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Dynamics of Democracy

Administrative Law, Institutional Change, and Democratic Governance in Taiwan

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Please consider the following three cases:

1. In 1991, a group of international airlines, including Northwest Airlines, United Airlines, Japan Airlines, and Malaysia Airlines, filed a suit against Taiwan's Ministry of Transportation and Communications (MOTC). The suit came right after the Taiwanese government's lifting of martial law, which occurred in July 1987. The airlines challenged one of the MOTC's administrative rules providing that no civil aviation business shall carry any passenger who does not hold either a Taiwan visa or an entry permit to Taiwan. Any airline found violating this rule would be subject to a penalty of between 30,000 and 150,000 NT dollars. In fact, the rule is similar to its predecessor under the martial-law regime. The only difference is that the new rule's penalty was three to eight times greater than the original rule's penalty. The airlines argued that although the enactment of the administrative rule in dispute was delegated by congressional law, the enabling law itself was unclear and too broad. The airlines argued, in addition, that the application of the penalty infringed upon people's property rights.[1]

2. Ms. Chen had been a trader at former Yuan-tong Securities. Company which had ceased business. She counterfeited her clients' personal stamps and ID cards to open new accounts at Fu-shan Securities Company. Ms. Chen then sold her clients' stocks without permission and embezzled those incomes. The government prosecuted the manager, the traders, and the assistants of Fu-Shan Securities under Article 177 of the Securities and Exchange Act of 1988. The provisions of Article 177 delegated to the responsible agencies the power to promulgate relevant administrative rules so as to prohibit, suspend, and restrict certain transactions and activities. The government charged the employees of Fu-shan Securities with violation of the "Regulatory Rule for Managers and Traders of Securities Companies" issued by the Securities Management Commission (SMC). The rule prohibits traders and their supervisors from opening accounts for clients who neither appear in person at the opening nor authorize agents to do so. However, the defendants asserted that the related

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[1] Interpretation No. 313 of the Council of Grand Justices (hereinafter *Interpretation No*. 313) (February 12. 1993) (Taiwan), English translation available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=313

administrative rule providing criminal liability infringed upon people's basic rights. According to the defendants, the Legislative Yuan should not delegate its legislative authority to the agency so that the SMC can prescribe any criminal punishment in administrative rules.[2]

3. Mr. Hung was a technical professional specialized in waste disposal and cleanup. His company was found to have wrongfully operated in the process of waste disposal. As a consequence of the company's operations, toxic materials polluted the soil around the storage facility. Therefore, the Kaohsiung County Bureau of Environmental Protection revoked the operating license of the factory as well as the professional licenses of Mr. Hung and his colleagues. Mr. Hung argued that he was not a manager at the factory and that, consequently, he should not bear the responsibility of the wrongful operations of the factory's managerial personnel. However, the government's revocation of his license rested on an administrative rule of Taiwan's Environmental Protection Administration (EPA), which listed several conditions regarding the revocation of professional licenses for waste-disposal businesses—conditions including the illegal and undue operation of waste disposal and cleanup company. Mr. Hung argued that the agency's delegated power to revoke a professional license was vague and too broad.[3]

It is a widely accepted notion that law in developing countries is always a means to economic growth.[4] Therefore, governments in these countries aim to devise administrative procedures as an instrument to facilitate national policies. This means-to-an-end mechanism usually takes places under an authoritarian regime where the government can allocate and maneuver social resources according to technocrats' instrumental rationality. However, after democratic transition, the supreme goal of economic growth has ceded place to a more profound requirement of human-rights protection, owing in large part to the atrocities under authoritarian rule. In view of this ideological transformation, the setup of Administrative Procedure Law is

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[2] Interpretation No. 522 (March 9. 2001) (Taiwan), English translation available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=522

[3] Interpretation No. 612 (June 12. 2007) (Taiwan), English translation available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=612

[4] This is an oversimplified idea about the role of law in the developmental state. According to such an understanding, "[T]he primary use of law in the developmental state is as a tool to remove 'traditional' barriers and change economic behavior. Laws are needed to create the formal structure for macroeconomic control." *See* David M. Trubek & Alvaro Santos, *Introduction*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 6 (Trubek & Santos ed., 2006). Chalmers Johnson's seminal research on Japan's economic growth and bureaucrats stands for an exemplar of this school. *See* CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975 (1982). As for relevant legal analysis, *see* JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 149-164 (Oxford University Press 1991). Frank Upham and Ramseyer & Nakazato provide counterarguments regarding the conventional observation on Japanese experience. *See* Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, *in* PROMOTING RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 93-94, 75-104 (Thomas Carothers ed., 2006). J. Ramseyer & Minoru Nakazato, Japanese Law: An Economic Approach 2-3, 191-219(1999).

often viewed as an embedment of "rule of law" in the process of democratization.[5]

However, administrative law is a contextual legal framework corresponding to the political, social, and economic conditions of a country. It reveals the relationship between government and individuals and defines the legitimate procedures of power allocation. In practice, administrative law provides policymakers and other political actors a platform on which they can reach the optimal equilibrium for public policy. It is an arena for outsiders to estimate transparency, accountability and governing capability of administrative agencies in a country. Administrative law is a field located at the juncture of markets, political systems, and social participation. However, literature on democratic theory and rule of law has not paid sufficient attention to this field, despite its significant role in democratization.[6]

The three cases in the prologue represent three periods of administrative law in Taiwan. After the lifting of martial law in 1987, the legislative branch and the judiciary have been trying to confine the authoritarian state power. Both of these constitutional branches evoked the post-WWII German jurisprudence of *Rechtsstaat* to promote administrative-law reform in Taiwan. The Council of Grand Justices has established rigid judicial scrutiny under both the non-delegation doctrine and the intelligible principle since the early days of the 1990s. The Legislative Yuan enacted the Administrative Procedure Law in 1999, before the authoritarian party, the Kuomintang (KMT), had stepped down from the power. The two forces came together in shaping a new regime of administrative law on the basis of human-rights protection. However, the stringent regime of administrative law has created some critical problems for democratic governance. In this paper, I contextualize the transformation of administrative law in Taiwan in three different arenas: the executive, the legislative, and the judicial. This paper also examines the source of institutional changes during democratization from the perspective of administrative law. In addition, it analyzes the involution of state power in light of the rational calculation of different political actors. In the end, I would like to answer with rigor the following question: How does a nascent democracy overcome the institutional challenges emerging from the process of democratization? As we will see in this paper, democracy is an ongoing process of self-ruling. The most important notion of democratic governance is that all the critical challenges for democracy reinvigorate institutional changes to improve the democracy itself.

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[5] John Ohnesorge, Western Administrative Law in Northeast Asia: A Comparativist's History 220-242 (2001) (unpublished S.J.D. dissertation, Harvard Law School) (on file with author).

[6] *See* examples, JUAN J. LINZ AND ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA AND POST-COMMUNIST EUROPE 7-15 (1996). LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION 90, 111-2 (1999). CONSTITUTIONALISM AND DEMOCRACY 1-18 (Jon Elster & Rune Slagstad eds., 1988). THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 168, 170-3 (1999). Ulrich Preuss, *The Politics of Constitution-Making: Transforming Politics into Constitutions*, 13 LAW & POL'Y 107 (1991).

1. Bounded Institutional Change: Bureaucrats and administrative patterns in transition

As many scholars of law and development have noted, unfettered technocratic discretion is one of the key elements that have led to the astounding success of NIEs in East Asia and, specifically, in places such as Singapore, South Korea, and Taiwan.[7] The Taiwan government under the KMT, by freely deciding whose interests should be protected and sustained, fundamentally bypassed the due process of law. Actually, such a regulatory pattern of technocrat-centeredness (also known as *elite-centeredness*) embedded itself in KMT administration for decades.[8] Not only officials who took charge of economic affairs but also officials who took charge of environmental protection, public health, finance, and other areas were accustomed to exercising autonomous rulemaking powers as a regulatory tool in the absence of any power-balancing mechanism.[9]

By analyzing the statistics concerning administrative rules that derive from a governmental gazette (here, the Gazette of the Office of the President), we can grasp how the KMT government operated with and without legislative delegation between 1950 and 2000.[10] As Figure 1 shows, in the era of economic take-off (the 1950s, the 1960s, and the 1970s), the number of administrative rules was extremely low, whereas the aggregate number of administrative rules increased sharply in the 1990s. A possible rationale is that the agencies did

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[7] *See* Robert Wade, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION 337-42, 228-239 (1990). In commenting on the KMT's economic policy of fostering entrepreneurs, Peter Evans notes, "[W]ithout the autonomy made possible by a powerful bureaucratic apparatus, it would have been impossible to impose the unpleasantness of free competition on such a comfortable set of entrepreneurs." *See* PETER EVANS, EMBEDDED AUTONOMY: STATES & INDUSTRIAL TRANSFORMATION 59 (1995). Kanishka Jayasuriya, *Political Economy of Democratization*, *in* TOWARDS ILLIBERAL DEMOCRACY IN PACIFIC ASIA 124-132 (Daniel A. Bell et al. ed., 1995). John Gillespie, *Law and Development in 'the Market Place': An East Asian Perspective*, *in* LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 122-127 (Kanishka Jayasuriya ed, 1998).

[8] For a comparative perspective, please also refer to Japan and South Korea's similar experiences. *See* Chalmers Johnson, *supra* note 4, at 242-274. Ha Myoung Jeong, The Delegation Doctrine and Administrative Procedure Acts in the United States and Korea 155-161 (2001) (unpublished S.J.D. Dissertation, University of Wisconsin Law School) (on file with the UW Madison Law Library). Ha Myoung Jeong attributes the loose control of administrative rules to historical (dynastic Korean and colonial Japanese ruling), cultural (Confucianism) and political (threaten from North Korea) reasons.

[9] Wade has pointed out that, in the process of Taiwan's economic growth, the selective ruling elite played an important role. *See* Wade, *supra* note 7, 195-227.

[10] A methodological note: in this study, I record only the number of administrative rules that the Gazette of the Office of the President published in the period between 1951 and 2000. Though ministerial gazettes, as well, may publish the administrative rules of the central government, it is hard to trace administrative rules in every single ministerial gazette. The main problem here is that not every ministry published its official gazette during the authoritarian era. Since the Gazette of the Office of the President is the most longstanding governmental gazette, it is our most statistically valid resource for the trend of administrative rulemaking.

not even bother to carry out rule-bound regulations under the authoritarian regime. The single party, the KMT, did not rule but reigned over the island. It was not necessary for the KMT technocrats to enact administrative rules that authorized the technocrats' exercise of regulatory power. They could promulgate a three-year economic project, a framework of industrial development, or a statement of national policy. In fact, technocrats under the KMT not only played the role of administrators but also the role of lawmakers. Those administrative rules perhaps were not constitutional but functioned effectively to promote economic growth under the KMT's party-state politics.

After democratization, the number of administrative rules underwent a dramatic 3.5-fold increase in the 1990s. The statistics that prove the existence of this increase reflect a significant fact: political democratization and judicial activism, both of which simultaneously occurred in the 1990s, had prompted the administrative agencies to adopt new regulatory means.[11] As more and more members of the rival party (the Democratic Progressive Party, or the DPP) were elected to the Legislative Yuan, they tried to institute and strengthen the government's commitment to transparency and to accountability. Besides, under the environment of political liberalization, there was more and more administrative litigation challenging the government's arbitrary decision-making.[12] So the post-martial law KMT administration was trying to avoid undesirable litigation by enacting broad and unconstrained written rules that, like a blank check, delegated to the administrative agencies the unfettered power to maintain its developmental policies and regulatory regime.

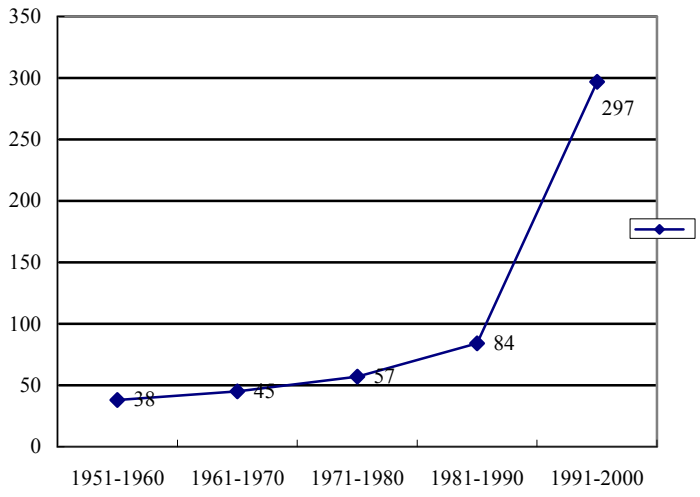

Figure 1. Total number of the three types of administrative rules

[11] Chang Wen-Chen, Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective 391-97 (2001) (unpublished JSD dissertation, Yale Law School) (on file with author).

[12] See *infra* note 46.

According to the jurisprudence of Taiwan's administrative law, there are three types of administrative rules: (1) rules that have an external binding effect on people's rights but that the legislative branch does not delegate; (2) rules that have an external binding effect on people's rights and that the legislative branch delegates; (3) rules that have only an internal effect and that the legislative branch need not delegate.[13] As Table 1 shows, even in the 1990s, government agencies preferred the type-I rule to the type-II rule. Apparently, the type-I rule provides a government agency with more leeway in any area of regulation. Once the organic law of an agency has conferred authority to that agency, bureaucrats can promulgate a rule whenever and wherever they deem it to be appropriate and necessary, without delegation from the Legislative Yuan. It seems that during the early years of democratization, the government was still apt to use Type I rules to deal with the emerging challenges of an increasingly empowered society.

From the perspective of rule of law as law of rule, the KMT government in the 1990s seemed to get closer to vindicating the rule of law by instituting administration that was more rule-bound than before.[14] But among these administrative rules, 63.64% were rules without legislative delegation. In other words, the executive branch promulgated over half of the administrative rules on the basis of its discretionary power. These rules can still be products of arbitrary and capricious administration. Though the form of administrative rules has changed, the objectives of Type I rules as an instrument to facilitate national policies are the same as the case in the 1950s. If one regarded the increase of Type I rule as an achievement of rule of law, the meaning of rule of law should have been reduced to a nominal one. Nevertheless, the percentage of Type I rules in the 1990s was even higher than the percentage of Type I rules in the 1980s (51.19%). From the 1980s to the 1990s, the number of Type I rules underwent an approximately 4.4-fold increase, while the number of Type II rules underwent only a 3.25-fold increase. Apparently, with the intensification of democratization, the government relied more and more on the non-delegated rules to advance its state-building. Meanwhile, the Legislative Yuan had been increasingly enacting enabling laws that delegated legislative power to agencies. In the 1980s, the number of Type-II rules was only 24, but the number rose up to 78 in the 1990s. This data indicates that the legislative branch has also tried to respond to the problem of state-building in the aftermath of democratization by way of legislative delegation. However, the legislature was also in transition and still had no enough capacity to create enough enabling laws to respond comprehensively to urgent state-building needs at this stage. It seems the executive branch dominated the agenda of rule-of-law reform at the early stage of

[13] Chang Wen-chen, Reforming the Procedure of Rulemaking: A Proposal of Designing Multiple and Optimal Procedure 14-20 (1995)(unpublished LL.M. thesis, National Taiwan University) (on file with author).
[14] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURT AND THE LAW (1997).

democratization. .

It has been hard for the executive branch to transform its administrative pattern from a state-directed development model to a power-equilibrium model spontaneously.. The executive branch would choose an instrument that would adequately preserve the branch's power-related leeway but that would meet nominal rule-of-law requirements. Therefore, administrative agencies in transition usually adopted a minimalist strategy of rule-of-law reform on a case-by-case basis. In particular, most of the administrative agencies still consist of bureaucrats recruited and trained under the authoritarian regime. They can carry out governmental policies faithfully, but will not spare their time in drafting enabling laws that, would only give political credit to politicians, but might lessen the bureaucrats' regulatory power in many ways. Bureaucrats during the democratization were still bounded by their instrumental reason and accustomed to the decision bias of authoritarian administration. Their first and foremost concern during this transition process is self-preservation. Democratization does prompt the executive branch to carry out institutional changes but the changes only occur in a minimalist way. The change of administrative rules might need some exogenous variables to affect the structure of bureaucratic decision-making.[15] In fact, the revitalized legislative branch has been gradually reclaiming its power from the executive branch. Therefore, the Legislative Yuan's enactment of the Administrative Procedure Law may play a role of agenda-setter to catalyze the institutional change in a more profound way.

[15] ELINOR OSTROM, UNDSTANDING INSTITUTIONAL DIVERSITY, 12-15 (2006).

Table 1 Number and percentage* of the three types of administrative rules

Year	Type I[a]				Type II[b]				Type III[c]			
	Executive Yuan	Agencies	Subtotal	%	Executive Yuan	Agencies	Subtotal	%	Executive Yuan	Agencies	Subtotal	%
1951-1960	20	6	26	68.42	4	1	5	13.16	7	0	7	18.42
1961-1970	18	3	21	46.66	9	3	12	26.67	5	7	12	26.67
1971-1980	23	0	23	40.35	16	0	16	28.07	9	9	18	31.58
1981-1990	34	9	43	51.19	19	5	24	28.57	14	3	17	20.24
1991-2000	56	133	189	63.64	30	48	78	26.26	18	12	30	10.1
Total	151	151	302		78	57	135		53	31	84	

Source: *Gazette of the Office of the President*, Taiwan, 1951-2000

Notes:

a. Type-I rule: Externally binding, affecting people's rights, based on the authority of organic law but *without* delegation by congressional law
b. Type-II rule: Externally binding, affecting people's rights, *with* delegation by congressional law (viz. *Rechtsverordnung* in German administrative law)
c. Type-III rule: Internal interpretative rules or rules of a subsection's organization (viz. *Verwaltungsvorschrift* in German administrative law)

* The percentage is the number of a given type of rule divided by the sum of all three types of rules.

** These data are only a calculation of the administrative rules publicized in the Gazette of the Office of the President; they should not be regarded as the totality of administrative rules during this time.

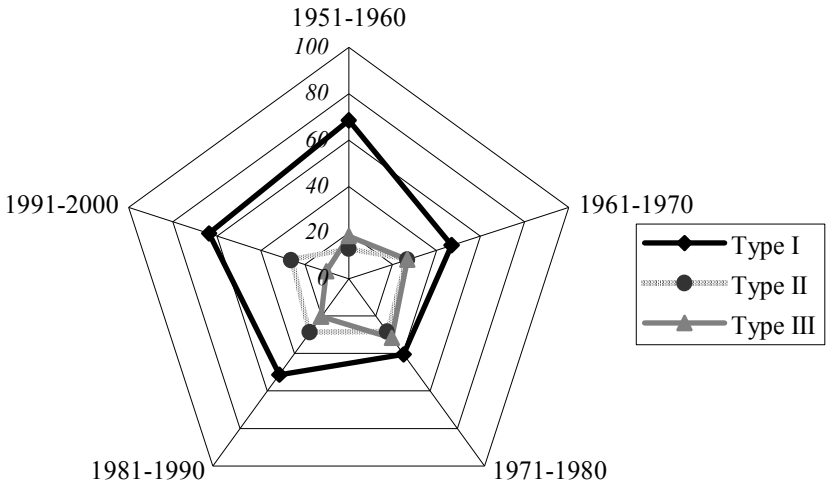

Figure 2**.** Percentage distribution of the three types of administrative rules

2. The Race for Legitimacy: The Administrative Procedure Law and the dilemma of legislative overreaction

After twelve years of democratization, Taiwan enacted its very detailed Administrative Procedure Law (APL) in 1999. This fundamental statute regarding administrative operations was first advocated in the mid-1980s, when Taiwan was just launching into its political liberalization and democratization. Some advocates of the APL, especially legal scholars, anticipated the need to implement the procedural safeguards of law so as to constrain the unfettered state power and to enhance the process of democratization. With the support of young public law scholars, the Council for Economic Planning and Development (CEPD) at the Executive Yuan initiated a task force in 1989 to research the legislation problems of the APL. The task force submitted a detailed though academic-oriented draft of the APL in December 1990. But the transitional government in the early 1990s was reluctant to introduce the draft into legislation, so the government defended its refusal to introduce the draft by arguing that, if enacted, it would undermine efficient administration and would impede Taiwan's economic growth.[16]

However, by the early 1990s, burgeoning social groups began to organize social protests against the government and tried to participate in the policymaking process, as well. Meanwhile, the KMT government confronted its legitimacy crisis. A mass student protest in the Chiang Kai-shek Memorial Hall, the abolishment of the Temporary Provisions and Interpretation No. 261, which had forced the illegitimate national representatives to leave office, all these events occurred in the first two years of the 1990s and pushed the incumbent government to justify its political legitimacy by deepening democratic practices. In 1991, the Ministry of Justice (MOJ) instituted an official committee to draft the second version of the APL. Though the MOJ's version was similar to the CEPD's, the Executive Yuan feared that it would lose much of its autonomous exercise of administrative power and, in the final draft of 1995, rejected a whole chapter of rulemaking that constituted the core issues of both the CEPD's and the MOJ's versions. In fact, the MOJ's representative had argued in the drafting

[16] Please refer to the opinion of then Justice Weng Yueh-sheng, *see* FAWUBU XINGZHENGCHENGXUFA ZHIDING CILIAO HUIBIAN(I) [COLLECTED MATERIAL REGARDING DRAFTING THE ADMINISTRATIVE PROCEDURE LAW (I), hereinafter *Collected Material*] 16 (1992), Ministry of Justice (Taiwan). In fact, before the MOJ's draft in the 1990s, there were already other governmental projects regarding the APL. The earliest research project was initiated by the Research, Development and Evaluation Commission (RDEC) at the Executive Yuan in 1974. However, that project aimed mainly at collecting legislative material from the United States and European countries. It did not contribute to the drafting directly. Another project was the CEPD project that turned out to be the intellectual foundation of the MOJ's drafting. For an illuminating introduction to the legislative process of Taiwan's APL, *see* JIUNN-RONG YEH, MIANDUI XINGZHENGCHENGXUIFA [WHEN TAIWAN CONFRONTS ADMINISTRATIVE PROCEDURE ACT,…] 42-47 (2002).

committee that the definition of 'administrative rule' had been prescribed in another statute, the Statutory Promulgation Act, so that there was no need to double prescribe, as it were.[17] Furthermore, the Executive Yuan referred to the Japanese version of the APL, which Japan had passed in 1993. The Japanese version prescribed only two types of administrative behavior: administrative disposal (gyôsei shôbun) and administrative guidance (gyôsei shidô). The Japanese experience provided solid excuses for the Taiwanese government to refuse in-depth legislation. In fact, this narrowing of focus has further revealed the passive unwillingness of the government to constrain its discretionary power.

However, after the Executive Yuan submitted the bill to the Legislative Yuan in 1995, the legislation of the APL stepped on an unexpected journey of political competition among different parties. Earlier, in 1994, some legislators lead by the KMT Legislator Wu Tong-sheng, a Harvard S.J.D. graduate, had submitted the MOJ's version to the Legislative Yuan independently. And earlier still, in 1993, a group of DPP legislators had submitted the CEPD's version to the Legislative Yuan as well. These enthusiastic legislators had undertaken these efforts in cooperation with young legal scholars just returning from abroad, especially from Germany. The scholars sought to put the German *Rechtsstaat* into practice in Taiwan by means of the APL. In 1995, Legislator Xie Qida (New Party), the convener of the Committee on Legal Affairs at the Legislative Yuan, invited zealous legal scholars to integrate those various bills of the APL and to render a definitive bill, which turned out to be an amalgam of foreign legislation, including the German *Verwaltungsakt*, American and German *rulemaking* processes, the French *administrative contract*, Japanese *administrative guidance*, and the traditional Chinese *petition*.[18] Finally, in January 1999, the Legislative Yuan read and passed Legislator Xie's bill. The newly enacted APL has provided the government a moratorium of two years during which the government can prepare its execution of the APL. The multifaceted construction represents mainly Taiwan's aspirations for a new democracy in which the protection of fundamental rights is achieved through a balancing of government powers.[19] The most controversial section of the APL is about the rulemaking. According to this rigorous standard, Articles 150, 158, and 159 of the APL provide that, except for internal rules (which relate only to miscellaneous office work and have no external effect on people's rights), any administrative rule should obtain legislative delegation from congressional law in advance.

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[17] Please refer to the opinion of MOJ's representative Huang Sho-gao, see *supra* note 16, COLLECTED MATERIAL at 397.

[18] The statute adopts mainly the German Administrative Procedure Law [Verwaltungsverfahrensrecht] but adopts also some specific legislation, such as the "king's action" (*fait du prince*) principle found in the administrative contract from France, the "freedom of information" of the United States, and the "administrative guidance" (*gyousei shido*) of Japan. Meanwhile, the Chinese people used to beseech for justice from the government in the form of petition (*Qing-yuan*). Taiwanese APL retains this traditional Chinese custom.

[19] Please refer to the comment of Legislator Xie Qi-Da, *Committee Meeting on Administrative Procedure Law before the Joint Committees*, 85 (69) LEGISLATIVE YUAN GAZETTE 212 (1996).

Meanwhile, the purpose, content, and scope of legislative delegation must be clear, concrete, and specific. Thus, an administrative rule based on the agency's organic law or a general delegation, which is the Type-I administrative rule, would be a big problem.[20] In fact, whether or not a Type-I administrative rule would be illegal under the APL has inflamed fierce debates between legal scholars.[21]

However, in the legislative process, the stipulation regarding administrative rule has changed over time. (Please refer to Appendix A, a comparison of different versions.) The scholarly product of the CEPD version does not expressively prohibit Type-I rules. It states that only if the administrative rule affects people's rights shall the agency obtain a legislative delegation in advance. Otherwise, the agency could enact administrative rules on the basis of its organic authority. The MOJ's version does not even mention legislative delegation, and the Executive Yuan even canceled the whole section on administrative rule. It is the integrated version of Legislator Xie that expressively stipulated that an agency shall enact administrative rule only when the agency first acquires legislative delegation, regardless of whether or not the rule would affect people's rights. However, during the second-reading process in the Legislative Yuan, some legislators expressed their dissent regarding this rigid standard. Legislator Liu Guang-hua (KMT) argued, "[T]he legal academia shall abandon its stereotype toward the executive branch, which regards bureaucracy as stubborn, departmentalistic, and reform-resistant. Legal scholars shall pay more attention to the research on public administration, especially to that on organizational behaviors."[22] So the second-read bill provided that an agency can also make rules on the basis of its legal organic authority. Nevertheless, the Legislative Yuan passed the integrated version, which was the brainchild of Legislator Xie's team and which had the most rigid administrative-rulemaking requirement

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[20] XINGZHENG CHENGXUFA [ADMINISTRATIVE PROCEDURE LAW, hereinafter *APL*] art. 150, art. 158, and art. 159 (Taiwan). *See* Chang Wen-chen and Yeh Juinn-rong, *Zhiquan Mingling yu Sanquan Zhengzhi: Yi Xingcheng Chengxu Fa Di Yibeiqishisi Tiao chi Yi wei Zhunxin* [*On Administrative-Rule-based-on-Organic-Authority and Separation of Powers: Focusing on the Article 174-1 of Administrative Procedure Law*] at the Second Annual Conference of Practice and Theory of Administrative Law 1-2 (Nov. 2002) (Taiwan) (on file with author).

[21] A great number of literature has focused on this issue in the year 2000. *See* Hsu Tzong-li, *Zhiquan Mingling shifo Haiyo Mingtian? – Lun Zhiquan Mingling de Hefaxing gi qi Shiyung Fanwei* [*Does Administrative-Rule-based-on-Organic-Authority have its future?- On the Legality and application of Administrative-Rule-based-on-Organic-Authority*], *in* XINGZHENGFA ZHENGYIWENTI YANJIU [THE CONTROVERSIAL QUESTIONS IN ADMINISTRATIVE LAW] 341-60 (Weng Yueh-sheng ed., 2000). Yeh Juinn-rong, *Xingzheng Mingling* [*Administrative Rule*], XINGZHENG FA [ADMINISTRATIVE LAW] 447-538 (Weng Yueh-sheng ed., 2000). Dung Bau-tschen, *Buntu "Zhiquan Mingling" Fali Jiango zhi Changshi* [*An Attempt to Establish the Legal Framework of Indigenous Administrative-Rule-based-on-Organic-Authority*] 11 TAIWAN BUNTU FAXUE [TAIWAN LAW JOURNAL] 93, 93-99 (2000). Fa Jyh-Pin, *Zhiquan Mingling yu Sifa Shengcha* [*Administrative-Rule-based-on-Organic-Authority and Judicial Review*] 11 TAIWAN BUNTU FAXUE [TAIWAN LAW JOURNAL] 100, 100-106 (2000).Symposium, *Zhiquan Mingling zhi Guoqu, Xianzai yu Weilai* [*The Past, Present and Future of Administrative-Rule-based-on-Organic-Authority*] 11 TAIWAN BUNTU FAXUE [TAIWAN LAW JOURNAL] 119-130 (2000).

[22] Please refer to the comment-in-writing of Legislator Liu Guang-hua, *Wuoguo Xingzheng Chengxu Fa zhi Zhengdian, Lunzheng yu Xing Shijie* [*The Questions, Arguments and New Visions of Our Administrative Procedure Law*], 87 (8) LEGISLATIVE YUAN GAZETTE 173 (1998).

among all the versions.

In general, the second-read bill would be the final version in the legislative process. It is rare that the second-read bill would undergo revision during a third reading, which is just a formal procedure in which bills are read out in front of all legislators. However, the Legislative Yuan reinstated the most rigid version of rulemaking during the third reading. The Legislative Yuan passed the APL bill on January 15, 1999, after the new legislators had been elected and only a few days before the third-term legislators were to leave office. Despite remaining the largest party in the third term of the Legislative Yuan, the KMT was barely able to control the majority of legislators. When the opposition, the DPP and the New Party, cooperated with each other, they needed only three more votes from KMT legislators to pass a bill. In fact, there were eight KMT legislators already endorsing Legislator Xie's bill.[23] Meanwhile, before the Legislative Yuan voted on the APL, major parties conducted a party-negotiation meeting together on controversial statutes in the APL. Of the eight negotiation representatives from major parties, only one was from the KMT: three members hailed from the New Party and four from the DPP. In addition, the KMT representative was even not a legal specialist and held no strong opinion on the bill. Therefore, the legislators from the New Party and the DPP tightly cooperated with one another to dominate the legislative process of the APL.[24]

It perhaps was not a surprise that the DPP legislators wanted to cooperate with the New Party legislators on the APL legislation. Strongly opposing the KMT regime, the DPP had long vowed to overthrow the party-state system and to establish a legitimate regime of democracy. On the other hand, the New Party was a faction of the KMT, known also as the Non-mainstream Faction, which had broken off from the KMT owing to ideological divergence from and political clashes with the then-president Lee Teng-hui. The New Party criticized the Lee-led KMT as a corrupt party of "black money" (i.e., alliance building that made room for local mafia and big-money greed). The New Party argued that the current KMT regime had deviated from Sun Yat-sen's political manifest, *The Three Principles of the People*. As political fundamentalists, the New Party sought to strengthen its legitimacy by emphasizing their support for the rule of law. Therefore, with zealous public law scholars, the New Party and the DPP phalanx grasped the momentum of administrative-law reform, while the KMT regime struggled to acquire legitimacy and to transform its political character after democratization.

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[23] *Record of Yuan Sitting*, 88 (6) LEGISLATIVE YUAN GAZETTE 606 (1999).

[24] *See id*. at 607. The chairperson of this party-negotiation meeting was Legislator Huang Er-hsuan (DPP), who had studied public policy at the University of Tokyo. The only KMT representative was Legislator Wang Ling-lin, who was a CEO of Eastern Multimedia Group. In addition to the three parties' whips, Legislators Xie Qida (NP), Huang Guo-zhong (NP), Pong Shao-jin (DPP), and Hsu Tian-tsai (DPP) attended the meeting. Of them, Xie and Pong had been prosecutors, and Huang had received an LL.M. degree from Yale Law School.

Table 3 Composition of the Legislative Yuan from 1996 to 2008

		KMT	New Party	DPP	Others
The 3rd Term	Seats	85	21	54	4
1996-1999	Percentage (%)	51.8	12.8	32.9	2.4
The 4th Term	Seats	123	11	70	21
1999-2002	Percentage (%)	54.7	4.9	31.1	9.3

		KMT	PFP	NP	DPP	TSU	Others
The 5th Term	Seat	68	46	1	87	13	10
2002-2005	Percentage	30.22	20.44	0.44	38.66	5.77	4.44
The 6th Term	Seat	79	34	1	89	12	10
2005-2008	Percentage	35.11	15.11	0.44	39.55	5.33	4.44

Source: Central Election Commission, R.O.C.
* PFP: People First Party; TSU: Taiwan Solidarity Union.
** Pan Blue: KMT, PFP, and New Party; Pan Green: DPP and TSU.

In fact, though the DPP and the New Party occupied opposite positions on the political spectrum of national identity, both of them attacked the KMT regime in the name of "rule of law," or *Rechtsstaat*. To excel in the "rule of law" competition, no party would ever confirm the Type-I rule as legitimate administrative rule, since the popular discourse of public law back then favored the German legal doctrines of *Bestimmtheitsgebot* (the intelligible principle) and *Prinzip des Gesetzesvorbehalt* (the non-delegation doctrine). During the 1990s, the Council of Grand Justices established incrementally its doctrinal system regarding both the non-delegation doctrine and the intelligible principle. Therefore, if we were to take the legislative process of the APL as an interdependent game in which the DPP and the New Party competed against each other and in which the KMT kept silent to prevent its further loss of legitimacy, the focal point of this game would be the *Rechtsstaat* legislation. If the DPP backed away from the stringent requirement for administrative rule, the DPP would receive fewer payoffs than the New Party would receive, and vice versa. Because the two parties could communicate with each other, they would, in the game of prisoner dilemma, end up choosing the stringent control of administrative rules, which represents the ideal of *Rechtsstaat*. So Article 150 of the APL would be a Nash equilibrium for the two parties, and the APL legislation would definitely

expel the legality of the Type-I rules.[25]

However, the administrative agencies could not easily comply with such a severe restriction on rulemaking. After the APL went into effect, in 2000 the former authoritarian party, the KMT, stepped down and its rival party, the Democratic Progressive Party, came to power. As we have seen in the previous section, after forty years of exercising authoritarian rule, the KMT government had enacted various administrative rules without any legislative delegation. In the course of democratization, Type-I rules became the most expedient regulatory instrument with which the technocrat-centered administration could maintain both the developmental state that they had created and nominal sense of rule of law. Although the transfer of state power occurred peacefully, the DPP government had to face the KMT legacy of Type-I rules and the rigid APL framework, the latter of which had been intended to constrain the authoritarian government's power.[26] The APL would invalidate most of the administrative rules created by the KMT government. In this regard, bureaucrats have to go through several stages of work. First, bureaucrats have to single out every administrative rule that has no clear legislative delegation. Then, they have to revise the rules or propose a new bill. All this work entails time and effort.

I should note, as well, that when the administrative agencies either request an enabling law from the Legislative Yuan or send a bill as a replacement to the Legislative Yuan, the legislative branch would have to spend a lot of time and efforts to review these bills and to decide whether to pass them or not. However, in the very early days of the DPP administration, the KMT-controlled Legislative Yuan fell into political antagonism and blocked bills proposed by the DPP government. The Legislative Yuan witnessed the rise of a political league, the Pan Blue league, which consisted of the KMT, the New Party, and later the People First Party and which insisted on the political manifesto of anti-independence and pro-unification; in contrast, Pan Green parties—namely, the DPP and the TSU—advocated for Taiwan's independent status. The Pan Blue members occupied 59.6% of the seats in the Legislative Yuan's third term, 51.11% in the fourth term, and 50.66% in the fifth term, whereas the Pan Green members occupied a percentage of seats always below 45%. The political battles between the Pan Blue parties and the Pan Green parties have never ceased since 2000. National politics has focused on the problem of national identity and has polarized every policy issue in Taiwan. Legislators have balked at the thought of wasting even a second on the insipid job of amending an enabling law, a job that would neither have a significant political effect nor in any way help the legislators' reelection campaigns.

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[25] DOUGLAS BAIRD, ROBERT H. GERTNER AND RANDAL C. PICKER, GAME THEORY AND THE LAW 190-91 (1994).
[26] Yeh Jiunn-Rong & Chang Wen-Chen, *Judicial Empowerment: The Changing Role of the Council of Grand Justices* at the International Workshop on Challenges to Taiwan's Democracy in the Post-Hegemonic Era (Oct. 2002) (Hoover Institution, Stanford) (on file with the authors).

Nevertheless, the number of Type-I rules operating in the government was astronomical, and most of the daily administration was threatening to come to a halt because of the APL's effectiveness. Therefore, the Legislative Yuan finally agreed to grant a moratorium of one year by amending Article 174-1 of the APL; the moratorium would begin on January 1, 2001.[27] One year later, the Legislative Yuan extended the moratorium to the end of 2002 but refused to make any further concession. Thus, in theory, all the Type-I rules should have become void after January 1, 2003. However, the truth is that the Legislative Yuan passed package legislation of enabling laws to delegate legislative power to the executive branch so that the rules could remain legally valid. In fact, owing to its institutional capacity, the Legislative Yuan cannot afford to deliberate, review, and examine every single enabling law and the content of relevant rules. To some extent, the "package legislation" of enabling law, rather than change the substance of administrative rules, has only re-consolidated the authoritarian regulatory regime by bestowing legislative legitimacy on those Type-I rules. This is indeed a critical challenge to Taiwan's democratic governance.

As I discussed above, in the course of democratization, the former authoritarian party's loss of control over the legislative branch prompted the opposition parties to compete with each other. The competition centered on their efforts to score "rule of law" points by advocating the APL legislation. If parties refused to cooperate with each other, the legislative process would turn into a chicken game—the first party to concede would lose. So the constraint on administrative rule would not be loosened until one party retreated from the competition. On the contrary, given the parties were to cooperate, the Nash equilibrium would become the option that both parties would simultaneously take. Meanwhile, the focal point (here, *Rechtsstaat*) would have a great influence on the parties' decision. In our case, a stringent rulemaking model would maximize the two parties' payoff in the race for legitimacy. Therefore, the parties would move together toward an extreme standpoint regarding APL legislation, for example applying the most stringent requirement to the rulemaking process. Therefore, the race for legitimacy after democratization would result in an irrational strategy of "legislative overreaction". In fact, the legislative overreaction usually entraps many post-democratization states. (In Taiwan's case, Article 150 of the APL exemplifies the legislative overreaction.) A deadlock of insufficient rulemaking emerges from a post-democratization state's legislative overreaction so that, subsequently, neither the legislative branch nor the executive branch is willing to solve the dilemma. One account of this phenomenon refers to the two political branches' institutional incapacity and attributes the incapacity to the legacy of longstanding authoritarian rule. Another plausible explanation is that rule of law is a public value from which every political

[27] APL art. 174-1 (Taiwan).

actor can derive interests but whose problems no political actor would try to solve. This phenomenon represents a dilemma of a common-pool resource.[28] It takes a high exclusion cost to prevent the exploitation of "rule of law" discourse, and there is no institutional rule to govern the "rule of law" mechanism. Under this condition, the institutional changes that may optimize the common-pool resource would be initiated by a third party, like the judiciary. In Taiwan's case, the judgments of the Council of Grand Justices would constitute operational rules that would help change the structured dilemma of legislative overreaction.[29] In the next section, I discuss the transformation of both the non-delegation doctrine and the intelligible principle in Taiwan's administrative law.

3. Reconfiguration of State Powers: Judicial review and its pursuit of democratic constitutionalism

The Council of Grand Justices (i.e., the constitutional court in Taiwan) reclaimed its constitutional power stage by stage after the political liberalization in the mid 1980s.[30] To expand its jurisdiction, the court first struck down administrative actions, especially those in the field of tax administration, for example Interpretation No. 217 (1987).[31] Taxation law is trivial to an authoritarian government because of its non-political nature, but taxation law is also the backbone of the modern rule of law. With this pattern in mind, the court undertook its constitutional mission by first invalidating tax rules and, more specifically, by actively building a series of judicial criteria by which it could examine the constitutionality of administrative rules. The court first introduced the "non-delegation doctrine" in Interpretation No. 268 (1990), declaring that "only congressional law can restrict people's constitutional rights" and that "the administrative rule that transgresses the scope of legislative delegation shall be held unconstitutional." The first case establishing the judiciary's *rigid* control of administrative rules was the landmark Interpretation No. 313 (1993), whose facts is the first story in the prologue. In this interpretation, the court has successfully employed the "non-delegation doctrine" and "intelligible principle" to strike down the administrative rule in dispute.

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[28] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

[29] From Ostrom's perspective, this set of operational rules would be "choice rules," which "specify what a participant occupying a position must, must not, or may do at a particular point in a decision process in light of conditions that have, or have not, been met at that point in the process." *See* OSTROM, *supra* note 15, 200-02, 214-15.

[30] Regarding the judicial activism of the fifth Council of Grand Justices since 1985, *see* Chang, *supra* note 11, 290-305.

[31] Regarding the expansion of judicial review by striking administrative actions, *see* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 140-42 (2003).

The establishment of active judicial formalism

The case that led to Interpretation No. 313 was brought to the Council of Grand Justices in 1992, only five years after the lifting of martial law. According to the court's construction, Article 23 of the R.O.C. Constitution provides that any restriction on constitutional rights shall be legislated in congressional law, rather than in administrative rules. This is the core definition of the non-delegation doctrine. Furthermore, "[w]hile certain legislative delegation might be permissible, the *purpose, scope*, and *content* of such delegation must be *clearly* and *specifically* detailed and prescribed in the enabling law" (emphasis added).[32] This requirement for legislative delegation is known as the "intelligible principle." Between Interpretation No. 313 and the year 2000, the Council of Grand Justices exhibited its judicial activism by striking down at least 12 administrative rules among 21 relevant cases (please refer to Appendix B).[33] In Interpretation No. 367 (1994), the grand justices further distinguished between two kinds of legislative delegation. The first kind of legislative delegation was *specific delegation*, which the court had already addressed in Interpretation No. 313. The second kind was *general delegation*, which refers to enabling laws' delegation that lacks both specificity and clarity in terms of content, purpose, and scope. For example, Article 59 of the Business Tax Act provides that the enforcement rules of the Act shall be prescribed by the Ministry of Finance and submitted to the Executive Yuan for approval and promulgation." This enabling law is just as broad as a blank check. However, because legislators cannot foresee every possible eventuality pertinent to an actual operation, a general delegation regarding the law-enforcement issue is inevitable.

In the case of Interpretation No. 367, based on the general delegation of the Business Tax Act, the Ministry of Finance had revised in 1986 the Enforcement Rules of the Business Tax Act ("Enforcement Rules"). However, Article 47 of the Enforcement Rules substantively expanded the scope of taxpayers. The court therefore held the article to be unconstitutional in that the administrative rule with general delegation shall be limited to technical and miscellaneous issues only. The scope of taxpayers affects people's constitutional rights, like property rights, and the legislative branch shall enact relevant regulation in congressional laws or delegate the legislative power to agencies with specific delegation.[34] Thereafter, the court reiterated the restrictions on general delegation in interpretations including No. 394 (1996) and No. 402

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[32] See *supra* note 1. For a contextual discussion on this Interpretation, *see* Chang, *supra* note 11, 393-94.
[33] The Interpretations invalidating administrative rules includes No. 367, 380, 390, 394, 402, 423, 443, 450, 465, and 479. This activist trend of applying the "intelligible principle" and the "non-delegation doctrine" came to its peak during the years of 1995 and 1996 while the brisk sixth Council was on bench since 1994. See generally Chang, *supra* note 11, Chapter 8. Also *see* GINSBURG, *supra* note 31, 148-52.
[34] Interpretation No. 367 (November 11, 1994) (Taiwan), English translation available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=367

(1996), which invalidated two administrative rules that had possessed general-legislative delegation only.

Ultimately, the Council of Grand Justices established a doctrinal *system of graded delegation* in Interpretation No. 443 (1997) based on the German constitutional theory known as *System des Abgestuften Vorbehalts* (literally, the system of graded reservation).[35] The court constructed the "non-delegation doctrine" as a four-level system of delegation in this interpretation. First, the constitution protects some inalienable rights that include the right to habeas corpus and that neither congressional laws nor administrative rules can alter (Level-I). Nevertheless, congressional laws—but not administrative rules, whether by legislative delegation or not—may restrict some other fundamental rights regarding people's life, body, and freedom. For example, law rather than administrative rules shall prescribe the elements of crime (Level-II). Third, supplemental administrative rules can restrict some other rights only if congressional law applies to the rules scope, content and purpose that are clear and specific. The property rights in Interpretation No. 367 constitute an example of one such right (Level-III). Last, to enforce laws, agencies can promulgate administrative rules based on general legislative delegation, but these rules must pertain only to miscellaneous and technical issues (Level-IV). Justice Wu Gung, an influential scholar specialized in public law, has described the system of graded delegation as analogous to the Kantian categorical imperative, meaning that the system is a deontological obligation to observe, with "no exception, no condition and no leeway for negotiation."[36]

However, the application of this doctrine has been criticized as formalistic and mechanical.[37] By applying this doctrinal interpretation, the court does not need to consider substantive arguments concerning, for example, regulatory purpose, professional expertise, market failure, or the balancing test of interests. Once the administrative rules fail to satisfy the formal condition, the court nullifies the rule without invoking any other reason. Originally German, Taiwan's system is "imperative" because it aims at protecting human rights from threats. Human rights as a supreme value constitute the best weapon with which a constitutional court can oppose its authoritarian government in the course of democratization. Meanwhile, a court's

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[35] *System des Abgestuften Vorbehalts* is a constitutional theory grounded in the Fundamental Law (Grundgesetz) of the German Federal Republic. *See* THOMAS WULFING, GRUNDRECHTLICHE GESETZESVORBEHALTE UND GRUNDRECHTSSCHRANKEN 26ff (1981). For Taiwan's application of this German doctrine, *see* Interpretation No. 443 (Dec. 26, 1997) (Taiwan), English translation available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=443. Also *see* WU GUNG, THEORY AND PRACTICE OF ADMINISTRATIVE LAW 98,107 (7th ed. 2001).

[36] *See* WU *supra* note 35, at 97-102.

[37] *See* Chang, *supra* note 13, 74-95. Yeh Jiunn-rong and Chang Wen-chen, *Transitional Court and the Rule of Law: On Judicial Activism of the Supreme Administrative Court in Reviewing Administrative Rules* [in *Chinese*], 14 (4) JOURNAL OF SOCIAL SCIENCE AND PHILOSOPHY 515-559 (2002) (Taiwan).

formalistic application of non-delegation doctrine to rulemaking would be less likely to get the justices in political trouble than would other types of court applications. In the specific case of Taiwan, this imperative *stare decisis* enabled the Council of Grand Justices to establish a rule-control model based on human-rights protection. This model combines the political legitimacy of human-rights protection with both the non-delegation doctrine and the intelligible principle, emphasizing greatly the legitimacy of legislative powers and the congressional law's function as a restriction on administrative power. Only through the due process of congressional legislation and delegation can government restrict people's fundamental rights. This model implies a classic Lockean idea: government shall be distrusted. In fact, the ideological implication exactly fits the milieu of a post-authoritarian state.

After the Council of Grand Justices' establishment of the graded-delegation system in 1997, the court invalidated five administrative rules consecutively in 1998 and 1999. While the legislation of the APL in 1999 canceled the Type-I rules, which were based on agencies' organic authority, the legislative and judicial control of administrative rules reached its peak of rigorism. Public administration in Taiwan must rely heavily and only on *specific* legislative delegation for two reasons: first, the system of graded delegation has restricted *general* legislative delegation, one of the two kinds of Type-II rules, to technical and miscellaneous issues; and second, the APL has in effect eliminated the Type-I rule. This control model might be the most stringent one in the world. Like the legislative branch, the court in the late 1990s zealously used strict formalism to encage executive power.

Two serious problems underlie this formalistic approach to the rule of law in a nascent democracy.[38] First, unless the legislative branch can enact sufficient laws and make its delegation of powers both clear and specific, a type of judicial activism hinging on a formalistic application of the rule of law would create a vacuum of applicable law. Second, the APL's problematic Article 174-1 had actually incurred the package legislation which had legitimized those Type-I rules so that formalistic review of administrative rules are no longer adequate for striking down those *legitimated authoritarian rules.* This active judicial formalism responding to democratization would engender nominal *Rechtsstaat*, would help a nascent democracy little in its efforts to renovate administrative law, and would paradoxically reassert the supposed legitimacy of the authoritarian regulatory regime.

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[38] By the expression *formalistic rule of law*, I mean that the court regards literal, textual, and positive statutes to be the only legitimate source of "law." The court usually bypasses the burden of reasoning and mechanically applies the literal, textual, and positive law to the legal landscape. Please refer to David Dyzenhaus' explanation of formal conception of the rule of law. *See* David Dyzenhaus, *Recrafting the Rule of Law*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 1-12 (David Dyzenhaus ed., 1999).

Departing from the system of graded delegation

Nevertheless, while the Legislative Yuan placed a moratorium on the Article 150 of the APL, the constitutional court came to reflect on its orthodox "intelligible principle" in Interpretation No. 522 (2001). The second story of my prologue above outlines the facts of this interpretation. The court, in this case, tried to answer a confusing question about legislative delegation: "how intelligible is intelligible enough?" The court reasoned that "as for the degree of specificity and clarity of the delegation, it should be in proportion to the degree of impact of the delegated administrative rules on the rights of the people." In this case, the criminal punishment that the government would impose on security traders is involved with people's rights of life, freedom, and property, so it is the congressional law shall prescribe this matter. However, the administrative agency overseeing security transactions can enact supplemental rules for detailed regulations, but these rules shall have specific legislative delegation that the enabling law provides.[39] Though the main structure of this interpretation follows the idea of the graded-delegation system, the court points out that the requirement of specificity shall be proportional to the effect of the related administrative rule. In other words, the court was trying to emphasize the *effect on* human rights rather than the *imperative nature of* human rights. This is a step to moderate the rigorism of Interpretation No. 443 but to remain obedient to the graded-delegation system. The following year in Interpretation No. 538 (2002), the court upheld an administrative rule regarding governmental regulation of construction business, which had only general legislative delegation. According to the system of graded delegation, such a general delegation shall apply only to rules of technical and miscellaneous issues. But in this case, the administrative rule in dispute required various qualifications for construction business—qualifications that substantially restricted people's ability to work. However, the court found this rule constitutional in that these requirements adequately fulfill the legislative purpose of the Construction Act. Furthermore, the court interpreted the Construction Act as integration, arguing that it is the legislators who intentionally delegate rulemaking power to the responsible agency so that the agency can regulate the business of construction. Therefore, the rule in dispute constituted a professional judgment based on the expertise of the agency-in-charge.[40]

Though it seems that the court was trying to lift the restriction on general delegation in No. 538 and to undertake a purposive review of administrative rules, the court repeatedly applied the dichotomy of specific and general delegation to cases that yielded, for example, Interpretations No. 559 (2003), No. 561 (2003), and No. 593 (2005). From this perspective, the court in the early 2000s was lingering between two lines, judicial formalism and judicial purposivism. The

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[39] See *supra* note 2.
[40] Interpretation No. 538 (April 4, 2002) (Taiwan), English translation available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=538

court appeared to extend considerable respect to the expertise and the efficiency of administrative agencies, as in Interpretation No. 586 (2004), but still would not part with the rigorism of systematic delegation, as in Interpretation No. 593. In the post-APL context, the Council of Grand Justices was passing through a transitional process from a "redemptive court in full-fledged democratization" to a court aware of a normal democracy's administrative state.[41]

Five and a half years after the APL came into effect, the constitutional court declared a major revision of the judicial control of administrative rules. The case surrounding Interpretation No. 612 (2006) was about governmental supervision over waste-disposal-and-cleanup companies (i.e., the third story in the prologue). While balancing society's need for environmental protection against people's right to work, the court declared constitutional the *general delegation* under Article 21 of the Waste Disposal Act. The court argued that "although the said enabling provision did not specify the content and scope of the qualifications of the specialized technical personnel, it should be reasoned, based on construction of the law as a whole that the lawmakers' intent was to delegate the power to the competent authority to decide […]."[42] By restating its opinion in Interpretation No. 538, the court reconfirmed purposive interpretation and recognized the need for deferring to administrative expertise in a modern state, especially in the arenas of environmental, technological, and health regulation, which are filled with uncertainty and risks. It seems that the court had no trouble here with general delegation, even though an administrative rule rather than a congressional law sharply limited the technical professionals' right to work. The court stressed the importance of public interest as the legislative purpose. Owing to the unpredictability of environmental risks, the court held that the Legislative Yuan could delegate to the Environmental Protection Agency the legislative power to manage waste-disposal companies for the purpose of public health and intergenerational justice.

It should not be a surprise that this interpretation has inflamed a fierce debate among the justices. On the basis of textual analysis, Justice Liao Yi-nan and Justice Wang He-hsiung, two specialists of administrative law, criticized the majority opinion for confusing the natures of delegated administrative rules in this case. The two justices argued that by holding the *general delegation* under Article 21 of the Waste Disposal Act constitutional, the majority opinion risked to jeopardize the well-established non-delegation doctrine and the intelligible principle. According to their dissenting opinion, the rule in dispute infringed upon people's right to work and went far beyond the limited function of general delegation. They seriously warned the majority that this interpretation essentially overruled the court's very own *stare decisis* since Interpretation No. 313 and that the current interpretation would definitely invite severe

[41] For the term of "redemptive court", see Chang *supra* note 11, chapter 8.
[42] http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03_01.asp?expno=612

criticism from legal academia.[43] Meanwhile, Justice Hsu Yu-hsiou, in her dissenting opinion, denounced this interpretation as "a judicial review without substantive review." She disagreed with the majority's purposive approach and criticized the notion that public interest justified the creation of blank checks for arbitrary and capricious administrative action. In her view, human-rights protection should start from the individual level rather than the collective level. Her libertarian conception of human rights calls for a coherent interpretation based on the court's precedents.[44]

In contrast, Justice Pong Fong-zhi and Justice Hsu Bi-hu argued in their concurring opinion that the Waste Disposal Act was in fact a policy judgment rendered by the Legislative Yuan. The Legislative Yuan had deliberated collectively and had decided to delegate to the EPA the power to adopt appropriate regulations regarding waste-disposal problems. The justices went on to argue that this general delegation was a *political judgment* of the legislative branch that should not cede place to the court's own judgment. Meanwhile, pursuant to the proportionality test in Interpretation No. 522, the two justices argued that this rule's negative effect is not greater than the public interest protected by the rule. This concurring opinion implied that the court neither is better suited than the executive branch to make policy decisions nor has legitimate reasons to challenge the political judgment of the legislative branch. In short, the opinion states that it is the two political branches should be held accountable for their environmental policy.[45]

Toward the paradigm of democratic efficacy

Following Interpretation No. 612, the court upheld three administrative rules in respect of agencies' expertise and policy discretion in Interpretation No. 614 (2006), No. 615 (2006), and No. 628 (2007). Is this series of interpretations pronouncing the coming of a new age of regulatory state in Taiwan after twenty years of democratization? It might be too early to predict because the transformation is ongoing. If the court were to be sincere to the thoughts underpinning Interpretation No. 612, the autonomy of the executive branch would gain strength and the power relationship between the legislative branch and the executive branch would significantly change. There would be a reconfiguration of state power, which would bring administrative agency back on the stage of state-building, with the judiciary exercising reasonable rather than strict and formalistic control over agency's rulemaking capability. A new paradigm of the rule-control model grounded on judicial deference would replace the overreactive human-rights paradigm that took root in the aftermath of democratization.

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[43] See *supra* note 3, Justice Liao's and Wang's joint dissenting opinion.
[44] See *supra* note 3, Justice Hsu's dissenting opinion.
[45] See *supra* note 3, Justice Pong's and Justice Hsu's joint concurring opinion.

Why at this stage would the court like to reflect on its own jurisprudence regarding legislative delegation? Is the court responding to the institutional dilemma of administrative rulemaking created by the antagonistic legislative-executive relationship? What is the political implication beyond the legal interpretation of No. 612? First of all, executive power under the DPP is no longer as dominant as it was under the KMT. Indeed, the legislative branch as controlled by the former authoritarian patrons possesses the overwhelming power of agenda-setting in the political arena. In other words, executive power since the year 2000 has weakened, as is the case when an authoritarian states transitions into a normal democracy. However, the legislative branch, which has been controlled by the former authoritarian party, retains its counter-authoritarian character, constantly enlisting popular sovereignty to legitimize its fight against the DPP administration. The reversal of the power imbalance since 2000 may induce the grand justices to reconsider whether or not the strict rule-control model can strike the balance of power in view of strengthening democratic constitutionalism.

Second, the Legislative Yuan thoroughly revised the Administrative Litigation Law (ALL) in 1998. Since taking effect in July 2000, the ALL has provided more "causes of action" than ever to people who would bring suit against agencies. Also, the new ALL creates three High Administrative Courts and designates the Supreme Administrative Court as the appellate and final court.[46] Although the revised ALL is a complete adoption of German administrative litigation law and is therefore extremely abstract and conceptualized, the ALL does empower people to institute administrative litigation and thereby to challenge administrative actions. For example, only twelve cases in the whole year of 1997 involved use of the non-delegation doctrine to sue administrative agencies, but within six months after the APL took effect (in 2000), fourteen such cases were brought before the new administrative supreme court.[47] On the other hand, the administrative court had never ruled in favor of plaintiffs on the grounds of the non-delegation doctrine, but since 2000, the court has struck down administrative actions pursuant to the non-delegation doctrine.[48] Therefore, the revision of the ALL has intensified judicial control over administrative action. Administrative courts' increasing use of the graded-delegation system has also reinforced contested judicial formalism, which may loom as a serious concern for the Council of Grand Justices. The Council, in turn, might consider a substantive approach to judicial review.

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[46] Before 2000, there is only one administrative court, which becomes the Supreme Administrative Court afterward. According to the official statistics, the Supreme Administrative Court received 5,434 cases in 1997, 8599 cases in 1998 and 7,253 cases in 1999. After 2000, the High Administrative Courts have the original jurisdiction. In 2000, there are 20,698 cases brought to the High Administrative courts and 27,516 cases in 2001. However, after the first two years of administrative-suit-booming, the number of newly-lodged cases decreases to 9,928 in 2002 and remains the same level afterward, which is still larger than the average amount of newly-lodged cases in the Supreme Administrative Court between 1997 and 1999. *See* 2006 JUDICIAL STATISTICS YEARBOOK 4-6, 7-8 (Taiwan), http://www.judicial.gov.tw/juds/index1.htm (last visited Oct. 12, 2007).

[47] See Yeh and Chang, supra note 37, at 525.

[48] *Id.* 527-28.

Third, the cases entering the constitutional courts are more diverse than ever, so the court has to face challenges emerging from different arenas of public life that require varied specific knowledge. For example, between 2000 and 2006, the constitutional cases that involved rulemaking touched on such subjects as traffic regulation (No. 511, 604), security transaction (No. 522, 586), land use (No. 532, 561, 562, 598), public construction (No. 538), the medical profession (No. 547), intellectual property (No. 548), domestic violence (No. 559), labor relations (No. 568, 609), and social security (No. 570). Only three cases were directly related to taxation (No. 566, 593, 606). The diversity of constitutional cases, to some extent, catalyzes the justices' idea of the administrative state. In the early 1990s, the court focused on the area of taxation owing to the non-political nature of taxation and to people's reluctance to challenge other governmental regulation. However, while the democratic practice of everyday life have embedded themselves in Taiwanese society, every single administrative action, ranging from the licensing of a satellite network to the protecting of rare species, can be brought before the court. Facing the burgeoning social diversity and relevant policy choices, the court cannot but rethink its control of administrative rules.

The *broadening process of democratic life* has prompted the judiciary to reorient its checking mechanism from active formalism to self-constrained purposivism. This judicial endeavor tries to leave more room for political communication and policy deliberation between the legislative branch and the executive branch. It is the judiciary's belief that only through the dynamics of power balance can democratic governance and political accountability be secured. It is reasonable to describe this new paradigm of the rule-control model as the paradigm of "democratic efficacy," which stresses the deliberative process of policymaking and the importance of public good. According to this paradigm, the ultimate goal of a democratic constitution is not merely to protect libertarian fundamental rights, but to promote the quality of public life and to prevent government corruption, as well. The paradigm applies a functionalistic understanding to the separation of powers. Because the executive branch has more experts in certain areas than the other branches have, the judicial branch shall defer to an administrative agency's professional decision while the legislative branch renders political judgments by delegating its legislative power to agencies, be they specific or general. In order to effectuate democratic governance, this judicial approach would release agencies from stringent control of administrative rules after twenty years of democratization; and to examine the political efficacy of legislative delegation, this approach would employ an integrative and purposive method of legal interpretation. To the end, the judicial paradigm of democratic efficacy can reinstate the function of democratic politics, as well as deepen the practice of rule of law in post-democratization Taiwan.

4. Conclusion – Tentative

Democracy is a process of becoming. We never know where the end of this journey will be. In the past twenty years, Taiwan has experienced various contestations, confrontations, and frustrations in its turbulent course of democratization. In this paper, I examine the challenges that have beset both democratic governance and the rule of law in Taiwan, and I do so from the perspective of administrative law. Early in Taiwan's democratization, the executive branch was used to the authoritarian regulatory model, which encouraged the executive branch either (at best) to enact administrative rules without any legislative delegation or (at worst) to govern without any rules. The Legislative Yuan passed the APL to constrain this unfettered administrative power. However, owing to the political camps' race for legitimacy, the APL adopted the most stringent definition of 'administrative rule', which has ruled out the raison d'être of administrative rules based on an agency's organic authority. As it turns out, the APL was a product of legislative overreaction. However, political antagonism in the Legislative Yuan obstructed the necessary legislation that would have facilitated the state-building project after authoritarian regime. Eventually, the self-contradictious legislative branch and the entrapped executive branch jointly legitimized the authoritarian regulatory regime by passing enabling laws in the form of package legislation. With the aid of judicial formalism regarding the graded-delegation system, the court also would have worsened the institutional deadlock of administrative rule in the post-APL era, had the court not reflected on its own jurisprudence.

It is the *democratic life*, as an outcome of democratization's endless challenges that has engendered institutional change. People living in a free society actively challenge governmental regulation from all perspectives. The diversity of cases coming before the constitutional court reconstituted the justices' understanding of the administrative state. Gradually, the court adjusted its control model of administrative rules on a case-by-case basis. At last, the court made a paradigmatic shift from rights-based formalism to a self-constrained purposivism with an emphasis on democratic efficacy. Though it is debatable as to whether this new model has overruled the court's *stare decisis*, the court has made a significant attempt to reconfigure the power relationship between two political branches. The court's substantive review of purpose and function may also help to resolve the constitutional dilemmas (e.g., the legitimized authoritarian administrative rules) challenging the nascent democracy. The institutional change brought by the broadening of democratic life may cyclically deepen Taiwan's practice of democratic politics in its post-democratization era. The dynamics of democracy constitute a powerful way to overcome the upheavals of democracy.

Appendix A - Comparison of different versions of Taiwan's Administrative Procedure Law*

Version	**Articles regarding Administrative Rules**
RDEC, 1974	Section 1, Article 39 "The enactment of administrative rule means the behavior of an administrative agency to supplement to, interpret and execute the laws, within the scope of legislative delegation or based on the necessity of executing its organic authority." 第三十九條 「行政規章之訂定，係指行政機關在立法機關授權範圍內，或基於職權行使之必要，爲輔助、解釋、或施行法律，而訂頒法規命令之行爲。（Ⅰ）」
CEPD, 1990	Section 1, Article 98, "The term 'administrative rule' (hereinafter 'rule') used in this Act means a rule with normative binding effect, enacted by an administrative agency, in respect of general matters and applicable to non-specified persons." Section 2, Article 98, "An administrative agency shall obtain the delegation of congressional law or local legislature prior to its enactment of rules involving restriction on people's freedom and rights." 第九十八條 「本法所稱法規命令（以下簡稱命令），係指行政機關，就不特定事件對不特定多數人所發佈具有法規範效力之規定。（Ⅰ） 行政機關訂定限制人民自由、權利之命令須有法律或自治規章之授權。（Ⅱ）」
MOJ, 1995	Article 90, "The term 'administrative rule' used in this Act means a general rule, enacted by an administrative agency, in respect of general matters and applicable to non-specified persons." 第九十條 「本法所稱法規命令，係指行政機關對多數不特定人民就一般事項所做抽象之規定。」
Executive Yuan, 1995	None 無規定
Legislator Xie, 1996	Section 1, Article 154, "The term 'administrative rule' used in this Act means a general rule with external effects of *public law*, enacted by an administrative agency with legislative delegation, in respect of general matters and applicable to non-specified persons." Section 2 Article 154, "An administrative rule shall specify its authority delegated by law based on which it is enacted, and shall not transgress the scope of such authority or divert from the legislative purposes of the enabling law."

* *Italics* are the differences among the version of Legislator Xie, Second-read bill and the consented legislation.

	第一百五十四條 「本法所稱法規命令，係指行政機關基於法律授權，對多數不特定人民就一般事項所作抽象之對外發生公法效果之規定。（Ⅰ）法規命令之內容應明列其法律授權之依據，並不得逾越法律授權範圍與立法精神。（Ⅱ）」
Second-Read Bill, 1999	Section 1, Article 144, "The term 'administrative rule' used in this Act means a general rule with external legal effects, enacted by an administrative agency with legislative delegation or within its legal authority, in respect of general matters and applicable to non-specified persons. Section 2, Article 144, "An administrative rule *with legislative delegation* shall specify its authority delegated by law based on which it is enacted, and shall not transgress the scope of such authority or divert from the legislative purposes of the enabling law." 第一百四十四條 「本法所稱法規命令，係指行政機關基於法定職權或法律授權，對多數不特定人民就一般事項所作抽象之對外發生公法效果之規定。（Ⅰ）法律授權之法規命令之內容應明列其法律授權之依據，並不得逾越法律授權範圍與立法精神。（Ⅱ）」
Administrative Procedure law, 1999	Section 1, Article 150, "The term 'administrative rule' used in this Act means a general rule with external legal effects, enacted by an administrative agency with legislative delegation, in respect of general matters and applicable to non-specified persons." Section 2 Article 150, "An administrative rule shall specify its authority delegated by law based on which it is enacted, and shall not transgress the scope of such authority or divert from the legislative purposes of the enabling law." 第一百五十條 「本法所稱法規命令，係指行政機關基於法律授權，對多數不特定人民就一般事項所作抽象之對外發生法律效果之規定。（Ⅰ）法規命令之內容應明列其法律授權之依據，並不得逾越法律授權範圍與立法精神。（Ⅱ）」

Appendix B Constitutional Interpretation regarding the Non-delegation Doctrine and the Intelligible Principle

Year	Interpretation Number	Constitutionality	Sum
1989	246	Only in dissenting opinion	**1**
1990	268	Unconstitutional	**1**
1991	274	Unconstitutional	**1**
1993	313	Unconstitutional, moratorium granted[+]	**1**
1994	345	Constitutional	**4**
	346	Constitutional	
	360	Constitutional	
	367	Unconstitutional, moratorium granted	
1995	380	Unconstitutional, moratorium granted	**2**
	390	Unconstitutional, moratorium granted	
1996	394	Unconstitutional, moratorium granted	**3**
	402	Unconstitutional, moratorium granted	
	423	Unconstitutional, moratorium granted	
1997	426	Constitutional	**4**
	431	Constitutional	
	438	Constitutional	
	443	Unconstitutional, moratorium granted	
1998	450	Unconstitutional, moratorium granted	**4**
	454	Unconstitutional, moratorium granted	
	455	Unconstitutional	
	465	Unconstitutional	
1999	479	Unconstitutional	**3**
	480	Constitutional	
	497	Constitutional	

[+] The court declares the regarding administrative rules unconstitutional but the court also grants moratorium of certain period for the agency-in-charge to revise the rules.

2000	511	Constitutional	**1**
2001	522	Unconstitutional	**2**
	532	Unconstitutional	
2002	538	Constitutional	**3**
	547	Constitutional	
	548	Constitutional	
2003	559	Constitutional	**6**
	561	Constitutional	
	562	Unconstitutional	
	566	Unconstitutional	
	568	Unconstitutional	
	570	Unconstitutional	
2004	586	Constitutional; only one article unconstitutional, moratorium granted	**1**
2005	598	Constitutional	**4**
	593	Constitutional	
	604	Constitutional	
	606	Constitutional	
2006	609	Unconstitutional	**5**
	612	Constitutional	
	614	Constitutional	
	615	Constitutional	
	619	Unconstitutional	
2007	628	Constitutional	**1**
Total			**47**