

# Changing Forces of Constitutional and Regulatory Reform in Taiwan

YEH JIUNN-RONG\*

## I. INTRODUCTION

Throughout Chinese history, there have been ambitious reforms in the face of external or internal threats. In recent years, socialist China has undertaken a program of reform, or *gaige*, to cope with an economic crisis arising from problems of lack of incentive.<sup>1</sup> Across the Taiwan Strait, almost forty years after a successful land reform in the early 1950's,<sup>2</sup> sweeping political and social changes are also taking place.

Constitutional reform may relate to changes in the constitutional regime establishing the power structure and the protection of fundamental rights or it may relate only to reorientation of the regulatory system.<sup>3</sup> In addition, reform at either the constitutional or regulatory level may be directed toward achieving efficiency through the rearrangement of a market/state equilibrium,<sup>4</sup> or it may be designed to enhance democratic legitimacy by increasing citizen involvement in

---

\* Associate Professor of Law, National Taiwan University. LL.M. 1986, J.S.D. 1988, Yale Law School.

1. For a general survey of these reform efforts, see H. HARDING, *CHINA'S SECOND REVOLUTION: REFORM AFTER MAO* (1987).

2. The goals of the reform were equalization of land ownership and "land to the tiller," specified by articles 142 and 143 of the Constitution of the Republic of China (hereinafter ROC CONST.). The project was completed in three steps. In 1949, a rent-reduction program was launched. The next year, the government sold some of the public land to tenant farmers at low prices and under favorable conditions. The last step, the so-called "land to the tiller" program, was carried out in 1953. Land owners, according to the Land to the Tiller Act, were required to sell to the government land exceeding the official ceiling, which was then resold to tenant farmers. This line of measures has successfully laid the foundation for Taiwan's subsequent economic development.

3. I do not claim there is a clear-cut distinction between constitutional reform and regulatory reform. Regulatory reform often involves the realization of constitutionally-mandated values, such as citizen participation in governmental functions, and hence is not limited to the "administrative" sphere.

4. Recent poor performance of planned economies compared to those with more dominant capitalist sectors has led to a rejection of state-directed programs. This trend has been reinforced by the World Bank's pressure on debtor countries to adopt market-oriented reforms when they apply for structural adjustment loans. Shuck & Litan, *Regulatory Reform in the Third World: The Case of Peru*, 4 YALE J. ON REG. 51, 52 (1986).

regulatory processes. In this article, I will discuss the changing forces of constitutional and regulatory reform in Taiwan.

In the past four years, Taiwan has taken a notable step forward in participation-oriented reform at the constitutional level. This has occurred through, *inter alia*, the decree lifting martial law, the allowance of the formation of political parties and the liberalization of the press. In contrast, the accomplishments in regulatory reform have been limited. Unlike the general constitutional structure, which has been transformed from single-party authoritarianism<sup>5</sup> to a democratizing environment, the regulatory structure in general remains unchanged. Very few efforts have been made to provide institutional channels for citizen participation in administrative processes. It can be fairly said that government officials, with few exceptions, retain a technocratic mentality that favors simple solutions for what should be political issues requiring citizen participation. If the recent constitutional reform is meant to move Taiwan away from a "soft authoritarianism"<sup>6</sup> toward a modern industrial democracy, this mission cannot be accomplished without proper institutional settings that allow citizen input in the regulatory regime.

This article begins with a general review of recent constitutional reforms in Taiwan from the perspective of "the constitution in action" as opposed to "the constitution on the books." It then analyzes the present status of regulatory reform efforts. After reviewing the institutional responses to recent societal changes, this article suggests ways to direct Taiwan's regulatory reform toward meaningful participatory democracy.

## II. THE DYNAMICS OF CONSTITUTIONAL REFORM IN TAIWAN

### A. *The Concepts of the "Constitution in Action" and the "Constitution on the Books"*

One can readily relate constitutional reform to the revision of the constitutional text. Underlying this notion is the assumption that equates constitutional law with the text and thus constitutional reform with the revision of the text. There are situations, however, where constitutional norms evolve while the constitutional text remains unchanged. This apparent contradiction arises out of the dis-

---

5. Prior to the lifting of the martial law decree, Edwin A. Winckler identified a transformation from "hard" to "soft" authoritarianism in Taiwan. Winckler, *Institutionalization and Participation on Taiwan: From Hard to Soft Authoritarianism?*, 99 THE CHINA QUARTERLY 481 (1984).

6. *Id.*

inction between the "constitution in action" and the "constitution on the books."

The "constitution in action" refers to constitutional norms that dictate the operation of the constitution in a society over a given period of time. A constitution in this sense functions organically, responding to external influences. The evolution of a living constitution may be brought about by textual revision, but it may also be influenced by other stimuli, such as judicial decisions, legislative enactments, or political forces.

The "constitution on the books" refers to the written constitution that establishes the power structure and the protection of basic rights in most constitutional democracies. A constitution on the books remains unchanged unless revised through legitimate constitutional processes.

### *B. Constitutional Reform without Revision of the Constitution*

For reasons stated below, constitutional reform in Taiwan and revision of the constitution are not necessarily linked. Nonetheless, from the perspective of the "constitution in action," constitutional reform has been occurring in Taiwan for years. To understand the dynamics of this process, a general survey of Taiwan's constitutional structure and historical context is necessary.

#### 1. Taiwan's Constitution

The Constitution of the Republic of China (Constitution) did not originate on Taiwan. Instead, it was promulgated in Nanjing on January 1, 1947, in the midst of the Civil War. Soon afterward, the Nationalist Government lost the war and retreated to Taiwan. One reason the Constitution has been retained by the Nationalist Government is to assert the legitimacy of its claim over Mainland China.

Though the Constitution was a product of bargaining among political factions, it retained the five-power governmental structure designed by Dr. Sun Yat-sen.<sup>7</sup> The government envisaged by the drafters was a cabinet system whereby the President of the Executive

---

7. The five-power constitution is Dr. Sun Yat-sen's unique contribution to political theory. Its significance lies in its emphasis on the independence of the examining and supervisory powers, a tradition of long standing in Imperial China; the other three powers are generally recognized in Western modes of democracy. The Examination Yuan, the highest and most independent institution, is in charge of the civil examination, a constitutional requirement for becoming a governmental official. The Control Yuan has independent supervisory powers. In Chinese history, there is a long list of celebrated officials in charge of impeachment, who admonished even the emperors for their misdeeds. See W. TUNG, *THE POLITICAL INSTITUTIONS OF MODERN CHINA* 96-97 (1968).

Yuan was responsible to the Legislative Yuan.<sup>8</sup> Nonetheless, there are provisions granting the President powers beyond that of a ceremonial president in a typical cabinet government.<sup>9</sup>

Like the constitutions of most constitutional democracies, the Constitution in the Republic of China (ROC) provides for the guarantee of fundamental rights, including freedom of expression, freedom of movement, and freedom of association.<sup>10</sup> The Constitution also establishes basic policies in areas such as national defense, foreign relations, the national economy, social security, education and culture.<sup>11</sup> Judging from the text, the scope of this Constitution is apparently no less comprehensive than those of other constitutional democracies.

The Constitution itself vests powers of constitutional interpretation exclusively with the Judicial Yuan.<sup>12</sup> Unlike the U.S. system, however, judicial review cannot be exercised by ordinary courts, but only by the Council of Grand Justices. It is composed of seventeen members nominated by the President and approved by the Control Yuan.<sup>13</sup> According to the Judicial Yuan Council of Grand Justices Act,<sup>14</sup> both governmental organs and individuals may apply for a constitutional interpretation, *i.e.*, there is no "case or controversy" requirement.<sup>15</sup> However, since the Grand Justices Act requires a three-fourths super majority vote for any constitutional interpretation,<sup>16</sup> the Council has never been a major force in constitutional change despite periods of judicial activism.

The road of Chinese constitutionalism has never been smooth.

---

8. ROC CONST. arts. 53, 55, 56, 57.

9. The most significant of these powers are provided for in ROC CONST. arts. 39 and 43. According to article 39, the President may declare a state of siege by securing approval or ratification from the Legislative Yuan. The Legislative Yuan, if it deems it necessary, may ask the President to lift the declaration. Article 44 grants the President the power, when the Legislative Yuan is in recess and by means of a resolution of the Executive Yuan Council, to issue emergency decrees in accordance with the Emergency Decree Act in reaction to natural calamities, epidemics, and serious financial or economic crises. This action, however, must be confirmed by the Legislative Yuan within one month.

10. ROC CONST. arts. 7-18 (specifying numerous basic rights) and art. 22 (securing unenumerated rights).

11. ROC CONST. arts. 137-169.

12. ROC CONST. art. 78.

13. ROC CONST. art. 79. The Constitution remains silent as to the number of Grand Justices. By present practice, the number is fixed by the Judicial Yuan Council of the Grand Justices Act.

14. Ssu-fa Yüan Ta-fa-kuan Hui-i Fa [hereinafter Grand Justices Act] (promulgated July 21, 1958) 33 CHUNG-HUA MIN-KUO HSIEN-HSING FA-KUI HUI-PIEN (Collection of Current Laws and Regulations of the Republic of China) [hereinafter CCLRRC] 19783.

15. *Id.* art. 4. But individual applicants must exhaust all judicial remedies before applying for constitutional interpretation.

16. *Id.* art. 13.

The Constitution was adopted in the midst of civil war. For the purpose of power consolidation during the war, proposals to amend the Constitution were initiated. A mere sixteen months after promulgation of the Constitution and less than four months after its adoption, the National Assembly, the sole organ of constitutional revision,<sup>17</sup> formally precluded amendment of the Constitution. It chose instead to pass the Temporary Provisions for the Period of Mobilization to Suppress Rebellion (Temporary Provisions) as an addendum to the Constitution<sup>18</sup>. The Temporary Provisions, later amended several times, freeze some constitutional provisions and grants the President special authority to consolidate power.<sup>19</sup> There is no doubt that the Temporary Provisions have infringed upon principles inherent in the Constitution. Moreover, since its retreat to Taiwan, the Nationalist Government has maintained that the "period of mobilization to suppress rebellion" has not yet come to an end and has thus refused to retire the ostensibly "Temporary" Provisions.<sup>20</sup>

In sum, there has historically been a great disparity between the "constitution in action" and the "constitution on the books" in Taiwan. Rather than involving textual revision, constitutional reform in Taiwan emphasizes the modification of living constitutional norms through policy changes and through the enactment or revision of the so-called quasi-constitutional statutes.<sup>21</sup>

---

17. Although the Legislative Yuan may propose amendments, the National Assembly retains the final say. See ROC CONST. art. 174.

18. Tung-yüan K'an-luan Shih-chi T'iao-k'uan (Temporary Provisions for the Period of Mobilization to Suppress Rebellion [hereinafter Temporary Provisions] (promulgated April 18, 1948, last amendment Mar. 23, 1972) 1 CCLRR 21.

19. There are sections in the Temporary Provisions, *id.*, that run against the general framework of the Constitution. Section one relieves the President, when exercising emergency power in reaction to financial or economic crises or for the purpose of preventing the state or people from immediate danger, from procedural requirements specified in ROC CONST. art. 39 and 43. According to section 2, the President may run for his or her third term notwithstanding ROC CONST. art. 47 that prohibits any President from seeking more than two terms. Section 4 grants the President authority to set up organs to formulate fundamental policies in the period of Mobilization to Suppress the Rebellion. The National Security Council housed in the Presidential Office has been established as a result. The President may also reorganize the structure of the central government, according to section 5 of the Temporary Provisions. The Office of Personal Administration has since been established in the Executive Yuan.

20. The President may declare that the Period of Mobilization to Suppress the Rebellion has come to an end.

21. Temporary Provisions, *supra*, note 18, section 10. Statutes may perform the functions of constitution law—establishing power structures or guaranteeing fundamental rights. Promulgation or amendment of these statutes has the effect of changing the living constitutional law. In Taiwan, these statutes include the Voluntary Association Act, the Election and Recall Act, the Public Gathering and Demonstration Act, and the National Security Act. See Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 481-82 (1976).

## 2. The Non-Revision Policy

Soon after it retreated from the Mainland to Taiwan, the Nationalist Government pronounced that it would never revise the Constitution. Besides reflecting the government's determination to recover the Mainland, keeping the original text intact has also been the basis of a claim of legitimacy over the Mainland. Henceforth, not amending the Constitution became the national policy, and suggesting constitutional revision became political taboo.<sup>22</sup> Taiwan thus represents one of the rare examples of "self-paternalism"<sup>23</sup> in constitutional revision. Under this policy, the concept of constitutional revision has been confined to revision of the Temporary Provisions, whose constitutional status has long been in doubt.

## 3. Constitutional Reform

The enterprise of constitutional reform in Taiwan is clearly unique compared to that of other countries. Because the non-revision policy has been sacrosanct, constitutional reform in Taiwan normally means conforming to the original notions of constitutionalism or "going back to the Constitution," a slogan favored by some liberal scholars, rather than revising the constitutional text itself.

While the government recognizes the need to revise the Temporary Provisions, it refuses to repeal them altogether. Still, the government has long perceived the need for political reform to sustain its legitimacy. From the standpoint of "the constitution in action," the constitutional reform that has taken place in Taiwan is indeed amazing, although there is still much room for criticism. Four years ago, in a then authoritarian state run by a strongman and a highly dominant Nationalist Party, few would have anticipated the current extent of political liberalization.

Among the reform efforts, the lifting of the 38-year-old martial law decree on July 15, 1987, was the pivotal event. Prior to the spring of 1986, when the late President Chiang Ching-kuo proposed the lifting of martial law in the Kuomintang Central Committee, few believed it would ever happen. The lifting of martial law has provided

---

22. Reacting to efforts by dissidents to change the Constitution, including the drafting of a Basic Law equivalent to the German *Grundgesetz*, the authorities insisted on adding "abiding by the Constitution" in two politically sensitive laws, the Voluntary Association Act and the National Security Act.

23. By pronouncing a non-revision policy, the authorities in Taiwan chose what it believed to be the best for the nation in the long run, even though that choice entails giving up some short run freedom of choice. For self-paternalism, see Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1113 (1972).

the basis for a wide array of reforms, including a liberalized policy toward the formation of political parties and voluntary associations. On September 28, 1986, the most significant opposition party, the Democratic Progressive Party (DPP), was established without official authorization or recognition. In January 1989, by the amendments to the Voluntary Association Act, the newly formed political parties finally gained legal status. The same law substantially liberalized the formation of voluntary associations other than political parties,<sup>24</sup> although a permit from the authorities is still required.<sup>25</sup>

Liberalization of the printed media has also occurred. In the past, applications for new newspaper permits were not accepted and existing permits were strictly regulated. For example, newspapers could not print more than six pages per issue. Since the liberalization, both the number and influence of the mass media have increased dramatically.<sup>26</sup>

Reforms in Taiwan's governmental structure have been significant if not entirely satisfactory. The majority of seats in the Legislative Yuan, the National Assembly, and the Control Yuan continue to be reserved for Mainland delegates elected in 1947.<sup>27</sup> According to a constitutional decision rendered by the Council of Grand Justices in 1954, these representatives were to retain their seats until reelection in the Mainland became possible.<sup>28</sup> Additional seats have been made available to local inhabitants since 1969, but these governmental bodies still largely lack proper representation and accountability. In Feb-

---

24. Prior restrictions included a requirement that there should never be more than one association of the same nature in the same region.

25. There was a proposal to enact a statute governing political parties. This proposal was finally rejected and matters concerning the regulation of political parties were squeezed into the law governing the regulation of voluntary associations. This explains why the Voluntary Association Act as amended specifies a two-track system applicable to both political parties and other associations. According to the Act, political parties can be established by notifying the authorities. Other voluntary associations, however, have to secure a permit from the authorities.

26. Before the lifting of the martial law decree, there were only 31 registered newspapers. As of early September 1989, the number had jumped to 227. Data revealed by the Director of Government Information Office, Chung-kuo Shih-pao, Sept. 3, 1989, at 2.

27. According to a constitutional decision rendered by the Council of Grand Justices, these three organs are equivalent to the Congress or Parliament. Council Interp. Shih-76, SSU-FA YÜAN TA-FA-KUAN HUI-I CHIEH-SHIH HUI-PIEN (Compilation of Interpretations of the Council of Grand Justices, Judicial Yuan) [hereinafter CIC] (Fourth ed. (1984)).

28. Council Interp. Shih-38, CIC (Fourth ed. 1984) This interpretation, however, covers only representatives of the Legislative Yuan and Control Yuan. For representatives of the National Assembly, the claimed legal basis for the extension of their terms of office has been an executive interpretation of ROC CONST. art. 28 which says the terms of office of the representatives of the National Assembly expire on the day when the next term congregates. Because it has been impossible to hold a national election for the 2nd National Assembly, the 1st National Assembly's term of office continues.

ruary 1989, after much political wrangling, a statute was enacted to provide for the voluntary and quasi-voluntary retirement of legislators, although it has not been entirely effective.

While all of these events have substantially changed the living constitution in Taiwan, the text of the Constitution remains unchanged. This represents a striking example of constitutional reform without constitutional revision.

### *C. Characteristics of Constitutional Reform*

The orientation of Taiwan's constitutional reform movement is unique in several respects. First, constitutional reform followed economic development, which reinforced changes in the political realm. Second, constitutional reform in Taiwan has been directed mainly by the ruling Kuomintang,<sup>29</sup> although efforts by the DPP have had some effect. The process of reform has thus been largely top down. It has been relatively peaceful as well. Third, as has been mentioned, constitutional reform has been undertaken without amending one provision of the Constitution.

## III. REGULATORY REFORM

Although constitutional reform and regulatory reform have each been widely discussed by legal scholars,<sup>30</sup> little has been written about the relationship between these two types of reform. Recent events in Taiwan present an illustration of this relationship.

Compared with constitutional reform in Taiwan, regulatory reform has been marginal. While the Voluntary Association Act and the Assembly and Demonstration Act were meant to liberalize political associations and their activities, the government has been slow to provide for citizen involvement in administrative processes. Accordingly, while political parties and interest groups have been established, there have been very few institutional mechanisms for channeling their involvement into regulatory processes.

---

29. The late President and Kuomintang Chairman Chiang Ching-kuo's determination was most decisive. Nevertheless, both internal and external pressure also reinforced his determination. See Chou & Nathan, *Democratizing the Transition in Taiwan*, 27 *ASIAN SURVEY* 277, 283-85 (1987).

30. In the field of constitutional reform, see J. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* (1986); M. WHICKER, R. STRICKLAND, & R. MOORE, *THE CONSTITUTION UNDER PRESSURE: A TIME FOR CHANGE* (1987). In the field of regulatory reform, see S. BREYER, *REGULATION AND REFORM* (1982); G. EADS & M. FIX, *RELIEF OR REFORM?*; REAGAN'S REGULATORY DILEMMA (1984).



### A. *The Existing Regulatory Regime*

To understand the dynamics of regulatory reform in Taiwan, an introduction to the constitutional basis of the regulatory system is necessary. The Constitution vests executive authority with the Executive Yuan,<sup>31</sup> which may propose bills for passage by the Legislative Yuan.<sup>32</sup> Executive agencies are administrative in nature and exercise quasi-judicial and quasi-legislative powers through legislative delegation, although the Constitution remains silent on these matters.

Judicial review by the Administrative Court is available only for administrative actions of an adjudicatory nature and is allowed only after administrative remedies have been exhausted.<sup>33</sup> Rule-making itself is not subject to judicial review,<sup>34</sup> though the legality of regulations as applied may be challenged in particular cases. Standing to sue an agency is also greatly limited and there are no legal vehicles such as citizen suits or the private attorney general doctrine to extend standing to sue to members of the public.<sup>35</sup>

There is also no law analogous to the U.S. Administrative Procedure Act of 1946 or the German *Verwaltungsverfahrensgesetz* of 1976 to govern regulatory processes. The specific regulatory laws also include few, if any, provisions of a procedural nature, such as a requirement for an evidentiary hearing.<sup>36</sup> There is also no legal vehicle governing the disclosure of governmental information. Not surprisingly, citizens often complain that administrative processes operate as if inside a "black box."

### B. *Regulatory Style, Social Changes and Institutional Responses*

The restrictive regulatory regime of Taiwan may have been acceptable during the martial law era, but it is inappropriate today. To better understand the evolution of the regulatory scheme, we

---

31. ROC CONST. art. 53.

32. Most legislative bills are introduced by the Executive Yuan. Legislative activism in the Legislative Yuan has been a recent phenomenon.

33. Taiwan's legal system is largely patterned after European civil law systems, especially the German system. Accordingly, there is a separation of the Supreme Court and the Administrative Court. Unlike the U.S. system, judicial review of governmental actions in Taiwan is within the jurisdiction of the Administrative Court. This separation has no constitutional basis. It can only be explained by legal tradition.

34. According to article 1 of the Administrative Litigation Act, only administrative adjudication, equivalent to German *Verwaltungsakt*, is subject to judicial review. There has been no cause of action to challenge agency rules.

35. There have nonetheless been calls for this. See Yeh, *Citizen Participation in the Enforcement of Environmental Laws*, 4 SOCIOECONOMIC L. & INSTN. REV. 67 (1989).

36. Japan has not yet enacted an administrative procedure act either, but there are procedural provisions included in individual regulatory statutes.

should begin with an examination of the traditional Chinese regulatory style. It will be shown how the existing regulatory regime has failed to cope with social changes that dictate regulatory reform elsewhere.

# 1. The Traditional Chinese Regulatory Style and Its Development in Taiwan

The Western stereotype of Chinese bureaucracy is an image of comprehensive control of all aspects of civil life. On balance, however, traditional Chinese regulation was more *laissez-faire* than imagined. The reason for this lies in China's vast territory and population, as well as in the distinction between public and private regulation.<sup>37</sup>

Imperial influence on civil life in China concentrated on two areas: criminal sanctions and taxation. "The government" (or "the emperor"), in the eyes of a peasant, was "as distant as the sky." Traditional wisdom also honored the spirit of avoiding the *Yamen*.<sup>38</sup> For most of China's history, a law-abiding peasant, having paid his taxes, was spared interference from the *Yamen*. In contrast, the private "regulation" of family and community pervaded every aspect of civil life. By and large, this regulatory structure remained unchanged even after the establishment of the Republic in 1911.

In 1949, when the Nationalist Government retreated from the Mainland to Taiwan, the government placed primary emphasis on social stability and the centralization of power. Not surprisingly, the local autonomy called for in the Constitution was not implemented,<sup>39</sup> voluntary associations and their activities were restricted or closely monitored, and civil control was intensified. Thanks to Taiwan's relatively small territory, the state was able to penetrate every aspect of life on the island. A more intrusive governmental regulatory regime was thus established, while the power of private regulation declined.

---

37. In an era of deregulation, proposals have been made to increase the function of self-regulation or private regulation. The concept of private regulation used here refers to public changes brought about not by public regulatory institutions but by existing private institutions. See L. GRAYMER & F. THOMPSON, *REFORMING SOCIAL REGULATION: ALTERNATIVE PUBLIC POLICY STRATEGIES* 171 (1982).

38. The smallest administrative unit of imperial China was a district headed by a magistrate. The district magistrate's office was called *Yamen*. The *Yamen*, in the eyes of ordinary people, was the symbol of the government and imperial authority. For the concept of the *Yamen* and its operation, see M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 157-93 (1981).

39. ROC CONST. art. 112 says that the provincial and county governments may enact laws pursuant to the Province and County Autonomy Act. This Act has not been enacted. Any constitutionally mandated local autonomy has, therefore, failed to develop.

Soon after its arrival on Taiwan, the Nationalist Government sought to promote economic development. Stability, however, remained an overriding goal. As a result, these two interrelated forces came to characterize the regulatory style of Taiwan over forty years. The national government has been heavily involved in planning, creating a favorable environment for foreign investment, designating strategic technologies and industries for development, and providing technical assistance and subsidies. Accordingly, industries have tended to lose their self-initiative, waiting instead for the government to provide funding and leadership.<sup>40</sup>

In the area of pollution control, most industries have requested agency guidance. Medium and small industries in particular have expected the relevant control agency to specify the equipment and methods to be used in pollution control. This high level of dependency has created a built-in tendency toward regulatory paternalism, with the government taking an active role in the guidance of business management and industries tending to rely on the government's wisdom to solve their problems.

Technocracy is another characteristic of regulatory control in Taiwan. While American politics and bureaucracy have been dominated by lawyers, Taiwan's national development over the last forty years has been shaped by technocrats and economists.<sup>41</sup> Currently, scientists and economists comprise the majority of policy-makers in the government.<sup>42</sup> For this reason, typical characteristics of technocracy, such as distrust of market mechanisms and of democratic participation, have been prevalent in Taiwan. Some have argued that this technocracy has contributed to Taiwan's economic miracle, but the concurrent long-term costs should not be ignored.

## 2. Recent Social Changes

Social, economic and political forces have led to a challenge of the existing regulatory structure. Several specific trends can be identified.

A key element has been the explosion of citizen activism. This explosion has resulted in part from an increasingly uneven distribu-

---

40. See Y. WU, *BECOMING AN INDUSTRIALIZED NATION: ROC'S DEVELOPMENT ON TAIWAN* 121 (1985).

41. Sun Yun-shun and K.T. Li, two individuals making great contributions to Taiwan's economic development, have engineering and economics backgrounds respectively.

42. In the Environmental Protection Administration for example, the current and former heads are all scientists. The Legal Affairs Committee is not chaired by a lawyer, although the current Deputy General Counsel and the Secretary General are lawyers.

tion of income in Taiwan.<sup>43</sup> Over the last three years, skyrocketing real estate prices and a "feverish" stock market have reinforced the trend. This distribution change, along with rapid urbanization, has left much of the population feeling victimized by the distorted economic "miracle." At the same time, the political liberalization following the lifting of martial law and other constitutional reform measures has created a more liberal institutional environment for the contention of rival interests. More than ever, special interest groups such as farmers, veterans, native tribal people, pollution victims, homeless people, students, the handicapped, university professors, and feminists have taken to the streets to voice their concerns.

Owing to institutional deficiencies in incorporating citizen input, citizen participation in Taiwan has been accomplished mainly through protests or civil disobedience. This noninstitutional participation in government can best be illustrated in the area of environmental regulation.

Environmental protection has become a national priority in Taiwan.<sup>44</sup> Owing to longstanding neglect of environmental management during the height of Taiwan's economic development, complaints about pollution have spread across the island. As the political environment has liberalized, these complaints have frequently evolved into political action, such as street protests, sit-ins, and plant blockages. Major construction projects, such as industrial zones, chemical plants, and land-fill sites increasingly meet with citizen protests. One of the most controversial incidents involved Tai Power's proposed Fourth Nuclear Power Plant, which was strongly opposed by residents near the site. The project's highly controversial nature has caused some to call for a national referendum. Nonetheless, the Atomic Energy Commission, the regulatory entity overseeing nuclear safety, is not legally required to hold a hearing for interested parties before granting a construction permit. Although proponents of major construction projects are required to file environmental impact statements, this requirement is based solely on internal guidelines, which do not include legal mechanisms allowing citizen involvement.<sup>45</sup> Similarly, in spite of the high level of citizen interest in environmental

---

43. See S. KUO, G. RANIS & J. FEI, *RAPID GROWTH WITH IMPROVED INCOME DISTRIBUTION IN THE REPUBLIC OF CHINA: 1952-1979* (1980). Income distribution has become increasingly inequitable for the last eight consecutive years.

44. In the 1986 national election, the Central Daily News identified environmental protection and pollution control as the top political issues. Central Daily News (Int'l. Ed.), Dec. 9, 1986, at 2.

45. Guidelines for implementation of the Environmental Impact Assessment Act were approved by the Executive Yuan in October 1985. The Act is due to expire in October 1990. Enactment of the Environmental Impact Assessment Act has met resistance from industry.

regulation, the Environmental Protection Administration is not legally required to solicit comments or hold hearings for its proposed emission standards or other major actions.

The restrictive nature of Taiwan's legal authority is a second element of social change. In the cause of national development, the law has been viewed as an instrument to further policy objectives.<sup>46</sup> This attitude did not cause serious problems when Taiwan was a highly authoritarian state. With the coming of political liberalization, however, the weakness has become evident.

In the cause of social transformation, courts in Taiwan have not played a significant role in initiating reforms. Rather, they have been limited to a punitive role in social conflicts. Due to citizen distrust of the courts and barriers involving standing, pollution victims have rarely turned to the courts for relief, preferring to protest in the streets, to block plants or to resort to other measures of a violent nature. Without the possibility of granting relief and winning people's hearts, the courts have been left to punish these protestors as trespassers. In other words, courts are viewed as the defender of the system rather than as the vanguard of social justice.

In periods of social transformation, many social conflicts are "solved" in a very political manner, often at the cost of legal integrity. The Lin-Yuan incident is one of the most notorious examples of this.<sup>47</sup> Political compromise may be necessary for social and political harmonization, but the resulting sacrifice of legal integrity may incur social costs in the long run.

Adversarial regulatory relations represent a third element of change. Regulatory relations in Taiwan are becoming more and more adversarial as governmental decisions are increasingly challenged by interested citizen groups. In addition, due to mistrust of the government, big corporations, and conflict-resolving mechanisms, industrial interests and alleged pollution victims often overstate their claims in the contention process. Finally, Taiwan lacks a highly respected civil service, a business community prepared to cooperate with government officials, and a public that is not particularly mistrustful of large

---

46. Of four models used to describe the interaction of law and policy, this may fall within the law-follows-policy model. See J. TOMAIN, *NUCLEAR POWER TRANSFORMATION* 203, n.2 (1987).

47. Villagers along the San-Wei coast complained of waste water leaking from the government-run waste water mass treatment plant in the Lin-Yuan Industrial Zone, the site of 18 of the largest petrochemical plants in Taiwan. In September 1988, all the plants were forced to shut down due to protests by local residents. In response, the Ministry of Economic Affairs initiated a political settlement. The settlement package specified that the government and plants agree to pay NT\$1.27 billion and not to punish the violators.

corporations.<sup>48</sup>

The adversarial nature of Taiwan's regulatory style should not lead one to conclude that it is equivalent to the American regulatory system. The American regulatory system is legalistic as well as adversarial.<sup>49</sup> While a participatory legal system has been the source of adversarial regulation in the U.S., the force behind adversarial regulation in Taiwan lies in institutional deficiencies and the "participation explosion." Accordingly, while environmental groups in the U.S. challenge the Environmental Protection Agency's actions in the courts or through administrative processes, citizens in Taiwan protest on the streets or through other non-institutional means of self-help.

### 3. Institutional Responses

The existing regulatory framework in Taiwan is seriously deficient in responding to the forces of citizen activism. The government may have sensed this in the abstract, but it seems ambivalent about the direction actual reform should take.

Facing increasing citizen participation through noninstitutional means such as protests, the government has chosen the route of authoritative deterrence instead of institutionalizing citizen involvement. Events in recent years have confirmed the government's determination to restore "civil order." On the eve of the Chinese New Year in 1988, President Lee declared that the government would halt the social phenomenon of disregarding laws and regulations. This pronouncement was later reiterated by Premier Yu. The chief of police also made it clear that he had been instructed to take a tougher stand in responding to citizens activism. Prosecutors and even judges received similar instructions. At the same time, the Environmental Protection Administration formulated guidelines specifying acceptable environmental protest practices. In October 1989, the government drafted a legislative bill that provided more bases for capital punishment and increased sentences for other crimes. In twelve articles, there were fully fourteen bases for the death penalty, including the blockage of industrial plants.<sup>50</sup>

Though the outcry over the environment has continued for several years, the courts have not been able to serve as a forum for con-

---

48. D. VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES 242 (1986).

49. In the field of environmental protection, see Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENV'T'L L. REV. 1 (1985); Ackerman and Stewart, *Comment: Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

50. This bill is still under debate in the Legislative Yuan. Several harsh penalties have been dropped, however.

flict resolution. Nevertheless, no real effort has been made to remove the barriers to judicial remedies. Believing that pollution related disputes have devastated the worsening investment environment and threatened social stability, the government is anxious to "solve" these disputes. It has not made efforts to improve judicial remedies, such as the liberalization of standing to sue. Instead, the government has summarily concluded that mechanisms such as the Japanese Pollution Dispute Management Act, which relies on administrative intervention, are the sought-after solution.<sup>51</sup>

The government has remained wary of voluntary associations, including environmental groups. With the lifting of martial law, the Voluntary Association Act was finally amended to cope with the more liberal political environment. Nevertheless, the amendments still leave the authorities with the right to assert tight control over the voluntary associations through a rigid permit requirement. Two relatively active environmental protection groups, the Formosa Environmental Protection Union and the Formosa Green Peace Organization, have been unable to get permits from the authorities and thus remain officially illegal.<sup>52</sup>

Even the actions of voluntary associations with official recognition have been closely watched. For example, reacting to overwhelming public dissatisfaction with pollution law enforcement, the New Environment Foundation, a moderate environmental group, set up a hot-line for nuisance complaints. The government did not welcome such assistance from the private sector, even though its poor enforcement record had been due in part to a shortage of manpower.<sup>53</sup>

#### IV. REFORM IN AN AGE OF SOCIAL TRANSFORMATION

Some in the government view the recent protests as a threat to social stability and economic growth and argue that the government should adopt a restrictive response. Others take the position that the phenomenon is the inevitable by-product of social transformation and requires no response at all. Both attitudes are deficient in that they fail to appreciate the value of citizen participation. By deliberately treating citizen involvement as a "problem" or "by-product," the government may lose a key opportunity to channel private energy into improving the public welfare.

---

51. The Executive Yuan has drafted a bill entitled the Pollution Disputes Management Act.

52. Official reasons for the rejection are that these associations should have carried the name of Republic of China rather than Formosa. These associations have maintained, however, that the name Formosa has been used as an ecological term rather than a political one.

53. United Daily News, Feb. 2, 1989, at 5.

Constitutional reform cannot establish a basis for democratization without regulatory reform that addresses the issue of citizen involvement. In light of recent social changes, I believe reform should move in two directions: (1) toward institutionalizing citizen participation and (2) toward restoring the function of private regulation.

#### *A. Institutionalizing Citizen Participation*

The existing regulatory regime is seriously deficient in failing to properly channel public input. To begin with, there is no equivalent to the U.S. Administrative Act specifying uniform procedural requirements. Second, no regulatory regime permits interested persons the right to a hearing. Third, unless an individual is armed with a court order, government-held information remains inaccessible. Finally, standing to sue in the Administrative Court has been highly restricted. The following are suggestions as to how this situation could be remedied.

To begin with, a comprehensive administrative procedure law should be adopted. As long ago as 1946, the U.S. Congress passed the Administrative Procedure Act, which regulates nearly all the administrative decision-making processes of the U.S. federal government. In 1976, the more conservative German lawmakers enacted a similar law. A legal vehicle such as an administrative procedure act could make regulatory processes more accessible to the general public and enhance public confidence in them. Until such an act is promulgated, participatory mechanisms should be added to individual regulatory statutes.

Second, a statute requiring public disclosure of government-held information is also needed. For the past forty years, government officials in Taiwan have developed a general policy of non-disclosure of government information. This was understandable in an authoritarian state, but it is inconsistent with the current movement toward an open society. Information is a prerequisite to meaningful citizen participation. Despite the government's progress in political liberalization, little has been done in the area of public access to information. An information disclosure act should be enacted to meet this need.

Third, citizens' standing to sue should be liberalized. The existing Administrative Litigation Act provides for only one very limited instance of public standing to sue.<sup>54</sup> The law should be amended to provide environmental groups with standing to sue on behalf of the public. The law should also include a statutory cause of action, such

---

54. A bill to amend the Act has been completed, but it may take time before it can be passed in the Legislative Yuan.



as the citizen suit provided for in most American pollution control laws. While the liberalization of standing in the U.S. has been brought about by both courts and legislatures, the same process will most likely take place through legislation in Taiwan.<sup>55</sup>

### *B. Restoring the Function of Private Regulation*

As mentioned earlier, the traditional Chinese regulatory regime did not involve intensive state intervention, given the pervasive system of private regulation of family and community. This nongovernmental sector has diminished with the increasing penetration of the state into the inner workings of society. Urbanization and industrialization have also diminished the function and authority of private regulation. By the same token, due to the Kuomintang's absolutist attitude toward social and political stability, public gatherings and associations have been restricted. As a result, the general public has remained ill-equipped for collective decision making and existing voluntary associations have not been able to perform their function as private regulators.

To cope with increasing tensions in the regulatory sphere, the government should strengthen the functioning of private institutions. First, the existing Voluntary Association Act should be further liberalized by simplifying the permit system. Second, some governmental activities should be delegated to authorized private associations, such as professional associations, public interest groups and local communities. In the end, although statutory revisions will help, only changes in the government's attitude toward private regulation will prove effective in the long term.

## V. CONCLUSION

Recent efforts toward constitutional reform have established a better basis for participatory democracy in Taiwan. At the same time, constitutional reform only creates a more open political atmosphere in which citizens feel at ease in caring about, talking about, and even demonstrating about public issues. In the absence of institutionalized access to government, such as public hearings or the right to comment in administrative processes, citizens have little real alternative other than to take to the streets. Accordingly, institutional accommodation for citizen participation in regulatory processes is a follow-up step to political liberalization.

---

55. I cannot reasonably anticipate that courts in Taiwan would substantially liberalize the standing requirement on their own. After all, civil law countries are generally more reactive in judicial law-making than their common law counterparts.

Regulatory reform along this line has been institutionalized in the U.S. for many years. Nevertheless, few would deny that the regulatory regime in the U.S. is highly adversarial and litigious. The cost and delays of the U.S. court system have also been frequent targets of criticism. Not surprisingly, regulatory analysts and legal scholars in the U.S. have proposed a host of reforms. Some have recommended "alternative dispute resolution" as the best means to avoid expensive and time-consuming litigation.<sup>56</sup> In general, a more cooperative and harmonious form of regulation and conflict resolution seems preferable to the present system.

In Taiwan, the problems arising from social transformation stem not from an excess of litigiousness but from a lack of it. Likewise, the problems lie not in too much participation but in the lack of institutionalized participation. Policy makers in Taiwan should therefore spare no effort in devising legal mechanisms to create meaningful participatory democracy.

---

56. For an introduction and a critique to ADR, see Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).