency in handling such negotiations.

Despite the rigid constitutional amendment process as the result of the 2005 constitutional amendments, engaged citizens and civic groups have been vigilant and engaged about the issues and mechanisms of constitutional revision. The proposal to lower the voting age from 20 to 18 years, for example, has been pushed forward with more general consensus in the light of the Sunflower Movement events.

The primary underlying issue of the Sunflower Movement was the increased engagement across the Taiwan Strait, in addition to the challenges to the younger generation in an increasing digital world and a globally competitive job market. Thus the transformation to civic constitutionalism in the light of Taiwan's Sunflower Movement bears tremendous significance not only to China and Hong Kong but also far beyond.

