

ABROGATION OF A TREATY UNDER THE
CONSTITUTION OF THE REPUBLIC OF CHINA

The question raised is whether, under the Constitution of the Republic of China, the President can abrogate a treaty without involvement of the legislature or whether the legislature must consent to or otherwise play a role in the abrogation of a treaty.

The Constitution of the Republic of China [hereinafter "the Constitution"] was adopted by the National Assembly on December 25, 1946, promulgated by the National Government on January 1, 1947, and effective from December 25, 1947.

Article 38 of the Constitution provides:

Article 38. The President shall, in accordance with the provisions of this Constitution, exercise the powers of concluding treaties, declaring war, and making peace. 1/

In the Chinese text of this article, the phrase here translated as "concluding treaties" is "t'i chieh t'iao yüeh" []. While Article 38 thus is explicit about the President's powers in concluding treaties, it makes no mention of his role in the abrogation of treaties.

It will have been noted that Article 38 provides that the President is to exercise his powers of concluding treaties

1/ A Compilation of the Laws of the Republic of China, v. 1, Taipei, 1974, p. 10.

"in accordance with the provisions of this Constitution...." The provision most relevant in this regard is Article 63. The English translation of the Constitution published in A Compilation of the Laws of the Republic of China renders Article 63 as follows:

Article 63. The Legislative Yüan shall have the power to decide by resolution upon statutory or budgetary bills or bills concerning martial law, amnesty, declaration of war, conclusion of peace or treaties, and other important affairs of the State. 2/

This translation would lead one to believe that the Constitution explicitly provides for a role for the Legislative Yüan in the case of "bills concerning...conclusion of...treaties." Checking this translation against the Chinese text of the Constitution, ^{3/} however, reveals that the translation is faulty. A more acceptable rendering of the Chinese text into English appears in The Constitution of the Republic of China. In this source Article 63 is translated as follows:

Article 63. The Legislative Yüan shall have the power to decide upon any statutory or budgetary bill or any bill concerning martial law, general amnesty,

2/ Ibid., p. 16.

3/ The Chinese text of the Constitution of the Republic of China appears in Tsui hsin liu fa ch'üan shu [Most Recent Complete Book of the Six Codes], edited by T'ao Pai-ch'uan, Taipei, San min shu chü, 1977, p. 1-6.

declaration of war, conclusion of peace, treaties and other important affairs of the State. ^{4/}

In an even more literal translation of this article into English, we have rendered Article 63 as follows:

Article 63. The Legislative Yüan has the power to decide by resolution upon statutory bills, budgetary bills, martial law bills, general amnesty bills, bills declaring war, bills concluding peace, treaty bills and [bills concerning] other important affairs of the State.

According to the last of the above three translations, which is the most faithful to the original Chinese text, the Legislative Yüan has the power of deciding by resolution upon "treaty bills" [t'iao yüeh an]. Contrary to the impression given by the first of the three translations, Article 63 does not limit the Legislative Yüan's power to the "conclusion of...treaties." While, on the one hand, it does not limit the Legislative Yüan's power to the conclusion of treaties, it does not, on the other hand, explicitly provide for a role for the Legislative Yüan in the abrogation of treaties. Indeed, nowhere in the Constitution is the abrogation of treaties explicitly mentioned.

It is problematic whether the Legislative Yüan's constitutional power "to decide by resolution upon...treaty bills" encompasses

^{4/} The Constitution of the Republic of China, Taipei, China
Culture Publishing Foundation, 1954, p. 17.

both the conclusion and the abrogation of treaties. Our examination of sources available in the collection of the Library of Congress has yielded no interpretation of the Judicial Yüan resolving this question, and the international law and constitutional law texts that we have consulted were silent on the matter.^{5/}

One can argue that the power given the Legislative Yüan by Article 63 includes the power to decide by resolution upon both the conclusion and the abrogation of treaties. To support this position one could argue that the drafters of the Constitution would have used the term "t'i yueh an" [] [bills concluding treaties] or the term "t'i chieh t'iao yueh an" [] [bills concluding treaties] if they had intended to limit the Legislative Yüan's role to bills involving the conclusion of treaties. The fact that the drafters instead employed only the general term "t'iao yueh an" should be construed, it can be argued, as indicating that the drafters intended that the Legislative Yüan decide by resolution upon any bill involving either the conclusion or the abrogation of a treaty. One can find support for this argument in the following 1931 Order of the Judicial Yüan:

^{5/} The texts that we consulted included Lin Chi-tung's Chung hua min kuo hsien fa chu t'iao shih i [Article-by-Article Explanation of the Constitution of the Republic of China], Taipei, San min shu chü, 1973.

In principle, if there is a conflict between the law and a treaty, the effect of the treaty shall be superior to the law. If the ratification date of a treaty is later than or the same as that of the promulgation date of a law, then there is no question [of which is superior]. If the ratification date of a treaty is earlier than the promulgation date of the law, then the points of conflict must be reported immediately so that an examination will be made. 6/

According to this Order, treaties take precedence over legislative statutes. Some would consider treaties to be a superior form of legislation. It can be argued that both the conclusion and the abrogation of a treaty are important changes in a superior form of legislation. Since, according to Article 62 of the Constitution, the Legislative Yüan "shall exercise legislative power on behalf of the people," it can be argued that Article 63's grant of power to the Legislative Yüan "to decide by resolution upon...treaties" logically includes the power to decide upon both the conclusion and the abrogation of treaties.

6/ Order of the Judicial Yüan to the Ministry of Judicial Administration, "Hsün" No. 459 of July 27, 1931; the Chinese text of this Order appears in Chung hua min kuo liu fa p'an chieh li yu hui pien [Compilation of Decisions, Interpretations and Explanations Regarding the Six Codes of the Republic of China], edited by Fu Ping-ch'ang and Chou Ting-yü, v. 1 (Constitution), Taipei, Hsin lu shu chü, 1964, p. 10.

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