

# Widening the Constitutional Gap in China and Taiwan: History, Reform, and the Transformation of the Control Yuan

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## I. AN ENDURING CONSTITUTION?

Quantitative studies on the endurance of the world's national constitutions demonstrate the uncanny prescience of Thomas Jefferson, who argued that constitutions should have a 'life expectancy' of no more than nineteen years.<sup>2</sup> Part of Jefferson's argument stemmed from an anxiety that overly entrenched constitutions precluded a nation's constitutional culture from adapting to the evolving social, political, and economic changes within its jurisdiction.<sup>3</sup> A new constitution would redesign, or replace, the institutions of the preceding constitution often rendered obsolete or ineffective by the changing political and social landscape. The alternative would lead to an ever-widening constitutional gap, in which a firmly entrenched 'long-lived' constitution comprised of increasingly obsolete institutions could potentially hinder maintenance of good governance. Thus, from a Jeffersonian perspective, a constitution's endurance is often evaluated by measuring the width of the gap between the dictates of constitutional document and the nature of the society it governs.<sup>4</sup>

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<sup>2</sup> ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009); Christopher Hammons, *Was James Madison Wrong? Rethinking American Preference for Short, Framework-Oriented Constitutions*, 93 *AM. POLIT. SCI. REV.* 837–849 (1999).

<sup>3</sup> ELKINS, GINSBURG, AND MELTON, *supra* note 2 at 23–29.

<sup>4</sup> *Id.* at 34–35. ('With respect to fit, certainly no one would suggest that a constitution continue in effect if its provisions are grossly out of step with society [...] there is certainly the possibility that constitutions can outlive their utility and create pathologies in the political process that distort democracy.)

There are, of course, long-lived exceptions to Jeffersonian paradigm which, despite exhibiting significant gaps between the constitutional document and constitutional landscape, have continued to endure. One such ‘exceptional’ constitution is the 1947 Constitution of the Republic of China (hereafter 1947 ROC Constitution) which has not only endured a civil war, the relocation and application to a territory and population only a fraction of the sizes it was originally designed to govern, and the effective suspension of its function under forty years of martial law. It has also endured a rapid process of constitutional reform culminating in the elimination of key constitutional institutions and the significant alteration of the power distribution between various branches of government. By most accounts this constitution should be—to borrow the nomenclature of Elkins, et al.—‘euthanized’. However, due to a combination of domestic and international pressures, the 1947 ROC Constitution remains in effect today.

The 1947 ROC Constitution has a unique Five-Power design that was first theorised by Sun Yat-sen who, looking back at the constitutional chaos of the early Republic, viewed the transplantation of a purely foreign constitutional design as inadequate for resolving the conflicts over legitimate power distribution and control within the fledgling Republic.<sup>5</sup> Instead, he attempted to blend the traditional western conception of a tripartite government system that disperses legitimate governmental power amongst the executive, legislative and judicial branches, with two additional government institutions drawn from China’s traditional past: the Control Yuan, a reformulated version of imperial China’s censorial office that was central to monitoring the exercise of government powers by other branches; and the Examination Yuan, an institution modelled on the traditional Chinese examination system to serve as the sole gateway for all citizens wishing to enter public service. Under this Five-

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<sup>5</sup> For an overview of the “constitutional chaos” of the early Republic, see WU ZONGCI, *ZHONGHUA MINGUO XIANFA SHI* (2nd ed. 1973); SUISHENG ZHAO, *POWER BY DESIGN: CONSTITUTION-MAKING IN NATIONALIST CHINA* (1996); ZHONGHUA MINGUO XIANFA SHILIAO (Zhang Rongxi ed., 1973).

Power system, Sun argued that the exercise of government powers could be effectively regulated so as not to allow any branch to infringe upon the sovereign powers of the citizenry.

Unfortunately, the civil war between the Nationalist/KMT forces and the Communists led to the passage of the 1948 Temporary Provisions Effective During the Period of Communist Rebellion, which effectively froze the constitution until the early 1990s.<sup>6</sup> In 1949, the KMT government was forced to flee to the island province of Taiwan where they established a quasi-government in exile claiming to represent all of China, while vowing to reclaim the mainland. In the meantime, they maintained a façade of governing the island under the 1947 ROC Constitution, while imposing nearly forty years of martial law. After abandoning hopes of reclaiming the mainland, in the late 1980s the government in Taiwan began transitioning from authoritarianism towards democracy. Unwilling, and unable to fully abrogate the 1947 ROC Constitution and start afresh, the government opted for a series of constitutional amendments (seven to date), which have significantly altered the constitutional structure of government. All of these events have produced a series of constitutional gaps between, on the one hand, the 1947 democratic constitutional document designed to govern all of mainland China's provinces and territories as well as its hundreds of millions of citizens, and on the other the actual constitutional landscape of Taiwan.<sup>7</sup>

Political scientists and legal scholars in both Asia and the west have primarily studied the impact of these periods of transition and reform on the presidency/executive, legislature, and judiciary, as well as their implications for changes to domestic politics and citizen representation.<sup>8</sup> Little attention, however, has been given to the implications of constitutional

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<sup>6</sup> TEMPORARY PROVISIONS EFFECTIVE DURING THE PERIOD OF COMMUNIST REBELLION, (1948) (Taiwan). (Hereafter, Temporary Provisions).

<sup>7</sup> Martial law in Taiwan was formally declared in May 1949 and was not lifted until July 1987. Similarly, the Temporary Provisions were not abolished until April of 1991.

<sup>8</sup> See for example HUANG YANDONG, *ZHONGHUA MINGUO XIANFA XINLUN* (2006); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003); CHAO AND MYERS, *supra* note 2; Bernard Y. Kao, *Democratic Transition and*

reforms to the powers and continued endurance of the two ‘indigenous’ branches, the Control Yuan and the Examination Yuan, which have seen their governmental powers steadily decrease amidst growing calls for their abolishment.

In this article, I reconsider some of the factors contributing to the endurance of the 1947 ROC Constitution by examining the historical development of a significant series of ‘constitutional gaps’ between the text of the constitution and the changing constitutional landscape in China and Taiwan. To do this, I highlight the history of changes to one of the ‘indigenous’ branches of government, the Control Yuan, and ask two questions. First, to what extent are the ‘gaps’ which develop with the increased longevity of national constitutions reflected in the factors contributing to the endurance of specific institutions within said constitutions? And, vice versa, are there other, independent factors influencing the endurance of individual institutions that can tell us more about the overall endurance of national constitutions from which they originate? With the exception of the now abolished National Assembly, the Control Yuan has perhaps been the most affected by the myriad constitutional changes in China and Taiwan. A closer examination of its history, in particular the exercise of its constitutional powers, will likely shed some new light on how and why the 1947 ROC Constitution has endured.

In Sections II and III, I first contextualise the powers of the Control Yuan within the overall system of governmental power distribution found in the text of 1947 ROC Constitution and the constitutional theory that undergirds it. Section IV considers how this institution functioned under the authoritarian system of martial law. In Section V, I then examine how successive constitutional reforms beginning in the 1990s steadily eroded the power originally wielded by the Control Yuan and diminished its potential contributions to

the overall constitutional system. Finally, in Section VI, I consider how this loss of power by one branch and the concomitant transfer of that power to another branch significantly alters the distribution and legitimate exercise of power by government institutions. In doing so, this paper illustrates how far Taiwan's current constitutional landscape has evolved from its original design in the 1947 ROC Constitution, and further considers the implications for our understanding of the theoretical and constitutional basis for legitimate power distribution and use within Taiwan's current national government. More broadly, this article highlights Taiwan and its constitutional institutions as extremely valuable, though perhaps problematic, comparands for studies of constitutional endurance and hybrid-constitutional design, as well as of constitutional change under authoritarianism and during democratic transitions.

## II. THEORETICAL FOUNDATIONS OF THE FIVE-POWER CONSTITUTION

The Control Yuan represents one branch of a unique five-branch constitutional structure initially theorised by the 'father' of modern China, Sun Yat-sen. Having witnessed China's decades-long struggle to establish a stable government predicated upon a western-derived constitutional design, Sun began arguing for the construction of an alternative government organisation that not only incorporated elements of indigenous Chinese political norms, but also responded to the struggling republic's clear need for an institutional structure capable of not only producing government power, but also effectively distributing and controlling such power.<sup>9</sup>

Sun understood 'power' to exist in two distinct forms. The first was *zhengquan*, which constitutes a form of sovereign political power innately possessed by the people of a nation. This power manifests in four distinct and inviolable individual rights: election, recall, initiative, and referendum.<sup>10</sup> By directly or indirectly exercising their individual sovereign

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<sup>9</sup> WEI-TUNG PAN, *THE CHINESE CONSTITUTION: A STUDY OF FORTY YEARS OF CONSTITUTION-MAKING IN CHINA* 34–47 (1983).

<sup>10</sup> *Id.* at 66.

political power, Chinese citizens legitimise or delegitimise the conduct of the central government. The second power, termed *zhiquan*, is the legitimate administration of domestic and international affairs on behalf of the people by specified government institutions. This ‘power to administer’ is functionally similar to those powers traditionally vested in the executive, legislative, and judicial branches of western constitutional systems. For Sun, the people’s power of *zhengquan* and the government’s power of *zhiquan* are complementary to the extent that both are required to properly form and conduct the duties of a legitimate national government.<sup>11</sup> Sun was adamant, however, that the government’s exercise of its bestowed power should never be allowed to infringe upon the innate sovereign powers of citizens or any other rights guaranteed by law. This concern over protecting the sovereign power of the people motivated Sun’s critique of traditional western tripartite government design, and gave rise to his unique Five-Power Constitution.<sup>12</sup>

The tripartite separation of government power that so exercised Sun has been traditionally ascribed to the French scholar Montesquieu. It has directly influenced the architectonics of modern western constitutionalism, and more than two hundred years later, still serves as the power distribution model for the vast majority of the world’s current constitutional designs.<sup>13</sup> However, various systems of checks and balances have since been developed in different constitutional jurisdictions to complement this tripartite structure—such as executive veto of legislation, parliamentary consent of executive appointments, and judicial review of executive actions or legislative acts—in order to ensure that no government

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<sup>11</sup> *Overviews of Sun Yat-sen’s theory of ‘power’ can be found in* WEN-YAN TS’AO, *THE CONSTITUTIONAL STRUCTURE OF MODERN CHINA* 23–47 (1947); PAN, *supra* note 9 at 45–63.

<sup>12</sup> HIONG-FEI TCH’EN, *ESSAI DE DROIT CONSTITUTIONNEL CHINOIS: LES CINQ POUVOIRS* 135–142 (1933).

<sup>13</sup> *See generally* M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (2nd ed. 1998) (providing a comprehensive examination of the development and evolution of the doctrine of separation of powers).

branch may exercise its power *ultra vires*, monopolise absolute power, or unconstitutionally infringe upon the rights of citizens.<sup>14</sup>

Against the backdrop of China's decades-long struggle to adopt a traditional western constitutional arrangement, in which polarised disagreements over executive or parliamentary supremacy saw several constitutional drafts rise and fall, and citizens' enshrined rights frequently trampled, Sun Yat-sen argued that a tripartite separation of powers was simply incompatible with China's social, political, and economic needs, and incapable of adequately protecting citizens' rights. Sun went further to suggest that a tripartite government was not only incompatible with China, but that it was also no longer appropriate for several western constitutional systems.<sup>15</sup> In this and other speeches, he notes several western scholars calling for the creation of additional branches of government capable of eliminating government corruption and nepotism, particularly in the United States. James L. Hyslop and John W. Burgess, for example, both saw the merit of establishing a four-power system in the US in which the power of impeachment was removed from the legislature and vested in an independent supervisory branch, while W.A.P. Martin, in his study of traditional China, opined that nepotism and electoral corruption within western democracies could be eliminated by introducing an independent government branch modelled on China, which would control civil examinations and civil administrative appointments.<sup>16</sup>

Sun, however, never rejects the necessity of executive, legislative, and judicial branches. Instead, drawing on the critiques of Hyslop, Burgess, and Martin, he suggests that the answer to China's constitutional dilemma as well as the inadequacies of a tripartite

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<sup>14</sup> CHRISTOPH MÖLLERS, *THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS* 1 (2013); VILE, *supra* note 13.

<sup>15</sup> Sun Yat-sen, *Cai yong wuquan xianfa zhi biyao*, 3 in *GUOFU QUANJI* 145–146, 146 (Sun Yat-sen ed., 1957).

<sup>16</sup> JAMES L. HYSLOP, *DEMOCRACY: A STUDY OF GOVERNMENT* (1899); JOHN W. BURGESS, *THE RECONCILIATION OF GOVERNMENT WITH LIBERTY* (1915); W.A.P. MARTIN, *THE AWAKENING OF CHINA* (1907).

constitutional system can be found in two government institutions employed in China's imperial past: the civil examination system and the Censorate.<sup>17</sup>

First, Sun was critical of western electoral systems, such as those of the US, due to their use of legislative and procedural impediments to universal suffrage. Even with universal suffrage allowed, he argued, western elections still would not necessarily yield the nomination of the most capable individuals.<sup>18</sup> Sun believed that even those allowed to vote would not be truly exercising their sovereign political power, because western elections are dominated by the wealthy and corrupted through nepotism.<sup>19</sup> Furthermore, the fact that the powers of appointment and confirmation were typically vested in the executive and/or legislative branches, and not an independent branch, failed to ensure a high level of transparency and accountability.<sup>20</sup> Drawing on imperial China's examination system—in which prior to appointment all public officials in local, provincial, and central government posts were required to pass a series of centralised exams open to all persons irrespective of social class—Sun suggested that China establish a constitutional branch of government, the Examination Yuan, to oversee all matters related to the candidacy, tenure, promotion and demotion, and salaries of public officials.<sup>21</sup> Thus, the Examination Yuan would utilise its power to administer (*zhiquan*) in order to ensure the best and most capable individuals gained

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<sup>17</sup> Sun, *supra* note 12 at 146; Sun Yat-sen, *Cai yong wu quan fenli zhi yi qiu san quan dingli zhi bi*, 3 in GUOFU QUANJI 150–151, 150–151 (Sun Yat-sen ed., 1957).

<sup>18</sup> *Part of Sun Yat-sen's programme of political development for China called for a period of political tutelage in which citizens would be instructed on the nature and value of their power to elect officials. After the nation had been converted to a full-fledged constitutional democracy, it was imperative to ensure that only highly qualified individuals be elected to office.* DAVID J. LORENZO, *CONCEPTIONS OF CHINESE DEMOCRACY: READING SUN YAT-SEN, CHIANG KAI-SHEK, AND CHIANG CHING-KUO* 74–80 (2013).

<sup>19</sup> Eric Chiyeung IP, *Building Constitutional Democracy on Oriental Foundations: An Anatomy of Sun Yat-sen's Constitutionalism*, 9 HIST. CONST. REV. ELECTRONICA 327–330, 332–333 (2008).

<sup>20</sup> Sun Yat-sen, *Wu quan xianfa*, 6 in GUOFU QUANJI 93–107 (Sun Yat-sen ed., 1957).

<sup>21</sup> See generally BENJAMIN A. ELMAN, *CIVIL EXAMINATIONS AND MERITOCRACY IN LATE IMPERIAL CHINA* (2013) (providing a critical appraisal and comparison of how the traditional examination system was envisioned and how it actually functioned).



government positions (appointed or elected), and by extension, this branch would protect the sovereign political power (*zhengquan*) of the people to elect representatives for specified offices.<sup>22</sup>

Within the framework of the Five-Power Constitution, the Control Yuan answers Sun's second question of western constitutionalism: which branch should possess the power to impeach and/or censure government officials? Sun was critical of the US model in which the powers of impeachment and recall were held by the legislature over the executive. Such an arrangement provided the legislature with too much power and influence over executive policy-making and action, thereby creating the potential for legislators to hinder governmental efficacy.<sup>23</sup> This problem, however, could be eliminated through the creation of a separate independent branch of government specifically tasked with supervising and investigating the legality and efficiency of government actions, as well as possessing the power to impeach and censure officials guilty of illegal or corrupt practices.<sup>24</sup>

As with the Examination Yuan, the inspiration for the Control Yuan also came from China's imperial past. The Censorate existed in some form as a component of the Chinese bureaucracy from the time of the Qin dynasty (221-202 BCE) and was still employed during the last ruling dynasty, the Qing (1644-1911 CE).<sup>25</sup> Officials appointed as Imperial Censors were tasked with investigating complaints of government corruption and incompetence and reporting directly to the Emperor. As such, these agents worked independently of the imperial bureaucracy and possessed a high level of investigative autonomy. In fact, their job was not limited to investigating and censuring government officials, but could also offer

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<sup>22</sup> TCH'EN, *supra* note 12 at 151–153.

<sup>23</sup> IP, *supra* note 19 at 333; Sun, *supra* note 15.

<sup>24</sup> Sun, *supra* note 15.

<sup>25</sup> Richard L. Walker, *The Control System of the Chinese Government*, 7 FAR EAST. Q. 2–21, 7–12 (1947).

direct remonstrance to the Emperor, should his actions be deemed contrary to the promotion of good governance.<sup>26</sup>

From this rich historical tapestry, Sun Yat-sen hoped to retain the supervisory powers of the traditional Censorate and weave them into the fabric of a modernised constitutional framework wherein the Control Yuan would exist as an independent government branch, to ensure that government corruption or incompetence would not infringe upon the sovereign power of the people.<sup>27</sup> The Control Yuan's independence would further guarantee, at least in theory, that its officials would not be biased towards other branches or be subject to influence from political affiliations.

Sun Yat-sen died having never completed an actual draft of a Five-Power Constitution, yet he bequeathed to the Chinese people a mountain of writings on the subject. The task of putting his rather broad constitutional theory into practice fell to individuals such as Hu Hanmin, Sun Fo, Wu Jingxiong, and Zhang Zhiben.<sup>28</sup> The next section traces the 'formal' establishment of the Control Yuan under the 1947 ROC Constitution in order to demonstrate how these constitutional architects transformed the institution from a remnant of imperial autocracy into an integral component of the democratic five-power constitutional system. The social and political turmoil of the 1940s in China forced the drafters to deviate from Sun's original dictates. Therefore, a close examination of how they empowered the Control Yuan within the five-power check-and-balance structure further illustrates the initial 'gap' between the constitutional theory of Sun Yat-sen and the actual government system established by the first Five-Power Constitution.

### III. DESIGNING POWER FOR THE CONTROL YUAN

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<sup>26</sup> Charles O. Hucker, *The Traditional Chinese Censorate and the New Peking Regime*, 45 *AM. POLIT. SCI. REV.* 1041–1057, 1045–1047 (1951); Herbert H.P. Ma, *Chinese Control Yuan: An Independent Supervisory Organ of the State*, *WASH. UNIV. LAW REV.* 401–426, 404 (1963).

<sup>27</sup> Sun, *supra* note 15; TCH'EN, *supra* note 12 at 160–161.

<sup>28</sup> PAN, *supra* note 6 at 48–55; JING ZHIREN, *ZHONGGUO LI XIAN SHI* 383–388 (1984).

In 1928, Hu Hanmin, Sun Fo, and Dai Jitao submitted a draft of the Organic Law of the National Government (hereafter, 1928 Organic Law) to the Kuomintang (hereafter, KMT) for consideration.<sup>29</sup> It passed and was formally promulgated by the KMT Central Executive Committee on 8 October 1928. The legitimacy of this quasi-constitutional document was predicated upon Sun Yat-sen's theory of political tutelage, in which the central government would be tightly controlled by a single dominant party, the KMT, until the Chinese people had been properly indoctrinated to the responsibilities and value of their sovereign political rights.<sup>30</sup> While this document obviously did little to provide for direct representation of the people, it did, however, outline for the first time the basic structure of the Five-Power constitutional system that would subsequently serve as the blueprint for future constitutional drafts. However, it was not until the promulgation of the 1947 ROC Constitution that the Control Yuan took its final form, becoming a fully representative institution and enjoying the height of its constitutional power.

At the end of World War Two, the fragile alliance between Nationalist KMT forces under Chiang Kai-shek and the Communist forces under the leadership of Mao Zedong eventually collapsed into civil war. To ease the mounting social pressure against KMT political dominance, Chiang Kai-shek called for the immediate end to the Period of Political Tutelage and the institution of a fully formed constitutional government.<sup>31</sup> The resulting drafts culminated in the 1947 Constitution of the Republic of China, which passed its third reading by the National Assembly on 25 December 1946 and went into effect 25 December

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<sup>29</sup> WILLIAM L. TUNG, *THE POLITICAL INSTITUTIONS OF MODERN CHINA* 118–120 (1964).

<sup>30</sup> Robert E. Bedeski, *The Tutelary State and National Revolution in Kuomintang Ideology, 1928-31*, *CHINA Q.* 308–330 (1971) (providing an overview of the ideological basis for KMT rule during the period of tutelage); CHANG PENG-YUAN, *CONG MINQUAN DAO WEIQUAN: SUN ZHONGSHAN DE XUNZHENG SIXIANG YU ZHUAN ZHE JIANLUN DANGREN JI ZHI SHUSHI* (2016).

<sup>31</sup> TUNG, *supra* note 29 at 198–205.

1947.<sup>32</sup> Unfortunately, the tides of war turned against the Nationalists, and in 1949 the KMT-led government fled across the Strait to the island of Taiwan where they established the government of the Republic of China on Taiwan.

Although the 1947 ROC Constitution governed mainland China for only a brief time, its contents continue to structure the government of the Republic of China on Taiwan to this very day. Within the framework of the constitution, the Control Yuan most closely resembled the supervisory institution envisioned by Sun Yat-sen; however, the drafters of the constitution deviated from Sun's initial theories in a handful of distinct, yet important, ways.<sup>33</sup>

Under Sun's original theory, all five branches of government, including the Control Yuan, would be directly appointed by and responsible to a single representative institution, the National Assembly. Under the 1947 ROC Constitution, however, the Control Yuan was christened as one of three representative institutions elected by the people, and it was responsible to the people for ensuring good and efficient governance.<sup>34</sup> Article 91 provides that the Control Yuan will be composed of members elected from provincial assemblies, municipalities, Mongolia and Tibet, as well as elected members representing overseas

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<sup>32</sup> TS'AO, *supra* note 11 at 275.

<sup>33</sup> TCH'EN, *supra* note 12 at 166–168.

<sup>34</sup> *Throughout this article, I use the term 'representative' to translate the Chinese phrase daibiao minyi, which literally means 'to represent the people's intentions'. In the literature pertaining to Republican Chinese and contemporary Taiwanese constitutionalism, this term is applied to government institutions with members who are popularly elected, who are meant to act on behalf of the people, and who are subject to recall by their respective constituencies.*

Chinese.<sup>35</sup> The Control Yuan is to be chaired by a President and Vice-president both selected by Control Yuan members from amongst their own membership.<sup>36</sup>

To ensure that its members were capable of exercising their duties free from personal interests or external influences, Control Yuan officials are forbidden from holding an appointment in another branch of government or engaging in a professional career.<sup>37</sup> Due to the fact that the supervisory function of the Control Yuan could potentially lead to personal conflicts with individuals or government agencies under investigation, officials of the Yuan receive a number of special constitutionally-enshrined immunities. For example, Control Yuan members are free from persecution and prosecution for comments and/or votes made when the Yuan is in session.<sup>38</sup> Furthermore, Yuan members may not be arrested or investigated, without the permission of the President of the Control Yuan, with the exception of cases of *flagrante delicto*.<sup>39</sup> As elected representatives of the people, members of the Control Yuan were immune from impeachment, and could only be recalled after six months in office by their representative local council.<sup>40</sup>

The above protections serve to ensure the independent nature of the Control Yuan by providing a relatively high degree of autonomy over its internal organisation and protection of its members from potential prosecution. As such, the members of the Control Yuan could carry out their primary functions much like their imperial predecessors. The primary difference of course is that Control Yuan members, unlike imperial Censors, are responsible to those communities that elected them.

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<sup>35</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 91 (1947) (Taiwan). (According to the constitution, the Control Yuan should be comprised of a maximum of 223 elected officials. Due to the ongoing civil war with communist forces, the 1948 elections were not held in all regions of China, and the results yielded a total of only 180 elected officials.) *See also*, Ma, *supra* note 26 at 405.

<sup>36</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 92 (1947) (Taiwan).

<sup>37</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 103 (1947) (Taiwan).

<sup>38</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 101 (1947) (Taiwan).

<sup>39</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 102 (1947) (Taiwan).

<sup>40</sup> Ma, *supra* note 26 at 405–6.

Having designed the Control Yuan as a representative institution and attempting to buffer it from personal bias and external influence by utilizing both exclusionary clauses and protection clauses, the constitutional drafters were confident empowering the branch with several exceedingly important supervisory powers. Article 90 of the constitution states that the “Control Yuan serves as the highest supervisory organ of the State”, and it “exercises the powers of consent, impeachment, censure, and audit”. Some of these powers are merely a continuation of powers granted under the 1928 Organic Law; however, the 1947 Constitution formally enshrines these powers into the constitutional document. Furthermore, contrary to the writings of Sun Yat-sen, the drafters provided the Control Yuan with additional powers directly linking its supervisory function to its new status as a representative institution.

### *Consent*

The power of consent (*tongyi quan*) represents one of the new powers provided to the Control Yuan. According to the 1947 ROC Constitution, the Control Yuan gained the power to confirm, or consent to, presidential appointments of several non-elected central government offices.<sup>41</sup> These offices include the President, Vice-President and Grand Justices of the Judicial Yuan, as well as the President, Vice-President and members of the Examination Yuan.<sup>42</sup> As Herbert Ma points out, this power was indeed quite foreign to the Censorate of traditional China, and it likely represents a transplantation of Western practices (such as US Senate confirmations) into a constitutional design designed to dilute the power of the Presidency.<sup>43</sup>

After the establishment of the KMT government on Taiwan, the Control Yuan’s power of consent became one of the most vigorously debated constitutional issues. Advocates point to the fact that, as a representative institution that supervises official conduct,

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<sup>41</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 79 and art. 84 (1947) (Taiwan).

<sup>42</sup> Ma, *supra* note 26 at 414–415.

<sup>43</sup> *Id.* at 415.

the Control Yuan should, therefore, be empowered to evaluate the acceptability of a potential presidential appointee. Furthermore, these advocates argue that the ‘politicisation’ of consent is mostly precluded by the existence of the civil service examination system and basic laws of each of the government branches, which stipulate a series of basic requisites for appointment.<sup>44</sup> Critics, on the other hand, note that both the representative nature of the Control Yuan and its power of consent directly violate the teachings of Sun Yat-sen.<sup>45</sup> They argue that according to Sun’s writings the only elected body should be the National Assembly, and this body would consent or refuse presidential appointments to all five branches of government.<sup>46</sup> Such arguments led to several individuals advocating for the transfer of the power of consent from the Control Yuan to the National Assembly.<sup>47</sup>

Although the Control Yuan’s power of consent represents a departure from Sun Yat-sen’s original theory, in the spirit of his desire to preclude any one branch from gaining hegemony over other branches, the constitutional drafters did provide the Legislative Yuan, also an elected body, with the power of consent for presidential appointments of the Premier (head of the Executive Yuan) and the Auditor-General of the Control Yuan (*shenji chang*).<sup>48</sup> In this way, the Control Yuan could not claim confirmation power over presidential appointments for three branches of government and potentially abuse its power to effectively hinder three-fifths of the national government’s ability to function.

### *Impeachment*

The power of impeachment (*tanhe quan*) represents the *raison d’être* of the Control Yuan, as well as its predecessor the imperial Censorate. Under the original provisions of the

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<sup>44</sup> XIE WENYI, *JIANCHA YUAN TONGYI QUAN ZHI YANJIU* 23–25 (1968).

<sup>45</sup> REN ZHUOXUAN, *WUQUAN XIANFA ZHI LILUN YU SHIJI* 227–234 (1982); ZHANG YOUNONG, *ZHONGGUO XIANFA YU SANMIN ZHUYI* 187–188 (5 ed. 1977).

<sup>46</sup> ZHANG, *supra* note 45 at 187.

<sup>47</sup> Fu Qixue, *Jiancha yuan zuzhi ji gongneng zhi pingjia*, 3 in *ZHONGHUA MINGUO JIANCHA YUAN ZHI YANJIU* 1029–1077, 1075–1077 (Fu Qixue ed., 1967).

<sup>48</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 55 and art. 104 (1947) (Taiwan).

constitution, the Control Yuan possesses the power to impeach officials of the Executive Yuan, Examination Yuan, and Judicial Yuan, as well as the President and Vice-president of the Republic. To carry out an impeachment, the constitution requires an initial petition for investigation by at least one member of the Control Yuan, and must be approved by a minimum of nine members after due investigation of accusations.<sup>49</sup> Once the impeachment is approved, the dossier for impeachment is turned over to the Committee on the Discipline of Public Functionaries which is a part of the Judicial Yuan.<sup>50</sup> If in the course of the impeachment investigation, the Control Yuan members discover sufficient evidence of criminal activity, then the case is handed over to the criminal courts.<sup>51</sup>

It should be noted that the impeachment of the President and Vice-President of the Republic utilises a modified procedure. Such an impeachment requires an initial petition of no less than one fourth the total number of Control Yuan members, and after investigation it must pass by a majority consent of all current members.<sup>52</sup> If impeachment is approved, the dossier is transferred to the National Assembly for trial. One minor problem with this arrangement is the fact that the constitution also provides the National Assembly with the power to initiate an impeachment of the President and Vice-president of the Republic.<sup>53</sup> This jurisdictional overlap gives rise to a potential conflict if, for example, one branch advocates an impeachment whilst the other branch condemns it.<sup>54</sup>

A more significant problem with the Control Yuan's power of impeachment is that in many ways it represents a "tiger with no teeth". Although the Control Yuan possesses the power to carry out impeachment proceedings against suspected offenders, it lacks any true

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<sup>49</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 98 (1947) (Taiwan).

<sup>50</sup> CONTROL LAW, art. 8 (1948).

<sup>51</sup> CONTROL LAW, art. 15 (1948).

<sup>52</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 100 (1947) (Taiwan).

<sup>53</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 27 (1947) (Taiwan); LAW GOVERNING THE ELECTION AND RECALL OF THE PRESIDENT AND VICE-PRESIDENT, art. 10 (1947).

<sup>54</sup> Ma, *supra* note 26 at 409.



power to execute the results of its decision. The decision of whether or not to punish and how to punish is determined by a separate committee housed in the Judiciary. Technically, the Control Yuan may still press for a specific action from the Committee on the Discipline of Public Functionaries. The Control Law requires the committee to carry out the impeachment trial in due course and to report the results and reasoning behind their final judgement to the Control Yuan. If they fail to do so, then the Control Yuan may initiate a censure or impeachment investigation against the disciplinary committee members.<sup>55</sup>

### *Censure*

In many ways, the power of censure (*jiuju quan*) represents a less severe form of administrative punishment than an impeachment. Whereas impeachment requires a trial and subsequent referral to the Judicial Yuan's disciplinary committee, a censure is directed towards the offending official's immediate superior, who in turn is required to address the issue in a manner acceptable to the Control Yuan.<sup>56</sup> A censure requires an initial petition by one or more members of the Control Yuan with a subsequent confirmation of three or more members, after which the petition is forwarded to the offender's immediate supervisor for action.<sup>57</sup> If the reported reasoning and action of the offender's superior fails to satisfy the Control Yuan, then its members may initiate a case of impeachment against the original offender as well as initiate a censure or even impeachment against the superior.<sup>58</sup> The power of censure provides the Control Yuan with more 'control' over its decisions as it does not require an additional trial in another institution. Herbert Ma argued that "it is much quicker

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<sup>55</sup> CONTROL LAW, art. 17 (1948).

<sup>56</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 90 (1947) (Taiwan); CONTROL LAW, art. 21 (1948).

<sup>57</sup> CONTROL LAW, art. 19 (1948).

<sup>58</sup> CONTROL LAW, art. 22 (1948).

and more effective for the Control Yuan to seek to censure a public functionary than to impeach him”.<sup>59</sup>

### *Corrective Measures*

Related to the power of censure, the constitution also provides the Control Yuan with the power to propose corrective measures (*jiuzheng quan*).<sup>60</sup> This power is in many ways a carry over from the extended powers granted to the Control Yuan during World War Two, which provided it with the power of proposal. Unlike the powers of impeachment or censure which are aimed at individuals, the corrective measures target the actions of the Executive Yuan and its ministries, as well as the policies predicated such actions. Furthermore, petitions for corrective measures emanate from a Control Yuan committee and the office to which the petition is directed must respond in writing within two months of the recommendation.<sup>61</sup>

### *Other Powers*

In addition to the powers highlighted above, the Control Yuan also holds the power of audit over the government budget,<sup>62</sup> and is charged with invigilating the civil service exams administered by the Examination Yuan.<sup>63</sup> The constitution, and additional legislation, also provide the Control Yuan with broad powers of investigation allowing its members access to any government document pertaining to an ongoing case of impeachment, censure, corrective measure, or audit.<sup>64</sup>

### *The Initial ‘Gap’ between Theory and Text*

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<sup>59</sup> Ma, *supra* note 26 at 411.

<sup>60</sup> CONSTITUTION OF THE REPUBLIC OF CHINA, art. 97 (1947) (Taiwan).

<sup>61</sup> Ma, *supra* note 26 at 412.

<sup>62</sup> *Although the power of audit is an important duty of the Control Yuan, the Auditor-General and the Bureau of Audit function fairly independent of the other functionaries of the Control Yuan. As such, the power of audit will not be examined in detail in this article.*

<sup>63</sup> Ma, *supra* note 26 at 415.

<sup>64</sup> LI SHENYI, JIANCHAYUAN ZHI LILUN YU SHIWU 77–81 (2 ed. 2005).

A comparison of the institutional design and powers invested in the Control Yuan under the 1947 Constitution with the constitutional thought of Sun Yat-sen illustrates an initial ‘gap’ between constitutional theory and constitutional design. This gap, however, can best be explained by considering the circumstances leading up to the drafting of the constitution, which provides some insight into the potential reasoning behind the drafters’ deviation from Sun’s original theory.

First, Sun never fully drafted a constitution based on his theories, nor did he articulate a concrete constitutional design with any measure of specificity in his writings. Second, the drafters of the 1947 ROC Constitution were confronted with a deeply fractured society in a severely damaged post-war country. The tenuous alliance between Nationalists and Communist forces to defeat the Japanese invasion broke down immediately following the conclusion of the war. Communist forces gained control of several parts of rural China and the weakened Nationalist government was unsure of its ability to maintain a majority control over a freely elected constitutional government if the design were made to fit within Sun’s dictates. Therefore, they grounded the constitution’s founding principles in Sun’s anxiety about a single branch becoming hegemonic and holding the entire government ‘hostage.’ They designed a constitution in which power was highly diluted amongst multiple branches of government. For Sun Yat-sen, the Control Yuan was merely to be a branch of government responsible to the National Assembly (as were all other branches), yet tasked with ensuring all branches properly exercised their *zhiquan* or ‘power to administer’. Under the 1947 ROC Constitution, however, the Control Yuan became a representative branch of government responsible to its electorate, and empowered not only to supervise the conduct of government officials with its powers of impeachment and censure, but also to utilise its power of consent by serving as a gatekeeper for entry to non-elected government service via presidential appointment.

With the promulgation of the 1947 ROC Constitution, the drafters effectively formalised a Control Yuan with more power than previously conceived. Unfortunately, this powerful and representative institution suffered great losses of prestige and efficacy, first under the constrained authoritarian system introduced by the KMT with the passage of the Temporary Provisions in 1948, and then under the perpetuation of martial law on Taiwan for nearly forty years.

#### IV. MARTIAL LAW and CONSTITUTIONAL STASIS

In 1949, the Nationalist government was forced by the Communist armies to retreat to the island province of Taiwan. There they established the ‘temporary’ home of the national government of the Republic of China, retaining both the 1947 ROC Constitution and the Temporary Provisions, and preparing to eventually recover the lost mainland territory. Initially, the Temporary Provisions were set to automatically expire after three years from the date of promulgation; however, given the continued declared state of war between the Communist and Nationalists, in 1954 the legislature extended the Temporary Provisions indefinitely.<sup>65</sup> As the years went by, the reality of reclaiming the mainland diminished, yet the KMT maintained authoritarian control over the island and its inhabitants via the Temporary Provisions and martial law. The rhetoric of reclaiming the mainland and the ROC government as representing the ‘true’ government of China further required the perpetuation of the 1947 ROC Constitution, despite the fact that the reality of the situation on Taiwan did not match the constitutional document. Thus, unlike other authoritarian regimes which often establish their own constitutions for legitimacy,<sup>66</sup> the KMT government manufactured its own legitimacy through the continuing endurance of the 1947 ROC Constitution. Yet there

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<sup>65</sup> Hungdah Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan*, 2 OCCAS. PAP. SER. CONTEMP. ASIAN STUD. 1–61, 14–16 (1993).

<sup>66</sup> Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 1–17 (Tom Ginsburg & Alberto Simpser eds., 2014).

arose a significant gap between the institutions established for a constitutional democracy within the document and the functioning of those institutions under martial law.

For the Control Yuan, the subsequent decades of authoritarian rule greatly impeded its ability to *independently* carry out its constitutional duties and represents a significant ‘gap’ between the actual provisions of the constitution and the reality of constitutionalism under authoritarianism.<sup>67</sup> While public opinion of the Control Yuan suffered greatly during this period, one should not, however, view the actions of the Control Yuan with only cynicism. Although its primary powers of impeachment and censure were certainly constrained, the Control Yuan still managed to find ways of influencing government reform by relying on other less confrontational powers.

#### *Constrained Power and ‘Levels’ of Consent*

Articles 79, 84, and 90 of the 1947 ROC Constitution provide the Control Yuan with the important power of consent over presidential appointments to the Judicial Yuan and Examination Yuan. Interestingly, during the martial law period, Chiang Kai-shek and later his son Chiang Ching-kuo continued to publically seek Control Yuan consent for all appointments made by the President of the Republic. On the one hand, this demonstrates the authoritarian government’s desire to maintain the pretence of following constitutional procedure. On the other hand, given the authoritarian political environment, the practice appears on the surface to be devoid of meaning as the Control Yuan was powerless to refuse its consent.

Records from the Control Yuan do indicate that all nominees for presidential appointments during the period from 1949 through the 1970s were approved.<sup>68</sup> On the surface, such records appear to confirm the opinions that the Control Yuan existed merely as

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<sup>67</sup> *Though some scholarship exists on the establishment and use of constitutional documents under authoritarian regimes, the 1947 ROC Constitution is unique in that it was designed to*

<sup>68</sup> XIE, *supra* note 55 at 38–58; WANG WEI-HSIN, WOGUO JIANCHA YUAN TONGYI QUAN ZHIDU 59–95 (1982).

a co-opted and powerless ‘rubber-stamp’ for the dictates of the authoritarian KMT government. However, a closer examination of the statistics demonstrates that although all appointees received consent, the levels of consent (ie, the percentage of votes for or against) varied widely, and several appointees only narrowly secured the required number of consenting votes. For example, when Chiang Kai-shek sought Control Yuan consent to appoint Luo Jialun to the post of Vice-president of the Examination Yuan in 1952, the appointment passed with only 57.3% of votes. Similar results can be found for other appointees such as Liu Xiangshan and Tang Daiguang.<sup>69</sup> Requirements for posts within the Judicial Yuan were stricter than those for the Examination Yuan, so as long as Chiang Kai-shek nominated individuals who met the minimum threshold requirements, then the Control Yuan would not be able to legitimately (within the constraints of an authoritarian regime) refuse consent.<sup>70</sup> Throughout the martial law period no individual received a unanimous vote of consent, and the vast majority of appointees secured between 65-75% of the required votes. The majority of nominees receiving low vote counts, however, were candidates for the Examination Yuan who, Control Yuan members openly argued, were unsuitable or lacked the proper qualifications for the positions to which the president was appointing them.<sup>71</sup> Hu Fo argued that although the Control Yuan’s exercise of consent was clearly susceptible to interference by the KMT, its members were at the very least able to voice some level of dissatisfaction with the nominees by providing only the minimal threshold number of votes to secure consent.<sup>72</sup> Lastly, these varying ‘levels’ of consent in voting statistics for candidates

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<sup>69</sup> In 1960, Liu Xiangshan was confirmed as an ordinary member of the Examination Yuan with 52.4% of votes. In 1966, he was confirmed to a successive term with 61.6%. Likewise, Tang Daiguang was confirmed to the Examination Yuan in 1978 with only 57.1% of votes. See WANG, *supra* note 68 at 86–94.

<sup>70</sup> *Id.* at 97–99.

<sup>71</sup> Hu Fo, *Zhengdang ji liyi tuanti yu jiancha yuan*, 3 in *ZHONGHUA MINGUO JIANCHA YUAN ZHI YANJIU*, 940–941 (Fu Qixue ed., 1967).

<sup>72</sup> *Id.* at 941.

can also serve as a potential indicator of the president's prestige vis-à-vis the party, as well as the prestige of the nominees within the party.<sup>73</sup>

### *'Safe' Exercise of Powers*

As mentioned above, the constitution requires the Control Yuan to surveil the national government, highlight problematic policies and actions of ministries, and impeach or censure officials guilty of corruption or negligence. Under a functioning democratic government, the constitution provides the necessary powers and protections for the Control Yuan to carry out these functions; however, under an authoritarian government system, the independent exercise of such powers could be dangerous. To avoid directly confronting other government officials, the Control Yuan emphasised the use of other less confrontational powers in order to at least partially fulfil its constitutional mandate.

The statistics related to the accepted caseload for the Control Yuan during the martial law period indicate a downward trend in the overall numbers of impeachments, censures, and corrective measures, but until the later decades of martial law the two powers of censure and corrective measures were used more frequently than impeachment. This suggests a 'subtle' gap between how the Control Yuan was designed to function under the 1947 ROC Constitution and how it actually functioned within an authoritarian regime. There are two possible reasons for the reliance on these two powers over impeachment.

First, Herbert Ma argued that impeachment is difficult even under normal instances, as the power to actually execute an impeachment request by the Control Yuan rests with another branch of government.<sup>74</sup> However, under an authoritarian system, the punishment and attempted removal of an official from office by virtue of an independent petition and investigation would not be likely, and impeachments, particularly of high level political elites, would only be possible with sanctioning from the KMT. The statistics for the period indicate

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<sup>73</sup> WANG, *supra* note 68 at 98.

<sup>74</sup> Ma, *supra* note 26 at 411.

the expected dramatic drop in the total number of impeachment cases initiated by the Control Yuan. In 1947-48, the only full year in which the Control Yuan functioned as it was intended under the constitution, its members initiated 291 impeachments.<sup>75</sup> However, during the forty-year martial law period, the Control Yuan initiated a mere 351 cases, only averaging nine per year.<sup>76</sup> In the thirty years since the lifting of martial law, the Control Yuan has initiated 505 impeachment cases with an average of 18.7 impeachment cases per year.<sup>77</sup> Furthermore, given the extraordinary powers provided to the President of the Republic, as well as the carefully cultivated image of Chiang Kai-shek, and the dominance of the KMT in the Legislative Yuan and National Assembly, the power to impeach the president was simply outside the capacity of the Control Yuan.

Second, given these impediments to the independent exercise of impeachment, the Control Yuan appears to have turned its attention to alternative powers which circumvented the potential for overt conflict with KMT elites or the president. As mentioned above, a censure is directed towards the immediate superior of the offending official. Within the authoritarian system, such a practice would appear ‘safer’ for the Control Yuan to carry out, because it allows the office concerned to be notified of an incident involving one of its own officials and to deal with the situation internally, avoiding the public confrontation of two government branches in an impeachment investigation. The initial year of the Control Yuan saw it initiate 287 censure cases; however, in the forty years from 1949-1987, the Control Yuan initiated a total of 526, with an average of 13.4 censure cases per year.<sup>78</sup> Like the statistics for impeachments, the numbers of censure cases drop steadily during the martial law period, yet whereas impeachment cases increased with democratisation in the late 1980s,

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<sup>75</sup> The Control Yuan publishes statistics on its activities each year, *see* JIANCHA YUAN GONGBAO, (1947- ).

<sup>76</sup> *Id.* (Especially reports covering the years 1949-1987).

<sup>77</sup> *Id.* (Especially reports covering the years 1988-2014. As the author writes this article, the 2015 Annual Report has not yet been published.)

<sup>78</sup> *Id.* (Reports covering the years 1947-1987).



censure cases continued to decline. From 1987-2014, the Control Yuan carried out a total of 22 censure cases, averaging only 0.8 cases per year.<sup>79</sup>

Like a censure case, the proposal of a corrective measure to a government ministry is ‘safer’ in that it allows that ministry to take the initiative to determine the best course for reform. Statistics during and after the martial law period further demonstrate that use of corrective measures steadily became the Control Yuan’s preferred course of action against government ministries. In the initial year of the Control Yuan, it sent forth 175 petitions for corrective measures.<sup>80</sup> Under martial law, it sent forth 655 petitions, averaging 16.7 per year.<sup>81</sup> The use of corrective measures continued to be important after democratization, with 2972 petitions being sent forth from 1988-2014, with the Control Yuan averaging 110 petitions per year.<sup>82</sup>

Finally, the Control Yuan possesses the ability to petition the Judicial Yuan for constitutional interpretations. Although this power receives very little attention in the literature, it created an avenue for the Control Yuan to directly represent the peoples’ interests by seeking clarification of laws and their application. Prior to 1958, individuals were not entitled to directly petition for a judicial interpretation.<sup>83</sup> However, individuals could petition the Control Yuan, which in turn could request a specific decision from the Judicial Yuan. During the period of 1950-1990, the Control Yuan requested a total of thirty-nine interpretations, second only to the Executive Yuan with 104 petitions.<sup>84</sup> By petitioning the Judicial Yuan for interpretations, the Control Yuan was able to highlight existing legal conflicts or procedural inconsistencies in an indirect manner. Unlike corrective measures,

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<sup>79</sup> *Id.* (Reports covering the years 1988-2014).

<sup>80</sup> *Id.* (Reports covering the year 1947-8).

<sup>81</sup> *Id.* (Reports covering the years 1949-1987).

<sup>82</sup> *Id.* (Reports covering the years 1988-2014).

<sup>83</sup> Tsung-fu Chen, *Democracy and Rule of Law in Taiwan: The Judiciary’s Authority and Credibility*, RCTED WORK. PAP. SER. NO 2003-0006 1–18, 5 (2003).

<sup>84</sup> *Id.* at 8.

which require the Control Yuan committees to openly investigate other government offices, a petition in these instances originates from the public; the Control Yuan is merely fulfilling its legal obligation of seeking clarification. This in turn leaves much of the work and political liability to the members of the Judicial Yuan. Furthermore, the Control Yuan can point out to the public that the failure of the petition was not result of the Control Yuan, but instead arose from the actions, inactions, or co-optation of the judiciary.

### *Subtle Constitutional 'Gaps' under Authoritarian Rule*

Unlike the constitutional gap between Sun Yat-sen's five-power theory and the final draft of the 1947 ROC Constitution outlined in the previous section, the constitutional landscape of the martial law period in Taiwan suggests an implicit 'gap' between the Control Yuan's powers enshrined in the constitutional document and the actual efficacy of the Control Yuan's exercise of such powers within an authoritarian regime. Although the Temporary Provisions and martial law directly limited the representative nature of the Control Yuan, its constitutionally-enshrined powers were not formally curtailed. Instead, nearly four decades of a constant 'state of emergency' provided numerous procedural overrides and exemptions to the President of the Republic and led to the establishment of a government dominated by the KMT. This authoritarian political climate impeded the Control Yuan's ability to *independently* carry out its constitutional duties of supervision, impeachment, and censure against the government. Despite these limitations, the Control Yuan still functioned, albeit by utilising certain constitutional powers which would not overtly challenge the activities of the KMT elite. Furthermore, surreptitious disapproval of presidential appointees gleaned from officially reported voting results, the extensive use of the powers of censure, the proposal of corrective measures, and petitions to the Judicial Yuan for constitutional interpretations all serve to demonstrate that far from being completely disempowered, the Control Yuan attempted to contribute to the development and reform of

the central government in Taiwan during the martial law period. By the early 1980s, international and domestic pressures for political reform and the end of martial law led to a gradual democratic transition culminating in the formal revocation of the Temporary Provisions in 1991. Interestingly, with the stage set for democratisation, the subsequent constitutional debates and eventual constitutional revisions failed to produce a new constitution.

## **V. DEMOCRATISATION AND THE TWILIGHT OF CONTROL?**

Before he died in 1988, President Chiang Ching-kuo initiated the process of fully lifting martial law and re-establishing a democratic constitutional government based upon the 1947 ROC Constitution. His successor, Lee Tung-hui, was tasked with carrying out this programme of democratisation and overseeing the dismantling of overt KMT authoritarian rule. It was immediately apparent that the structure and dictates of the 1947 ROC Constitution were not wholly compatible with the existing political and social situation on Taiwan. Yet, due to tensions between China and Taiwan over the true status of the island, the government on Taiwan was reluctant to establish a new constitution. As such, the government opted for a series of constitutional amendments. Many of these revisions enhanced Taiwan's democracy by returning to representative institutions several constitutional powers which had been usurped by the authoritarian KMT government during the two Chiang presidencies. Ironically, instead of re-empowering the Control Yuan and returning it to its fully representative status, the constitutional reforms of the early 1990s stripped it of more power than had the former authoritarian government. These reforms produced a new series of 'gaps' by fundamentally altering the relationships between the Five-Power constitutional theory, the document of the 1947 ROC Constitution, and the form and function of the Control Yuan. Most would expect, and indeed many have called for, the abolishment of such an out-of-touch and disempowered institution, yet just as it did in the

martial law period, the Control Yuan has endured and found new avenues for exercising its remaining powers.

### *Constitutional Revision 1991*

The Additional Articles to the constitution passed by the National Assembly in 1991 represent an attempt by the KMT government to adjust the electoral processes enshrined in the 1947 ROC Constitution in order to better reflect the reality of the national government's position in Taiwan.<sup>85</sup> The original text of the constitution established representative institutions with high membership numbers, based on the premise that the national government covered all provinces and territories of mainland China. Representation allocations were redesigned for the National Assembly, Legislative Yuan, and Control Yuan with candidates and voting regions limited to Taiwan and other 'free areas'.<sup>86</sup> Subsequently, the first wave of national elections for *all* popularly elected central government posts were scheduled to be held for the first time since 1948.<sup>87</sup>

For the Control Yuan, these elections held the potential to return the institution to its 'representative' status and thereby restore the rationale underpinning its power of consent. Elections for the Control Yuan were scheduled for 31 Jan 1993.<sup>88</sup> Under the 1991 Additional Articles, the Control Yuan appeared on the brink of finally brushing away the dust of the

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<sup>85</sup> Judicial Yuan Interpretation No. 31 (1954) provided the legal basis for arguments by 'old-guard' members to retain their positions held since 1948 or 1964. In April 1990, members of the opposition party petitioned the Constitutional Court for a strict interpretation of Article 28, sec 1 and 2 of the Constitution and Article 6 of the Temporary Provisions. The Court issued Judicial Yuan Interpretation No. 261 on 20 June 1991 which required, *inter alia*, that all members of popularly elected institutions who assumed their posts in 1948 or 1969 were required to resign by 31 December 1991. See Judicial Yuan Interpretation No. 261, (1991); and CHAO AND MYERS, *supra* note 8 at 221–224.

<sup>86</sup> ADDITIONAL ARTICLES TO THE CONSTITUTION OF THE REPUBLIC OF CHINA, art. 1, art. 2, and art. 3 (1991).

<sup>87</sup> HSIEH CHENG-TAO, *ZHONGHUA MINGUO XIUXIAN SHI* 213–245 (2 ed. 2005) (Providing one of the most comprehensive and detailed analysis of all seven constitutional revisions).

<sup>88</sup> Hungdah Chiu, *Constitutional Development in the Republic of China in Taiwan*, in *IN THE SHADOW OF CHINA: POLITICAL DEVELOPMENTS IN TAIWAN SINCE 1949* 17–47, 38 (Steve Tsang ed., 1993).

authoritarian period, and becoming once again an *independent* supervisory government institution.

### *Constitutional Revision 1992 and Subsequent Revisions*

The Control Yuan would not, however, enjoy the fruits of its return to democratic representation. The 1991 Additional Articles were quickly followed by another round of revisions in 1992. Although the focus of these new revisions was primarily aimed at elections for the National Assembly and the Presidency, during the negotiations and debates, the status of the Control Yuan drew the attention of both opposition and KMT factions.<sup>89</sup> Lin Jih-wen argues that amending the powers and structure of the Control Yuan was a rather safe stepping stone for further negotiations on more prickly issues such as indirect or direct method of election for the President. Since the 1980s, the main opposition party, the Democratic Progressive Party (DPP, or *Minjin dang*) advocated eliminating the branch of government entirely. Much of this was due to the corruption and vote buying scandals associated with the elections organised during the martial law period.<sup>90</sup> Likewise, Lee Tung-hui and other KMT members were eager to further empower the Presidency vis-à-vis other state organs. However, more conservative factions within the KMT would not support eliminating the Control Yuan out of fears that such an act might signal to the international community, and more specifically mainland China, that the government was subtly shifting towards the founding of a formally independent Taiwan republic.<sup>91</sup> The end result was a significantly disempowered Control Yuan which possessed little of its original constitutional mandate.

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<sup>89</sup> HSIEH, *supra* note 87 at 271–272.

<sup>90</sup> Jih-wen Lin, *Transition through Transaction: Taiwan's Constitutional Reforms in the Lee Teng-hui Era*, in SAYONARA TO THE LEE TENG-HUI ERA: POLITICS IN TAIWAN, 1988-2000 63–89, 73 (Wei-chin Lee & T.Y. Wang eds., 2003).

<sup>91</sup> *Id.* at 73–74.

The most fundamental change to the Control Yuan was the removal of its representative status. The 1992 Additional Articles invalidated Articles 91, 92, and 93 of the constitution, as well as portions of Articles 3, 4, and 5 of the 1991 Additional Articles dealing with the election of Control Yuan members. The 1992 Additional Articles instead depart from the complex theory predicating the five-power constitution by providing that Control Yuan members would henceforth be appointed by the President of the Republic with the consent of the National Assembly.<sup>92</sup> This loss of this ‘representative’ status required the additional removal of powers vested in the Control Yuan on the basis of its existence as an institution representing the people. The 1992 Additional Articles removed the Control Yuan’s power of consent over presidential appointments to the Judicial and Examination Yuans and transferred the power to the National Assembly. Furthermore, the constitutionally enshrined privileges of immunity from prosecution or arrest without the approval of the President of the Control Yuan were removed.<sup>93</sup> As part of a representative institution, the elected members of the Control Yuan could only be removed from office by their constituencies, yet with their new status as presidential appointees, members could now be impeached or censured through the very procedures applied to other central government officials.<sup>94</sup> Within the space of two years, the processes of democratising the national government in Taiwan had fundamentally altered the Control Yuan and reduced its powers and privileges to their lowest state since it was formally founded in 1928.

Subsequent constitutional revisions further reduced the Control Yuan’s powers of impeachment. Because its members were appointed by the President of the Republic, several legislators argued that the Control Yuan should not have the power to initiate presidential

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<sup>92</sup> ADDITIONAL ARTICLES TO THE CONSTITUTION OF THE REPUBLIC OF CHINA, art. 15 (1992).

<sup>93</sup> ADDITIONAL ARTICLES TO THE CONSTITUTION OF THE REPUBLIC OF CHINA, art. 15 (1992).

<sup>94</sup> ADDITIONAL ARTICLES TO THE CONSTITUTION OF THE REPUBLIC OF CHINA, art. 15 (1992).

impeachment cases.<sup>95</sup> As such, the 1997 Additional Articles transferred the power to impeach the President and Vice-president of the Republic to the Legislative Yuan with approval by the National Assembly.<sup>96</sup> The revisions of 2005 formally abolished the National Assembly and its powers of consent were transferred to the Legislative Yuan.<sup>97</sup>

These changes represent a radical departure from the constitutional theory which upholds the Control Yuan as the highest supervisory organ in the national government. As mentioned above in Sections II and III, Sun Yat-sen and the drafters of the 1947 ROC Constitution were concerned with not only with diluting powers between the five government branches, but also providing the Control Yuan members with constitutional protections to adequately ensure they could carry out their rather confrontational and potentially politically sensitive duties without bias or interference. The removal of these constitutional provisions gives rise to questions over the actual independence of the Control Yuan. Furthermore, the new method of appointment by presidential nomination with National Assembly (and later Legislative Yuan) approval opened the door for the Control Yuan to become embroiled in the political battles over the confirmation of presidential appointments, which often erupted between the President of the Republic and the Legislature.<sup>98</sup>

For example, in early 2004, the DPP incumbent candidate Chen Shui-bian was re-elected by a razor-thin margin in an extremely controversial presidential election. Chen's party, however, only held a minority in the Legislative Yuan. Due to Taiwan's current hybrid semi-presidential system, the KMT was able use its legislative majority to frustrate most of Chen's reform policies.<sup>99</sup> In 2005, the term of the Third Control Yuan was set to

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<sup>95</sup> HSIEH, *supra* note 87 at 352–353.

<sup>96</sup> ADDITIONAL ARTICLES TO THE CONSTITUTION OF THE REPUBLIC OF CHINA, art. 4 (1997).

<sup>97</sup> ADDITIONAL ARTICLES TO THE CONSTITUTION OF THE REPUBLIC OF CHINA, 2005.

<sup>98</sup> JIUNN-RONG YEH, *THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS* 52–63 (2016).

<sup>99</sup> CINDY SKACH, *BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC* 2–10 (2005) (Demonstrating the problematics of

expire, and as president, Chen Shui-bian provided the Legislative Yuan with a list of names for appointment to the new Control Yuan. The KMT controlled Legislative Yuan refused to consent to the appointments.<sup>100</sup> The 1947 ROC Constitution does not provide a procedure for handling a case in which the President of the Republic and the Legislative Yuan reach an impasse over appointments. After repeated attempts by Chen to get his nominees appointed, and after the expiration of the Third Control Yuan's term, the DPP finally petitioned the Council of Supreme Justices for an interpretation. The Court decision did little to resolve the issue, and only opined that the Legislative Yuan was required to confirm the appointments in a timely manner.<sup>101</sup> Despite this decision, the Legislative Yuan continued to boycott approving the nominees until after the 2008 elections when the KMT reclaimed the Presidency under Ma Ying-jeou.<sup>102</sup>

The fact that the Control Yuan could effectively cease to function for nearly four years due to divisive party politics demonstrates how far removed the Control Yuan is from its original form and function. This episode further demonstrates how the retention of the 1947 ROC Constitution, and the revisions to the overall structure of the constitutional government institutions have produced numerous as yet unresolved problems.<sup>103</sup>

### *New Wine in Old Bottles*

Within the turbulence wrought by the rapid series of constitutional revisions, the Control Yuan, conscious of its increasingly precarious situation, has once again emphasised

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policy making in semi-presidential systems when the party of the president holds a minority in parliament).

<sup>100</sup> Jiunn-rong Yeh & Wen-Chen Chang, *A Decade of Changing Constitutionalism in Taiwan: Transitional and Transnational Perspectives*, in *CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY* 141–168, 146 (Albert H.Y. Chen ed., 2014).

<sup>101</sup> Judicial Yuan Interpretation No. 632, (2007). See *JUSTICES OF THE CONSTITUTIONAL COURT, JUDICIAL YUAN, ROC, INTERPRETATIONS*, [http://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=632](http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=632).

<sup>102</sup> Yeh and Chang, *supra* note 100 at 147–148.

<sup>103</sup> Jean-Pierre Cabestan, *A New Constitutional Balance and the Prospect for Constitutional Change in Taiwan*, in *PRESIDENTIAL POLITICS IN TAIWAN: THE ADMINISTRATION OF CHEN SHUI-BIAN* 29–47 (Steven M. Goldstein & Julian Chang eds., 2008).



specific aspects of its constitutional remit found in the 1947 ROC Constitution to carve out new niche within the changed constitutional landscape. Two areas of activity deserve special mention as as they represent for many the future of the Control Yuan and the key to its continued existence.

The first area of activity is the Control Yuan's service in implementing the so-called, Sunshine Acts, a series of legislative acts aimed at increasing transparency and accountability within government offices. All publically elected government officials are responsible for reporting to the Control Yuan all political donations, their own personal assets, as well as any potential conflicts of interests.<sup>104</sup> Thus, while its powers of consent, impeachment, and investigation have been severely curtailed and in some cases eliminated, the Control Yuan has maintained its status at the 'highest supervisory organ' by adapting its practice so as to contribute to the national government's new drive for greater public accountability and transparency.

The second area in which the Control Yuan has recently produced a visible role is in dealing with human rights complaints from the public.<sup>105</sup> The ROC government has already written several international human rights covenant into domestic law.<sup>106</sup> When considering the implementation of the covenants, the question arose over what government institution would handle human rights complaints and investigations.<sup>107</sup> Opinions varied with some arguing for naming the judiciary primary supervisory organ, while others advocated establishing a national human rights commission.<sup>108</sup> Throughout the debates, the Control

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<sup>104</sup> See generally, Li, *supra* note 64.

<sup>105</sup> *Id.* at 319–327.

<sup>106</sup> YEH, *supra* note 98 at 233–236.

<sup>107</sup> Mark L. Shope, *The Adoption and Function of International Instruments: Thoughts on Taiwan's Enactment of the Act to Implement the ICCPR and the ICESCR*, 22 INDIANA INT. COMP. LAW REV. 159–192.

<sup>108</sup> Fort Fu-te Liao, *Establishing a National Human Rights Commission in Taiwan: The Role of NGOs and the Challenges Ahead*, 2 ASIA-PAC. J. HUM. RIGHTS LAW 90–109 (2001).

Yuan fought hard to demonstrate why the existing government structure was sufficient, and thereby precluded the need for establishing a new commission. In the end, by emphasising its citizen's petition system and its constitutional function of supervising and investigating government action, the Control Yuan successfully re-branded itself as the principle investigator of human rights abuses in Taiwan and publicly demonstrated the continuing need for its existence.<sup>109</sup>

Though the Control Yuan still possesses little power to act on any of its findings in either of these two new areas of activity, the very fact that it was able to successfully adapt and even fight off competition, thereby visibly retaining relevance demonstrates a continuing line of flexibility reminiscent to its activities under martial law. It also alludes to the fact that despite calls for its abolishment, the Control Yuan could very well continue to endure by exploiting the levels of flexibility within the 1947 ROC Constitution as well as the constitutional culture of Taiwan.

## VI. WHITHER CONTROL?

The degeneration of specific institutions within a constitution is one sure sign that this constitution has outlived its utility, yet ideological and political reasons can cause such constitutions and their institutions to endure.<sup>110</sup> A close examination of the Control Yuan demonstrates this paradoxical nature of constitutionalism in Taiwan and its relationship to the enduring 1947 ROC Constitution. On the one hand, the ideological entrenchment of the constitution required the maintenance of the five-power system during the move to Taiwan and through martial law, and, due to fears over antagonising China, this entrenchment persisted through democratisation and on to the present.<sup>111</sup> Although some institutions, such as the National Assembly, were abolished, this did not necessarily affect the core structure of

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<sup>109</sup> Wen-Chen Chang, *Xin shiji Taiwan xiangai de zhidu xuanze: lun Jiancha yuan Kaoshi yuan yu Guomin dahui de cunfei*, *YUE DAN FA XUE* 209–225 (2004).

<sup>110</sup> ELKINS, GINSBURG, AND MELTON, *supra* note 2 at 171–174.

<sup>111</sup> *Id.* at 173–174.

the five-power system. On the other hand, this protracted endurance and the changes occurring throughout the constitution's history required the Control Yuan to continually alter its use of available powers within this constitutional remit in order to survive. It is clear that ideological factors could not be the sole factors contributing to the persistence of the 1947 ROC Constitution. The ability of individual institutions, like the Control Yuan, to realign and negotiating their ever changing position also allows them to form bridges between the framework of the written constitution and the needs of the constitutional government in Taiwan. The above mentioned examples demonstrating the flexibility of the Control Yuan to adjust and adapt to the changing constitutional landscape whilst staying within the constraints of the written constitution allude to the possibility that, despite calls for its abolishment, the Control Yuan will likely endure. Indeed, in many ways, its fate seems inextricably linked to the endurance of the 1947 ROC Constitution and the ideal of a Five-Power constitutional system.