

# FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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## Session II Amending an Existing Constitution

### Taiwan

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***What events led to the constitutional revisions towards democratisation that began in the 1980s?  
What constitutional changes were made?***

Taiwan's Constitution, the Republic of China Constitution (hereinafter "the ROC Constitution" or "the Constitution"), was enacted on Mainland China in 1947. However, the government controlled by the Nationalist Party (*Kuomintang*, KMT) lost to the Chinese Communist Party (CCP) in the civil war during 1947-48 and was relocated to Taiwan in 1949. Due to the government relocation and ensuing warfare between Taiwan and Mainland China across the Taiwan Strait, the ROC Constitution was not implemented. Instead, the Temporary Provisions Effective during the Period of National Crisis" (hereinafter "the 1948 Temporary Provisions" or "the Temporary Provisions") that substantially expanded presidential powers were enacted along with the imposition of a martial law decree that curtailed the enjoyment of civil and political rights for decades.

With the government's relocation, the President, the five branches (*Yuans*) of the national government – the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Examination Yuan and the Control Yuan (a functional equivalent to modern ombudsmen) – and the National Assembly (vested with the exclusive power of constitutional revision), all elected or appointed on Mainland China, resumed their offices in Taiwan. Very soon a serious constitutional question arose as to whether and how to conduct a second national election for the representatives of the Legislative Yuan and the National Assembly (to be directly elected by the people), and for the members of the Control Yuan (to be elected by provisional councils). There was no way to have elections held on Mainland China under the CCP's control, and the KMT government was not willing to have any constitutional revision as they thought that a constitutional revision would formally acknowledge their defeat and threaten their representative status as China's only legitimate government in the United Nations and around the world.

The question of whether and how to conduct a second election for national representatives was then brought before the Constitutional Court, known as the Council of Grand Justices, of the Judicial Yuan. In *JY Interpretation No 31*, the Constitutional Court decided that all of the first-term national representatives should continue to exercise their respective powers before the second-term members would be elected as the state was “*undergoing a severe calamity, which makes re-election of the second term ... de facto impossible.*”

Deprived of the right to vote for their national representatives as well as other civil and political freedoms, Taiwanese people struggled to fight for democratization and constitutional rule of law. With the success of economic developments and the emergence of a middle-class, social organizations and human rights groups were formed in the late 1970s and early 1980s. The global recognition of the CCP government and its admission into the United Nations in the 1970s also seriously threatened the KMT's governing legitimacy. Eventually, the leaders of the KMT, Chiang Kai-shek and his son, Chiang Ching-Kuo, had no choice but loosened political and social control, resulting in what political scientists have termed as “soft authoritarian governance” in the 1970s and 1980s. In July 1987, a year before the death of Chiang Ching-Kuo, a martial law decree, along with the bans on the formation of political parties and social organizations, were lifted. The first opposition party, the Democratic Progressive Party (DPP) was formed in September 1986. The streets of Taipei, the capital city, saw unprecedented waves of political and social protests demanding for grand reforms.

In January 1988, President Chiang Ching-Kuo died. Lee Teng-Hui, a native Taiwanese specialist in agricultural economics and a hand-pick by Chiang as his Vice President, succeeded to the presidency. The hope for further political reforms was raised high. In 1990, when the first-term members of the National Assembly, who remained in office for nearly four decades, met again to elect Lee as the President, an unprecedented number of students and citizens took to the street for weeks, known as “March Student Movement”, demanding for an immediate retirement of the first-term national representatives, an election for the second term and most importantly, constitutional reforms.

The first-term national representatives' remaining in office, however, was based on the constitutional interpretation mentioned above. This issue was once again brought before the Constitutional Court. In June 1990, *JY Interpretation No 261* was made, in which the Constitutional Court clarified that “*J.Y. Interpretation No. 31 was not intended to allow the first-term national representatives to continue exercising their powers indefinitely, and to cope with the present situations, those first-term national representatives who have not been reelected on a periodical basis shall cease the exercise of their powers no later than December 31, 1991.*” Even more importantly, the Constitutional Court demanded that “the Central Government is further mandated to hold, in due course, a nationwide second-term election of the national representatives, in accordance with the spirit of the Constitution, the essence of this Interpretation and the relevant regulations, so that the constitutional system will function properly.”

Among others, *JY Interpretation No 261* was vital in providing the constitutional foundations for the retirement of the first-term national representatives, the election of the second term, and the subsequent constitutional reforms. The first constitutional revision—together with the abolition of the Temporary Provision—was undertaken in May 1991, still by the first-term National Assembly. The second-term was elected in 1992. Since then, constitutional revisions were undertaken respectively

in 1992, 1994, 1997, 1999, 2000, and 2005, all focusing on the rearrangements of constitutional institutions adjusted to the governing reality in Taiwan.

***At what point was it decided to amend the existing constitution rather than make a new one? Who made the decision, how was it made, and what factors influenced it?***

In June 1990, around the time when the Constitutional Court was deliberating *JY Interpretation No 261*, a national consultative conference – initiated by President Lee Teng-Hui in response with the March Student Movement – was held. All major political parties including the KMT and DPP along with key political and social groups participated in the conference. The debate on the methods, processes and contents of constitutional reforms was taking place.

For the KMT, in order to continue to assert their representation of “China”, their baseline was to keep the ROC Constitution intact. Facing tremendous political pressures, however, the KMT could make concessions to amending constitutional provisions so as to allow the “national” elections to take place only in Taiwan deemed only as one province under the ROC Constitution. For the DPP, they had long denounced the KMT’s governing legitimacy and advocated for Taiwan’s independence. Their best option was to make a brand-new constitution that could signify Taiwan as a separate entity from the People’s Republic of China (PRC) on the Mainland. Notably, however, making a new constitution was not really an option. Not only the KMT in Taiwan opposed it, but also the CCP on China was against it. Even the United States was worried about any adverse impacts on regional security if Taiwan would opt for making a new constitution.

On the compromises primarily made between the KMT and DPP, constitutional revisions were to be undertaken gradually in the format of additional articles. This way, the ROC Constitution could remain intact in its name and form, but all of the constitutional institutions originally written in the ROC Constitution could still be substantially changed to adjust to actual circumstances. And this was what happened. After seven rounds of constitution revision since 1991, while the ROC Constitution’s name and text remained, all of the additional articles made substantial changes to the Constitution. To name just a few, the parliamentary government system was changed to a presidential one, the President was made to be directly elected by the people, the mechanism of public referendum was added, and the National Assembly was abolished, and the procedure of constitutional amendment was also changed, among others.

***Were the procedures for amendment set out in the existing constitution followed? Why or why not?***

Yes, the procedures for amendment in the ROC Constitution were followed throughout all seven rounds of constitutional revision.

***Are there now alternative or changed procedures for amending the Constitution? Which procedures are followed and why?***

Yes, the last two – sixth and seventh – rounds of constitutional revisions in 2000 and 2005 respectively altered the procedures of constitutional amendments. The change was made largely in response to the rearrangement of constitutional institutions.

As briefly stated above, the ROC Constitution created the National Assembly – in addition to the Legislative Yuan – and vested the National Assembly with the exclusive power to amend the Constitution as well as to elect the President and Vice President. In 1994, however, the third round of

constitutional revision changed the presidency to be directly elected by the people, and the National Assembly was left only with the power to amend the Constitution. Whether there was any need in keeping the National Assembly or should the power to amend the Constitution be shifted to the Legislative Yuan became a debated issue. Since the opening up of elections for national representatives in the early 1990s, there were complaints about having too many elections. And whenever the National Assembly met to consider proposals of constitutional amendments, they always took the opportunity to provide themselves with more powers and benefits, the “rent-seeking” syndrome criticized by many. Thus, there were quite a few citizen groups organized to advocate for abolition of the National Assembly as well as for adoption of national referendum for constitutional revision, a stand that the DPP also strongly supported. Some of these groups also took such a reform as steps towards further independence of Taiwan.

In 2000, the sixth constitution revision changed the National Assembly from a long-standing institution into a mission-oriented one. It was stipulated that only when the proposals of constitutional amendments were passed by the Legislative Yuan would the election for the 300 members of the National Assembly be held, and as soon as constitutional amendments were enacted, the National Assembly would be resolved. In 2005, the seventh constitutional revision was undertaken, and the process followed the rule laid down in 2000. This time, the National Assembly was abolished, and the power to amend the Constitution was given to the Legislative Yuan followed by a national referendum.

***Why were the amendments made in multiple stages, rather than all at once? What were the advantages and disadvantages of this approach? How did this fit with other major political events?***

The incremental nature of constitutional revision in Taiwan was a result of compromises between the KMT and the DPP. As stated above, the KMT was very keen in preserving its Chinese identity from the ROC Constitution. The KMT insisted that the first round of constitutional revision in 1991 must be carried out by the first-term National Assembly elected from Mainland China in 1948, and could only make concessions to having subsequent constitutional revisions carried out by the second-term representatives elected in Taiwan. Thus, at least in the beginning, the two-stage reform was inevitable. Also, the incremental nature of constitutional revision made it possible for the two major political parties – the KMT and DPP – to negotiate with each other over time and not rush into any political solution that would undermine both parties.

***Were the prescribed formal procedures for constitutional amendment supplemented by other processes? If so, how were these processes determined and why were they used?***

No, the prescribed procedures for constitutional amendments were never supplemented by other procedures.

***Was judicial review of the constitutional amendments possible, and if so did this affect the process or substance of the amendments?***

Yes, in 2000, the Constitutional Court made *JY Interpretation No 499*, invalidating the fifth round of constitutional revision on both procedural and substantive limits that were not expressly prescribed in the Constitution or in the additional articles. In the constitutional revision undertaken in 1999, both the KMT and DPP reached a compromise to keep the National Assembly but to suspend its elections. The seats of the National Assembly would then be allocated in accordance with the seats of political parties in the Legislative Yuan, and in order to implement the reform, the present terms of the members of the National Assembly and the Legislative Yuan would be extended for about a few

months to two years. This revision was fiercely criticized by the general public as secret and self-dealings between the KMT and DPP. In order to pass this constitutional amendment, the KMT and DPP also changed the voting rule from open to secret ballots. All of these procedural flaws and substantive self-aggrandizement of powers were invalidated by the Constitutional Court as violating “*the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution’s very existence.*”

The judicial invalidation of the fifth constitutional revision quickly led to the passage of sixth constitutional revision in 2000. The National Assembly was then changed from a long-standing institution into a mission-oriented one, and in 2005, was eventually abolished.

***What sources or comparative experiences did constitution makers look to? Were any other international influences brought to bear?***

Because the seven rounds of constitutional revision were primarily focused on the re-arrangements of constitutional institutions, the comparative experiences of government systems were what constitutional makers look to. Most popular was the French semi-presidential system, followed by the American presidential system and the German parliamentary system.

***With hindsight, might anything have been done differently?***

As stated above, the making of a new constitution or even a grand-scale of constitutional revision that might signal Taiwan’s separate and independent identity from China was not an option in the course of constitutional reform. It was not only opposed by the KMT in Taiwan, but also by the CCP in China and even the US across the Pacific Ocean. Against such contextual dynamics, the method of incremental changes, through which constitutional institutions transplanted from China were nevertheless substantially altered if not all abolished, were inevitable. Even with hindsight, nothing could have been done differently.

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