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RESEARCH ARTICLE

Innovation through Litigation: Prison Reform and the Legal Opportunity Structure in Taiwan

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Abstract

Drawing on the theory of the legal opportunity structure, this article traces the progress of prison reform in Taiwan by highlighting how a case of parole revocation in the beginning led to an overhaul of the prison system in the end. This article argues that, through four interpretations of the Constitutional Court and the legal opportunity structure shaped thereby, including the split between courts, creation and expansion of inmates' access to court, and the support from allies, the prison reform was eventually achieved. Theoretically, this article makes two contributions to the literature: (1) the combination of inactive legislature and reactive executive branch as the political context is decisive to the openness of the legal opportunity structure for it increases the receptivity of a proactive judiciary; (2) the international human rights frame incorporated into the legal stock by the Constitutional Court made the prison reform an ongoing process rather than a done work.

Keywords: legal opportunity structure; access to court; legal framing; parole; prison litigation; human rights

1. Introduction

Inmates in Taiwan had been struggling for access to court for they were of a desire that the judicial review would shed light on their grievances against prison agencies for a long time, such as the revocation of parole, denial of parole, and other dispositions and measures by prison authorities during their daily management. Unfortunately, under the previous prison legal structure, inmates were granted exceedingly restricted access to the courts. That is, before 2010, almost every contestation between inmates and prison authorities would be addressed by prison agencies within the prison system. Also, the protection of a prisoner's rights was quite limited during their time of incarceration. But now, the thoroughly revised prison law, which took effect in July 2020, allows inmates to bring their cases to court for a judicial review. In addition, some important human rights are statutorily preserved in the newly enacted prison law. This shift is enormous and impactful, but no one has done any systematic analysis of it. Thus, for exploring how such a tremendous yet incremental change happened during the period of 2010–20, this article draws on the theory of the legal opportunity structure to trace the progress of the legal reform of prison in Taiwan over the decade.

With the increasing use of courts as part of their social movement strategies by activists around the world for the policy-making function of courts, scholars have developed the idea of the legal opportunity structure to explain how law creates and constrains the opportunity structures for parties to mobilize the law in pursuit of social change or institutional reform. The notion of the legal opportunity structure showed up for the first time in the early years of the 2000s and was soon widely used in the ensuing years

(Hilson, 2002; Andersen, 2005; Tam, 2013). It was derived out of the theory of political opportunity structure, which mostly treats law as part of politics and does not pay sufficient attention to the individual characteristic of the legal system. This disinterested view towards the uniqueness of law makes their arguments not insightful and persuasive from a lawyer's perspective (Hilson, 2002, p. 243).

Like political opportunity structure, there are structural and contingent components in legal ones. By contrast, the theoretical framework of the legal opportunity structure can help us understand how a change or reform is achieved or frustrated through the opportunity structure shaped by legal variables.

1.1 Components of the legal opportunity structure

Prior research has specified some crucial components for measuring the legal opportunity structure, such as the rules determining legal standing (Andersen, 2005, pp. 9–10; Evans Case & Givens, 2010, p. 224; De Fazio, 2012, pp. 6–7; Wilson & Rodriguez, 2006; Setzer & Benjamin, 2020, pp. 94–6). The existence of the court system itself does not mean that courts are accessible to everyone for every case at any moment. On the contrary, being able to bring cases to court depends on the rules related to legal standing, which conditions the access to court. Rules about legal standing vary across jurisdictions, but they usually include who may litigate, either individually or collectively, what may be litigated, and what venue the litigation may be brought to. Finding out a proper legal standing is the first and key step to mobilizing courts for strategic use.

Changes in the power configuration are also important dimensions of the legal opportunity structure (Andersen, 2005, pp. 10–11). Studies on political opportunity structure have pointed out that conflicts between political elites create incentives for resource-poor groups to take on collective actions (Tarrow, 1994, p. 88). Similar circumstances may take place in the legal realm as well. Judges, generally the legal elites, may take up or turn down a legal claim unanimously. At the same time, they may also be divided on the same legal question. Therefore, conflicting judgments between courts will likely motivate more litigations, change the route of current cases, or influence their outcome.

Legal stock serves as another vital perspective of the legal opportunity structure (Evans Case & Givens, 2010, pp. 223–4; Vanhala, 2018a, p. 384; Vanhala, 2018b, p. 112). It refers to the existing body of laws in a specific field, usually containing constitutional, statutory, administrative, common, and case laws. Legal stock acts as the basis for legal reasoning, without which the persuasiveness of legal claims will be probably diminished substantially. Moreover, such legal stock cannot take effect without legal framing (Andersen, 2005, pp. 12–14; Vanhala, 2018a, pp. 395–406). The notion of framing comes from Erving Goffman's idea of a frame as a "schemata of interpretation" (Pedriana, 2006, p. 1721). It refers to the process through which social movements mobilize symbols, claims, and even identities in the pursuit of activism (Williams, 2004, p. 93). The process of framing is also applicable to law. Activists need to articulate their claims in accordance with the legal stock through framing skills.

Lawyers, organizational support, as well as money, are integral to litigations because lawyers are necessary to craft strategies, backing from organization makes lawyers work more smoothly, and funding allows litigation to last longer. Consequently, allies and material resources play an important role in the legal opportunity structure (Hilson, 2002; Evans Case & Givens, 2010, pp. 224–5; Vanhala, 2011). Without such support, it is usually very difficult for litigants to get through the entire process alone.

Another thing with regard to money is legal costs, which means who shall pay for the costs incurred in litigation. Research shows that it is of consequence in shaping the opportunity structure for legal action (Vanhala, 2012; Vanhala, 2018a, p. 385;

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Vanhala, 2018b, p. 112). In the US, each party is accountable for their own legal expenses for attorneys. On the contrary, the losing party has to pay for the winning party's legal fees under English law. The system of the loser pays causes much greater risk for litigants. In Taiwan, the party that loses the case shall bear the fees of litigation, which indicates the fees of court, but the attorney's fees on the side of the prevailing party are not included.[1] The only exception is if the case is tried at the level of the Supreme Court, when the losing party needs to bear the fees of the court as well as those of the attorney on the winning party's side.[2]

Finally, the receptivity of the judiciary to novel ideas and arguments is another critical measurement for the legal opportunity structure (De Fazio, 2012, p. 7; Vanhala, 2012, p. 527). Access to court is indeed necessary for the use of courts as a means to strive for success, but it is not sufficient. Only if courts are receptive to the legal arguments made by the litigants, and willing to make a decision accordingly, may the activists get a favourable result. This component is particularly impactful when the legal arguments are novel in order to make changes to society. The receptivity of courts usually hinges on the power configuration between courts or the political context during that time. This will be discussed in detail with illustration later in this article.

The above research was made mostly on the experience of Western countries. On the contrary, there has been relatively little study on Taiwan as well as other Asian countries with such a theoretical framework (Chen, 2012). Maybe the novelty of this theory is the main reason for the scarcity of Asian voices in the field. Therefore, this article will make an addition to the literature by putting Taiwan onto the list, by which the article expects to bring about more law and society studies on Asian countries in this vein.

1.2 Layout of the article

Accordingly, this article will be focused on how the legal opportunity structure was shaped through the four important cases of prison litigation and their interpretations made by the Constitutional Court of Taiwan, and how this legal opportunity structure contributed to the prison reform. By plumbing the four interpretations and the political context then, this article will demonstrate the components of the legal opportunity structure. Due to the case-specific nature of every litigation, not every component of the legal opportunity structure can be found meaningful in the cases examined here. Therefore, this article focuses mainly on five components of legal opportunity, including the creation and expansion of a prisoner's access to court, the clashing views between courts, the support from allies, the emergence of certain political context that increased the receptivity of a proactive judiciary, and the adjustment in the legal framing of the interpretations upon international human rights, which is also an influential addition to the legal stock. These components eventually brought about the overhaul of the legal structure of the prison system, which is beyond the expectation of the litigants.

This article begins by setting out the backdrop before the prison reform when inmates did not have any access to court and what led to inmates being caught in such a legal trap. This article identifies the theory of *Besondere Gewaltverhältnis* (Special Authority Relationship) as the key account for the unavailability of court access for inmates to address their complaints. The following section discusses Interpretation Nos 681 and 691: the former eliminated the theory of a Special Authority Relationship between inmates and the prison system, and the latter gave rise to the access of prisoners to courts. Then, this article turns to the political context composed of an inactive legislature and a reactive executive branch, which made the Constitutional Court more receptive to novel legal ideas

[1] The Code of Civil Procedure, Art. 78.
[2] The Code of Civil Procedure, Art. 466–3.

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and proactive to take drastic steps. Next section discusses Interpretation Nos 755 and 756: the former expanded the scope of a prisoner's access to court, and the latter confirmed that inmates do not lose the constitutional protection of their substantive rights when being incarcerated. In addition, there are two crucial features of the two interpretations in shaping the legal opportunity structure, namely the support from allies during the litigation and the change in the arrangement of the legal framing of the Constitutional Court. They made the legal opportunity structure more exploitable for future strategic activists. The last section gives a full picture of the revamped prison law and displays its connections with the four interpretations.

2. Prisoners' access to court before the reform

The theory of Special Authority Relationship had been applied to the relationship between the government and "the governed" in Taiwan for a long time in several legal regimes, such as civil servants, military personnel, and students. With this theory, the government enjoys special authority on the governed, so their relationships will not be regulated by laws but by their internal rules and orders, and the disputes between them will not be subject to a court's review but to investigation by administrative agencies (Lu & Chang, 2015, p. 2). The theory of the Special Authority Relationship was coined by the German legal scholars (Cherng, 2013, pp. 194–6). Its use in Taiwan could be traced back to as early as the time of Japan's colonial control of Taiwan in the 1900s, and the theory was retained by the Nationalist government after Japan lost its governance of Taiwan because of World War II (Cherng, 2013, pp. 197–207). There are some attributes of the relationship between the government and the governed under the theory of the Special Authority Relationship, such as the disparity between their power, uncertainty of duties for the governed, little protection provided by law for the governed, and limited access to court if the governed have any grievances (Wu, 2012, p. 169).

The relationship between prisoners and the government was also included in the coverage of the theory of the Special Authority Relationship. Most legal rules and principles are thus inapplicable to the daily operation of Taiwan's prison system. For example, the Administrative Procedure Act was enacted to ensure that all governmental acts are carried out in pursuance of the law and the rights and interests of the people are therefore protected.[3] If someone's right or interest is unlawfully infringed by government agencies, she or he may bring the case to the supervisory agencies (administrative appeal)[4] or file a lawsuit with the administrative court (administrative litigation)[5] for their review. Actions taken by prisons and other custodial houses, however, were excluded from the protection by those laws and procedures before the prison reform.[6] Such a legal void in the regime of prison administration of sentences could be realized from the following three critical aspects: revocation of parole, disapproval of parole, and dispositions and management measures of prison agencies.

2.1 Revocation of parole

In Taiwan, a convicted defendant who is sentenced to imprisonment will be sent to prison according to the instructions of the prosecutor.[7] This step is called the "enforcement of judgment." After being sent to prison, the sentenced becomes a prisoner and starts to

[3] The Administrative Procedure Act, Art. 1.
[4] The Administrative Appeal Act, Art. 1.
[5] The Administrative Litigation Act, Art. 2.
[6] See e.g. the Administrative Procedure Act, Art. 3, s. 3, subs. 4.
[7] See the Code of Criminal Procedure, Arts 457, 466.

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serve her or his sentence under the supervision of the prison agencies. This step is called the "execution of sentence." The two steps have different legal definitions. According to the resolution by the Joint Conference of the Presiding Judges of the Supreme Administrative Court in February 2004, if a parolee's parole was revoked by the Ministry of Justice,[8] then the parolee was not allowed to bring forth a litigation to the administrative court. Instead, pursuant to Article 484 of the Code of Criminal Procedure,[9] the parolee may file an objection with the criminal court only when a prosecutor instructs the prison to execute the remaining sentence after the revocation of parole. After an objection was filed, what the criminal court would review, however, was whether there exist any legal problems in the prosecutor's instructions for the enforcement of judgment, not the Ministry of Justice's decision to revoke the parole (Lu & Wei, 2011, p. 54).

The reasoning of the resolution is simple and straightforward: the case of parole revocation shall stay within the criminal justice system, namely the prison; the prosecutor; the Ministry of Justice, who is the head of the prison system; and the criminal court that renders the judgment because parole revocation involves the use of the penal power of the regime. Therefore, inmates were not permitted to resort to other remedies outside the criminal justice system, such as an administrative litigation. Further, even when a parole was revoked by the Ministry of Justice and the remaining sentence was to be executed pursuant to the instructions of the prosecutor, the criminal court was only permitted to review "the enforcement of judgment" by prosecutors—that is, to review whether there were any legal mistakes in the prosecutor's instructions, rather than "the execution of sentence" by the prison.

Why was the revocation of parole not eligible for a judicial review? The logic of this reasoning of the resolution is premised on that the government, namely the prison agencies in the case of imprisonment, has a special authority over prisoners by the execution of criminal sanctions. Based on the theory of the Special Authority Relationship, this Special Authority Relationship between the prisoner and the prison is not subject to a court's review. Therefore, any revocation of parole was not reviewable by criminal courts and inmates were provided with limited access to courts if having any grievances against the prison authorities. The case of parole revocation is a vivid illustration that the theory of the Special Authority Relationship also wielded strong power in the relationship between inmates and the government.

2.2 *Disapproval of parole*

The influence of the Special Authority Relationship theory became more conspicuous when it was concerned with the issue about the approval or disapproval of parole before the prison reform in 2020. Parole may be granted to an inmate by the Ministry of Justice through a report from the prison, which is produced upon evaluation by the parole commission, provided that there is proof of the inmate's repentance during the execution of imprisonment.[10] In addition, the inmate must have served 25 years of a sentence to life imprisonment, one-half of a sentence to imprisonment, or two-thirds of a sentence to the imprisonment if the prisoner is a recidivist.[11]

[8] Per the Criminal Code, Art. 78, s. 1 (ineffective 6 November 2020), if the offender has intentionally committed another crime during the period of parole, for which the offender is sentenced to an imprisonment or a more severe punishment by a final judgment, the offender's parole shall be revoked.

[9] It provides that "The sentenced and his statutory agent or spouse shall file an objection to the court which pronounces the judgment upon finding instructions by the prosecutor impropriate."

[10] The Prison Act, Art. 81, ss. 1, 2 (ineffective 15 July 2020); the Statute of Progressive Execution of Penalty, Arts 75, 76.

[11] The Criminal Code, Art. 77, s. 1.

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Nevertheless, in accordance with the previous stable view of the Supreme Court in its decisions,[12] if a parole was not approved, the inmate was only allowed to file a complaint to the prison supervisory authority or prison inspectors via the prison warden.[13] She or he was not permitted to bring the case to court for a judicial review. The reasoning is that, for the government, either the approval or disapproval of parole is part of the government's execution of sentence—an illustration of penal power. The government exclusively owns the penal power to decide on whether to report or grant the inmate parole. Therefore, no matter what the decision is, any disputes regarding parole shall be addressed inside the government and is not subject to a court's review.[14] Therefore, a prisoner's access to court on the case of parole disapproval did not even exist in Taiwan before the prison reform. It has been criticized by some legal researchers (Lu, 2016; Lu & Wei, 2011, pp. 48–54).

2.3 Dispositions and management measures of prison agencies

In addition to the revocation and disapproval of parole, other actions taken by prison agencies, such as dispositions and management measures during the daily administration of prisons, were also not reviewable by courts in Taiwan before the prison reform. According to the provisions of prison laws at that time, prisoners might file complaints to the prison supervisory authority or prison inspectors via the prison warden if disagreeing with the disposition or management measures of the prison,[15] and prison agencies possessed the power to make final decisions on such complaints from prisoners.[16]

When prisoners looked for remedies through the track of criminal courts, the courts usually denied their cases with the reason that what a criminal court might legally review is the step of "enforcement of judgment" by prosecutors.[17] But if the complaint is about the step of "execution of sentence" by prison agencies, it has gone beyond the scope of the supervisory power of criminal courts.[18] When prisoners sought help through the track of administrative courts, they usually dismissed the cases with the opinion that the present laws only allowed those cases to be tackled within the prison system and did not authorize prisoners to bring their cases to administrative courts.[19] As a result, administrative courts had no jurisdiction over such disputes.[20] Therefore, just like the revocation and disapproval of parole, complaints against dispositions and management measures from prison agencies should also be addressed within the prison system and were forbidden to leak out of the bounds to courts. Likewise, such legal practice was also blasted by legal scholars (Lu, 2005, pp. 255–63; Lee, 2005, pp. 26–7).

3. The silver lining: Interpretation Nos 681 and 691

In this section, two interpretations made by the Constitutional Court will be discussed: one is Interpretation No. 681 and the other is Interpretation No. 691.[21] Both interpretations are

[12] See e.g. 99 Taikang No. 605 Criminal Ruling of the Supreme Court.

[13] The Prison Act, Art. 6, ss. 1, 3 (ineffective 15 July 2020).

[14] See the reasoning in the Supreme Court's decision, 99 Taikang No. 605 Criminal Ruling of the Supreme Court.

[15] The Prison Act, Art. 6, s. 1 (ineffective 15 July 2020).

[16] The Enforcement Rules of the Prison Act, Art. 5, s. 1, subs. 7 (ineffective 15 July 2020).

[17] The Code of Criminal Procedure, Art. 484. See *supra* note 9 and its accompanying text.

[18] See e.g. 99 Taikang No. 926 Criminal Ruling of the Supreme Court, and 104 Kang No. 972 Criminal Ruling of the Taiwan High Court.

[19] See the Prison Act, *supra* note 10 and the Criminal Code, *supra* note 11.

[20] See e.g. 92 Cai No. 267 Ruling, 93 Cai No. 538 Ruling, and 105 Cai No.1249 Ruling of the Supreme Administrative Court.

[21] In Taiwan, the Constitutional Court made interpretations of the Constitutional Law rather than judgments when reviewing cases. But things have changed since 4 January 2022, after the promulgation of the Constitutional

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related to parole: Interpretation No. 681 tackled the issue of the revocation of parole and Interpretation No. 691 dealt with disputes over the denial of parole. By dealing with such parole-related cases, the Constitutional Court expelled the theory that a Special Authority Relationship existed between prisoners and prison agencies. The Constitutional Court also insinuated to the Congress the necessity for making some legal modifications to the court procedure at that time for accommodating prison disputes. In addition, the Constitutional Court laid the foundation for the legal opportunity structure by announcing the applicability of "the right to remedy" to inmates in Interpretation No. 681 and subsequently created prisoners' access to court for grievances against prison authorities in Interpretation No. 691.

3.1 Vacating the theory of the Special Authority Relationship

The Constitutional Court released its Interpretation No. 681 in September 2010 (for the full coverage, see Judicial.gov.tw, 2010). This interpretation tackled the controversy about the eligibility of parole revocation for a court's review. As explained in the prior section, the theory of the Special Authority Relationship played a decisive role in the relationship between prisoners and the prison authorities. In other words, such a Special Authority Relationship prevented prisoners from seeking judicial review of their grievances over the actions taken by prison agencies, including the revocation of parole, disapproval of parole, and other dispositions and management measures by prison authorities. The resolution by the Joint Conference of the Presiding Judges of the Supreme Administrative Court in February 2004 also confirmed that revocation of parole was not eligible for review by administrative courts. Rather, when the remaining sentence was to be executed in accordance with the instructions of the prosecutor,[22] the inmate might file an objection with the criminal court to review the instructions of prosecutors, but not the step of the execution of sentence by the prison.

Interpretation No. 681, however, did not follow such conventional legal reasoning based on the theory of the Special Authority Relationship, which had wielded its power in haunting Taiwan's legal realm for more than a century. Instead, the Constitutional Court followed up its previous several interpretations to vacate the theory of the Special Authority Relationship and emancipate "the governed," such as civil servants in Interpretation No. 243, students in Interpretation No. 382, soldiers in Interpretation No. 430, public university professors in Interpretation No. 462, and detainees in Interpretation No. 653, from the control of the government under this theory.

The fundamental reason for Interpretation No. 681 is that "where there is a right, there shall be a remedy," which came out as early as in Interpretation No. 243 in 1989. The remedy here means the right to seek a court's review of a case about the encroachment on one's right. This is people's "right to remedy," which is preserved by Article 16 of the Constitution.[23] For the Constitutional Court, therefore, there are no Special Authority Relationships between prisoners and the prison. Alternatively, once any of the prisoner's rights is infringed by the prison, the prisoner shall enjoy the right to remedy by bringing the case to a court for their review.

In Interpretation No. 681, revocation of parole is concerned with the personal freedom of the parolee, which is a right preserved by Article 8 of the Constitution, because the

Court Procedure Act. The Constitutional Court now makes judgments instead of interpretations. Except for the names and some procedural settings, there is no substantive difference between the effects of an interpretation and a judgment; i.e. either interpretations or judgments are final and binding on all the government authorities as well as the people. See the Constitutional Court Procedure Act, Art. 38, s. 1.

[22] The Code of Criminal Procedure, Art. 484. See *supra* note 9.

[23] It provides that "The people shall have the right of presenting petitions, lodging complaints, or instituting legal proceedings."

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parolee will lose her or his free life and be sent back to prison. Hence, there shall be a legal remedy for parolees to resort to a court's review of their cases. As a result, Interpretation No. 681 on the one hand acknowledged that Article 484 of the Code of Criminal Procedure, which allows parolees to file an objection with the criminal court after the parole is revoked and the remaining sentences is about to be executed upon the prosecutor's instructions, was a legal remedy conforming to the constitutional requirement. The interpretation on the other also raised a constitutional concern that the protection of the right to remedy here was incomplete if the scope of a review by a criminal court was limited to the instructions of the prosecutor and did not include the revocation of parole. Instead, there shall be a legal remedy for parolees to seek a court's timely and complete review of the revocation of parole prior to serving their remaining sentences.

Accordingly, Interpretation No. 681 hollowed out the theory of a Special Authority Relationship between prisoner and prison agencies and underscored the importance of a court's timely and complete review when dealing with contention about the revocation of parole. The interpretation, however, failed to carry through its intention to reinstate prisoners' full access to court, if any, to the end. It neither touched on the controversies over other actions of prison authorities, such as the disapproval of parole, nor indicated which court, either criminal or administrative, shall be the appropriate track for coping with the lawsuits between inmates and prison agencies. Thus, after the release of Interpretation No. 681, the controversies remained unresolved.

3.2 Conflicts between courts

After the announcement of Interpretation No. 681, the power struggle between criminal courts and administrative courts came to the fore when the two groups of courts were determining which track was entailed with jurisdiction over the lawsuits between inmates and prison authorities. The campaign was commenced by the Supreme Administrative Court in October 2010. When being confronted with a case about parole disapproval, the Supreme Administrative Court decided to transfer the case to criminal courts instead of making a judgment by itself on the merits.[24] The Supreme Administrative Court believed that in accordance with the laws then, when determining on whether to grant parole, a prison would send eligible inmates to the parole commission for its evaluation and then report qualified cases to the Ministry of Justice for its final review and to make a decision.[25] In other words, it was those prison authorities that possessed the power and discretion to determine on granting parole, not the inmates who owned the right to apply for parole. As a result, if parole was not granted, the inmate might file a complaint to the prison supervisory authority or prison inspectors[26] or file an objection with the criminal court,[27] but the inmate was not permitted to bring the case for the review of administrative courts.

After the case was handed over to the track of criminal courts, the Criminal Division of the Supreme Court (hereinafter "the Supreme Criminal Court"), however, followed its precedents and insisted that criminal courts did not have the jurisdiction to review the decisions from prison authorities in relation to parole and thus dismissed the case in the end whereas, in the time before the release of Interpretation No. 681, the Supreme Criminal Court had a constant conclusion that criminal courts might be able to review what was done or instructed to be done by prosecutors during the execution of sentence. Whether to grant parole, however, hinged on the decision of prison authorities and hence

[24] See 99 Cai No. 2391 Ruling of the Supreme Administrative Court.
[25] See *supra* note 10.
[26] See *supra* note 13.
[27] See *supra* note 10 and its accompanying text.

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did not involve the role of the prosecutor. As a result, criminal courts did not have the leverage to handle such parole controversies.[28]

Even after the announcement of Interpretation No. 681, the Supreme Criminal Court kept reiterating the reasoning of its precedents and refused to follow Interpretation No. 681 by distinguishing between the two cases. In the case transferred by the Supreme Administrative Court to the criminal track, the Supreme Criminal Court opined that Interpretation No. 681 was dealing with the issue of the revocation of parole rather than the decision on whether to grant parole. Therefore, Interpretation No. 681 was not applicable to the present case about the disapproval of parole.[29] The Supreme Criminal Court also noticed the principle of "where there is a right, there shall be a remedy" in Interpretation No. 681, but it fended off the inquiry by stating that there were no such laws regulating the remedy for parole decisions, and courts did not possess the legislative power and so were not able to create legal remedies for parole decisions without any authorization from the law.[30] Consequently, not only did the Supreme Administrative Court disqualify inmates from seeking a reversal of a parole decision from the administrative courts, but the Supreme Criminal Court also put a stop sign in front of them to prevent those cases from entering the criminal courts, notwithstanding that Interpretation No. 681 relinquished the theory of a Special Authority Relationship and instead advocated a prisoner's right to access the court as a legal remedy.

In addition to the conflicting views between the Supreme Administrative Court and the Supreme Criminal Court, there was also the inconsistency within the decisions of the Supreme Administrative Court itself. As explained earlier in this section, the Supreme Administrative Court believed that the track of criminal courts owned jurisdiction over the issue regarding parole decisions of prison authorities but, later in April 2011, another decision of the Supreme Administrative Court changed its point of view and followed the reasoning of the Supreme Criminal Court that whether to grant parole was not related to any action or instruction of prosecutors, so it was not reviewable by criminal courts as well.[31] In other words, the Supreme Administrative Court changed its standpoint to a more restrictive way: disapproval of parole was not reviewable by either administrative or criminal courts. The Supreme Administrative Court thus dismissed the case directly without transferring it to the criminal counterparts.

The conflicting view between the Supreme Administrative Court and the Supreme Criminal Court and the inconsistency within the Supreme Administrative Court itself revealed that the theory of the Special Authority Relationship was still exerting a substantial influence on other actions of prison agencies towards prisoners. The unresolved question left by Interpretation No. 681 regarding which track of courts shall be afforded jurisdiction over prison litigations led both the administrative court and the criminal courts to shirk their duty. Eventually, prisoners' right to remedy advocated by Interpretation No. 681 was hollowed out during the power struggle between the two groups of courts. On the other hand, the conflict and the inconsistency also generated a power gap between the two groups of courts so that inmates and their allies could take advantage of this opportunity structure to carry the reform forward.

3.3 Creation of prisoners' access to court

As recounted in the previous section, it is obvious that when facing a dispute about parole disapproval, both the Supreme Administrative Court and the Supreme Criminal Court

[28] See e.g. 99 Taikang No. 605 Criminal Ruling of the Supreme Court.
[29] 100 Taikang No. 811 Criminal Ruling of the Supreme Court.
[30] *Ibid.*
[31] 100 Cai 901 Ruling of the Supreme Administrative Court.

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remained obsessed with the theory of a Special Authority Relationship even after the release of Interpretation No. 681. But the power struggle between the two courts also produced a new opportunity structure for legal changes to take place. Afterwards, not so surprisingly, Interpretation No. 691 was announced in October 2011 (for details of the interpretation, see Judicial.gov.tw, 2011) only around one year after the release of Interpretation No. 681.

Interpretation No. 691 took on the controversy over which track of courts shall take up the responsibility to review the cases of parole disapproval by prison agencies. It elucidated that even though the inmate could file a complaint to the prison supervisory authority or prison inspectors when failing to acquire parole from the Ministry of Justice, the procedure of complaint was designed for internal redress within the circle of prison agencies and was not equivalent to a court's review of the case. Consequently, this internal procedure would not be able to substitute for the formal remedy to court.[32] As a result, the Constitutional Court stressed that an inmate may file a lawsuit with a court for judicial redress if unsatisfied with the decision of parole disapproval. Accordingly, the incidence of prisoners' right to remedy had expanded from only cases of parole revocation to cases of parole disapproval. In other words, anything about parole became triable by courts since then. Further, Interpretation No. 691 also noticed that only the right to court was not enough because the experience had manifested that the two tracks of courts would rather pass the buck than take on the tasks. Thus, Interpretation No. 691 expressly specified that lawsuits about parole denial against prison agencies shall be decided by the track of administrative courts unless the legislature stipulates otherwise.

Consequently, this interpretation not only expanded prisoners' access to courts for parole issues, but also substantially laid the foundation for general access to courts for prisoners, allowing the court to redress any wrongdoings during the daily administration of the prison. In addition, the idea that the government's internal procedure of complaint cannot be a substitute for formal access to court continues to exert influence on future interpretations about other prison actions that infringe on the rights of inmates.

4. The political context: inactive legislature and reactive executive branch

The increase in a court's policy-making function allows judicial systems to become potentially influential in the arenas for contentious politics and to play a pivotal role in furthering social or legal reform (De Fazio, 2012, p. 5). As mentioned at the beginning of this article, the study of the legal opportunity structure is derived from and shares several important dimensions with the study of a political opportunity structure; the legal opportunity structure is even considered as part of the political one in a broader sense (Hilson, 2002, p. 243). In practice, however, legal and political opportunities usually influence and interact with each other as changes happen in one opportunity structure may accelerate the opening of the other (De Fazio, 2012, p. 6). Therefore, when probing into the legal opportunity structure of a certain case, it is also crucial to gauge the openness of the broader political context for courts to exercise their capacity of policy-making.

While Interpretation No. 691 expressly designated administrative courts to deal with cases of parole denial for the prevention of a power struggle between the criminal and administrative courts from happening again, it also gently admonished that it is the legislature that bears the responsibility to set up the laws on the court proceedings for cases of parole denial. The designation by Interpretation No. 691 was merely a tentative measure and the Congress had the legislative power to make a final decision on such an

[32] See *supra* notes 15 and 16.

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issue. The Congress, however, has neither enacted any new provisions nor made any revisions to the Prison Act or the Code of Criminal Procedure since the announcement of Interpretation No. 691. In other words, the Congress overlooked the thoughtful reminder from the Constitutional Court and literally did nothing of what it was supposed to do.

Unlike the inactiveness of the legislature, the executive branch was quite reactive during this period. As early as in December 2008, the Ministry of Justice formed a task force to carry out research on possible amendments to the laws of detention centres and prisons, and to prepare a draft of such amendments. The establishment of the task force was in response to Interpretation No. 653, which was released in December 2008 and concerned the constitutionality of the Detention Act. Interpretation No. 653 was also a response to the forthcoming incorporation of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights into Taiwan's domestic legal system in 2009. Since its launch, the task force had held more than 20 internal meetings, two public hearings, and one conference with experts, professionals, and scholars in 2009 and 2010. But the draft drawn up by the task force never went out of the loop for further discussion and only stayed inside the agency. Instead, since then, there was a moratorium on the task force for two years until 2012.

After the release of Interpretation No. 681 in September 2010 and Interpretation No. 691 in October 2011, the task force was reinvigorated and resumed its work on preparing the draft. In July 2012, the draft was finally sent to the Ministry of Justice for further review and deliberation. Since then, there had been 64 meetings held by the Ministry of Justice to review and modify the draft until August 2016. Again, however, even going through such a long period full of preparation works, the draft remained inside the Ministry of Justice and was not sent to other relevant authorities for advanced discussions.

Later in November 2016, the newly inaugurated president launched the National Affairs Conference on Judicial Reform, a state-level conference assembling all experts, scholars, officials in the field, broadly defined, to form a judicial system with public trust.[33] One topic of the conference was related to the reform of the correctional system. This conference concluded in August 2017. The conclusion for the topic on the reform of the correctional system was to make amendments to the laws of prisons, detention centres, and juvenile reformatory schools. For fulfilling this conclusion, the Ministry of Justice prepared to kick off another round of research and draft on the Prison Act, but Interpretation Nos 755 and 756 came up soon after the end of the conference.

As we can observe along the progress, the Ministry of Justice never did anything beforehand. Instead, it always acted in response to certain events: formed a task force in reply to Interpretation No. 653 and the incorporation of international covenants on human rights, resumed the task force in reply to Interpretation Nos 681 and 691, and being ready to initiate another round of preparation in reply to the conclusion of the National Affairs Conference on Judicial Reform. By contrast with the inactiveness of the Congress, the executive branch is reactive. But in the eyes of the Constitutional Court, being reactive is not sufficient, especially because the reactiveness was intermittent rather than persistent. As a result, Interpretation Nos 755 and 756 came about, only four months after the conclusion of the conference.

5. The final blow: Interpretation Nos 755 and 756

Unlike the inaction and reaction of its constitutional counterparts, the judiciary became quite proactive in exercising its policy-making function since the release of Interpretation No. 691 when, in Interpretation No. 681, the Constitutional Court demonstrated its

[33] See the Conference's official website at https://justice.president.gov.tw/aboutus/3/.

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deference to the Congress by merely vacating the theory of a Special Authority Relationship between inmates and the prison and signalling that Article 484 of the Code of Criminal Procedure was an incomplete remedy for inmates to redress their grievances against the dispositions of prison agencies. But when seeing the inaction of the Congress for more than one year and the two highest courts hiding away from the responsibility to take on cases about prison disputes, the Constitutional Court turned proactive by directly appointing the administrative courts to deal with cases of parole disapproval in Interpretation No. 691. Therefore, not surprisingly, the Constitutional Court took more proactive measures in Interpretation Nos 755 and 756 when it saw the inaction of the Congress for more than six years and the intermittent reactiveness of the executive branch. In addition, after the creation of prisoners' access to court in Interpretation No. 691, two interesting changes took place and brought changes to the legal opportunity structure: one was the assistance from the professionals and NGOs in Interpretation No. 755, in particular the support from the person who used to stand on the opposite side; and the other was the adjustment in the legal framing of Interpretation No. 756.

5.1 Support from allies

The Constitutional Court promulgated Interpretation No. 755 in December 2017 (for more details, see Judicial.gov.tw, 2017a). It took more than six years after the release of Interpretation No. 691 in October 2011. Interpretation No. 755 coped with the everyday actions taken by prison agencies, namely their dispositions and management measures during the daily operation of the prison. Following the fulcrum of Interpretation No. 691's reasoning, in other words the procedure of complaint within the prison system was not equivalent to the review of courts, Interpretation No. 755 announced that Article 6 of the Prison Act and subsection 7 of section 1 of Article 5 of the Enforcement Rules of the Prison Act[34] violated inmates' right to remedy, which is protected by Article 16 of the Constitution. As a result, the two provisions were unconstitutional for they prohibited inmates from bringing lawsuits to courts when inmates found that their rights were infringed by the dispositions and management measures of the prison during daily operations. Inmates' access to court was hence expanded again from parole revocation and denial to grievances against the daily dispositions and management measures of the prison.

One critical feature of this interpretation was that the Constitutional Court specifically set a deadline for the Congress to finish its duty of legislation. The Constitutional Court pointed out that the two provisions had not had any changes since the announcement of Interpretation No. 691 in October 2011, so it was necessary for the Constitutional Court to make another interpretation to rectify the difficulties encountered by inmates when they looked for help from courts. As a consequence, the Constitutional Court gave the Congress as well as other relevant authorities two years to make necessary revisions to the laws and rules, and thus to furnish inmates with a full procedure of a court's review. Before the modification of such laws and rules by the Congress was concluded, the Constitutional Court directed inmates that, after using up the internal complaint procedure, they may file lawsuits with district administrative courts for a judicial review of their grievances.

This interpretation also has another implication for the study of the legal opportunity structure by focusing on support from allies out of different backgrounds. Among the previous interpretations, only one of the petitioners in Interpretation No. 681 retained a lawyer as his representative and none of the petitioners in Interpretation No. 691 ever retained any lawyers in their petitions. Nonetheless, things have changed in Interpretation No. 755. One petitioner hired three lawyers as his representatives in the petition and

[34] See *supra* notes 15 and 16.

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another petitioner had organizational support from an NGO, the "Judicial Reform Foundation" (Jrf.org.tw, 2019; Amnesty.org, 2019),[35] and its lawyers. Most intriguingly, there was one judge at a district criminal court also petitioning for the interpretation of the Constitutional Court when the judge found that the case on the prison dispute over which he was presiding probably contravened the inmate's right to remedy. Judges in the past, as we may observe in Interpretation Nos 681 and 691 and other court decisions, almost directly turned down inmates' claim that they enjoy a right to a court's review on their grievances. Inmates were frequently frustrated by judges when they brought their cases to court. Thus, judges were never viewed as allies as lawyers and were even considered as the barriers when inmates were fighting for their rights. But in Interpretation No. 755, it was the first time that there was a judge who stood for the inmates in the case of prison disputes and petitioned for an interpretation from the Constitutional Court.

The presence of such allies not only increased the possibility that the Constitutional Court would make a determination favourable to the petitioners, but also manifested that the political opportunity structure generated by the inactiveness of the Congress and the intermittent reactiveness of the executive branch were employed by strategic activists as a legal portal for possible prisoners' rights reform. The full utilization of the political opportunity structure by strategic users to create new legal opportunity would be demonstrated again in the subsequent Interpretation No. 756.

5.2 The incorporation of international human rights into the legal stock

On the same day as the release of Interpretation No. 755, the Constitutional Court also laid out its Interpretation No. 756 (Judicial.gov.tw, 2017b). This interpretation, petitioned by one of the petitioners in Interpretation No. 755[36] was taking on the controversy over the violations of inmates' privacy of correspondence[37] and freedom of expression[38] conducted by prison authorities. According to the laws and rules then,[39] prison officials were allowed to review the correspondences of inmates and to cross out content that was believed to bring about negative effects on the order of the prison. Also, inmates were not permitted to publish their opinions in newspapers, magazines, and journals unless prison officials found that their submissions had a proper theme and would not cause disadvantageous effects on the order of the prison. The Constitutional Court declared the unconstitutionality of these laws and rules for they breached inmates' freedom of expression and privacy of correspondence preserved in Articles 11 and 12 of the Constitution. Further, the Constitutional Court gave the legislature and the relevant authorities two years to amend such laws and rules for satisfying the requirements of the Constitution. So, except the part of the proper theme, which lost its effect immediately after the release of Interpretation

[35] This petitioner was Ho-Shun Chiou, who was charged with committing murder and kidnap in 1987, convicted in 2011 with the death sentence, and has been detained in the Taipei Detention Centre since 1988. His case involves several misconducts and misjudgments of the government officials and courts during the process of investigation and trial, including extorting his confession by torture, using such forced confession as evidence in the judgment, and loss of other important evidence. This is a very controversial case, so he has not been executed since the conviction and has been held in death row for more than a decade. Either domestic or international NGOs are striving for a retrial for him.

[36] The petitioner was also Ho-Shun Chiou.

[37] Per the Constitution, Art. 12, everyone shall have freedom of privacy of correspondence.

[38] Per the Constitution, Art. 11, everyone shall have freedom of speech, teaching, writing, and publication.

[39] The Prison Act, Art. 66 and Enforcement Rules of the Prison Act, Art. 82, subss. 1, 2, 7 and Art. 81, s. 3 (all ineffective 1 December 2019, except the part of "proper theme," which turned into ineffective in 1 December 2017).

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No. 756, other provisions would become ineffective within two years after the release of this interpretation.

One crucial feature of Interpretation No. 756 was that it provided a frame for international human rights in its reasoning. The interpretation directly cited Principle 5 of the Basic Principles for the Treatment of Prisoners,[40] which was adopted and proclaimed by the General Assembly of the United Nations by Resolution 45/111 on 14 December 1990, as one of the sources in its legal reasoning. According to the principle, all prisoners shall retain all international human rights and fundamental freedoms unless the limitation on such rights or freedoms is necessary for incarceration. The Constitutional Court hence reasoned that prisoners still possess the rights to privacy and to freedom of expression, which are not always necessarily related to incarceration unless proven otherwise by the government. Consequently, unnecessary limitations on such rights would be deemed unconstitutional.

It was the first time that the Constitutional Court had directly referred to international human rights and cite it as a reference in their interpretations on prison disputes. The impact of this shift to international human rights in the Constitutional Court's legal framing was tremendous and influential in terms of the legal opportunity structure. This shift extended the scope of existing legal stock and created a new framework of legal reasoning so that future users may be able to take advantage of these new legal resources to spark off new strategies for not only litigations but also social movements.

6. Afterwards: an overhaul of a prison's legal structure

After the release of Interpretation Nos 755 and 756 in December 2017, the Ministry of Justice halted its hibernation on the research for and draft of the Prison Act and resumed the unfinished works immediately in January 2018. The Ministry of Justice finalized the draft of the Prison Act and sent it to the Executive Yuan, the head of the executive branch, in May 2018. After 25 review meetings and numerous revisions, the Executive Yuan wrapped the draft up and forwarded it to the Congress in April 2019. After three internal review meetings and several discussions as well as negotiations, an overhauled Prison Act was finally passed by the Congress in December 2019 and took effect in July 2020 (see the press release by Moj.gov.tw, 2019). Since then, the prison system of Taiwan has arrived at a new stage.

The new Prison Act has responded to the requirements set by the four interpretations discussed in this article. It statutorily establishes inmates' access to administrative courts for a full review by courts if their paroles are denied, terminated, or revoked. The new provisions follow the instructions of Interpretation Nos 681 and 691 to establish a judicial review of decisions of the Ministry of Justice, namely the step of execution of sentence, instead of the instructions of the prosecutor, namely the step of enforcement of judgment. As a result, parolees do not have to bring their cases to criminal courts for futile review anymore if their paroles are revoked.[41] Also, there are provisions in the new Prison Act for inmates to seek review from administrative courts if they believe the dispositions and management measures of prison agencies have infringed on their rights. This change is to meet the requirement set by Interpretation No. 755. The Judicial Yuan, the head of the judicial branch, promulgated accordingly the "Precautions for Courts Dealing with

[40] It provides that "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."

[41] See *supra* note 9 and its accompanying text.

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Administrative Litigation Cases in Accordance with the Detention Act and the Prison Act" in July 2020 to provide guidance for administrative courts and potential parties to process such a new type of administrative litigation.

In addition to the procedural rights of inmates, the refurbished Prison Act also has new provisions on the side of substantive ones. As to inmates' privacy and freedom of correspondence, for example, new provisions stipulate that prison officials are only allowed to check the correspondence of inmates under limited circumstances, such as for the security of the prison or to prevent contraband from entering the prison. The influence of international human rights can also be discovered in other parts of the Prison Act, such as prisoners' mental health, compensation for their labour, and medical care equipment. Thus, the frame of international human rights in Interpretation No. 756 is followed by the new Prison Act. Inmates may take advantage of this newly added legal stock to explore more kinds of substantive human rights to innovate the prison system through the access to court and the constitutional protection of the right to remedy. By way of such an institutional design, prison reform is not a done piece of work, but an ongoing process.

7. Conclusion

How can we account for the means by which the prison reform was achieved in Taiwan during the decade between 2010 and 2020? This article attempts to answer the question by way of the theory of the legal opportunity structure. This article has manifested how the change of the prison system was made possible through the legal opportunity structure developed and shaped by the four crucial interpretations of the Constitutional Court, Interpretation Nos 681, 691, 755, and 756, which were brought to court by persistent inmates. This article first points out that this legal opportunity structure includes three crucial components: the conflicting views between the Supreme Administrative Court and the Supreme Criminal Court on the jurisdiction over disputes about parole disapproval; the creation and expansion of inmates' access to court; and support from an NGO, its strategic lawyers, and a judge at district criminal courts. By the analysis of prison reform in Taiwan using the theoretical framework of the legal opportunity structure, this article expects to broaden the scope of law and society research in Taiwan and to attract more scholars to engage in this field.

Further, this article also makes contributions to the literature of the legal opportunity structure by discovering two additional components with their specific conditions. First, the political context is influential on the legal opportunity structure and deserves more exploration. We can see the inactiveness of the Congress and the intermittent reactiveness of the executive branch, in particular during the period of more than six years between Interpretation Nos 691 and 755. This political backdrop gave the Constitutional Court the incentive, the reason, and the foothold to become more receptive to novel legal claims and arguments from the parties and more willing to take proactive measures to make sure the core requirements of its interpretations are duly enforced, such as directly setting a deadline for the Congress to finish its duty of legislation in Interpretation No. 755.

Second, procedural variables open the door to users, but only substantive rights may give users the incentives to enter the door and take advantage of the court. Interpretation Nos 681, 691, and 755 step by step created and expanded the access to court for inmates. But if there are no substantive rights for users to argue in the courtrooms, such procedural openness will be not as useful as originally anticipated. Thus, the incorporation of an international human rights frame into the legal reasoning by the Constitutional Court in Interpretation No. 756, later followed by the newly revised Prison Act, gives inmates the incentives to innovate the prison system through ongoing rights litigation.

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