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Dynamics of Democracy

- Administrative Law and the Process of Institutional Changes in Taiwan

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“[D]emocratic politics entails a government based on popular will. … Yet regardless of the changes of the ruling party or different compositions of the cabinet, any change to policy guideline or major policies should nevertheless go through the constitutional mechanism of check and balance upon which the constitutional order is based. Under the rule of law, procedural legality cannot be replaced with legitimate political reasons.”


“High-level politicians, he commented ruefully, have made political issues very [complicated]. But if ordinary administrators such as those gathered that day were forced to consider these political concerns, well, as he saw it, the nation really had no hope.”

- Interview with Mr. Ke, an urban-planning administrator in the Taipei City Government

Taiwan is an island country whose territory is as large as Belgium but whose population is two times larger than that of Belgium. After rapid industrialization in the 1970s, its living environment deteriorated sharply as its economy was taking off. Since the 1980s, there has been a flourishing of social protests against environmental pollution resulting from state-directed industrial-development projects. Environmentalism in Taiwan has been intertwined with the process of

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1 Excerpt from Anya Bernstein, Why “Taiwan Is Too Democratic”: Legitimation, administration, and political participation in Taipei 141-42 (2007) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago Library). For transliterations in the text, Chinese names come in their original order, which means family name first and then first name. But for bibliographical information in the footnotes, I follow the word-order formats in the original publications. If the publication is in Chinese, the rule for Chinese names applies.
democratization and has helped foster public consciousness against authoritarian regulatory regimes.\(^2\) Most of the environmental protests occurred not in cities but in villages close to foreign-invested factories or industrial zones. It is thus argued that “Taiwan’s antipollution protests are characteristically communal in orientation.”\(^3\) Not surprisingly, the grassroots-based environmentalism attracted considerable attention from the party-state controlled by the Kuomintang (KMT, the Chinese Nationalist Party). In the early 1980s, the KMT government just managed to consolidate its authority after a series of diplomatic failures and political unrest.\(^4\) It brutally oppressed the opposition force in the Kaohsiung Incident in 1979 and allegedly murdered anti-KMT political and academic elites like Dr. Chen Wen-chen and the family of Lin Yi-hsiung, a prominent lawyer in the opposition camp during the early 1980s. These Political upheavals made the authoritarian regime more attentive to social issues that might arouse political movement. Therefore, in the last few years of its authoritarian rule, the KMT government started to channel environmental issues within governmental branches.\(^5\) Meanwhile, since environmental affairs involve technical expertise and professional knowledge, the government also employed administrative regulations envisaged by technocrats to respond to these social challenges.

One month after the lifting of martial law in 1987, the KMT government created the Environmental Protection Agency (TEPA) in Taiwan.\(^6\) As Yeh Jiunn-rong pointed out, a variety of environmental legislation appeared in the legislative agenda after the establishment of the TEPA.\(^7\) One of the prominent characteristics of this trend is that this legislation has delegated broad law-making power to agencies and has, omitted public participation in the policymaking process. Therefore, technocrats in the TEPA usually have handled environmental issues with wide delegated

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\(^3\) Ming-sho Ho, *Weakened State and Social Movement: The paradox of Taiwanese environmental politics after the power transfer*, 14 *JOURNAL OF CONTEMPORARY CHINA* 339, (2005).

\(^4\) The Republic of China, which was represented by the KMT government, withdrew its membership from the United Nations in 1971 and broke off its highly privileged relations with the United States, Taiwan’s major political sponsor, in January 1979.


\(^6\) Taiwan’s Environmental Protection Agency was established on August 22, 1987. The martial law was ended on July 15, 1987. For a general introduction to environmental law in Taiwan, see Dennis T. C. Tang, *New Developments in Environment Law and Policy in Taiwan*, 6 *PACIFIC RIM LAW AND POLICY JOURNAL* 245 (1997).

legislative power, which has turned out to legitimize its regulatory power over environmental issues in Taiwan’s transition to democracy.

During political liberalization in the mid-1980s, the Constitutional Court in Taiwan, namely the Council of Grand Justices, expanded its jurisdiction through a variety of administrative law cases. It first tested the political waters by applying German Rechtsstaat doctrine to tax cases, which constituted the major part of administrative law cases under the authoritarian regime. After 1987, the KMT remained the power-holder, controlling political-economic resources and never having to confront the effects of lustration, in contrast to the Communist Party in Central and Eastern Europe after the fall of the Berlin Wall. Meanwhile, the opposition forces had united together to forge a rival party, the Democratic Progressive Party (DPP), continuously challenging the political hegemony of the KMT. Against this background, the post-authoritarian politics in Taiwan faced endless political stalemates between the two united parties in the national legislature, namely the Legislative Yuan. During this period, the Constitutional Court’s interpretations in respect to administrative law were no longer limited to tax cases, having extended to other social-political issues. Like its counterparts in Central and Eastern Europe, the Constitutional Court in Taiwan became more and more critical to the political process.

In 2000, the KMT finally stepped down from power after fifty years of one-party rule. For the first time, a non-KMT candidate—Chen Shui-bian of the DPP—won the presidential election, with 39.30% of the total valid votes, in 2000 and was reelected in 2004 with 50.11% of the votes. In the eight years of DPP administration, the antagonism between the DPP and the KMT escalated into a zero-sum game sweeping across all political issues. The KMT coalition formed a majority in the Legislative Yuan throughout the eight years of the DPP administration. Mass media in Taiwan was filled with pro-China cultural elites who were extremely hostile to the local political powers like the DPP. Pro-China mass media depicted the DPP administration as a corrupted power. In the meantime, fundamental administrative codes like the Administrative Procedure Law of 1999 (TAPL) and the

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8 TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 140-42 (2003).
9 For the formation of an opposition party in Taiwan and its road to rule, please refer to SHELLEY RIGGER, FROM OPPOSITION TO POWER: TAIWAN’S DEMOCRATIC PROGRESSIVE PARTY (2001).
10 The 1947 Constitution of the Republic of China adopted the Austrian model of constitutional courts, which means that the constitutional court does not hear cases as normal courts would and does not render judgments on specific cases. It provides constitutional review of normative acts as preventive norm-control (präventive Normenkontrolle) on the basis of applications for constitutional review to the Council. After the amendment to the Constitutional Interpretation Procedure Act in 1993, the scope of applicants included government agencies, legislators (application threshold: one-third of the seats in the Legislative Yuan), people whose rights were infringed, and judges. See WU GENG, XIANFA DE JIESHI YU SHIYUNG (The interpretation and application of the constitution) 356 (2003).
Freedom of Information Act of 2005 (FIA) went into effect. These pieces of legislation provide a wide range of *ex ante* and *ex post* procedural mechanisms to constrain the executive power. The DPP administration had to deal with not only the antagonistic KMT-dominated Legislative Yuan but also the severe legal constraints provided in the TAPL and the jurisprudence of the Constitutional Court.

Since the dusk of the authoritarian regime, the Council of Grand Justices has been invoking German legal doctrines like the “principle of administration based on law” (Deer Grundsatz der Gesetzmässigkeit der Verwaltung) to strike down administrative rules and decisions. Under this overarching principle, the Council frequently has cited two sub-doctrines to constrain the rulemaking power of the executive branch: the reservation for statutes doctrine (Vorbehalt des Gesetzes) and the intelligible principle (Der Grundsatz der Bestimmtheit). The former mandates that administrative action should be made on the basis of legislative delegation, and the latter mandates that the content, scope, and purpose of legislative delegation should be specified in statute. These two doctrines have constituted the basis of the judicial review of administrative action for the Council in the past two decades.

The Council has vigorously applied these doctrines in order to strike down various administrative rules under the authoritarian regime. However, the Council appears to have loosened its stringent standards of judicial review in recent cases. In this chapter, we focus on a controversial case regarding the TEPA’s regulation of environmental affairs as treated by the Council’s Interpretation No. 612 of 2006. In this case, the Council granted the environmental agency more room in which to carry out its policies of waste-disposal management, which is a thorny issue for many local governments in Taiwan. After Interpretation No. 612, there were nine cases involving legislative delegation, and only three of them were struck down on the basis of the intelligible principle. Though the Council never publicly expressed its turn to judicial self-restraint in respect to public policy, the fierce debate that arose in relation to appeared in Interpretation No. 612 has not again been seen in recent cases.

In the following sections, I first contextualize the development of administrative law in Taiwan from two perspectives: bureaucratic operations and legislative campaigns. I try to locate this development on a long-term horizon and to identify how the authoritarian regime and democratization have affected the pattern of administrative rulemaking. In the second section, I discuss why Taiwan passed its Administrative Procedure Law (TAPL) in 1999. After comparing three existing

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12 For the Council’s application of the former doctrine, please see Interpretation No. 167, 210, 251, 268, 274, 384, and 443; for the latter doctrine, please see Interpretation No. 345, 346, 394, 426, 432, and 491.
theories about TAPL, I submit my own model of the “legitimacy race” among political parties. Furthermore, I discuss the results of legislative overreaction induced in the race for legitimacy. In the third section, I argue that the Council tried to ameliorate the rigid effects of legislative overreaction by micromanaging its standards of judicial control of administrative action so as to resolve the endless stalemates between the executive and the legislature.

4.1. Bureaucrats Administration in a Developmental State

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.13 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.14 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.15

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


15 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 13, at 195-227.
1950 and 2000. As Figure 4-1 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 not even bother to carry out rule-bound regulations under the authoritarian regime. As mentioned earlier, the KMT as the dominant party reigned over the island. It was not necessary for the KMT technocrats to enact administrative rules that reciprocally 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 for the purpose of regulation. In fact, technocrats under the KMT played the role not only of administrators but also of pseudo-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, prompted the administrative agencies to adopt new regulatory means. As more and more members of the rival party, 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. So the post-“martial law” KMT administration was trying to avoid undesirable litigation by enacting broad and unconstrained written rules that granted carte blanche power to the administrative agencies; in this way, the KMT hoped to maintain its developmental regulatory regime.

A methodological note: to the present purpose, I coded only administrative rules published in the Gazette of the Office of the President between 1951 and 2000. Though many ministerial gazettes also publish administrative rules on different subject matters, it is hard to code administrative rules in each field because Taiwan did not and does not have a system like the Federal Register in the United States. Since the Gazette of the Office of the President is the most longstanding governmental gazette constantly published in Taiwan, I elected it for the purpose of sampling.

FIGURE 4-1 TOTAL NUMBER OF THE THREE TYPES OF ADMINISTRATIVE RULE IN TAIWAN
According to general textbooks of administrative law in Taiwan, there are three types of administrative rules: (1) rules that are issued on the basis of agencies’ organic authority, without any legislative delegation, but that have external legal effects on people’s rights (or so-called “authority regulations,” zhiquan mingling); (2) rules that are issued on the basis of legislative delegation and that have external binding effects on people’s rights (or so-called “statutory regulations,” faguei mingling); (3) rules that have only internal effects and that need no legislative delegation (or so-called “administrative orders,” xingzheng queizhe). As Table 4-1 shows, even in the 1990s, government agencies preferred authority regulations to statutory regulations. Apparently, authority regulations would provide agencies with more discretionary power 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 see it as appropriate and necessary, without legislative delegation from the Legislative Yuan. It seems that during the early years of democratization, the government was still apt to use authority regulations to deal with emerging challenges in Taiwan.

From the perspective of the rule of law as laws of rules, 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. But of these administrative rules, 63.64% were rules without legislative delegation. In other words, the executive branch promulgated over half of the administrative rules without legislative delegation. These rules can still be products of arbitrary and capricious administration. If one regarded the increase of authority regulations as an achievement of the rule of law, the meaning of ‘rule of law’ might be reduced to a nominal one. Nevertheless, the percentage of authority regulations in the 1990s was even higher than the percentage of authority regulations in the 1980s (51.19%). From the 1980s to the 1990s, the number of authority regulations underwent an approximately 4.4-fold increase, while the number of statutory regulations 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 was increasingly enacting enabling laws that delegated legislative power to agencies. In the 1980s, the number of statutory regulation was only 24, but the number rose up to 78 in the 1990s. These data indicate that the legislative branch has also tried to control the process of state-building in the aftermath of democratization by way of legislative delegation. However, the legislature was also in transition and still had an


insufficient capacity to create enabling laws able to respond comprehensively to urgent state-building needs at this stage. At the early stage of democratization, it seems that the executive branch still dominated the agenda of rule-of-law reform.

It has been hard for the executive branch to transform its administrative pattern from a state-directed development model to a checks-and-balances model spontaneously. The executive branch would choose an instrument that would adequately preserve the branch’s discretionary power but that would satisfy the nominal rule-of-law requirements. Therefore, administrative agencies in transition usually adopted an *ad hoc* strategy of rule-of-law reform. 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 give political credit only to politicians and that might lessen the bureaucrats’ regulatory power in many ways. Bureaucrats during democratization have remained bounded by their instrumental reason and accustomed to the decision bias of authoritarian administration. Their first and foremost concern during this transition process has been self-preservation. Democratization did prompt the executive branch to carry out institutional changes, but the changes have occurred only in a minimalist way. The change of administrative rules might need some exogenous variables to affect the structure of bureaucratic decision-making. 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.

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### TABLE 4-1 NUMBER AND PERCENTAGE* OF THE THREE TYPES OF ADMINISTRATIVE RULE

<table>
<thead>
<tr>
<th>Year</th>
<th>Authority Regulations&lt;sup&gt;a&lt;/sup&gt;</th>
<th>Statutory Regulations&lt;sup&gt;b&lt;/sup&gt;</th>
<th>Administrative Orders&lt;sup&gt;c&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>E.Y.</td>
<td>Agencies</td>
<td>Sub- total</td>
</tr>
<tr>
<td>1951-1960</td>
<td>20</td>
<td>6</td>
<td>26</td>
</tr>
<tr>
<td>1971-1980</td>
<td>23</td>
<td>0</td>
<td>23</td>
</tr>
<tr>
<td>1991-2000</td>
<td>56</td>
<td>133</td>
<td>189</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>151</td>
<td>151</td>
<td>302</td>
</tr>
</tbody>
</table>

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

**Notes:**
- **a.** E.Y.: the Executive Yuan
- **b.** Authority Regulation: Externally binding, affecting people’s rights, based on the authority of organic law but *without* delegation by congressional law
- **c.** Statutory Regulation: Externally binding, affecting people’s rights, *with* delegation by congressional law (viz. *Rechtsverordnung* in German administrative law)
- **d.** Administrative Order: 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 be by no means regarded as the total composition of administrative rules during this time.

![Figure 4-2 Percentage Distribution of the Three Types of Administrative Rule in Taiwan]
4.2. The Race for Legitimacy: Administrative Procedure Law and the dilemma of legislative overreaction

4.2.1. Legislating Administrative Procedure in a New Democracy

In this section, I first introduce and analyze the legislative process of the Administrative Procedure Law in Taiwan (TAPL). Then I compare three existing theories about why Taiwan passed TAPL, including the insurance theory of Tom Ginsburg, the current control theory of Jeeyang Rhee Baum, and the sequence theory of John Ohnesorge. Finally, I submit my explanation regarding the Legislative Yuan’s decision to legislate the rigidly controlled rulemaking in the TAPL, an explanation that may improve our understanding of the origin of general administrative procedure law in Taiwan.

After twelve years of democratization, Taiwan enacted its very detailed Administrative Procedure Law (TAPL) 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 TAPL, especially legal scholars, anticipated the need to implement 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 TAPL. The task force submitted a detailed though jargon-loaded draft of the TAPL in December 1990. But the KMT government in the early 1990s was reluctant to introduce the draft into legislation, so it argued that, if enacted, the TAPL would undermine efficient administration and would impede Taiwan’s economic growth.21

However, as mentioned at the beginning of this chapter, burgeoning social groups like environmental activists began to organize social protests against the government and tried to participate in the policymaking process, as well.22

21 Please refer to the opinion of then Justice Weng Yueh-sheng: see FAWUBU XINGZHENGCHENGXUFA ZHIDING CILAO HUIHAN(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, which 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 XINGZHENGCHENGXUFA [WHEN TAIWAN CONFRONTED THE ADMINISTRATIVE PROCEDURE ACT...] 42-47 (2002).

22 Yun Fan, Taiwan: No civil society, no democracy, in CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE 164 (Muthiah Alagappa ed., 2004). P??
Meanwhile, the KMT government confronted its legitimacy crisis. A large-scale student protest in the Chiang Kai-shek Memorial Hall demanded that the government abolish the Temporary Provisions. Meanwhile, the Council of Grand Justices announced Interpretation No. 261, which forced the non-elected representatives of the National Assembly, the Legislative Yuan, and the Control Yuan to leave their offices. 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 TAPL. Though the MOJ’s version was similar to the CEPD’s, the Executive Yuan feared that it would lose much of its discretionary power in the policymaking process. Therefore, in the final draft of 1995, the Executive Yuan rejected a whole chapter of rulemaking that constituted the core issues of both the CEPD’s and the MOJ’s drafts. In fact, the MOJ’s representative had argued in the drafting committee that the definition of ‘administrative rule’ had been prescribed in another statute, namely the Statutory Promulgation Act, so there was no need to double prescribe, as it were.23 Furthermore, the Executive Yuan referred to the Japanese legislation, itself known as the Administrative Procedure Law (Gyôsei Tetsuzuki Ho), which Japan had passed in 1993. The Japanese APL provided only two types of administrative action: administrative disposal (gyôsei shôbun) and administrative guidance (gyôsei shidô). The Japanese experience provided excuses with which the KMT government could refuse sweeping legislation. In fact, by narrowing the focus, the KMT government further revealed its reluctance to restrain itself from exercising discretionary power.

However, after the Executive Yuan submitted the bill to the Legislative Yuan in 1995, the TAPL legislation began an unexpected journey of political competition among different parties. Earlier, in 1994, some legislators who were mobilized by the KMT Legislator Wu Tong-sheng, a Harvard-trained lawyer, had submitted the MOJ’s draft to the Legislative Yuan independently. And earlier still, in 1993, a group of DPP legislators had submitted the CEPD’s draft 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 lock in the German Rechtsstaat doctrine by means of the TAPL legislation. In 1995, Legislator Xie Qida (of the New Party), the chairwoman for the Committee on Legal Affairs at the Legislative Yuan, invited zealous legal scholars to merge these drafts of the TAPL so as to render an integrated bill. Nevertheless, the final draft prepared by

23 Please refer to the opinion of the MOJ’s representative Huang Sho-gao; see COLLECTED MATERIAL, supra note 16, at 397.
Legislator Xie turned out to be an amalgamation of foreign legislation, which included the German notion of administrative decision (Verwaltungsakt), the rulemaking process of the United States, the French concept of administrative contract, the Japanese creation of administrative guidance, and the traditional Chinese practice of petition.\(^{24}\) Finally, in January 1999, the Legislative Yuan read and passed Legislator Xie’s bill. The newly enacted TAPL provided a moratorium of two years for the government to prepare the practice of TAPL. The hybrid legislation represents Taiwan’s aspirations to become a new democracy in which the protection of fundamental rights would be achieved through effective constraints on the executive powers.\(^{25}\)

The most controversial section in the TAPL is about rulemaking. According to Articles 150, 158, and 159 of the TAPL, except for administrative orders that have only internal effects, every administrative rule should obtain legislative delegation from the Legislative Yuan in advance. 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, like authority regulations, would be invalid under the TAPL.\(^{26}\) In fact, this legal issue of the TAPL triggered fierce debates in Taiwan’s legal circles.\(^{27}\)

However, in the legislative process, the provision regarding administrative rule

\(^{24}\) 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, insofar as the Chinese people used to beseech the government for justice in the form of a petition (Qing-yuan), the Taiwanese APL retains this traditional Chinese custom.

\(^{25}\) Please refer to the comment of Legislator Xie Qi-Da, Committee Meeting on Administrative Procedure Law before the Joint Committees, 85 LEGISLATIVE YUAN GAZETTE 212 (1996).


has changed several times. The CEPD draft, a scholarly product, did not expressly prohibit authority regulations. It provided that only those administrative rules affecting people’s rights shall obtain legislative delegation in advance. Otherwise, agencies may envisage administrative rules on the basis of the agencies’ own organic authority. The MOJ’s draft did not even mention legislative delegation, and the Executive Yuan canceled the whole chapter of administrative rule. It was the integrated version of Legislator Xie that expressly denied the legality of authority regulations. However, during the second-reading process in the Legislative Yuan, some legislators expressed their dissent regarding this rigid legislation. Legislator Liu Guang-hua (KMT) argued, “[T]he legal academia shall abandon its stereotype of 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.”

After deliberation, the second-read bill reinstated the provision that an agency can make administrative rules on the basis of its organic authority. Nevertheless, in the final reading, 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 among all the drafts. In general, the second-reading bill would be the final version in the legislative process. It was a very rare case that after the second reading, the Legislative Yuan would revise a bill during the third reading, in which bills formerly were read out loud in front of all legislators and voted on.

The Legislative Yuan passed the TAPL on January 15, 1999, right after the fourth-term legislators were elected and only a few days before the third-term legislators were to leave office. Despite remaining the largest party in the Legislative Yuan, the KMT was barely able to control the majority of legislators. When the opposition parties, the DPP and the New Party, cooperated with each other, they only needed three more votes from the KMT legislators to pass a bill. In fact, there were eight KMT legislators already endorsing Legislator Xie’s bill. Meanwhile, before the Legislative Yuan voted on the TAPL, major parties conducted negotiations with one another, discussing controversial statutes in the TAPL. Of the eight party-delegates in negotiation, only one was from the KMT: three members hailed from the New Party and four from the DPP. In addition, the KMT representative even lacked legal expertise 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

29 Legislative Yuan Sitting Record, 88 LEGISLATIVE YUAN GAZETTE 606 (1999).
4.2.2. Why Taiwan’s Administrative Procedure Law Promotes Rigid Statutory Control of Administrative Rulemaking

During the 1990s, two other East Asian countries also launched legislation along the lines of administrative procedure law. Japan passed its Administrative Procedure Law in 1993. In the same year, the first civilian president in South Korea, Kim Young Sam, set up the Presidential Commission on Administrative Reform aiming to prepare a draft of the Administrative Procedure Law in South Korea. The South Korean Administrative Procedure Law was passed in 1996. Why these Asian countries in the 1990s wanted to adopt Administrative Procedure Laws has attracted scholarly attention in recent years.

To answer this question, John Ohnesorge provides a grand theory of the relationship between developmental states and administrative law. According to Ohnesorge, by adopting APLs, these developmental states may provide a “credible commitment” to economic actors, especially foreign investors. In his words, “[T]he interests of a pro-growth polity align naturally with those of business, particularly where the state preceded historically the rise of industry, and participated in its creation, as occurred in Northeast Asia.” He further applies the analysis of path-dependency to explaining the different sequences of liberal legality (pluralist administrative law), industrialization, and the regulatory state in three geographic areas: the United States, Germany, and Northeast Asia. He argues that, in Northeast Asia, the interventionist state emerged in conjunction with industrialization, which molded the relationship between the state and private industry into a “mutually dependent relationship.” Therefore, pluralist administrative law was delayed until changes in the mutually dependent relationship between the state and private interest groups. Once the relationship between the government and private interests was more separated and decentralized, administrative procedure laws were deemed as a credible commitment to empower judicial independence.

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30 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.


32 Id. at 249.

33 Id. at 251. Also see John Ohnesorge, Politics, Ideology and Legal System Reform in Northeast Asia, in GLOBALISATION AND RESISTANCE: LAW REFORM IN ASIA SINCE THE CRISIS 105 (Christoph Antons &
Ohnesorge’s comparative historiography of Northeast Asian administrative laws delivers a macro-analysis of institutional evolution through the dialectic relationship between the state and industry. Turning to the micro-level, and drawing from the theory of rational choice, Tom Ginsburg argues that political actors would desire administrative procedure law when they have a short time horizon and relatively few measures with which to control the bureaucracy.  

In South Korea, the newly elected presidents had to face various challenges in the aftermath of democratization; indeed, their political statuses were under threat all the time. They might want to secure their interests through the APL so that—upon performing poorly in a future election—their party would not find its political interests easily overturned by rival parties. Meanwhile, owing to the heritage of strongman politics, South Korean parties are known to be relatively weak and do not have informal mechanisms for controlling the bureaucracy. Therefore, South Korea has adopted comprehensive APL legislation, which features a notice-and-comment-type procedure of rulemaking. In doing so, political actors can expand the justiciability of administrative cases and diffuse the monitoring functions to constrain bureaucracy.  

In contrast, until 1993, the Liberal Democratic Party (LDP) dominated Japanese politics (for thirty-eight years following the end of World War II). Since the LDP enjoyed a stable political monopoly and its party machine had developed various measures to control the bureaucracy, like personnel meetings or the policy coordination apparatus of Shingikai, it had less incentive to adopt stringent APL, whose policies would be financially costly to implement. Thus, it was not a surprise that the entire rulemaking procedure was omitted in the Japanese APL. On this premise, Ginsburg further argued that the TAPL “lies somewhere between the Korean and Japanese statutes.” Since the KMT had reined in Taiwan for a long time, the party machine also had informal channels for controlling the bureaucracy. Meanwhile, the KMT did not see any strong competitor on the horizon during the 1990s, so it was not be willing to adopt an APL as stringent as the South Korean legislation. However, the KMT was also afraid of possible future electoral losses, so it still needed a procedural mechanism to guard its interests.

Following the logic of positive political theory, which regards administrative procedure law as the mechanism of controlling bureaucracy, Jeeyang Rhee Baum

Volkmar Gessner eds., 2007).


35 *Id.* at 257.


37 *Id.* at 624.
argues that presidents in South Korea and Taiwan supported the APL because they had problems controlling the current bureaucracy rather than problems securing their interests under the threat of possible future electoral losses. According to Baum, “[T]he more intra-branch conflict presidents face while in office, the more likely they will support an APA.” Applying this logic to Taiwan, Baum offers an elaborate story to explain why President Lee Teng-hui supported the enactment of TAPL. After the constitutional amendment of 1997, Taiwan adopted the semi-presidential system and lowered the threshold of the no-confidence vote from two-thirds to one-half of the seats in the Legislative Yuan. Since it became much easier for the opposition parties to oust the Premier appointed by the President, Lee was forced to cooperate with his opponents in the KMT, namely the non-mainstream faction. In fact, the non-mainstream faction had a closer relationship with the New Party than with Lee. Thus, Lee had to take precautions against these cabinet members. Since these non-mainstream ministers also exercised control over the bureaucracy, they and Lee had common interests in approving the TAPL. Baum argues that, if the lock-in theory (or the insurance theory) holds, Lee should have promoted the TAPL in his first term. But the TAPL was not even on the legislative agenda during his first term. Therefore, Lee did not worry about future electoral loss, but approved the TAPL in his second term because of the present control problem.

However, from the record of legislative history, it is hard to argue that President Lee truly supported the TAPL because not one of the most enthusiastic legislators was from the KMT. Besides, in his first term, he had nominated his political rival General Hau Pei-tsun as the Premier. Hau later became the vice-presidential candidate running alongside Lee’s independent-party opponent (a former high-level KMT politician and party leader) in the 1996 presidential election. In fact, Lee confronted more political opposition within the KMT his first term than he did second term, but he did not even propose the TAPL legislation in his first term. Post-authoritarian politics in Taiwan simply has not supported the current control theory. The major drive for the TAPL legislation, as Baum notes in her article, is the competition among different parties. In the following paragraphs, I argue that the race for legitimacy among parties in regard to electoral strategy is the core reason for the passage of the TAPL.

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40 Baum points out, “KMT reformers wanted to control the bureaucracy, through an APA, in order to rob the DPP of its primary issue [of transparency and participation], thereby effectively stealing the rival party’s political oxygen.” Id. at 390.
It perhaps was not a surprise that the DPP legislators wanted to cooperate with the New Party legislators on the TAPL 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 used to be 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 President Lee Teng-hui. The New Party criticized the Lee-led KMT as a corrupt party of “black money” (i.e., the iron triangle of the KMT, local mafia, and big-money greed). The New Party argued that the current KMT regime had deviated from Sun Yat-sen’s political manifesto, 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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<th>TABLE 4-2 COMPOSITION OF THE LEGISLATIVE YUAN FROM 1996-2008</th>
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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 authority regulations as legitimate administrative rule, since the ideological discourse of public law in post-authoritarian politics favored the German intelligible principle and the principle of statutory reservation. As mentioned at the beginning of this chapter, the Council of Grand Justices established its case law regarding both doctrines. Therefore, if we were to take the legislative process of the TAPL 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.\(^{41}\) 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 the prisoner’s dilemma, end up choosing the stringent control of administrative rules, which represents the ideal of Rechtsstaat.\(^{42}\)

However, the administrative agencies could not easily comply with such a severe restriction on rulemaking. After the TAPL 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 authoritarian rule, the KMT government had enacted various administrative rules without any legislative delegation. In the course of democratization, authority regulation became the most expedient regulatory instrument with which the technocrat-centered administration could maintain both the developmental state that the KMT had created and a nominal sense of the rule of law. Although the transfer of state power occurred peacefully, the DPP government had to face the KMT legacy of authority regulations and the rigid TAPL framework, the latter of which had been intended to constrain the authoritarian government’s power.\(^{43}\) Under the new TAPL, most of the administrative rules created by the KMT government would be illegal and, indeed, unconstitutional.

I should note, as well, that when administrative agencies either request an

\(^{41}\) Here I draw on the idea of the expressive function of law from Richard McAdams; see Richard McAdams, A Focal Point Theory of Expressive Law, 86 VA. L. REV. 1649 (2000).


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 effort 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 was a coalition consisting of the KMT, the New Party, and 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 Taiwan Solidarity Union—advocated 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. The battle over national identity has polarized almost every single 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.

Nevertheless, the number of authority regulations operating in the government was astronomical, and most of the daily administration was threatening to come to a halt because of the TAPL’s stringent requirements. Therefore, the Legislative Yuan finally agreed to grant a moratorium of one year for the validity of authority regulations by amending Article 174-1 of the TAPL; the moratorium would begin on January 1, 2001. 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 authority regulations should have become void after January 1, 2003. However, the truth is that the Legislative Yuan passed a packet of legislation for 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, debate, and examine every enabling law and the delegated legislation. To some extent, the “packaged legislation” of enabling laws, rather than change the substance of administrative rules, has only legalized the authoritarian regulatory regime. 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 TAPL 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. Indeed, given that 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 TAPL legislation, for example applying the most stringent requirement to the rulemaking process. Hence, 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 TAPL 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 actor can derive interests but whose problems no political actor would try to solve. This phenomenon represents a dilemma of a common-pool resource. It takes a high exclusion cost to prevent the exploitation of “rule of law” discourse, and there is no institutional rule to appropriate the “rule of law” rhetoric. 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 constitutional interpretations of the Council of Grand Justices would constitute operational rules that would help to change the structured dilemma of legislative overreaction. In the next section, I discuss the transformation of both the statutory reservation principle and the intelligible principle in the Tribunal’s jurisprudence.

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46 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, at 200-02, 214-15.
4.3. Effectuating Democratic Governance: Judicial review and the elicitation of information

The Council of Grand Justices reclaimed its constitutional power stage by stage after the political liberalization in the mid-1980s.\(^{47}\) 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).\(^{48}\) 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 statutory reservation principle, an adoption of Article 80(1) of the German Basic Law, in Interpretation No. 268 (1990), declaring that “limitation on people’s rights should be imposed by statutory law only” and that “administrative rule that transgresses the scope of legislative delegation shall be held unconstitutional.” The first case establishing the judiciary’s rigid control of administrative rule was the landmark Interpretation No. 313 (1993).\(^{49}\) In this interpretation, the court successfully employed the statutory reservation principle and the intelligible principle to strike down the administrative rule in dispute.

4.3.1. The Establishment of Judicial Authority through Doctrinal Application

Case 1: Interpretation No. 313 (February 12, 1993, Taiwan)

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

\(^{47}\) Regarding the judicial activism of the fifth Council of Grand Justices since 1985, see Ginsburg, supra note 8; Chang, supra note 17, at 290-305.

\(^{48}\) Regarding the expansion of judicial review by striking administrative actions, see Tom Ginsburg, supra note 8, at 140-42.

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.

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 specified in statutory law, rather than in administrative rules. This is the core definition of the statutory reservation principle. 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).50 This requirement for legislative delegation is known as the intelligible principle. Between the issuing of 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).51 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

50 For a contextual discussion on this Interpretation, see Chang, supra note 17, at 393-94.
51 The Interpretations invalidating administrative rules include 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 in 1995 and 1996 while the brisk sixth Council was on the bench (since 1994). See generally, Chang, supra note 17, Chapter 8. Also see Ginsburg, supra note 8, at 148-52.
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. Thereafter, the court reiterated the restrictions on general delegation in interpretations including No. 394 (1996) and No. 402 (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). The court constructed the statutory reservation principle 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, criminal punishment should be prescribed not in administrative rule but in congressional law (Level-II). Third, supplemental administrative rules can restrict some other rights only if congressional law applies to the rules’ scope, content, and purpose, which are to be 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 administrative law scholar, 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.”

However, the application of this doctrine has been criticized as formalistic and mechanical. By this formalistic application, the court does not need to consider

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53 System des Abgestuften Vorbehalts is a constitutional theory grounded in the Fundamental Law (Grundgesetz) of the German Federal Republic. 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 Hsu Tzong-li, Lun Falabahautilia Yuanze [On the statutory reservation doctrine], in his FA YU GUOJIA QUANLI [Law and the state power] 117 (1993); Wu Gung, supra note 11, at 98, 107.

54 See Wu, supra note 11, at 97-102.

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 rational scrutiny. 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 formalistic application of the statutory reservation principle to rulemaking would be less likely to get the justices in political trouble than would other types of court applications.

In Taiwan, this interpretative method enabled the Council of Grand Justices to establish a rule-bound mechanism based on human-rights protection. This mechanism combines the political legitimacy of human rights with both the statutory reservation principle and the intelligible principle, emphasizing greatly the legitimacy of legislative powers and the congressional law’s function as a restriction on administrative power. According to the Council, only through the due process of legislative delegation can government limit people’s freedom and fundamental rights. This mechanism implies a classic Lockean idea: government shall be distrusted. In fact, the ideological implication exactly fits the mentality 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 TAPL in 1999 canceled the legality of authority regulations (regulations that were based on agencies’ organic authority), the legislative and judicial control of administrative rules reached its peak of formalism. 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 statutory regulation, to technical and miscellaneous issues; and second, the TAPL has in effect eliminated authority regulation. 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. First, unless the legislative branch can enact sufficient laws and

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56 By the expression “formalistic approach of the rule of law,” I mean that the court regards literal, textual, and positive statutes as 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 conceptions of the rule of law. See David Dyzenhaus, Recrafting the Rule of Law, in RECREATING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 1 (David Dyzenhaus ed., 1999).
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 TAPL’s problematic Article 174-1 had actually incurred the packaged legislation, which had legitimized those authority regulations so that formalistic review of administrative rules would no longer be 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.

4.3.2. Departing from the Formalistic Conception of Administrative Law

Case 2: Interpretation No. 522 (March 9, 2001, Taiwan)

Ms. Chen had been a trader at Yuan-tong Securities, a company that 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 of the transaction nor authorize agents to open such an account. However, the defendants asserted that the related 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.

Case 3: Interpretation No. 612 (June 12, 2007, Taiwan)

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 a cleanup company. Mr. Hung argued that the agency’s delegated power to revoke a professional license was vague and too broad.

Five and a half years after the TAPL came into effect, the grand justices had a fierce debate over the application of the intelligible doctrine. The case underpinning Interpretation No. 612 (2006) was about governmental supervision over waste-management companies. 57 By balancing society’s need for environmental protection against people’s right to work, the Council upheld the constitutionality of the general delegation under Article 21 of the Waste Disposal Act. The Council 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 […]” By restating its opinion in Interpretation No. 538, the Council 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 Council 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 Council stressed the importance of public interest as the legislative purpose. Owing to the unpredictability of environmental risks, the Council held that the Legislative Yuan could delegate to the Environmental Protection Agency the legislative power to regulate waste-disposal companies for the purpose of public health and intergenerational justice.

It is a surprise that such a trivial case 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 on the bench, criticized the majority

opinion for confusing the natures of delegated administrative rules in this case. The two justices argued that by holding constitutional the general delegation under Article 21 of the Waste Disposal Act, the majority risked jeopardizing the well-established statutory reservation principle 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 Council’s very own stare decisis since Interpretation No. 313 and that the current interpretation would definitely invite severe criticism from legal academia. Meanwhile, Justice Hsu Yu-hsiou, a criminal law scholar, in her dissenting opinion, denounced this interpretation as “a judicial review without any review.” She disagreed with the majority’s purposive approach and criticized the majority’s use of public interest as writing a blank check for arbitrary and capricious administrative action. In her view, human-rights protection trumps any other principle of rule of law. Her libertarian conception of human rights calls for a coherent interpretation based on the Council’s precedents.

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

4.3.3. Broadening Process of Democratic Life

Following Interpretation No. 612, the Council upheld six administrative rules in nine cases in respect of agencies’ discretion and policy choices. Is this series of interpretations pronouncing a new age of the regulatory state in Taiwan after twenty years of democratization? As we mentioned earlier, it might be too early to predict

58 Id. Justice Liao’s and Wang’s joint dissenting opinion.
59 Id. Justice Hsu’s dissenting opinion.
60 Id. Justice Pong’s and Justice Hsu’s joint concurring opinion.
because the transformation is ongoing. If the Council were to be sincere to the thoughts underpinning Interpretation No. 612, the authority of the executive branch would gain more strength and the power relationship between the judiciary and the executive would significantly change. There would be a reconfiguration of state power, which would bring administrative agencies back on the stage of state-building, with the judiciary applying judicial review of reasonableness rather than that of textual and formalistic control over an agency’s rulemaking. A new paradigm of administrative decision-making grounded on judicial deference would replace the rights-oriented paradigm that took root in the aftermath of democratization.

If this is true, then what is the new paradigm for judicial control of administrative decision-making underlining Interpretation No. 612? First of all, we may reflect on the political background of these constitutional cases. After the rotation of the ruling party, the executive power during President Chen Shui-bian’s presidency was not as dominant as it had been under the KMT. Indeed, the legislative branch, which had been controlled by the former authoritarian patrons, possessed the overwhelming power of agenda-setting in the political arena. In other words, the executive power since the year 2000 has weakened, as is the case when an authoritarian state transitions into a normal democracy. However, the legislative branch constantly appealed to legislative supremacy in the fight against the DPP administration. The reversal of the power imbalance since 2000 may induce the grand justices to reconsider whether the strict rule-bound model can strike a balance of power in view of strengthening democratic governance.

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 like to 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. Although the revised

61 However, the Taipei High Administrative Court rendered an interventionist judgment relating to administrative discretion in 2007. In that case, the Court overruled an administrative decision on the basis of an environmental-impact review. For further discussion, please refer to Huang Jin-tang, Gaodu Keji Zhanxyexin Xincheng Jueding zhi Shifa Kongzhi [Judicial control of highly technological-professional administrative decisions], 21 SOOCHOW L. J. 1 (2009).

62 Before 2000, there was only one administrative court, which became the Supreme Administrative Court in 2000. According to the official statistics, the Supreme Administrative Court received 5,434 cases in 1997, 8,599 cases in 1998, and 7,253 cases in 1999. Since 2000, the High Administrative Courts have had original jurisdiction. In 2000, there were 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 decreased to 9,928 in 2002 and remained at 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 accessed Oct. 12, 2007).
ALL is a complete adoption of German administrative litigation law and therefore is extremely jargon-laden, 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 the issue of the statutory reservation principle. However, within six months after the TAPL took effect (in 2000), fourteen such cases were brought before the new administrative supreme court.63 On the other hand, the administrative court had never ruled in favor of plaintiffs on the grounds of the statutory reservation principle, but since 2000, the court has struck down administrative actions pursuant to the statutory reservation principle.64 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.

Third, the cases entering the Council of Grand Justices are more diverse than ever, so the Council 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 tax law (No. 566, 593, 606). The diversity of constitutional cases, to some extent, has catalyzed the justices’ idea of the administrative state. In the early 1990s, the Council focused on tax law owing to the non-political nature of taxation and to people’s reluctance to challenge other governmental regulation. However, while the democratic practices of everyday life have penetrated Taiwanese society, every single administrative action, ranging from licensing to the protection of rare species, can be brought before the Council.65 Facing the burgeoning social diversity and relevant policy choices, the Council cannot but rethink its control of administrative rules. The shift of political power, the increase of administrative cases, and the diversification of litigation all have contributed to the broadening process of democratic life, which has

63 See Yeh and Chang, supra note 55, at 525.
64 Id. at 527-28.
65 Yeh Jiunn-rong argues that the judicialization of governance in Taiwan is affected by the “democracy-reinforcing, process-centric pattern” of administrative law. See Yeh Jiunn-rong, Democracy-driven Transformation to Regulatory State: The case of Taiwan, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 127 (Tom Ginsburg & Albert H. Y. Chen eds., 2009).
prompted the judiciary to reorient its reviewing mechanism from active formalism to judicial self-restraint.

4.4. Concluding Remarks

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 chapter, 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 TAPL to constrain this unfettered administrative power. However, owing to the political camps’ race for legitimacy, the TAPL 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 TAPL 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 the authoritarian regime ceded power. Eventually, the self-contradictory legislative branch and the entrapped executive branch jointly legitimized the authoritarian regulatory regime by passing enabling laws in the form of packaged 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-TAPL 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. Prompted by the flood of litigation, the court adjusted its control model of administrative rules gradually on a case-by-case basis. At last, the court made a paradigmatic shift from rights-based formalism to an information-centered 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 and to promote the circulation of information among different groups. 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. Moreover, the information generated by the
court’s self-restraint approach provides a better and solid basis on which citizens and their representatives can deliberate regarding the areas of democratic governance that require improvement. Democracy is always about deliberation and discussion. Without information, no one can enhance the virtue of democracy and guarantee a better political life under democracy. According to Taiwan’s case, the constitutional court’s jurisprudence of self-restraint indeed helps to thrust the government towards providing more critical information so as to secure the dynamics of public governance in this nascent democracy.