

Commentary

Cabinet Rule in the Republic of China: A Constitutional Argument

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I. INTRODUCTION

Since the adoption of the Constitution of the Republic of China (Constitution) in 1946, the government of the Republic of China (ROC) has often been characterized as a "strong-man" system. This appellation implies that an individual, or "strong man," exercises full political power over people and policies within the state. It suggests also that to a certain extent such a person is able to raise himself above the confinements of the constitutional system in the exercise of such power. For example, a president has historically enjoyed substantial powers, while a premier of the Executive Yuan has served as the president's subordinate. This arrangement departs from constitutional provisions that establish the presidency as a nominal position with merely symbolic powers. Yet, it is this office which today retains the ultimate decision-making power and remains accountable to the Legislative Yuan.

Despite the historical evolution of this balance of power arrangement, the strong man form of politics is presently on the decline. The ROC now faces the real prospect of establishing the type of constitutional government which the Chinese people first envisioned nearly a century ago. Restoration of the principles of true constitutionalism must be preceded by a change in the system of strong-man politics. Accomplishing this goal should begin with an examination of both the true nature of the ROC's constitutional governmental system and the place of the Temporary Provisions Effective During the Period of Communist Rebellion (Temporary Provisions) within that system.

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This comment will first argue that the governmental system originally mandated by the Constitution is not only a cabinet responsibility system, but one in which the office of the presidency is granted a significant amount of power. Then this comment will show that the Temporary Provisions are not part of the Constitution.

II. CONSTITUTIONALISM AND THE DOUBLE-TRACK CONSTITUTIONAL SYSTEM

A. *Constitutionalism*

The Constitution regulates politics by establishing both the formal structure of the state's legal system and the substantive content of its politics. This blending of form and substance gives rise to the institutional regulation of the political process. The Constitution occupies the highest place in the country's hierarchy of laws and establishes fundamental norms within the country's political structure.

This political structure created by the Constitution defines the power relationships which exist among the different members of the political system. These relationships include the following: (1) the relationships among the general members; (2) the relationship between the general members and the authoritative bodies; and (3) the relationship between the authoritative bodies. The first refers to what the political status of the general members should be within the political process and involves a choice between equal rights (*p'ing ch'üan*) and special rights (*t'e ch'üan*). The second relationship in general, refers to whether the authoritative bodies should be accountable to and controlled by the general members, or whether external limits should be placed on the authoritative bodies' power over the general members. This relationship will determine whether the country is governed as a dictatorship (*chuan ch'üan*) or in accordance with principles of civil rights (*min ch'üan*). The third relationship refers to the institutionalization of checks and balances between different authoritative bodies engaged in the exercise of political power. This also constitutes the choice between centralization of power (*chi ch'üan*) and decentralization of power (*fen ch'üan*).

B. *Power and Responsibility*

The main function of authoritative bodies within a political system is the construction and implementation of policy. In a sovereign state, this function is performed by a government. Therefore, a government that is elected by and held accountable to the people may be regarded as a government created in accordance with constitutional principles, regardless of how policy decisions are made and who is

held responsible. Thus, the parliamentary system of the United Kingdom, the presidential system of the United States, and the political system of Switzerland may all be regarded as governments which exist in accordance with democratic constitutional principles. Notwithstanding the type of democratic system which actually exists, constitutionalism requires a clear separation of power and responsibility. Otherwise, the people will be denied the opportunity to scrutinize fully those officials responsible for policy formulation and implementation. Such a denial would, thereby, affect the operation of the democratic political system.

In accordance with this distinction between power and responsibility, the cabinet in a cabinet system retains the power to make policy decisions while still remaining politically responsible to the parliament. Hence, this form of government is usually characterized as a cabinet responsibility system. In a presidential system, however, both power and responsibility are retained within the office of the presidency. Even if a cabinet exists, it operates only as a subsidiary body which remains fully accountable to the president. However, in the presidential system of the United States, the president is accountable to the electorate. Although Congress may scrutinize presidential action, its discretion to remove the president may be exercised only in limited instances. It is clear, therefore, that the primary differences between a cabinet system and a presidential system are predicated on whether the cabinet or the president possesses policy-making power and thus exercises political responsibility. The focus of responsibility and the methods and principles used in making judgments are unrelated to the nature of the political system in question.

C. The Current Constitution and the Temporary Provisions

The current Constitution provides a historical context, guidelines for the future development of democracy, and a reliable foundation. During the early part of the 20th century, the Chinese people overthrew the Ch'ing Dynasty and established the ROC. The current Constitution, as a product of that revolution, has come to symbolize the establishment of the modern Chinese nationhood. Therefore, any attempts to reform the current political system should proceed with attention to this historical tradition.

The Constitution also serves to provide guidelines for the future development of democracy. For many years, political pressures have thwarted any real implementation of a constitutionally defined democratic system. Nevertheless, the system which has emerged retains certain fundamental qualities around which a democratic framework can be constructed. If we define politics as the interplay of power

relationships, then the essence of democracy is the combination of the principles of equal rights (*p'ing ch'üan*), civil rights (*min ch'üan*), human rights (*jen ch'üan*), and separation of powers (*fen ch'üan*). Despite the need for a few technical adjustments, such as the provisions concerning the number of the representatives in the central government, the current Constitution is very much consistent with the spirit of democracy. Building a future constitutional democratic government should, therefore, be based on the current Constitution, since it provides a direction for building democratic constitutional government in the future.

Furthermore, the Constitution of the ROC provides a reliable foundation. While the ROC in 1948 was implementing a democratic government in accordance with the Constitution, the need to mobilize the country's resources for the suppression of rebellions resulted in the enactment of the Temporary Provisions. Since the government's retreat to Taiwan in 1949, the Temporary Provisions have remained in force, subject to numerous revisions and enlargements. As a result, true governance in accordance with constitutional rule has never actually been implemented in the ROC and has never received the kind of respect to which it is entitled.

However, this absence of constitutionalism does not mean that the ROC lacks a foundation upon which future reforms can be based. To legitimize the practice of strong-man politics during the martial law regime and to retain the *pro forma* structure of constitutional government, the ROC government designed a delicate double-track (*shuang kuei chih*) constitutional system. Accordingly, the government retained the five departments required by the Constitution while simultaneously establishing an extraordinary system (*fei ch'ang t'i chih*) under the Temporary Provisions and martial law. This extraordinary system effectively weakened the powers of the constitutional government and suspended the protection of human rights required by the Constitution. Nevertheless, the system did retain a political structure consistent with the constitutional mandate. Such a double-track system offers a contrast to governance under strong-man politics. Under these circumstances, a double-track system can perform certain important functions. Opponents of strong-man politics have criticized and protested the institutionalization of strong-man rule, charging that such a strong-man rule totally deviates from the system prescribed by the Constitution. Such efforts have already met with some success as evidenced by the termination of martial law and by the lifting of restrictions on both the press and other political parties.

III. THE CONSTITUTION AND THE CABINET SYSTEM

The advocacy of the current Constitution raises the question of what form of governmental system is actually prescribed. An answer to this question requires first that the present Constitution be compared with the Provisional Constitution (*Lin-shih Yüe-fa*) which was in place during the time of the founding of the ROC.

When the ROC was initially founded, the provisional government adopted a presidential system pursuant to the Outline Regarding the Organization of the Provisional Government (*Lin-shih Cheng-fu Chu Chi*). At that time, there was no position of cabinet premier. Governmental power was concentrated in the hands of the president, who was accountable to the provisional senate. Later, Sun Yat-sen, the interim president, decided to relinquish his position to Yuan Shih-kai. The Southern Revolutionary Government then revised the Provisional Constitution by adopting the cabinet system. The cabinet premier was placed in charge of the government, although he remained accountable to the provisional senate. These changes resulted in the transformation of the presidency into a nominal position in order to prevent Yuan Shih-kai from manipulating power for his personal ends. These historical events have long been recognized by the Chinese people; indeed, during that time, it was rare that anyone, including Yuan Shih-kai and his supporters, doubted that the Provisional Constitution prescribed a cabinet system.

The system prescribed by the Provisional Constitution, as changed, was in fact a cabinet system. The appointment of the prime minister and the heads of various departments were subject to the senate's approval. The prime minister also possessed the power of countersignature, which transformed all the powers held by the president into nominal ones. Actual power was exercised by the cabinet. The appointment of the members of the State Council required the senate's approval. To indicate its respect for the final decisions of the political organ whose members were popularly elected, the cabinet was required to carry out the legislative bills which had been considered by the senate. All of the above procedures are comparable to the basic principles underlying the British cabinet system.

The current Constitution also adopts a similar system of countersignature and prescribes nominal powers for the president. To maintain a balance of mutual accountability within the governmental system, the appointment of the premier is subject to the approval of the Legislative Yuan. In addition, if the premier refuses to accept the adoption of resolutions after their reconsideration by the Legislative Yuan, he must resign. Thus the premier's responsibilities, while sig-

nificant, are clearly limited in scope. Furthermore, in examining the provisions of the current Constitution, it is apparent that the powers conferred on the cabinet are even more explicitly defined than those conferred by the Provisional Constitution. For example, the designation of the Executive Yuan as the highest administrative organ of the country, and the stipulation that the Executive Yuan shall possess the power to return legislation to the Legislative Yuan for the latter's reconsideration, differ from the framework established by the Provisional Constitution, which gave this power to return legislation to the president. In sum, the current Constitution establishes a cabinet system. This conclusion is based on a comparison with the Provisional Constitution, which is similar to the current Constitution and has also been described as establishing a cabinet system.

It is apparent that the current Constitution empowers the president to approve decisions made by the premier to return for reconsideration legislation promulgated by the Legislative Yuan. This arrangement would appear to give the president a significant amount of control over the legislative process. However, an examination of the consequences of a president's failure to approve such a decision reveals that this power lacks any substantive content and exists in name only. As described earlier, the process of returning legislation to the Legislative Yuan for reconsideration empowers the premier to make final decisions which cannot be vetoed by the president. In effect, the president, like the monarch in the British system, can only approve such decisions. If the president declines to grant his approval, he will render the premier unaccountable to the Legislative Yuan, since legislation originally intended for reconsideration by the Legislative Yuan will remain in the hands of the premier. Such an arrangement departs significantly from the principles of democratic constitutionalism.

Is there any special significance in having the president call meetings with the directors of the five Yuans to resolve disputes between the Yuans? Again, this power lacks substance. If the president mediates the disputes personally, his actions will have no more significance than those of other individuals. As a result, the cabinet system prescribed by the present Constitution is not affected by the provision which empowers the president to call meetings with the directors.

An integral part of the cabinet responsibility system of both the Provisional Constitution and the current Constitution is the requirement that legislation be returned to the Legislative Yuan for reconsideration. Approval is then contingent upon the affirmative vote of at least two-thirds of the members present. This method of accountability is similar to that of the American presidential system. It differs

from the English system, where approval of the legislation can be left to a newly elected parliament following dissolution of the old parliament. The question thus arises whether the method of accountability adopted would affect the nature of the cabinet system. As discussed earlier, the essence of the cabinet system lies in the arrangement whereby the cabinet retains power but remains accountable to the parliament. The method of allocating responsibilities has no effect on the inherent nature of the cabinet system. This is not to suggest that the choice of a particular method has no effect. Rather, it is argued that such effect falls on a different level; where legislation may be returned for reconsideration, the government's ability to procure the support of at least one-third of the parliament enables it to continue functioning in an effective manner.

However, one drawback remains. If the government loses one-half of its parliamentary support, its draft resolutions could easily be rejected by the opposition majority. Such a situation would interfere with the government's ability to carry out its proper functions. For example, several recent presidents of the United States have experienced functional difficulties following the loss of majority support in Congress. In the United Kingdom, however, even with a more than one-half majority vote of the Parliament, a vote of no confidence can still be cast by one side to bring down the cabinet. The cabinet itself may dissolve the Parliament and seek the support of one-half of the new Parliament. While this method makes it more difficult to maintain control of the political process, it rarely results in ineffectual government and the creation of political conflicts which evolve into long-term stagnant situations lacking any possibility for resolution.

IV. THE CONSTITUTION AND THE EXTRAORDINARY SYSTEM IN A PERIOD OF MOBILIZATION FOR THE SUPPRESSION OF REBELLION

The argument that the current Constitution mandates a cabinet system addresses issues relating to only one of the tracks in the double-track system described earlier in this comment. The other track is the extraordinary system prescribed by the Temporary Provisions. The central governmental system under the Temporary Provisions differs significantly from the system established by the current Constitution. Therefore, any return to the principles of constitutionalism must extend beyond the confirmation of the constitutional system as a cabinet system. It must also argue for the proposition that such an extraordinary system does not constitute constitutionalism.

Since the government's retreat to Taiwan in 1949, the Temporary

Provisions were amended four separate times by the National Assembly, ultimately becoming the basis for the present extraordinary system. It is argued that the Temporary Provisions prescribe an extraordinary system primarily because they were designed for application during "the period of mobilization for the suppression of rebellions," with the termination of such a period to be decided by the president. In effect, the Temporary Provisions froze the ordinary system stipulated by the Constitution, suspended the proper functioning of democratic constitutionalism, and broke up the structure of the legal system.

Despite the wealth of literature on the Temporary Provisions, fundamental questions still remain unanswered as to whether the Temporary Provisions conform in effect to the principles of democratic constitutionalism, and whether they may be considered a constituent part of the Constitution. However, it seems to be clear that these provisions not only subvert the cabinet system established by the current Constitution, they also contravene the principles of civil rights and separation of powers. In terms of the formal structure of the legal system, the Temporary Provisions lack any legal effect and thus cannot constitute the supreme law of the land.

The Temporary Provisions have entrusted the president with a great amount of power. The presidency is no longer a nominal position, but has evolved into the office with the greatest political power. This development does not necessarily preclude the realization of a democratic constitutional system as long as the president is held accountable to the legislature for policy decisions and does not act arbitrarily. To act in a manner contrary to these precepts would result in the abrogation of people's civil rights and the establishment of a dictatorial presidency.

Under the Temporary Provisions, however, the president is accountable to the Legislative Yuan. The president has power, but no responsibility. Among many of his powers, he may establish an "organization for mobilization" without procuring either the agreement of the Executive Yuan or the approval of the Legislative Yuan. The "organization for mobilization," which exists outside the governmental structure prescribed by the Constitution, is empowered to make political decisions and to adjust the administrative and personnel organizations within the existing central government. Under such a regime, presidential powers are not limited by either the Constitution or the nation's laws. Merely by issuing executive orders, the president can effectively control governmental organizations, personnel matters, and other policy decisions. While the Temporary Provisions require that such presidential power be exercised only during

“the period of mobilization,” the termination of “mobilization” is also determined by the president. Finally, the president may be reappointed consecutively for an unlimited number of terms, even for life.

These examples illustrate the extent to which the extraordinary system prescribed by the Temporary Provisions has violated the current Constitution’s principle requiring the Executive Yuan to remain accountable to the Legislative Yuan with regard to the exercise of power over national matters. Since the Temporary Provisions preclude the will of the people, as embodied in the Legislative Yuan, from acting as a check on presidential power, they seriously limit the protection of civil rights. Undoubtedly, strong-man politics and the extraordinary system are mutually reinforcing.

Under the Temporary Provisions, the president can establish a National Security Council and appoint himself as chairman. The premier and the ministers concerned all become members of the National Security Council and are required to abide by the president’s decisions. This power has effectively transformed the role of the premier from the head of the cabinet into an executive subordinate who follows decisions made by the president. In short, those powers conferred on the president by the Temporary Provisions have resulted in the premier’s loss of final decision-making power as granted by the Constitution.

The double-track system has thus altered the allocation of power and responsibility between the executive branch and the legislative branch. It has also affected the policy making procedures established by the Constitution. The above mentioned National Security Council has evolved into a governmental body superior to those created by the Constitution. Committees existing under the National Security Council include the National Construction Research Committee, the Scientific Development Consulting Committee, and the National Security Bureau. The authority of these committees overlaps with that of the subordinated departments of the executive branch. This arrangement further distorts the allocation of power and responsibility within the policy-making process and destroys the functions of the cabinet responsibility system.

Several reasons may be offered as to why the Temporary Provisions cannot be substituted for the Constitution. First, the system they prescribe is inconsistent with the principles of constitutionalism. The introduction to the Temporary Provisions clearly states that the consequence of their enactment was not to amend the Constitution. They were independently enacted by the National Assembly. Although an amendment (*hsiu cheng*) and an enactment (*chih ting*) appear to be similar in nature, they differ substantially in their legal

connotations. An enactment results in the transformation of a bill into a new law, while an amendment reflects a change in an existing law. An enactment possesses an independent structure, but an amendment is constructed upon an existing structure.

Our criminal law provides one example of this distinction. Despite numerous amendments, the law's internal logical structure remains the same. In contrast, the Legislative Yuan during the "Mobilization for the Suppression of Communist Rebellion" enacted an independent law concerning the elimination of communists and spies. When penalizing rebellions, the new enactment controls. It has become a special law which is more powerful than the existing relevant regulations. The latter were never amended or deleted, but they are no longer in use. Although the regulations still exist, they are no longer effective. When the mobilization period is over and the new provisions become inapplicable, the old ones will become effective immediately.

The two examples show that the Temporary Provisions enacted by the National Assembly may be linked to a "new dress," while the Constitution is an "old one" which has never been "patched." The Constitution retains all the original provisions, complete and unchanged. The word "*amendment*" has not appeared anywhere in the Constitution. It would have been recorded had there been any amendment because recording is required by law. Therefore, the relationship between the Temporary Provisions and the current Constitution is similar to the relationship between the provision regarding penalizing rebellion and the criminal law. The Temporary Provisions are treated as if they are superior to the Constitution.

It should again be emphasized that in a constitutional system the Constitution is preeminent. How can it thus be argued that the Temporary Provisions constitute part of the Constitution? It was discussed earlier that the Constitution has never been amended. This fact was mentioned by Mo De-hui, the main sponsor of the Temporary Provisions in the First National Assembly, in his speech given on the opening of the First National Assembly. When the Temporary Provisions was proposed, he emphasized that any decision on the Temporary Provisions should be predicated on the condition that "there be no change of the Constitution." Another representative, Wang Shih-chieh, attempted to clarify the effect of the proposed bill by stating that "we are not amending the Constitution, but only adding a temporary provision to the existing constitutional provisions." Since the Constitution has neither been amended nor changed, any provision should be regarded as nothing more than a special provision and, therefore, ineffective.

In addition to the distinction between an enactment and an amendment, another question arises as to the relationship between the consequences of a change and the procedure used to accomplish it. Although the National Assembly claimed that it did not amend the Constitution through the enactment of the Temporary Provisions, the procedure it adopted to enact the Temporary Provisions was one required for a constitutional amendment, namely one-fifth of the representatives must put forth the proposal, two-thirds must attend the meeting at which it is considered, and three-fourths of those in attendance must approve it. The purpose of adopting such a procedure is clearly to achieve the result of a constitutional amendment. The use of the constitutional amendment procedure to enact an additional provision, and not amend the Constitution, acts to eliminate the necessary link between procedure and result. At most, the National Assembly gave the same consideration to the enactment of the Temporary Provisions as an amendment to the Constitution. Despite the similarity in procedures, amendments and enactments should still not be equated. The form of the Constitution remains with no changes or amendments.

This comment has discussed earlier the enactment of the Temporary Provisions and the amending of the Constitution. However, what does the Constitution itself have to say about the issue? Under article 27 of the Constitution, the National Assembly may "amend the Constitution and approve constitutional amendments proposed by the Legislative Yuan." The Constitution does not, however, grant the representatives in the National Assembly the authority to "enact" additional provisions. Although the first National Assembly used the constitutional amendment procedure to enact the Temporary Provisions and suspended several measures provided by the Constitution, such actions should not be construed as effecting a constitutional amendment. The National Assembly simply had no authority to enact the Temporary Provisions. The Temporary Provisions are nothing more than a special provision provided by the Constitution and thus have no constitutional effect.

In sum, the enactment of the Temporary Provisions violated the principles of constitutionalism and impaired the constitutional structure. As to the form of the legal system, it conflicts with the principles of the current Constitution. Moreover, the Temporary Provisions were enacted by an unauthorized body. Therefore, they have no constitutional effectiveness and cannot become a part of the Constitution.

V. DEVELOPING NEW POLICIES

This comment has so far pointed out that the constitutional government of the ROC is a system of cabinet responsibility and the Temporary Provisions are not part of the Constitution. The development of a democratic constitutional government in the ROC has not proceeded smoothly for many reasons, the most important being the lack of an understanding of and belief in constitutional government by the people. The traditional political and cultural trend has emphasized authoritarian rule by a few people.

In addition to the traditional element of authoritarianism in Chinese culture, another factor which has had an adverse effect on democratic constitutional government has been the ROC's "crisis of recognition." This reflects the awkward situation of the ROC within the world community as a legally recognized entity as well as the possible conflict between the native Taiwanese and Taiwan residents who are originally from the Mainland. All of this has also had an adverse effect on democratic constitutional government.

What urgently needs to be done is the abolishment of the extraordinary system established by the Temporary Provisions. The best means by which to do this is to follow a true cabinet responsibility system and institutionalize the legislative process so that power and responsibility are properly divided between the president and the cabinet. The president should be respected by all the political parties, and should represent the tradition of Chinese culture. The president should also possess insight and good moral character so that he has the capacity to command the people, to eliminate regional conflicts, to unite the public, and to carry forward the spirit of solidarity in the country.

As the head of the administration, the premier should participate in the competition among the political parties. Being the leader of the congressional political sector, he should use his insight, policy-making ability, and his leadership skills to promote proper governmental functioning and to make policies. He should also be responsible for the success and failure of these decisions. The cooperation between the president and the premier will bring the function of control and the administration of the cabinet system into full play, so that the privilege and dictatorship that existed under the "strong-man" politics will end.