

## Final sovereignty transfer needed

Written by HoonTing 胡煌

Saturday, 15 December 2018 05:26

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Taiwan is a successful example of transformation from authoritarian rule to democracy, but the nation still lacks the foundation for implementing true rule of law. Due to the confusion resulting from the Republic of China's (ROC) Constitution, the consolidation of Taiwanese democracy has encountered problems that are hard to solve, and the nation is constantly bullied by China without being able to fight back.

In terms of its content, the Constitution was originally intended for China, which makes it inappropriate for Taiwan. Rendered ineffective for decades by the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (動員戡亂時期臨時條款), which served the needs of the military government, the Constitution was — absurdly — only restored after Taiwan's democratization.

The restoration was quickly followed by numerous piecemeal amendments aimed at making the Constitution conform to local needs, but the amendments only created an awkward situation that blurs authority and responsibility.

For example, the president is in charge of national security and foreign affairs, but does not need to answer to the legislature. The president can also call meetings between the heads of the Legislative Yuan, Executive Yuan and Judicial Yuan to resolve disputes between the branches of government.

Bypassing the separation of powers in this manner hampers the consolidation of Taiwan's democracy.

In terms of legitimacy, the Constitution was enacted by the citizens of China in 1946 and took effect the following year. It was originally a Chinese constitution.

Before the San Francisco Peace Treaty was signed, Taiwan was still the territory of an enemy state waiting for reconstruction, while its status remained undecided and its people continued to be Japanese citizens, so how did they enact a Chinese constitution?

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If Taiwanese could not enact a Chinese constitution, how could they be ruled by such a constitution?

In 1949, the constitution was replaced in China by a new provisional constitution, namely the Common Program of the Chinese People's Political Consultative Conference. The People's Republic of China's current constitution is the fourth version since 1954 and this version has already been amended five times.

Theoretically speaking, the ROC Constitution was already abolished by its constituents — the Chinese public — in 1949. Absurdly, this historical document with no binding power, which in theory has no legitimacy when it comes to governing and administering Taiwan, is still used to guide the everyday operations of the government. How absurd is that?

There is an immense discrepancy between the theory and the reality of Taiwanese democracy. Finding a theoretical foundation for reality is a political issue with extremely profound implications.

After the Pacific War ended, Taiwan, South Korea and other Japanese colonial possessions were placed under military occupation by the Allied powers, which appointed generalissimo Chiang Kai-shek (蔣介石) to occupy Taiwan in their name, establish a military government, and embark on economic rehabilitation and political reconstruction. Meanwhile, Taiwanese were waiting for a peace treaty that would determine their future.

According to the Potsdam Agreement, signed on Aug. 2, 1945, the rationale behind the Allied powers' military occupation of Germany was to transform the Axis powers' militarist administrations into modern democratic and free societies valuing human rights. This was also the principle for occupying and establishing military governments in the former Japanese Empire.

A military government is only a type of administrative government and does not affect the sovereignty of the occupied territory. However, occupying authorities have the power to shelve questions of sovereignty and administer the territory as a legitimate sovereign power would do.

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Upon the completion of reconstruction, occupying authorities should hand over sovereignty to a local democratic and legitimate government.

The handover process must take into account changes in both internal and external conditions, and also involve a staged transformation of the nature of the government from an initially strict military government, where a governor-general has autocratic powers, to an interim government and then a transitional government that gradually hands over power.

Eventually, a new constitution should be selected in a referendum and general elections should be held to form a legitimate local government, to which sovereignty is then transferred.

This reconstruction model was not only followed by Japan, South Korea and Germany after the war, it was also observed in the reconstruction of Afghanistan and Iraq after the wars there this century.

However, in Taiwan, there is also a “Chinese” constitution element thrown into the mix, which narrows academics’ focus to the Chinese Civil War and blurs the trajectory of political reconstruction.

The occupying authorities needed a basic guideline to direct political reconstruction, but Taiwan did not have one. Instead, a Chinese constitution was used, which, in addition to already having been abolished, was also irrelevant to Taiwan.

From a functionalist perspective, this historical constitutional document, which had been abolished and rendered ineffective by the Chinese, met the needs of the dictatorial power of the governor-general in the initial phase of military governance.

Appropriating a historical document does not affect sovereignty, nor does it override the authority granted by the Allied powers.

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It is only by treating the ROC Constitution as an “organic law for the occupied territories” from the perspectives of post-war political reconstruction and functionalism that this Constitution can be seen as legitimate.

Moreover, it is only because the Constitution is viewed as “the organic law of Taiwan” that the Taiwanese gradually can amend it in accordance with the needs of political reconstruction and remain in compliance with the demands of national sovereignty.

Taiwanese have come a long way to obtaining full self-governance, and organizing a democratic and legitimate government: from the first general local government elections in 1950, the first by-elections for the National Assembly and the Legislative Yuan in late 1969, and the launch of self-governance in the 1980s after the severing of diplomatic ties with the US, to the constitutional revisions and general elections of the 1990s, and the culmination of Taiwanese self-governance with the first direct presidential election in 1996.

However, the sovereignty transfer part of political reconstruction still lies in the distant future.

The original constitution and the Temporary Provisions could be viewed as “the Organic Law, Version 1.0,” and after the seven amendments passed in the 1990s, the current Constitution can be seen as a semi-democratic “Organic Law, Version 1.5.”

Nevertheless, the intrinsic authoritarian nature of the Constitution has impeded Taiwanese democracy, and its reference to “China” in the title makes it vulnerable to China’s unreasonable suppression using the “one China” excuse.

For that reason, Taiwan needs a brand new “Organic Law, Version 2.0” to consolidate democracy and counter foreign bullying. This will require the efforts of the Taiwanese and the support of the US, the “Principal Occupying Power.”

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