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民主台灣的國家形成和鞏固：

以國際法及憲法的連動發展為視角

The Formation and Consolidation of the Democratic State of
Taiwan: Interrelations of International Law and Constitution

徐滢珊

Stephanie Y.S. Hsu

指導教授:張文貞 博士

Advisor: Wen-Chen Chang, JSD.

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發展為視角

The Formation and Consolidation of the Democratic
State of Taiwan: Interrelations of International Law and
Constitution

本論文係徐溼珊君（學號 R07A41033）在國立臺灣大學國際
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指導教授：張文貞

口試委員：葉俊榮

姜皇池

黃居正

張文貞

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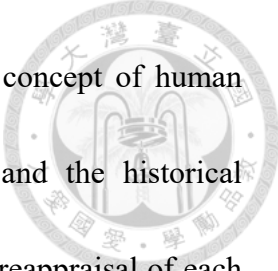
This work is dedicated to those who have devoted their life or lives to the democracy and freedom of this island.

Abstract



Since 1949, Taiwan was either be designated as a province of China or be confused with the Republic of China, and its current constitution name “Republic of China” (ROC) Constitution, has led to confusion about Taiwan’s legal status and its relations with China. The confusing identity of Taiwan is due to complex historical factors, international power plays and political calculus. For a long time, the legal status of Taiwan has been considered as a legal limbo, due to the traditional, separatist understanding of international laws and constitutions. Under that understanding, a declaration of invalidity in international law does not necessarily bear legal consequences in the domestic national system. On the other hand, legal status of a territorial unit is not solely determined by the municipal law of that state.

This thesis argues that the legal status of Taiwan cannot be well explained by closely looking into the interfaces between international law and constitution. As a matter of fact, international laws and constitutions have much more complex interfaces than one would have expected. An independent sovereign state cannot obtain its full sovereignty until its constitutional independence is attained. The concept of self-determination in international law is also closely associated with the concept of popular sovereignty in constitutional law; the central tenet of both is that the legitimacy



of law is based on the consent of the governed. Centering on the concept of human subjectivity, this Thesis looks back into the history of Taiwan and the historical background that put Taiwan at today's dilemma, providing a critical reappraisal of each relevant party's positions, and exploring the legal status of Taiwan from an interactive perspective of international law and constitution. By examining the interfaces of international laws and constitutions, this Paper has found that the legal status of Taiwan as an independent sovereign state has already been attained in the eyes of both international law and constitutional law, and suggests that the confusing identity of Taiwan should be rectified to consolidate this status.


Key words: *Taiwan, legal status of Taiwan, constitution of Taiwan, self-determination, one China policy, Taiwan China Relations, US Taiwan relations.*

摘要



1949 年以來，台灣不是被界定為中國的一個省，就是被拿來和中華民國混為一談。「台灣」，這個國際社會對這個島嶼公認的稱呼，至今無法作為台灣的官方名稱出現在國內外各種場合。1950-60 年代，全世界殖民地自決權運動風起雲湧之際，流亡到台灣的蔣氏政權宣稱中華民國流亡政府仍是全中國的合法政府，這個宣稱受到了冷戰時期大國對聯合國政治操控的助紂為虐，而被犧牲掉的是台灣人的自決權和主體意識。在 1990 年代的台灣民主化運動中，台灣人仍然無法擺脫統獨問題的桎梏，學界和政界在內國法層面確立了「中華民國在台灣」的理論基礎，導致「中華民國」在國際法上不被承認，卻在內國法上繼續存在的荒謬現象。台灣民主改革之後的 30 多年裏，在國內政治上，圍繞統獨問題不斷內耗，導致發展的停滯；在對外關係上，因為受制於「一個中國」原則而寸步難行。事實證明，「中華民國在台灣」的理論無法經受起時間和實踐的檢驗。

「中華民國在台灣」之所以無法被國際社會所接受，究其原因，是因為學術界一直把國際法和內國憲法分開討論和研究，而沒有意識到這兩者之間的連動關係。本文回顧台灣歷史，探究導致台灣今天法律地位困境的歷史原因，將國際法的國家理論和實踐涵攝到中華民國和台灣的國家地位認定。本文首先論證中華民國和台灣在國際法上是兩個不同的主體，進一步將國際上自決權運動和台灣民主



轉型與憲法的發展演變相結合，以實質憲法理論的主權在民內涵，說明台灣在憲政改革過程中如何有效的行使了自決權。本文主張，在中華民國憲法框架下的內國憲法詮釋上，必須將國際法上的自決權和內國法上的人民主權相結合，才能合理的解釋台灣的法律地位。

關鍵字：台灣國際地位，自決權，一個中國，中華民國憲法，人民主權

List of Abbreviations



AID	Agency for International Development
AIT	American Institute in Taiwan
ASPI	Asia Society Policy Institute
BRI	Belt and Road Initiative
CAC	Country and Area Committees
CCP	Chinese Communist Party
CSC	Central Standing Committee
DMZ	Demilitarized Zone
DPP	Democratic Progressive Party
DPRK	Democratic People's Republic of Korea
DSB	Dispute Settlement Body
ECA	Economic Cooperation Administration
FGR	Federal Republic of Germany
GDP	Gross Domestic Product
GDR	German Democratic Republic
HHS	Health and Human Services

IAAF	International Amateur Athletic Federation
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILC	International Law Commission
KMT	Kuo Ming Tang/Chinese Nationalist Party
NSC	National Security Council
NZ	New Zealand
OGG	Office of Governor General
PCIJ	Permanent Court of International Justice
PRC	People's Republic of China
ROC	Republic of China
ROK	Republic of Korea
SFRY	Socialist Federal Republic of Yugoslavia
SOPA	Society of Publishers in Asia
TCA	Taiwan Cultural Association
TRA	Taiwan Relations Act
UK	United Kingdom



UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration Mission in Kosovo
UNTCOK	United Nations Temporary Commission on Korea
US	United States
USSR	Union of Soviet Socialist Republics
VACRS	Vocational Assistance Committee for Retired Servicemen
VCLT	Vienna Convention on the Law of the Treaties of 1969
VOC	Dutch East India Company
WHO	World Health Organization
WTO	World Trade Organization



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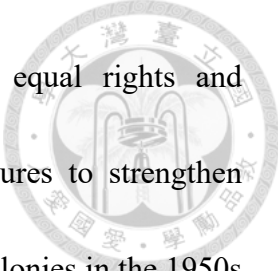
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Chapter I: Introduction



Since the KMT (Kuomintang or Chinese Nationalist Party) was defeated by CCP (Chinese Communist Party) in the Chinese civil war and took exile in Taiwan in 1949, the international identity of Taiwan has been confused with the Republic of China (ROC), leading to severe confusion about Taiwan's legal status and its relationship with China. The Taiwanese people are not able to control the narrative of their island up until today, despite that Taiwan has become a self-governing territory since its democratic reforms in the 1990s. The hands and feet of the Taiwanese people were tied by the Republic of China Constitution, which was enacted in Mainland China in the late 1940s and brought to Taiwan along with the ROC government. Since then, the articles in the constitution bestowing human rights had been frozen and the martial law declared by the incoming dictators had overshadowed the island for around four decades. Nevertheless, the ROC constitution had been nominally used to impose Chinese identity on the Taiwanese people, depriving them of equal representatives in the national government, under the regime's fictional claim that both Mainland China and Taiwan were governed by the ROC constitution.

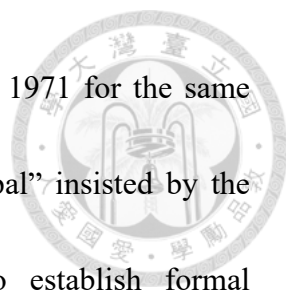
Since the establishment of the United Nations in 1945, it aims "to develop friendly



relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”¹ Thanks to the liberation struggles of the former colonies in the 1950s and 1960s, in addition to the adoption of various resolutions by the General Assembly that provided guidelines of international practice, self-determination- a people’s right to democratic self-governance has developed from a fundamental principle to jus cogens. Nevertheless, the fiction of ROC representing whole China in the UN was inflated by big powers in the cold war structure as a tool to contain the Communist China, which had been shut out of the world’s most significant organization for over two decades until the restoration of its Chinese seat by the UN GA Resolution 2758 in 1971.

The UN manipulation during the cold war period is disastrous for the national identity building of the Taiwanese people, who have been indulging in the legitimacy of “ROC on Taiwan” since then. As a result, the constitutional reforms in the 1990s failed to clarify the sovereignty and identity of Taiwan, so that the political energy of Taiwan has been largely consumed by the debate about independence or reunification with China since then, with Taiwan’s democratic institutions incapable of meeting the expectations of its voters. Furthermore, on the international arena, Taiwan has been shut out of

¹ UN Charter, art.1 (2).

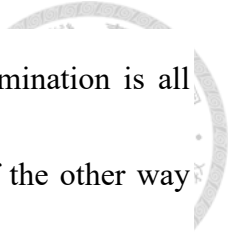


almost all the international organizations requiring statehood since 1971 for the same reason of UN GA. Resolution 2758. With the “One China Principal” insisted by the international community thereafter, Taiwan becomes unable to establish formal diplomatic relations with any major international players, aggravating the identity crisis of the Taiwanese people.

Given that as long as facts are not in themselves contrary to law, law must be based on facts, it is imperative to figure out the relationship between the Republic of China and Taiwan; see if Taiwan has attained statehood and what has prevented it from becoming a full functional member of the international community. Furthermore, considering that the constitution in use in Taiwan today is practiced in the name of Republic of China, to explore the statehood of Taiwan, it is necessary to examine the constitutional independence of Taiwan, since sovereignty, as “supreme power within a particular territorial unit”,² cannot be materialized until the territory’s legal system could determine with finality all the rules without any outside interference.

To get clear on this issue, the remainder of this paper proceeds as follows. Chapter II put out the important concepts about statehood that would be invoked to discuss the specific

² J. Crawford, *the Criteria for Statehood in International Law*, 48 (1) BRITISH Y. INTL’L 95, 96 (1976).



legal issues of Taiwan in the following chapters. Given that self-determination is all about a people to decide the fate of the territory they inhabit instead of the other way round, and the substrate of a state is people and territory, Chapter III looks back on the history of Taiwan over the last four hundred years, explaining how the fate of the Taiwanese people were dictated by the incoming colonial regimes one after another until they have finally been able to decide their own fate. Chapter IV looks into the historical background that put Taiwan's legal status in dispute, rebutting and reappraising of each relevant party's positions from the perspective of international law. It then probes the statehood evolvement of Taiwan by exploring the interactive development of international laws and constitution, clarifying the relationship between Taiwan and the Republic of China. Chapter V dwells on the constitutional development of Taiwan with reference to the constitutional independence of the previous dominions of the UK, which provides an good example of how new independent legal systems can be created out of old legal systems even when the relevant constitutional rules are followed to the letter, and constitutional continuity can be maintained while achieving constitutional independence. Chapter VI discusses the relationships between Taiwan and its two most significant influencers- the US and China, and how the perspectives of the legal status of Taiwan could be influenced by them from the perspective of both international law and constitutional law. Chapter VII concludes.

Chapter II: Important concepts about statehood



1. Sovereignty

As the cornerstone of modern international law, the 1648 Peace of Westphalia marked the first step in defining state sovereignty, introducing a state's right of non-intervention by outside powers and sovereignty in matters of local policymaking.³ The concept of non-intervention was further developed by the Permanent Court of International Justice (PCIJ)⁴ and later the International Court of Justice (ICJ) as a right “involves the right of every sovereign State to conduct its affairs without outside interference”;⁵ the right of entering into international engagements;⁶ a state's title to exercise jurisdiction rests in its sovereignty.⁷ Nevertheless, it is observed that a self-imposed restriction on a state's sovereignty would not amount to a diminution but rather an expression of sovereignty.⁸

³ Daniel Philpott, *Sovereignty - Stanford Encyclopedia of Philosophy*, First published on May 31, 2003; substantive revision on Jun 22, 2020, available at <https://plato.stanford.edu/entries/sovereignty/#DefiSove> (Last visited May.2, 2022)

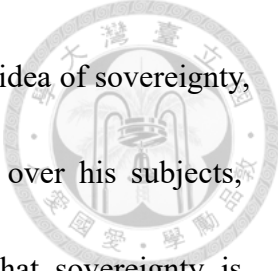
⁴ The PCIJ in Lotus said that “the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State”: PCIJ, (1927) Series A, No. 10, at 18, available at https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf (Last visited May.2, 2022)

⁵ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14., at 106, para 202, available at <https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> (Last visited May.2, 2022)

⁶ Case of the S.S. “Wimbledon”, PCIJ Judgment of 17 August 1923 (Series A, No. 1), p3, available at https://legal.un.org/PCIJsummaries/documents/english/5_e.pdf (Last visited May.2, 2022)

⁷ Case of Lotus, see *supra* note 4.

⁸ See John H. Jackson, *Global Economics and International Economic Law*, 1(1) JOURNAL OF INTERNATIONAL ECONOMIC LAW 1, 15-8 (1998)



The work of Jean Bodin is one of the earliest sources for the modern idea of sovereignty, which defined the sovereign as a supreme, absolute power over his subjects, which is only limited by divine and natural law.⁹ Bodin holds that sovereignty is indivisible – it must necessarily reside in one person or group of persons.¹⁰ For Hans Kelsen, a State's sovereignty under international law is its legal independence from other States.¹¹ A state is “sovereign” since it is only subjected to international law, instead of the national law of any other state.¹²

Stephen Krasner offers four frameworks for defining sovereignty in the modern world,¹³ in which the concept of sovereignty is classified into four categories- international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty.¹⁴ International legal sovereignty denotes the mutual recognition that states having formal juridical independence from one another within the international community.¹⁵ Second, when a state comes to control the movements across its borders, it is identified as “Interdependence Sovereignty”.¹⁶ Third, “Domestic sovereignty” is

⁹ See Jean Bodin, *Six Books of the Commonwealth* (1967), abridged and translated by M. J. Tooley, available at https://www.yorku.ca/comminel/courses/3020pdf/six_books.pdf (Last visited May 2, 2022)

¹⁰ See Jean Bodin, *Internet Encyclopedia of Philosophy*, available at <https://iep.utm.edu/jean-bodin/> (Last visited May 2, 2022)

¹¹ See Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*. 53 *YALE L. J.* 207-20 (1944).

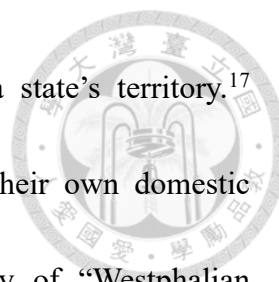
¹² *Id.*

¹³ See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 3 (1999).

¹⁴ *Id.*

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 13.



the effectiveness of governmental authority and control within a state's territory.¹⁷

Fourth, where states have the right to independently determine their own domestic authority without external interference; it falls into the category of “Westphalian sovereignty.”¹⁸ In effect, different rules apply to different manifestations of sovereignty.

Krasner provides four situations where sovereignty would be overridden by outside intervention: (1) religious toleration; (2) minority rights; (3) human rights; and (4) international stability.¹⁹

Since sovereignty is the right to self-government, a people under the rule of another is not qualified a State.²⁰ The internal sovereignty of a state is manifested within the state borders, in the fullness of legislative, executive and judiciary powers, which is closely associated with the constitutional concept of popular sovereignty. A number of national legal systems attribute sovereignty not to the state but to the people of the state.²¹ For instance, Article 20(2) of the German Basic Law is considered to be the expression of popular sovereignty, which requires that all exercise of state power shall be traced back

¹⁷ *Id.*

¹⁸ *Id.* at 20-21.

¹⁹ *Id.* at 46.

²⁰ Cited in Crawford, *infra* note 30, at 66 referencing to E.DE VATTEL, LE DROIT DES GENS: OU PRINCIPES DE LA LOI NATURELLE, APPLIQUE'S A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS 5-11 (1916).

²¹ *Eg.*, Portuguese Constitution (art. 3), that of Thailand (sec. 3), of Russia (art.3), Greece (art.1(2)), Brazil (art. 1) and of Germany (art. 20(2)).

to the will of the people.²²



As a political term, however, the connotations of sovereignty are those of untrammelled authority and power, in such discourse, the term can be quite problematic and disputable.

Thus, the discussions of this work will focus on the legal concept of sovereignty.

1.1 Territorial sovereignty

“In international law, the sovereignty expresses itself both as the exercise of the real right over the territory and as the manifestation of the exclusive power of government on the territorial community”.²³ Territorial sovereignty is not the ownership of but the governing power with respect to territory, involving the exclusive right to display the activities of a territory.²⁴ In practice, a government exercises its powers on a space constituting the sphere of territorial validity of the territorial jurisdiction.²⁵ For example, in mandated or trusteeship territories, the administering authority possesses the right to

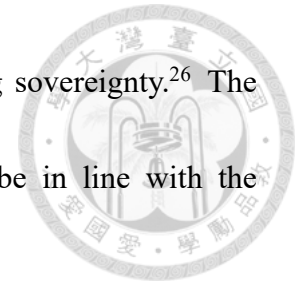
²² German Basic Law art.2 (2) states that: “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies”, available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0111 (Last visited May 2, 2022)

²³ GIOVANNI DISTEFANO, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW: A SKETCH OF THE INTERNATIONAL LEGAL ORDER 137(2019).

²⁴ Distefano, Giovanni, Theories on Territorial Sovereignty: A Reappraisal (May 7, 2009). Journal of Sharia and Law, Vol. 41, pp. 25-47, January 2010, at 34 with reference to Court of Cassation, Sezione Lavoro, 6 June 1978, n. 2824. Available at SSRN: <https://ssrn.com/abstract=1688967> (Last visited May.2, 2022)

²⁵ *Id.* at 33 with reference to R. Quadri, *Le navi private nel diritto internazionale* (1939).

exercise the powers of sovereignty over a territory without having sovereignty.²⁶ The right the mandatory held over the mandated territory seems to be in line with the concept of territorial sovereignty.



A cognate principle of territorial sovereignty is the doctrine of *uti possidetis*, which means “you shall possess as you possess”. It aims at establishing new boundaries for the newly independent States. The stability of existing boundary lines is considered as a consequence of the principle of *uti possidetis*. Other states are compelled to respect these established boundaries, which are prohibited from resorting to force to alter them.²⁷

Uti possidetis Juris does not apply after a new State is formed, but during the process of its creation to establish the border. Once a new state is created, it will be protected by principle of territorial integrity.²⁸ Violation of these boundaries will *prima facie* fall

²⁶ See James C. Hales, *Some Legal Aspects of the Mandate System: Sovereignty: Nationality: Termination and Transfer*, 23 *TRANSACTIONS OF THE GROTIUS SOCIETY* 85, 94 (1937).

²⁷ In the SC Res. 947 of 30 September 1994, the UN Security Council called for the Serb forces in Bosnia to abstain from violating the frontier with Croatia. Available at <http://unscr.com/en/resolutions/doc/947> (Last visited May 2, 2022); See also the statements issued by the President of the UN Security Council on 13, 18 and 26 November 1994 (UN Doc. S/PRST/1994/66, UN Doc. S/PRST/1994/69 and UN Doc. S/PRST/1994/71), together with SC Res. 959 of 19 November 1994 by the UN Security Council, in which the Security Council demanded that all parties to the conflict “and in particular the so-called Krajina Serb forces” respect the border between Croatia and Bosnia-Herzegovina, available at https://peacekeeping.un.org/en/mission/past/unprof_b.htm (Last visited May 2, 2022)

²⁸ M. N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 *BRITISH Y. INT’L L* 93, 124-5 (1996), available at <https://academic.oup.com/bybil/article/67/1/75/281947> (Last visited May 2, 2022); see also, by the same author, *Peoples, Territorialism and Boundaries*, 8 *EUR. J. INT’L L* 478 (1997), available at <http://www.ejil.org/pdfs/8/3/1457.pdf> (Last visited May 2, 2022)

within the definition of aggression²⁹



1.2 Independence

Another feature that characterizes the nature of sovereignty is an entity's independence in international relations. While "sovereignty" is the legal incident of the statehood, the term "independence" is used to denote the prerequisite for statehood.³⁰ Judge Huber stated in the Island of Palmas arbitration that: "Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."³¹

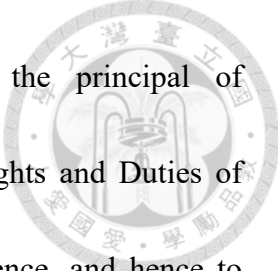
Crawford argues that the cases of the previous French mandate of Syrian and Lebanese "demonstrate well the requirement of independence as a criterion for statehood. Substantial local control exercised by a government with popular support was, properly, regarded as sufficient to override continuing French claims."³²

²⁹ See General Assembly Resolution 3314 (XXIX) on the Definition of Aggression, available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement> (Last visited May 2, 2022); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (2nd ed., 1994); ANTONIO CASSESE, VIOLENCE AND LAW IN THE MODERN AGE (1988); LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Damrosch and Scheffer eds., 1991); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).

³⁰ JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 89 (2d ed.2007).

³¹ Island of Palmas case (Netherlands, USA), April 4, 1928, p. 838, available at https://legal.un.org/riaa/cases/vol_II/829-871.pdf (Last visited May 2, 2022)

³² Crawford, *supra* note 30, at 85.



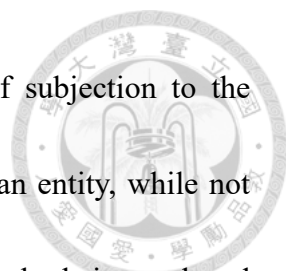
Independence is also a corollary result of sovereignty and the principal of non-intervention. The Article 1 of the Draft Declaration of the Rights and Duties of States in 1949 stated that: “Every State has the right to independence, and hence to exercise freely and without dictation by any other State, all its legal powers, including the choice of its own form of government.”³³ In addition, according to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States made on October 24, 1970: “[e]ach State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by any whatsoever other state.”³⁴

To conclude, two main elements of independence are indicated here: the separate existence of an entity within reasonably coherent frontiers, and it’s not being subject to the authority of any other State or group of States, which is to say that it has over it “no other authority than that of international law”.³⁵ “Separate existence” in this sense is dependent ‘upon the exercise of substantial governmental authority with respect to some territory and people. Where this exists, the area concerned is potentially a

³³ Draft Declaration on Rights and Duties of States with commentaries 1949, *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/2_1_1949.pdf (Last visited May 2, 2022)

³⁴ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), Oct. 24, 1970, *available at* <https://www.refworld.org/docid/3dda1f104.html> (Last visited May 2, 2022). Herein after (Friendly Relations Declaration)

³⁵ Crawford, *supra* note 30, at 66.



‘State-area’.”³⁶ But as Judge Anzilotti made clear, the absence of subjection to the authority of another State or States is necessary.³⁷ “It may be that an entity, while not formally independent, operates in fact with substantial freedom in both internal and external affairs. This situation arises where the gradual grant of power from a metropolitan State to a former colony masks the emerging statehood of the latter.”³⁸

With regard to the external restrictions upon a State’s liberty, Judge Anzilotti pointed out that: “as long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.”³⁹ To prove lack of real independence, one must show “foreign control overbearing the decision-making of the entity concerned on a wide range of matters and doing so systematically and on a permanent basis.”⁴⁰

1.3 Popular Sovereignty

Not until Hugo Grotius’ *De Indis* did the concept of sovereignty transform from an absolute power resident in a sovereign to powers emanating from the people who have

³⁶ *Id.*

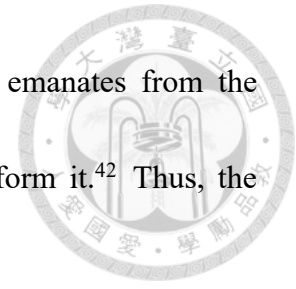
³⁷ Customs Regime between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5), para 81, available at http://www.worldcourts.com/pcij/eng/decisions/1931.09.05_customs.htm (Last visited May.2, 2022)

³⁸ Crawford, *supra* note 30, at 66.

³⁹ Customs Regime between Germany and Austria, *supra* note 37, para 84.

⁴⁰ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 76 (2ed 1973); CLYDE EAGLETON, *INTERNATIONAL GOVERNMENT* 82–3 (3rd ed. 1957)

concurrent to form a State.⁴¹ For Grotius, the sovereign's power emanates from the states, which is composed of the people who have concurred to form it.⁴² Thus, the sovereign power of a state derives from the people who constitute it.



Popular sovereignty is also described as sovereignty of the people. It refers to “the ultimate source of all authority exercised through the public institutions of the state originates in the people”⁴³, as articulated by its most influential theorists such as Locke, Montesquieu, Rousseau, Madison, and Sieyès. Accordingly, the legitimacy of a state is created by the consent of its people, who are the source of all political power, even though sovereignty may be exercised through an intermediary agent.⁴⁴ As a central feature of modern constitutionalism, popular sovereignty is closely associated with the social contract tradition and earlier the medieval legal doctrine of the *quod omnes tangit* [“What touches all ought to be decided by all”],⁴⁵ the central tenet of which is that the legitimacy of rule is based on the consent of the governed.

In state practice, the doctrine of popular sovereignty is especially influential in the

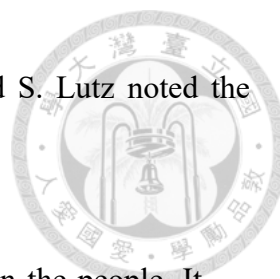
⁴¹ Published in 1864 as *de Jure Praedae*. See Robert Jennings, *Sovereignty and International Law*, in *STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE* 27, 29 (Gerard Kreijen et al ed.,2002)

⁴² *Id.*

⁴³ DANIEL LEE, *POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT* 1 (2016).

⁴⁴ See G.A. O'Donnell, *Delegative Democracy*, 5 *JOURNAL OF DEMOCRACY* 55-69 (1994).

⁴⁵ On the *Quod omnes tangit*, see the classic study of Gaines Post, *A Romano-Canonical Maxim, “quod omnes tangit,”* in Bracton, 4 *TRADITIO* 197–251 (1946).



American and French political traditions. Political scientist Donald S. Lutz noted the variety of American applications as follows:

To speak of popular sovereignty is to place ultimate authority in the people. It may be immediate in the sense that the people make the law themselves, or mediated through representatives who are subject to election and recall; it may be ultimate in the sense that the people have a negative or veto over legislation.

In each case, however, popular sovereignty assumes the existence of some form of popular consent, and it is for this reason that every definition of republican government implies a theory of consent.⁴⁶

Hence, American revolutionaries were generally committed to the principle that governments were legitimate only if they were formed with the consent of its people and their elected representatives, that is, the sovereignty of the people.⁴⁷

It has been argued that “while the Australian constitution does not explicitly claim to be

⁴⁶ DONALD S. LUTZ POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 38 (1980).

⁴⁷ Paul K. Conkin describes “the almost unanimous acceptance of popular sovereignty at the level of abstract principle”, in PAUL K. CONKIN, SELF-EVIDENT TRUTHS: BEING A DISCOURSE ON THE ORIGINS & DEVELOPMENT OF THE FIRST PRINCIPLES OF AMERICAN GOVERNMENT—POPULAR SOVEREIGNTY, NATURAL RIGHTS, AND BALANCE & SEPARATION OF POWERS 52 (1974); Edmund S. Morgan concludes that the American Revolution “confirmed and completed the subordination of government to the will of the people” in EDMUND S. MORGAN, THE PROBLEM OF POPULAR SOVEREIGNTY, ASPECTS OF AMERICAN LIBERTY: PHILOSOPHICAL, HISTORICAL AND POLITICAL 101 (1977); Willi Paul Adams asserts that statements of the “principle” of the people’s sovereignty “expressed the very heart of the consensus among the victors of 1776” in WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 137 (1980)

based upon popular sovereignty, it has a more justifiable claim to popular sovereignty than India, Germany or others that do make an explicit claim” to it⁴⁸, because the people are involved in the constitutional amendment procedure.



1.4 Sovereignty Equality

In international law, states are regarded as “equal”, a principle recognized by the Charter (Article 2(1)).⁴⁹ “The UN Charter ushered the international community of States from the rule of might to the rule of law in their relations with one another. Aided by the principle of self-determination, newly independent States did not have to show the economic or military might to establish them or defend themselves from the imperial ambitions of other states. The establishment and continuous existence of the State was based on law—a juridical approach to State sovereignty became the accepted rule.”⁵⁰

Sovereignty equality does not mean that all States are entitled to an equal voice or influence in the international relations or equal vote in the international organizations.

Yet it does mean that basically, States have equal status: “A dwarf is as much a man as a

⁴⁸ PETER C. OLIVER, THE CONSTITUTION OF INDEPENDENCE: THE DEVELOPMENT OF CONSTITUTIONAL THEORY IN AUSTRALIA, CANADA, AND NEW ZEALAND 160 (2005).

⁴⁹ U.N Charter art. 2(1) states that: “The Organization is based on the principle of the sovereign equality of all its Members.”

⁵⁰ ALEX ANSONG, THE CONCEPT OF SOVEREIGN EQUALITY OF STATES IN INTERNATIONAL LAW 20 (2012).

giant; a small republic is no less a sovereign state than the most powerful kingdom.”⁵¹

According to the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of United Nations, sovereign equality includes the following elements:

- (a) States are judicially equal;
- (b) Each State enjoys the rights inherent in full sovereignty;
- (c) Each State has the duty to respect the personality of other States;
- (d) The territorial integrity and political independence of the State are inviolable;
- (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.⁵²

The Declaration provides that:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.⁵³

⁵¹ E.DE VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE* (The law of Genoa, or principles of natural law) 47(1830).

⁵² Friendly Relations Declaration, *supra* note 34.

⁵³ *Id.*



State equality is therefore a logical result of State sovereignty. John H. Jackson argues that:

The concept of equality of nations is linked to sovereignty concepts because sovereignty has fostered the idea that there is no higher power than the nation-state, so its “sovereignty” negates the idea that there is higher power, internationally or foreign (unless consented to by the nation states).⁵⁴

2. Statehood

The best known formulation of the basic criteria for statehood is stipulated by the Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.”⁵⁵ It also has to be noted that these criteria have to be “based on the principle of effectiveness among territorial units.”⁵⁶

⁵⁴ Jackson, *supra* note 8, at 18.

⁵⁵ Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19. Available at <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml> (Last visited May.2, 2022)

⁵⁶ Crawford, *supra* note 30, at 46.

The population of a State is a group of people inhabiting permanently on a particular territory. Since many peoples are spread throughout different States⁵⁷, it does not necessarily have to be culturally, socially or ethnically homogeneous.⁵⁸ Although evidence is in support of the view that when sovereignty has changed, the nationality of the population follows,⁵⁹ the possession of a nationality is not conclusive for statehood, one example is that “A” Mandates, which were not States, had nationality.⁶⁰

As to a defined territory, the geographic area may be continuous or not,⁶¹ large or tiny,⁶² and is not required to be have completely defined without territorial disputes.⁶³ “Territorial dispute with a new State is not enough to bring statehood into question.”⁶⁴

Furthermore, to be a State, an entity must possess a government in control of its

⁵⁷ Such as the Anglo-Saxons, who inhabit on the Europe, America, Australia and Canada.

⁵⁸ The population on a particular territory formed as a people enjoys the right of self-determination under international law. For how the right of self-determination affect statehood, see DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 171 (2002).

⁵⁹ Ian Brownlie, *The relations of nationality in public international law*, 39 BRIT.Y.INT’L L.284, 320 (1963).

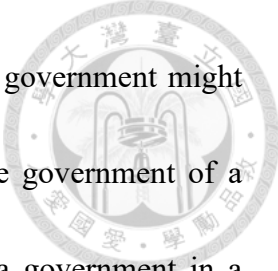
⁶⁰ Crawford, *supra* note 30, at 43.

⁶¹ *E.g.*, Alaska and Hawaii are both parts of the territory of the US, even though they are separated from the main territories of the country.

⁶² Russia and Mauritius are equally States regardless of their difference in geographical area and, the geographical areas of Tuvalu (seven square kilometres) and Nauru (twenty one square kilometres) do not affect their statehood. Cited in de la Cuba, *infra* note 188, at 124.

⁶³ As the ICJ has confirmed, “there is (...) no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not”. See North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands), Judgment of 20 February 1969. ICJ Reports 1969, p. 32, para. 46. *available at* <https://www.icj-cij.org/public/files/case-related/52/052-19690220-JUD-01-00-EN.pdf> (Last visited May.2, 2022)

⁶⁴ Crawford, *supra* note 30, at 52.



territory.⁶⁵ “The requirement that a putative State have an effective government might be regarded as central to its claim to statehood.”⁶⁶ Since “only the government of a State can bind that State, for example by treaty, the existence of a government in a territory is thus a precondition for the normal conduct of international relations.”⁶⁷

The capacity to “enter into relations with other States is a conflation of the requirements of government and independence”,⁶⁸ which is considered as a consequence of statehood, not a criterion for it, since it depends on the situation of particular states.⁶⁹ It has been argued that it should rather be considered as part of the definition of government, the emphasis of which must be put on the term “capacity” instead of the actual establishment of such relations.⁷⁰

A government would lack effectiveness when its exercise of power is not complete over a majority of the population and territory of the State. In this sense, the exercise of territorial jurisdiction makes it suitable as a condition for the attribution of the full

⁶⁵ *Id.* at 59.

⁶⁶ *Id.* at 55.

⁶⁷ *Id.* at 60.

⁶⁸ *Id.* at 62.

⁶⁹ *Id.* at 61.

⁷⁰ As Raic explains, “(i)t does not seem to be correct to state that a territorial and political entity must have relations with existing States in order to qualify as a State, because the existence or lack of such relations is largely dependent on the will of the existing States to enter into relations with the entity in question. The emphasis must, therefore, be put on the term ‘capacity.’” Raic, *supra* note 58, at 73.



international legal personality that States could enjoy.⁷¹

However, state practice⁷² indicates that statehood will be denied and recognition withheld if a political entity is created in violation of self-determination.⁷³ In other words, the obligation of respecting “for the right of self-determination has entered the law of statehood and may now be seen as a constitutive condition for statehood.”⁷⁴ This new development has been supported by the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union issued by the European Community in 1991.⁷⁵

Furthermore, the International Law Commission (ILC) has consistently acknowledged that there is an obligation for other states not to recognize as lawful a situation created in violation of peremptory international law.⁷⁶ “There is a consistent practice of

⁷¹ Crawford, *supra* note 30, at 58.

⁷² As in the cases of Southern Rhodesia, Katanga and Abkhazia. Cited in Dugard & Raic, *infra* note 73, at 109

⁷³ J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 105–106 (1979); J. DUGARD, RECOGNITION AND THE UNITED NATIONS 97–98 (1987); J. E. S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y. INT’L L 103, 112-3 (1965–1966); Raic, *supra* note 58, at 151–8, 418–26. Cited in John Dugard & David Raic, *The role of recognition in the law and practice of secession*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 94,109 (Marcelo G. Kohen ed., 2006).

⁷⁴ *Id.*

⁷⁵ The Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, Dec.16, 1991, *available at* <https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/> (Last visited May 2, 2022); *See also* Geoffrey Marston, *United Kingdom Materials on International Law 1991*, 62 BRIT. Y. INT’L.L 535, 559 (1991); Colin Warbrick, *Recognition of states*, 41INT’L & COMP.L.Q. 473, 477 (1992).

⁷⁶ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), art.40, 42, *available at*



resolutions or decisions taken by States or international organizations calling for the non-recognition of de facto entities created in breach of the non-use of force or of the principle of self-determination.”⁷⁷

2.1 Recognition

There has been a long debate over the nature of recognition between the constitutive school and the declaratory school. According to the constitutive theory, the recognition of a claimant entity as a State is necessary in creating the State.⁷⁸ Recognition therefore is a requirement of statehood.⁷⁹ The main objection to the constitutive view is that, if the Claimant State is recognized by some states and not by other states, it is in effect both a State and a non-State.⁸⁰ Clearly, such an uncertainty is undesirable. “It is essential to appreciate that political considerations do influence the decision and may prompt a State to recognize an entity prematurely or to refuse to grant it recognition.”⁸¹

In consideration of the political nature of recognition, Kelsen argues that “the political

https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (Last visited May.2, 2022)

In the commentary to those Articles, the ILC provided as an example of a situation fallen under the obligation to not recognize, the “attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples.” In Report of the International Law Commission on the work of its fifty-third session, Apr.23 – Jun.1 and Jul.2- Aug.10 2001, UN Doc. A/56/10, p. 114, para. 5. Available at https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (Last visited May.2, 2022)

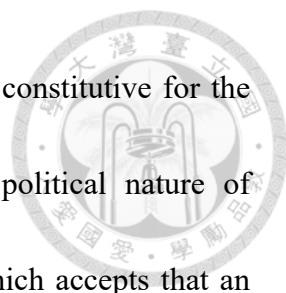
⁷⁷ Antonello Tancredi, *A normative “due process” in the creation of States through secession*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 171,194 (Marcelo G. Kohen ed., 2006).

⁷⁸ See H. Kelsen, *Recognition in International Law: Theoretical Observations*, 35AME.J.INT’L.L 605 (1941).

⁷⁹ J. L. BRIERLY, LAW OF NATIONS 139 (6th ed. 1963).

⁸⁰ Dugard & Raic, *supra* note 73, at 97.

⁸¹ *Id.* at 98.



act of recognition, since it has no legal effect whatsoever, it is not constitutive for the legal existence of the recognized state or government.”⁸² The political nature of recognition has prompted argument for the declaratory school⁸³ which accepts that an entity meeting the basic requirements of statehood becomes a State regardless of recognition by other states.⁸⁴ It must be noted that, however, under the Montevideo Convention on the Rights and Duties of States 1933, recognition per se is not a prerequisite for the acquisition of Statehood. Article 3 of the Convention states that:

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. ...The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law. ⁸⁵

⁸² Kelsen, *supra* note 78, at 605.

⁸³ Following the dissolution of Yugoslavia, The Badinter Arbitration Commission found that “the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory”. The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples , *available at* <http://www.ejil.org/pdfs/3/1/1175.pdf> (Last visited May.2, 2022)

⁸⁴ Dugard & Raic, *supra* note 73, at 98.

⁸⁵ The Montevideo Convention on the Rights and Duties of States 1933,art.3, *available at* <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml> (Last visited May.2, 2022)

A number of national and international courts, including federal courts in the United States⁸⁶ and the International Court of Justice (ICJ)⁸⁷, have also applied the declaratory theory. Accordingly, “an entity not recognized as a State but meeting the requirements for recognition has the rights of a State under international law in relation to a non-recognizing State,”⁸⁸ since “rights under international law are not contingent upon the acceptance of the right-holder by individual others.”⁸⁹

In its advisory opinion on Condition of Admission of a State to the United Nations (ICJ, Rep. 1948)⁹⁰, the ICJ opined that a State’s admission as a member of the UN will amount to collective recognition by those States who voted in the favor of its admission. Nevertheless, since cases of immature admission were not uncommon during the cold

⁸⁶ See *E.g.*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), it is stated that, “The definition of a state is well established in international law: Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.” “Although the Restatement’s definition of statehood requires the capacity to engage in formal relations with other states, it does not require recognition by other states.” Available at <https://www.casemine.com/judgement/us/5914bd3badd7b049347a11a1> (Last visited May.2, 2022)

⁸⁷ The International Court in the Bosnian Genocide case indirectly dealt with the question, “For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty.” In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment*, I. C. J. Reports 1996, p. 595, 613, available at <https://www.icj-cij.org/public/files/case-related/91/091-19960711-JUD-01-00-EN.pdf> (Last visited May 2, 2022)

⁸⁸ Crawford, *supra* note 30, at 93 with reference to AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES 107 (1965).

⁸⁹ *Id.*

⁹⁰ *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion* : I. C. J. Reports 1948, p. 57, available at <https://www.icj-cij.org/public/files/case-related/3/003-19480528-ADV-01-00-EN.pdf> (last visited Feb.22,2022).

war period⁹¹, it has to be noted that “an entity is not a State because it is recognized; it is recognized because it is a State...At least where the recognizing government is not acting in a merely opportunistic way, recognition is important evidence of legal status.”⁹²

Non-recognition “does not exclude the legal capacity of the new entity, but simply represents a cause of factual limitation of its legal sphere and of the effects deriving from the acts performed by its organs.”⁹³ “Recognition, therefore, had a consolidating effect, as it served to secure the independence of the State and to bolster the effectiveness of its government by lending international legitimacy.”⁹⁴

2.2 Self-determination

The concept of self-determination was first publicly used by the United States President Woodrow Wilson in 1918, which was purported to be the basis of the subsequent Versailles Peace Settlement of 1919.⁹⁵ Wilson believed that the essence of the right to self-determination stems from the general democratic principle that a governing power

⁹¹ There were instances in pre-1963 practice of premature recommendations for admission. For example, the Republic of Vietnam in 1950 was neither formally independent of France nor had a stable and effective government in the territory it claimed to govern. *See Crawford, supra* note 30, at 180.

⁹² *Id.* at 93.

⁹³ Tancredi, *supra* note 77, at 206.

⁹⁴ Dugard & Raic, *supra* note 73, at 135.

⁹⁵ Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, 43 INT’L & COMP. L. Q. 99 (1994).

has to be with the consent with the people.⁹⁶



After World War II, self-determination has gradually acquired the status of a legal right.⁹⁷ The UN Charter uses the term of self-determination twice: in Article 1(2) where one of the purposes of the United Nations is to develop “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”, and in Article 55, where it is used to express the general aims of the UN in social and economic development and respect for human rights⁹⁸

Although self-determination was originally perceived as the desiderata of the Charter instead of a legal right that could be invoked as such,⁹⁹ during the 1950s and 1960s, as more and more colonies became independent resulting from decolonization processes, the principle of self-determination gradually developed into an customary international law, thanks to the adoption of various resolutions by the General Assembly that had provided guidelines for international practice.¹⁰⁰ Art.1(2) of the Charter thus became “little by little one of the fundamental principles given the legal force typical of jus

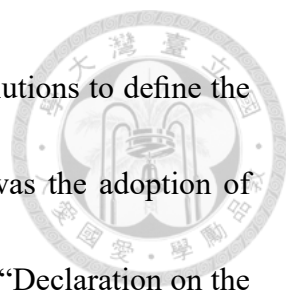
⁹⁶ *Id.*

⁹⁷ See VAN DEN DRIEST, REMEDIAL SECESSION: A RIGHT TO EXTERNAL SELF-DETERMINATION AS A REMEDY TO SERIOUS INJUSTICES 14-32 (2013).

⁹⁸ UN Charter, art. 2, art. 55.

⁹⁹ Yehuda Z. Blum, *Reflections on the Changing Concept of Self-Determination*, 10 ISR. L. REV. 509, 511 (1975).

¹⁰⁰ J.F.E. ESPINOSA, SELF-DETERMINATION AND HUMANITARIAN SECESSION IN INTERNATIONAL LAW OF A GLOBALIZED WORLD 14 (2017).



cogens”.¹⁰¹ The General Assembly has made a vast number of resolutions to define the content of the principle more precisely. The most important step was the adoption of Resolution 1514 (XV) of the General Assembly of the UN¹⁰² in the “Declaration on the Granting of Independence to Colonial Countries and Peoples” of 14 December 1960.¹⁰³ In 1966, the “International Covenant on Civil and Political Rights” and the “International Covenant on Economic, Social and Cultural Rights” defined the right identically in their first Art., “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.¹⁰⁴ By creating an obligation for member states to “respect a people’s right to . . . democratic self-governance,”¹⁰⁵ these two covenants brought a new life to self-determination. Art. 1(3) established that “the States Party to the present Covenant, including those having responsibility for the administration of Non-Self Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect the right, in conformity with the provisions of the

¹⁰¹ *Id.* at 15.

¹⁰² *Id.*

¹⁰³ UN Resolution 1514 (XV), Dec.14, 1960, *available at* <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/PDF/NR015288.pdf?OpenElement> (Last visited May 2, 2022)

¹⁰⁴ “International Covenant on Civil and Political Rights” and “International Covenant on Economic, Social and Cultural Rights”, of 16 December 1966, at art. 1(1). The two International Covenants were adopted by Resolution UN Doc. A/RES/2200 (XXI), of 16 December 1966, *available at* [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A\(XXI\)_civil.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf) (Last visited May.2, 2022); and 993 UNTS (1976), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201007/volume-1007-A-14531-English.pdf> (Last visited May 2, 2022).

¹⁰⁵ MILENA STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW 11 (2013).

Charter”.¹⁰⁶ Through this, all the State Parties are committed to take steps to carry it out.¹⁰⁷



Step by step, self-determination has developed into a right erga omnes, and all members of the international community are required to guarantee it. This view was supported by the ICJ in the matters of East Timor¹⁰⁸ and the Palestinian Wall Advisory Opinion¹⁰⁹.

In national law practice, the most noteworthy development of self-determination is the opinion given by the Supreme Court of Canada in the Reference re Secession of Quebec in 1998, in which it states:

The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond ‘convention’ and is considered a general principle of international law.¹¹⁰

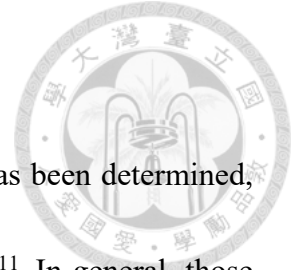
¹⁰⁶ The two International Covenants, *supra* note 104.

¹⁰⁷ The Right to Self-Determination of Peoples was adopted at the Twenty-first Session of the Human Rights Committee, on 13 March 1984, in “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Note by the Secretariat”, UN Doc. HRI/GEN/Rev.1, 29 July 1994, 107, p. 13, para. 6. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/189/63/PDF/G9418963.pdf?OpenElement> (Last visited May.2, 2022)

¹⁰⁸ East Timor (Portugal v. Australia), Judgment, I. C.J. Reports 1995, p. 90, 102, para. 29. Available at <https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf> (last visited Feb.22, 2022).

¹⁰⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 183, para. 118. Available at <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (last visited Feb. 22, 2022).

¹¹⁰ Supreme Court of Canada, Reference re Secession of Quebec (1998) 2 SCR 217. 115 International Law Reports (1999), 536, p. 278, para. 114. Available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do> (Last visited May 2, 2022)



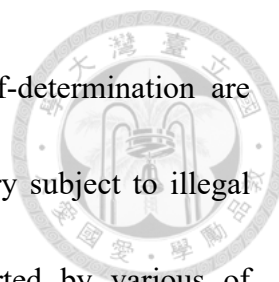
It has been observed that only after the unit of self-determination has been determined, does the principle of self-determination apply as a matter of right.¹¹¹ In general, those territories must be established as separate political units, such as the communities created by colonial powers within the same borders. In particular, it applies to the following categories of territories: trust and mandated territories, and non-self-governing territories under Chapter XI of the Charter; other territories forming distinct political-geographical areas, whose inhabitants are arbitrarily excluded from any meaningful share in their government, “with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing”;¹¹² those territories separate and distinct legal status from the authority administering it. Where a self-determination unit is not already a State, its people have the right of self-determination: that is, the right to choose its own political organization.¹¹³ “Self-determination can result in the independence of the self-determining unit as a separate State.”¹¹⁴

¹¹¹ Crawford, *supra* note 30, at 127.

¹¹² GA res 1541 (XV), Annex (‘Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73e of the Charter of the United Nations’) provides guidance in identifying territories in this category. But the fact that a territory is not reported on is not decisive. Cited in *id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 127-28.



On the other hand, the beneficiaries of the external right to self-determination are identified as a people - “the entire population living in the territory subject to illegal domination.”¹¹⁵ A people’s right to self-determination is supported by various of resolutions of the General Assembly and a number of legal decisions.¹¹⁶ In 1981, the Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities presented a study concluding with a proposal defining what constitutes a people that are entitled to enjoy and exercise the right of self-determination.¹¹⁷ Accordingly, a people are comprised of individuals feeling themselves to be members of the group and express a desire to preserve the group’s identity.¹¹⁸ A people tend to “enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity;(c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life,”¹¹⁹ “who feel discriminated against or

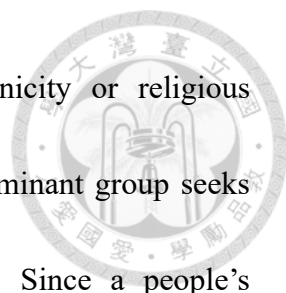
¹¹⁵ A. Tancredi, *Some Remarks on the Relationship Between Secession and General International Law in the Light of the ICJs Kosovo Advisory Opinion*. In *KOSOVO AND INTERNATIONAL LAW: THE ICJ ADVISORY OPINION OF 22 JULY 2010* 79, 91(P. Hilpold ed., 2012).

¹¹⁶ T. Jaber, *A case for Kosovo? self-determination and secession in the 21st Century*, 15 *INT’L J. HUM. RIGHTS* 926, 930 (2011).

¹¹⁷ *The Right of Self-Determination: Historic and Current Development on the Basis of United Nations Instruments*. Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (1981), UN Doc. E/CN.4/Sub.2/404/Rev.1, 125, p. 41. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G80/139/21/PDF/G8013921.pdf?OpenElement> (Last visited May 2, 2022)

¹¹⁸ Van den Driest, *Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, 62 *NETH.INT’L L.R.* 329, at 351(2015); J. Vidmar, *The Kosovo Advisory Opinion Scrutinized*, 24 *LEIDEN J. INT’L L* 355, at 364(2011).

¹¹⁹ UNESCO, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Report and Recommendations*, 1990, p.7-8. Available at <https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/819-UNESCO - Rights of Peop>



politically subordinate to a dominant group of a different ethnicity or religious affiliation.”¹²⁰ “This inter-faith tension is exacerbated when the dominant group seeks to impose its values and culture on the subordinate group.”¹²¹ Since a people’s relationship with a territory is the determining factor in their demands for self-determination,¹²² it could be stated that having longstanding roots in a given territory provides a persuasive rationale for recognition as a people.¹²³

Possessing the right of external self-determination, a people is entitled to separate from their mother State in order to achieve self-government, to determine their own political status, and to be free of alien domination.¹²⁴ Three situations where the people in question are entitled to a right to external self-determination were defined by the Supreme Court of Canada in the case of Reference re Secession of Quebec:

[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a

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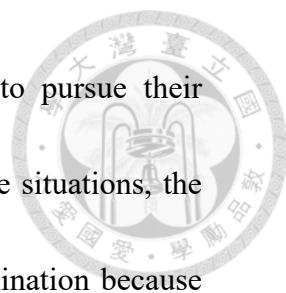
¹²⁰ Thio, *infra* note 130, at 320.

¹²¹ *Id.*

¹²² Cristescu, *supra* note 117, at 41; H. Hannum, *Rethinking Self-Determination*, 34VA.J.INT’L L, 35 (1993).

¹²³ Jaber, *supra* note 116, at 933; G. Lauwers & S. Smis, *New Dimensions of the Right to Self-determination: A Study of the International Response to the Kosovo Crisis*, 6 NATIONALISM ETHN POLIT 43, 57 (2000).

¹²⁴ See Ferran Requejo & Marc Sanjaume, *Recognition and Political Accommodation: from Regionalism to Secessionism-The Catalan Case*, in RECOGNITION AND REDISTRIBUTION IN MULTINATIONAL FEDERATIONS, 107,132 (Grégoire, J.-F. and Jewkes, M., eds., 2015).



definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.¹²⁵

2.3 Secession

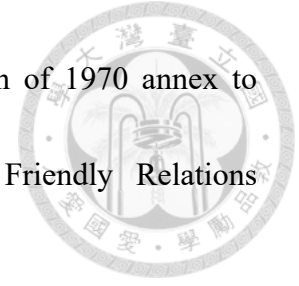
The term “secession” has been defined as “the creation of a State by the use or threat of force and without the consent of the former sovereign”.¹²⁶ Cassese observes that when internal self-determination of a racial or religious group is absolutely beyond reach, they may attempt secession—the form of external self-determination. Extreme and unremitting violation of human rights and the lack of any reasonable prospect for peaceful resolution may make secession legitimate.¹²⁷

Following Cassese, a right of secession arises as an external form of self-determination only if the internal right of self-determination cannot be exercised. The relationship between internal self-determination and external self-determination is reflected in the

¹²⁵ Reference re Secession of Quebec, *supra* note 110, at 1373, para. 138.

¹²⁶ Crawford, *supra* note 30, at 375.

¹²⁷ ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 120 (1995).



so-called “safeguard” clause to the Friendly Relations Declaration of 1970 annex to Resolution 2625 (XXV). In principle 5, paragraph 7 of the Friendly Relations Declaration, it is articulated that:

...nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color.¹²⁸

Accordingly, the exercise of the right to self-determination is limited by the protection of territorial integrity of States.¹²⁹ Nevertheless, “a State’s right to territorial integrity is contingent upon a representative government of the whole people of the particular area, respecting the right of peoples to ‘internal self-determination’, including the right to political participation.”¹³⁰

¹²⁸ Friendly Relations Declaration, *supra* note 34.

¹²⁹ Driest, *supra* note 118, at 338; Vidmar, *supra* note 118, at 367.

¹³⁰ li-ann Thio, *International law and secession in the Asia and Pacific regions*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 297,300 (Marcelo G. Kohen ed., 2006).



The “safeguard clause” was reaffirmed in the United Nations World Conference on Human Rights held in Vienna in 1993:

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this [sc the right of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.¹³¹

The provisions implicitly acknowledge the legitimacy of secession under the circumstances of the denial of internal self-determination or a serious violation of fundamental human rights.¹³² “The interpretation of the safeguard clause as allowing ‘remedial secession’ would lead, as a consequence of the violation of the internal dimension of self-determination, to the loss of the territory of the State whose

¹³¹ United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, *available at* <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action> (Last visited May 2, 2022)

¹³² Cassese, *supra* note 127, at 118.

government is acting in this way.”¹³³ This remedial character of self-determination has been affirmed by the International Court of Justice in the Western Sahara case.¹³⁴ It is argued that “The events leading to the establishment of Bangladesh and the events giving rise to Kosovo as an autonomous entity under international administration can both be classified as coming within the purview of remedial secession.”¹³⁵

The most significant modern discussion of the right of self-determination occurred before a national court – the Canadian Supreme Court, in the Quebec Secession case. The Court took secession as a “legal act as much as a political one” and defined it as the “the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane”.¹³⁶ and that “the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in

¹³³ Marcelo G. Kohen, *Introduction*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 1, 10 (Marcelo G. Kohen ed., 2006).

¹³⁴ ICJ Advisory Opinion of 16 October 1975 on Western Sahara (1975 I.C.J. 25), para 55-60, at 23-26, available at <https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-00-EN.pdf> (Last visited May 2, 2022) herein after (West Sahara Case); see also the case concerning Northern Cameroon (Cameroon v. United Kingdom) 1963 I.C.J. 3, available at <https://www.icj-cij.org/public/files/case-related/48/048-19631202-JUD-01-00-EN.pdf> (Last visited May 2, 2022) ; Nicaragua v. United States of America, *supra* note 5; Certain Phosphate Lands in Nauru (Nauru v. Australia) 1989 I.C.J. 12, 1991 ICJ 3, available at http://www.worldcourts.com/icj/eng/decisions/1992.06.26_phosphate.htm ; and East Timor (Portugal v. Australia) 1995 I.C.J. 90, available at <https://www.un.org/law/icjsum/timor.htm> (Last visited May 2, 2022)

¹³⁵ Christian Tomuschat, *Secession and self-determination*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 23, 42 (Marcelo G. Kohen ed., 2006).

¹³⁶ Reference re Secession of Quebec, *supra* note 110, para. 83.



Canada”¹³⁷. For the Court:

A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.¹³⁸

The court notes that the right to external self-determination only arises in the “most extreme of cases and, even then, under carefully defined circumstances”.¹³⁹ Such circumstances including colonial peoples, and “where a people is subject to alien subjugation, domination or exploitation”.¹⁴⁰ The Court then mentioned that when a people is “blocked from the meaningful exercise” of this right internally,¹⁴¹ they could be entitled to exercise its right to self-determination by secession “as a last resort”. By applying these criteria to Quebec, the Court then concluded that “the current Quebec context cannot approach such a threshold”¹⁴², since “The population of Quebec cannot plausibly be said to be denied access to government..... The population of Quebec is

¹³⁷ *Id.* para 92.

¹³⁸ *Id.* para. 130.

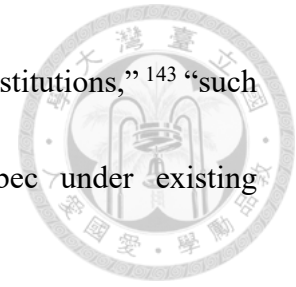
¹³⁹ *Id.* para. 126.

¹⁴⁰ *Id.* paras. 132–33.

¹⁴¹ *Id.* para. 135. In para 138, the Court used a different language to define it: “where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.”

¹⁴² *Id.*

equitably represented in legislative, executive and judicial institutions,”¹⁴³ “such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions”.¹⁴⁴



That being said, without the consent of the mother states, forcible attempts at secession are highly likely to be considered as threats to international peace and security, since there is a presumption in international law in favor of stability.¹⁴⁵ The UN Committee on the Elimination of Racial Discrimination indicated that “International law has not recognized a general right of peoples to unilaterally declare secession from a State” and that “fragmentation of States may be detrimental to the protection of human rights as well as to the preservation of peace and security.”¹⁴⁶

Furthermore, the principle of non-intervention imposes on third States and international organizations the obligation not to support any attempt made by a group to create a new State on the territory that fall within the domestic jurisdiction of an existing State. This is the reason why any support to secessionist movements from abroad could be

¹⁴³ *Id.*, para. 136.

¹⁴⁴ *Id.*, para. 138.

¹⁴⁵ A. Peters, *Does Kosovo Lie in the Lotus-Land of Freedom?* 24 *Leiden J.INT'L L* 95, at 99 (2011).

¹⁴⁶ CERD, General Recommendation XXI on self-determination, CERD/48/Misc.7/Rev.3 (1996), para 6, available at <https://digitallibrary.un.org/record/212171> (Last visited May 2, 2022)

considered as a breach of the principle of non-intervention.¹⁴⁷



However, the case of Bangladesh¹⁴⁸ evidenced that the principle of non-intervention is unable to prevent the creation of a new State if it is the final result. That is because the formation of a state in international law is a fact that precedes the law, which will be acknowledged by the law by attributing certain legal effects and legal status to it, only once it has materialized.¹⁴⁹ That is to say, if an entity succeeded in fulfilling the criteria of statehood, a new State is born. In this sense, “secession is not a question of law, but a question of fact”¹⁵⁰, and “the criterion of effectiveness will take precedence over any considerations of legitimacy”.¹⁵¹ In the Quebec case, the Supreme Court of Canada acknowledged that:

[a]lthough there is no legal right, under the Constitution or at international law,

¹⁴⁷ Nevertheless, the Court stated in the Nicaragua case that support to peoples in the context of their struggle against colonialism is not concerned by this principle, *Nicaragua v. United States of Americas*, *supra* note 5, at 108, para 206.

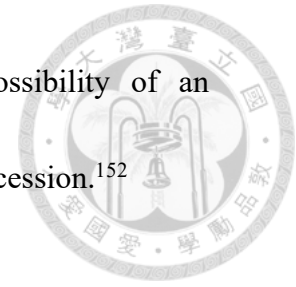
¹⁴⁸ East Pakistan, a part of the geographically divided State of Pakistan created at partition in 1947, had suffered relatively severe and systematic discrimination from the central government based in Islamabad. On 25 March 1971 the central government instigated a period of martial rule in East Pakistan, which involved acts of repression and even possibly genocide and caused some ten million Bengalis to seek refuge in India. The Awami League proclaimed the independence of Bangladesh on 10 April 1971. On 3 December 1971, large-scale war broke out between India and Pakistan and lasted until 17 December when the Pakistan army in East Bengal surrendered, and India declared a unilateral ceasefire on the western border. Meanwhile India and Bhutan had recognized Bangladesh on 6 and 7 December respectively. The Awami League substantially controlled East Bengal very shortly after the cease fire, with the assistance of Indian troops. Twenty-eight states had recognized Bangladesh de jure by 4 February 1972, and a further five states had extended de facto recognition. Recognition by Pakistan was, however, delayed until 22 February 1974. Text in Crawford, *supra* note 30, at 140-1.

¹⁴⁹ Georges abi-saab, *Conclusions*, in *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 470 (Marcelo G. Kohen ed., 2006).

¹⁵⁰ Theodore Christakis, *The State as a “primary fact”: some thoughts on the principle of effectiveness*, in *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 137 (Marcelo G. Kohen ed., 2006).

¹⁵¹ Tomuschat, *supra* note 135, at 44.

to unilateral secession [...] this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession.¹⁵²



In state practice, independence by Croatia and Slovenia, which were clearly unconstitutional under Yugoslav Law,¹⁵³ has not prevented third States from recognizing them as independent States.¹⁵⁴ Certainly, there is no obligation for third States not to recognize a new entity created in violation of a state's municipal law.¹⁵⁵

Although secession is a question of fact, it is important to note that the obligation of respecting for the right of self-determination has entered into the law of statehood and be now seen as a constitutive condition for statehood.¹⁵⁶ In the Western Sahara case, Judge Dillard expressed the view that self-determination remains in all cases the “cardinal principle” of international law, which cannot be overridden by territorial claims of third States.¹⁵⁷ In this case, the territory formerly known as Spanish Sahara

¹⁵² Reference re Secession of Quebec, *supra* note 110, para 155.

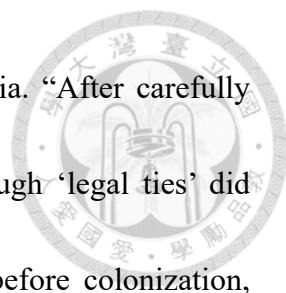
¹⁵³ See P. Radan, *Secession and Constitutional Law in the Former Yugoslavia*, 20 UNIV. TASMAN. L.R.201 (2001).

¹⁵⁴ THOMAS D. GRANT, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION* 103 (1999).

¹⁵⁵ Such obligation of non-recognition only exists for secession involving the use of force (*E.g.*, the secession of the “Turkish Republic of Northern Cyprus” from Cyprus) and when it results in the denial of the right to self-determination (e.g. the declaration of independence of the racist state of Rhodesia in 1965), text in Patrick Dumberry, *Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada*, in *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 416,440 (Marcelo G. Kohen ed., 2006).

¹⁵⁶ See p.20 of this Chap.

¹⁵⁷ Western Sahara Opinion, *supra* note 134, at 12, 122.



has been claimed on historical grounds by Morocco and Mauritania. “After carefully examining the historical material, the Court concluded that, although ‘legal ties’ did exist between the Western Sahara and the two claimant entities before colonization, these were not of such a character as to affect the exercise by the Western Sahara of its right to self-determination”¹⁵⁸. Judge Dillard stressed:

It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient “legal ties” of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people.¹⁵⁹

After full examination, the Court rejected the claim of Morocco and Mauritania and held consequentially that the principle of self-determination must prevail.¹⁶⁰

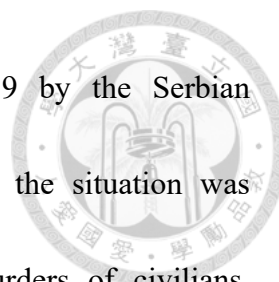
Another crucial test for the UN’s attitude towards secession is the Kosovo AO case.

Under the Yugoslav constitution of 1974, Kosovo was a self-administering province of

¹⁵⁸ Crawford, *supra* note 30, at 639

¹⁵⁹ Western Sahara Opinion, *supra* note 134, at 122.

¹⁶⁰ Crawford, *supra* note 30, at 641



Serbia.¹⁶¹ However, self-rule in Kosovo was curtailed in 1989 by the Serbian Government, leading to local unrest. Over the following years, the situation was worsened by massive violations of human rights, including murders of civilians, arbitrary arrests, and “disappearance” of individuals by both sides.¹⁶² The Security Council therefore determined that it constituted a threat to international peace and security, and called upon the parties to resolve the situation peacefully.¹⁶³ The SC res 1244 adopted on Jun.10, 1999 took measures to secure an end to the violence in Kosovo¹⁶⁴. It was backed by the Russian Federation and with the abstaining of only China.¹⁶⁵ Under this resolution, the Security Council decided to create the United Nations Interim Administration Mission in Kosovo (UNIMIK), the task of which is to govern the territory of Kosovo democratically and autonomously “pending a political settlement”, “facilitating a political process designed to determine Kosovo’s future status”.¹⁶⁶ To that end, a de facto government was established by the UNIMIK in

¹⁶¹ Constitutional history of Kosovo, *available at* <https://constitutionnet.org/country/europe-kosovo> (Last visited May 2, 2022)

¹⁶² Report of the Secretary-General Prepared Pursuant to Resolution 1160 (1998) of the Security Council, UN Doc. S/1998/834, of 4 September 1998, 9, p. 2, para. 7; 4, para. 16; and 5, para. 17, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/259/94/PDF/N9825994.pdf?OpenElement> (Last visited May 2, 2022); *see also* A.J. Bellamy, *Human Wrongs in Kosovo: 1974–1999* In THE KOSOVO TRAGEDY. THE HUMAN RIGHTS DIMENSION 105-126 (K. Booth ed., 2001)

¹⁶³ UN Doc. S/RES/1199 (1998), of 23 September, para. 15. UN Doc. S/RES/1203 (1998), of 24 October, para. 15, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/279/96/PDF/N9827996.pdf?OpenElement> (Last visited May 2, 2022)

¹⁶⁴ *See* para 3, 9 and 15 of the Security Council resolution 1244 (1999), *available at* https://peacemaker.un.org/sites/peacemaker.un.org/files/990610_SCR1244%281999%29.pdf

¹⁶⁵ *See* UN S/PV.4011, of 10 June 1999, *available at* <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/kos%20SPV4011.pdf> (Last visited May 2, 2022)

¹⁶⁶ Security Council resolution 1244 (1999), *supra* note 164, at para. 11(e).



Kosovo completely independently of the FRY, which was considered by some scholars as against the international law. On May 15, 2001, Regulation No. 2001/9 was adopted regarding a “Constitutional Framework for Provisional Self-Government” for the establishment of Provisional Institutions of Self-Government of Kosovo,¹⁶⁷ yet the question of determining the final status of Kosovo remained unresolved.¹⁶⁸

Given that no agreed solution could be attained, on February 17, 2008, the Assembly of Kosovo’s Provisional Institutions of Self-Government declared independence.¹⁶⁹ The Secretary General declared that the UN would maintain “strict neutrality” in respect of the final status of Kosovo.¹⁷⁰ In response to the declaration of independence, the Serbian authorities which deemed the unilateral declaration illegally infringing their sovereignty and territorial integrity¹⁷¹ brought in a draft resolution in the UN General

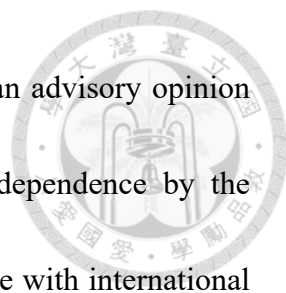
¹⁶⁷ On the executive branch of the provisional institutions of self-government in Kosovo, UNMIK/REG/2001/19, *available at* https://unmik.unmissions.org/sites/default/files/regulations/02english/E2001regs/RE2001_19.pdf (Last visited May 2, 2022)

¹⁶⁸ Espinosa, *supra* note 100, at 70.

¹⁶⁹ Kosovo Declaration of Independence, February 17, 2008, *available at* <https://www.refworld.org/docid/47d685632.html> (Last visited May 2, 2022)

¹⁷⁰ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/458, of 15 July 2008, p. 9, para. 29, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/412/84/IMG/N0841284.pdf?OpenElement> (Last visited May 2, 2022)

¹⁷¹ Intervention of Mr. Tadić (President of the Republic of Serbia), UN Doc. S/PV.5839, of 17 February 2008, 23, p. 4, *available at* <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20S%20PV%205839.pdf> (Last visited May 2, 2022); Intervention of Mr. Jeremić (Minister for Foreign Affairs of Serbia), UN Doc. S/PV.5850, of 11 March 2008, 5, p. 2, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/PRO/N08/267/60/PDF/N0826760.pdf?OpenElement> (Last visited May 2, 2022); Intervention of Mr. Jeremić (Minister for Foreign Affairs of Serbia), UN Doc. A/63/PV.22, of 8 October 2008, 15, p. 1, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/541/01/PDF/N0854101.pdf?OpenElement>



Assembly, requesting the International Court of Justice “to render an advisory opinion on the following question”¹⁷²: is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?¹⁷³ On 22 July 2010, the ICJ delivered its Opinion on the case of the Kosovo AO, concluding that the declaration of Independence by Kosovo, “[...] did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.”¹⁷⁴

The ICJ interprets the subjective scope of the relevant principle of territorial integrity¹⁷⁵ according to two documents: the General Assembly resolution 2625 (XXV) of 1970, entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations” and the Final Act of the Helsinki Conference on Security and Co-operation in Europe of

(Last visited May 2, 2022)

¹⁷² Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law, UN Doc. A/63/L.2, of September 23, 2008, at para. 5, available at <https://www.icj-cij.org/public/files/case-related/141/15022.pdf> (Last visited May 2, 2022)

¹⁷³ *Id.*

¹⁷⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, available at <https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> (Last visited May 2, 2022)

¹⁷⁵ *Id.* at para. 80.

1 August 1975 (the Helsinki Conference).¹⁷⁶



The ICJ states that:

[t]he illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).¹⁷⁷

The Court thus arrives at the conclusion that, “the authors of the declaration of independence of 17 February 2008 did not act as one of the provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration”.¹⁷⁸ The Court agrees with the position of the US and the UK that the Security Council resolution 1244 (1999) was designed to create an interim regime for Kosovo, channeling the long-term political process to establish its

¹⁷⁶ Regarding the first of these texts, the General Assembly reiterated “(t)he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”. In the same vein, the Helsinki Conference stipulated that “(t)he participating States will respect the territorial integrity of each of the participating States” (Art. IV). In *Id.*

¹⁷⁷ *Id.* at para. 81.

¹⁷⁸ *Id.* at para. 109.

final status,¹⁷⁹ and the declaration of independence would have a decisive effect to the establishment of that final status.¹⁸⁰



These purposes were also mentioned in section 11(c) of resolution 1244 (1999) that envisages “[a] political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords,”¹⁸¹ which¹⁸² established that the final settlement for Kosovo was to be based on the free “will of the people” of Kosovo.¹⁸³

To conclude, in the Kosovo AO case, the ICJ opinions that there is no prohibition of secession in international law regarding the principle of territorial integrity,¹⁸⁴ and that the democratic principle is the most important balancing factor of the principle of effectiveness in respect of stability.¹⁸⁵ It could be inferred that “international law adopts a neutral stance on declarations of independence that do not infringe peremptory

¹⁷⁹ *Id.* at para 114.

¹⁸⁰ *Id.*

¹⁸¹ Paragraph 11 (c) of the resolution 1244 (1999) says: “(t)he main responsibilities of the international civil presence will include: ... c) (o)rganising and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections.” In Resolution 1244 (1999), *supra* note 164, at para 11(c).

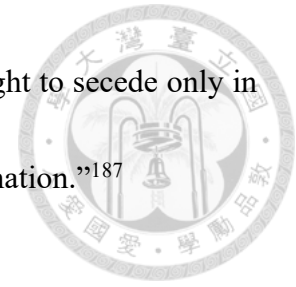
¹⁸² Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, UN Doc. S/1999/648 (June 7, 1999), available at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20S%201999%20648.pdf> (Last visited May 2, 2022)

¹⁸³ Hurst Hannum, *The Advisory Opinion on Kosovo: An Opportunity Lost, or Poisoned Chalice Refused?*, 24 LEIDEN J. INTL’L L 157,161 (2011).

¹⁸⁴ Urrutia, Iñigo, Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo (October 9, 2012). *Revista d’Estudis Autònoms i Federals*, num 16, octubre 2012, Available at SSRN: <https://ssrn.com/abstract=2365511> (Last visited May 2, 2022)

¹⁸⁵ *Id.* at 137.

norms,”¹⁸⁶ and that “the international law recognizes a unilateral right to secede only in certain exceptional circumstances linked to the right of self-determination.”¹⁸⁷



3. State Identity/Continuity

3.1 Failed State

State failure features the disintegration of governmental structures as a result of grave and intense internal armed conflicts, to the point that the government of the State as a legal condition for statehood in international law, has almost disappeared from the ground.¹⁸⁸ In terms of the judicial proceedings concerning a failed State, no one is regarded as having the authority to represent the whole country.¹⁸⁹

In such States, “the police, judiciary and other bodies serving to maintain law and order have either ceased to exist or are no longer able to operate.”¹⁹⁰ Identifying such types of armed conflicts as conflicts *déstructuré*¹⁹¹ (anarchic conflicts), The International

¹⁸⁶ *Id.* at 116.

¹⁸⁷ *Id.* at 118.

¹⁸⁸ Pablo Moscoso de la Cuba, *The statehood of “collapsed” states in Public International Law*, 18 AGENDA INTERNACIONAL 121 (2011).

¹⁸⁹ Brian Dube, Proceed Manatsa and Cowen Dziva, *Failed state discourse under international law: the place, attributes and implications*, 4(4.4) INTEL’L J. OF POLIT. & GOOD GOV. (2013), available at <http://www.onlineresearchjournals.com/ijopagg/art/141.pdf> (Last visited May 2, 2022)

¹⁹⁰ Daniel Thürer, *The “failed State” and international law*, 1999, available at <https://www.icrc.org/en/doc/resources/documents/article/other/57jq6u.htm> (Last visited May 2, 2022)

¹⁹¹ ICRC, *Les conflits armés liés à la désintégration des structures de l’État* (Armed conflicts linked to the disintegration of state structures), Document préparatoire du Comité international de la Croix-Rouge



Committee of the Red Cross (ICRC) observes that,

the essential characteristics of which are: (i) the disintegration of the organs of the central government, which is no longer able to exercise its rights or perform its duties in relation to the territory and the population; (ii) the presence of many armed factions; (iii) divided control of the national territory, and; (iv) the breakdown of the chain of command within the various factions and their militias.¹⁹²

In a failed state without an effective government in charge, there is no entity ready to succeed it regarding its international legal obligations.¹⁹³ On an international level, nobody is capable of representing the State: “either no institution exists which has the authority to negotiate, represent and enforce or, if one does, it is wholly unreliable, typically acting as ‘statesman by day and bandit by night’.”¹⁹⁴

The UN system seems to be unprepared to deal with the representation problem when the representative powers of a government have been lost in a failed state; it appears

pour la 1re réunion périodique sur le droit international humanitaire(Preparatory document of the International Committee of the Red Cross for the 1st periodic meeting on international humanitarian law), Genève, 9 - 23 janvier 1998. Available at: <https://www.icrc.org/fr/doc/resources/documents/misc/5fzfn9.htm> (Last visited May 2, 2022)

¹⁹² *Id.*

¹⁹³ De la Cuba, *supra* note 188, at 158

¹⁹⁴ Thürer, *supra* note 190. The author points out that a “failed” State is one which, although retains its legal capacity, it “has for all practical purposes lost the ability to exercise it.”

that the representatives of a failing state sent by the last government “retain limited representative powers during the period of uncertainty following the collapse of the state.”¹⁹⁵



The Vienna Convention on the Law of the Treaties of 1969 (VCLT) contains two provisions which may be applied in the circumstances of state failure, Article 61 dealing with the impossibility of performance, and article 62 referring to the fundamental change of circumstances. According to the ICJ, Article 62¹⁹⁶ refers to the emergence of a new situation that, “radically transform[s] the extent of the obligations.”¹⁹⁷ It has been argued that the occurrence of state failure would qualify as an unforeseeable external change that has affected the essential basis of the consent of the parties to be bound by the Treaty.¹⁹⁸

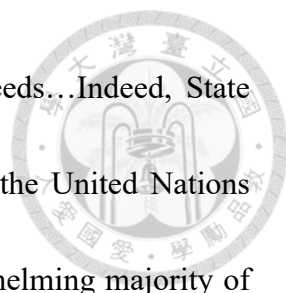
In the case of state extinction, another new state/government “takes over the

¹⁹⁵ De la Cuba, *supra* note 188, at 163 referencing to R. Koskenmäki, *Legal Implications Resulting from State Failure in Light of the Case of Somalia*, 73 *NORD.J.INTL’L* 1, 16 (2004).

¹⁹⁶ Vienna Convention on the Law of Treaties of 23 May 1969, Article 62(1) reads: “A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty”. Available at <https://www.worldtradelaw.net/document.php?id=misc/viennaconvention.pdf> (Last visited May 2, 2022) herein after (Vienna Convention)

¹⁹⁷ Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997. ICJ Reports 1997, p. 61, para. 104, available at <https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf> (Last visited May 2, 2022)

¹⁹⁸ Koskenmäki, *supra* note 195, at 20-1.



responsibility of the population and territory of the State it succeeds...Indeed, State practice as well as that of international organizations, particularly the United Nations through its General Assembly and Security Council, and the overwhelming majority of legal commentators, agree that such States continue their international legal personality, despite the absence of a constitutive element of statehood”¹⁹⁹ However, before a new effective government is firmly established, “collapsed” or “disintegrated” States would suffer serious consequences in exercising their international legal personality, as their capacity to celebrate international treaties is diminished. Moreover, “when it comes to the fulfilment of treaty obligations, the lack of effective government makes the application of the norms contained in the Vienna Convention on the Law of the Treaties difficult to occur in practice.”²⁰⁰

3.2 Theories and International Practices of State Identity/Continuity

As the negation of State extinction, state continuity is defined by Marek as “the dynamic predicate of state identity, simply meaning that one and the same subject of rights and obligations continues to exist.”²⁰¹ Therefore, a state which is identical at two

¹⁹⁹ De la Cuba, *supra* note 188, at 172-3.

²⁰⁰ *Id.*, at 174.

²⁰¹ KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 5 (1st ed. 1954).

different points in time is ipso facto continuous.²⁰² In the eyes of Marek, the identity/continuity of a State is the problem of its very existence.²⁰³ To examine whether one State is identical with the one proceeding it is to ask whether one State has died and another was born in its place, or whether the legal personality of the old State remains unchanged.²⁰⁴

The concepts of state identity and state continuity are mostly employed synonymously, though not without debate. Nevertheless, there is a consensus on the existence of several general rules of customary international law concerning the issue of state identity/continuity and state extinction: first, “it is firmly established that neither change of government nor change in the internal legal order of a given state, even by revolution or coup d’état, affects the identity and continuity of a state.”²⁰⁵ Second, in failed states, even the prolonged lack of an established government able to exercise overall governmental authority over the state territory does not per se lead to the extinction of the state.²⁰⁶ Crawford observes that “[t]here is a strong presumption that the State

²⁰² *Id.*

²⁰³ KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 4 (2nd ed. 1968).

²⁰⁴ *Id.* at 1.

²⁰⁵ Østrup, Anne, *Conceptions of State Identity and Continuity in Contemporary International Legal Scholarship* 8 (January 14, 2016). European Society of International Law (ESIL) 2015 Research Forum (Florence), University of Copenhagen Faculty of Law Research Paper No. 2016-15, Available at SSRN: <https://ssrn.com/abstract=2715701> or <http://dx.doi.org/10.2139/ssrn.2715701> (Last visited May 2, 2022)

²⁰⁶ *See* Crawford, *supra* note 30, at 715.

continues, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government.”²⁰⁷



As to the substantial criterion for state identity/continuity, Marek rejects recognition as a criterion of state identity/continuity, since it “withdraws the question of continued existence of a State from the realm of objective norms and makes it dependent upon the will of third States.”²⁰⁸ For her, recognition is rather declaratory and thus only of evidentiary importance.²⁰⁹

With regard to the loss of territory, Hall found that “[t]he identity of the state therefore is considered to subsist as long as part of the territory which can be recognized as the essential portion through the preservation of the capital or of the historical nucleus, remains either as an independent residuum or as the core of an enlarged organization.”²¹⁰ Similarly, Marek observed that territorial changes have no effect on state identity, since it is not territory which determines that identity. Yet she admitted that the identity of a state would be lost if the territorial loss is “total or very

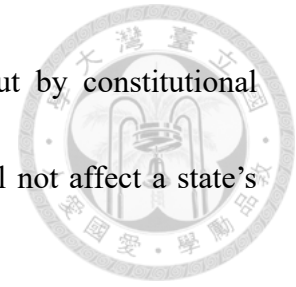
²⁰⁷ *Id.* at 34.

²⁰⁸ Marek, *supra* note 201, at 149.

²⁰⁹ *Id.* at 159.

²¹⁰ W. E HALL, A TREATISE ON INTERNATIONAL LAW 23 (1880).

considerable”,²¹¹ whereas internal changes, whether brought about by constitutional means or not,²¹² or belligerent occupation of a state’s territory will not affect a state’s identity.²¹³



When it comes to the replacement of government, however, State extinction occurs when accompanied by a succession of States, which refers to the “replacement of one State by another in the responsibility for the international relations of a territory”.²¹⁴ In this sense, state extinction entailing state succession is rather an expression of government change due to internal revolution, instead of the extinction of the state itself. Marek accepts that in a dynamic legal system, identity and continuity can only be relative.²¹⁵ Yet Crawford emphasized that “the notion of continuity is well established and, given the State/government distinction, is even logically required.”²¹⁶ When there is a change of government or constitution due to internal revolution, the successor state was viewed as direct heir to the personality and legal relationships of the predecessor state in the same way as the appointed successor in Roman law continued the

²¹¹ *Id.* at 15-24.

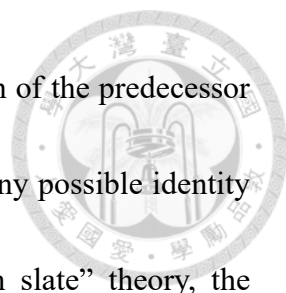
²¹² *Id.* at 24-73.

²¹³ *Id.* at 73-128.

²¹⁴ Article 2.1.a. of the 1978 Vienna Convention on Succession of States in respect of Treaties. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf (Last visited May 2, 2022)

²¹⁵ Marek, *supra* note 201, at 4–5.

²¹⁶ Crawford, *supra* note 30, at 668.



personality and legal relationships of the deceased.²¹⁷ The extinction of the predecessor state entails a succession by the successor state and puts an end to any possible identity or continuity of the predecessor state.²¹⁸ According to the “clean slate” theory, the sovereignty of the predecessor is not transferred, but rather extinguished.²¹⁹

Regarding the distinction between state and government, O’Connell’s theory might shed some light, who advocated shifting the paradigm from personality to effect. For O’Connell, what is necessary is an analysis of the real effect of change or continuities in political, social and administrative structure.²²⁰

In consideration of the political factors leading to the unification of Germany and the break-ups of the USSR and the Socialist Federal Republic of Yugoslavia (SFRY), another approach based on the legal criteria of statehood has been proposed by scholars such as James Crawford and Konrad Bühler.²²¹ In this way, state continuity is perceived as the outcome of a procedural process involving both “objective” factors derived from the legal concept of statehood, and “subjective” factors relating to the interplay of claim,

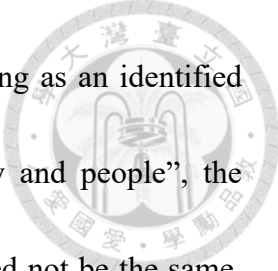
²¹⁷ Østrup, *supra* note 205, at 7.

²¹⁸ Marek, *supra* note 201, at 7-9

²¹⁹ D. P. O’CONNELL, THE LAW OF STATE SUCCESSION 8 (1956).

²²⁰ D. P. O’CONNELL, STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW I 7 (1967).

²²¹ Østrup, *supra* note 205, at 18.



recognition and acquiescence.²²² According to Crawford, “[..] as long as an identified polity exists with respect to a significant part of a given territory and people”, the irreducible core of the state remains,²²³ its constitutional system need not be the same, as long as it is independent and proclaims its continuity.²²⁴ At the same time, the recognition of or acquiescence in such claims by states concerned will be highly influential, if not decisive.²²⁵

Commenting on the case of the Russian Federation and its assumption of the USSR’s UN membership including its permanent seat in the Security Council, Crawford noted that, “the view that prevailed is that the legal process was one of devolution resulting in the establishment of a number of new States with the ‘core’ State, Russia, retaining the identity of the former Union.”²²⁶

Therefore, the Russian Federation’s claim to continue the legal personality of the USSR is “generally accepted”.²²⁷

²²² *Id.* at 19.

²²³ Crawford, *supra* note 30, at 671 with reference to B. Stern, *La succession d’États*, 262 INT’L J.HUM.RIGHTS. 9, 80 (1996); K.G. BÜHLER, STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS: LEGAL THEORIES VERSUS POLITICAL PRAGMATISM 15 (2001).

²²⁴ Crawford, *id.*

²²⁵ *Id.*

²²⁶ Crawford, *supra* note 30, at 705.

²²⁷ *Id.* with reference to M. Koskenniemi, *The Present State of Research Carried Out by the English-speaking Section of the Centre for Studies and Research of the Hague Academy of International Law*, in LA SUCCESSION D’ÉTATS: LA CODIFICATION À L’ÉPREUVE DES FAITS 89,101 (Kaskenniemi ed., 1996).



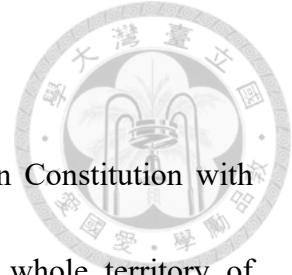
In contrast to the case of Russia, although the statehood of the Federal Republic of Yugoslavia is not contested, its claim to continue the international legal personality of the SFRY was rejected by the UN Security Council, which declared in 1992 that:

[T]he state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist [...] [The Security Council] [c]onsiders that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly [...]²²⁸

The Commission opines that “the existence of a federal States is seriously compromised when a majority of the constituent entities, comprising a majority of the population and territory of the federal State, constitute themselves as sovereign States with the result that federal authority could no longer be effectively exercised.”²²⁹

²²⁸ UN Security Council Resolution 777 of 19 September 1992, preamble and para1, available at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNMembers%20SRES777.pdf> (Last visited May 2, 2022)

²²⁹ De la Cuba, *supra* note 188, at 140 referencing to *Yugoslavia Peace Conference, Arbitration*



In the case of the unification of Germany, the 1949 West German Constitution with minor amendments was from October 3, 1990 in force for the whole territory of Germany.²³⁰ Given that the establishment of the German unity was the result of the voluntary accession of eastern Germany, which had given up its identity as a subject of international law to Western Germany, as the irreducible core of Federal Republic of Germany (Western Germany or FGR) remains, the FGR was able to retain its seat in the UN.²³¹

In light of the situations where there is no real continuity, rather the concept of state identity is a legal fiction to support the political claims; Cansacchi based state continuity on the material element of the people, which constitutes the international personality of the state, notwithstanding changes in the legal order or government of the state.²³² A similar argument was made by Herman Mosler in 1962: “The international legal capacity of a State, however, remains the same unless its substrate (territory and people) changes to such an extent that the continuity of the state as the historical-political form

Commission, 4 July 1992, 92 INTL’L L. REP 199, 201 (1993).

²³⁰ Crawford, *supra* note 30, at 674.

²³¹ *Id.*

²³² Østrup, *supra* note 205, at 17 with reference to G. Cansacchi di Amelia, *Identité et continuité des sujets internationaux*, 130 RECUEIL DES COURS 2, 88 (1970).

of life of the people organized in it is interrupted”²³³



In line with this approach, in a 1998 article, Matthew Craven notes that international legal personality is concerned with the substance rather than the form of a state. Considering that the traditional criteria for statehood are “abstract” in the sense that they relate not to a particular territory, population etc., but simply to a territory, population etc., the legal continuity of the state must be determined based on material elements, i.e., social, political and cultural identity.²³⁴ It is the sense of “self, singularity, and community” that justifies the attachment of international legal obligations to particular territories and social groups.²³⁵

4. Territorial Disposition

4.1 Peace Treaty

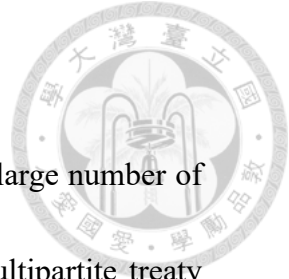
“Historically, major wars between States ended through concluding peace treaties between the warring States.”²³⁶ In the Advisory Opinion on the International Status of

²³³ Bühler, *supra* note 223, at 10 citing Mosler, H., “Völkerrechtsfähigkeit”. In Wörterbuch des Völkerrecht 3, 675(H.-J. Schlochauer ed., 1962).

²³⁴ M.C.R. Craven, *The problem of state succession and the identity of states under international law*, 9(1) EUR.J.INT’L.L 142,160 (1998).

²³⁵ *Id.* at 153.

²³⁶ FRANK CHIANG, *THE ONE-CHINA POLICY: STATE, SOVEREIGNTY, AND TAIWAN’S INTERNATIONAL LEGAL STATUS* 105 (2017).



South West Africa, the International Court of Justice stated that:


From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of a great war.²³⁷

Frank Chiang points out that “Most peace treaties are also territorial treaties that reallocate territories of the defeated States...The victorious State in a war may validly force the defeated State to dispose of its territories by a treaty.”²³⁸ “A treaty to cede a territory concluded at the end of a war is binding on both parties however unfair it may seem. This is because the defeated State is in a weaker bargaining position. No such treaty has ever been effectively revoked or terminated on the grounds of unfairness or unjust.”²³⁹ “Territorial treaties provide a final settlement of the territories between the

²³⁷ International status of South-West Africa, *infra* note 257, p.154.

²³⁸ Chiang, *supra* note 236, at 105; Kerr, *infra* note 642, at 39, “(S)overeignty could not be transferred until a peace treaty could be worked out, agreed upon, and signed.”

²³⁹ Chiang, *id.* at 107.



parties.”²⁴⁰ The characteristic of the finality of a territorial treaty is reflected in Article 62(a) of the Vienna Convention, which stipulates that the *rebus sic stantibus* rule would not be invoked “if the treaty establishes a boundary”. From the International Law Commission’s Commentary, it is clear that such treaties should constitute an exception to the general rule permitting termination or suspension in case of fundamental change of circumstances, since otherwise the rule might become a source of dangerous frictions.²⁴¹

The peace treaties use definite and precise terms, such as “cede,” “divide,” “relinquish,” or “renounce” to dispose of a territory.²⁴² For example, by Article 23 of the Treaty of Peace with Italy, Italy renounced its territorial possessions in Africa, in favor of the Principal Allied Powers.²⁴³ Japan renounced its title over Formosa and the Pescadores (Taiwan) to Formosa and the Pescadores by Article 2 (b) of the Japanese Peace Treaty.²⁴⁴ Bessarabia was ceded to the Soviet Union by Article 1 (with Annex I) of the Romanian Peace Treaty.²⁴⁵ According to the general rule of interpreting treaties,²⁴⁶

²⁴⁰ *Id.* at 105.

²⁴¹ United Nations, *Yearbook of the International Law Commission*, 259 (1966), available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (last visited Feb.18, 2022).

²⁴² Chiang, *supra* note 236, at 107.

²⁴³ Treaty of peace with Italy, Feb.10, 1947, available at <https://reparations.qub.ac.uk/assets/uploads/m-ust000004-0311.pdf> (Last visited May 2, 2022)

²⁴⁴ Treaty of peace with Japan, Sep.8, 1951, available at <https://treaties.un.org/doc/publication/unts/volume%20136/volume-136-i-1832-english.pdf> (Last visited May 2, 2022)

²⁴⁵ See F. Ismail, *The making of the treaty of Bucharest*, 1811-1812, 15(2) MIDDLE EAST.STUD.163-192 (1973).

which was adopted by the 1969 Vienna Convention,²⁴⁷ when there is a dispute on the meaning of the terms of the treaty, the ordinary meaning of the words and the intention of the signing parties control.



Even though the terms of a treaty have been in part pre-arranged in binding form between the belligerents, it has been argued “that the cession of territory at the end of a war must await the peace treaty.”²⁴⁸ Accordingly, Taiwan²⁴⁹ and Korea²⁵⁰ remained formally Japanese territories until the Peace Treaty with Japan was signed in 1952.

4.2 Transitional Arrangements

4.21 Mandate and Trusteeship

After world war I, Article 119 of the Treaty of Versailles states that "Germany renounces in favor of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions"²⁵¹ Article 127 states that: “the native inhabitants of the former German oversea possessions shall be entitled to the diplomatic protection of the Governments exercising authority over those territories.”²⁵²

²⁴⁶ REBECCA M. M. WALLACE, INTERNATIONAL LAW: A STUDENT INTRODUCTION 240 (1986).

²⁴⁷ Vienna Convention, *supra* note 196, art. 31 provides interpretive methodologies for all treaties.

²⁴⁸ See Crawford, *supra* note 30, at 208.

²⁴⁹ *Id.* at 207

²⁵⁰ *Id.* at 468-69

²⁵¹ Treaty of Peace with Germany (Treaty of Versailles) art.119, 1919, available at https://www.census.gov/history/pdf/treaty_of_versailles-112018.pdf (Last visited May 2, 2022)

²⁵² *Id.* art.127.



The Mandate system was established by the Principal Allied and Associated Powers in conjunction with the League of Nations under Article 22 of the Covenant of the League of Nations.²⁵³ As a substitute for an out-right annexation of the territories which the Allies had conquered from Germany and Turkey during the World War I, Article 22 refers to the “Colonies and territories which as a consequence of the late War have ceased to be under the sovereignty of the States which formerly governed them.”²⁵⁴

According to the propositions suggested by the Permanent Mandates Commission to the Council in October, 1921, “Individual inhabitants of the mandated territories should voluntarily obtain naturalization from the Mandatory Power in accordance with arrangements which it is open to such Power to make with this object under its own law.”²⁵⁵

Therefore, the imposition of national identity by Mandatory Power on the inhabitants of the mandated territories is not inconsistent with the Mandate arrangement. For example, in French Togoland, the natives could acquire French nationality; this was also the case

²⁵³ The Covenant of the League of Nations, December, 1924, available at https://avalon.law.yale.edu/20th_century/leagcov.asp (Last visited May 2, 2022)

²⁵⁴ *Id.* art.22.

²⁵⁵ Hales, *supra* note 26, at 105.

in Ruanda-Urundi in South-West Africa, in Western Samoa and in the Japanese Islands.²⁵⁶



After World War II, the mandate system was replaced by the International Trusteeship System, established under Chapters XII and XIII of the United Nations Charter.

It has to be noted that the establishment of a Mandate (or Trusteeship) over a territory did not constitute cession of that territory to the Mandatory.²⁵⁷ In other words, the Mandatory possesses the right to exercise the powers of sovereignty over a territory without having sovereignty.²⁵⁸ Indeed, the consensus view was that the concept of sovereignty was inapplicable to mandated and trust territories.²⁵⁹ As Lord McNair stated in his separate opinion in South West Africa (Status):

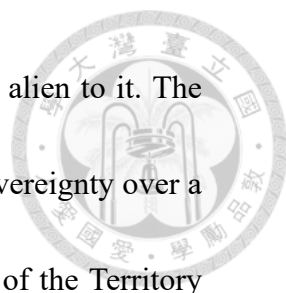
The Mandates System (and the “corresponding principles” of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which

²⁵⁶ *Id.* at 110.

²⁵⁷ See *International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950, p.128, 552, available at http://www.worldcourts.com/icj/eng/decisions/1950.07.11_status_of_SW_Africa.htm* (last visited Feb.22,2022). Herein after(status of South West Africa)

²⁵⁸ Hales, *supra* note 26, at 94.

²⁵⁹ Crawford, *supra* note 30, at 571.



does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to the new system. Sovereignty over a Mandated Territory is in abeyance; if, and when the inhabitants of the Territory obtain recognition as an independent State . . . sovereignty will revive and vest in the new State. What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate...²⁶⁰

The Mandates and Trusteeship System were bound up with international control in the interests of the inhabitants of the territory.²⁶¹ Despite these and that differences, the two systems had the same general aims of the encouragement of the “well-being and development” of the peoples of these territories, and of their “progressive development towards self-government or independence.”²⁶² Moreover, both of two systems “entailed

²⁶⁰ Status of South West Africa, *supra* note 257, at 151.

²⁶¹ *Id.* at 136.

²⁶² UN Charter, art. 76 (b).

a rejection of annexation of the colonial territories that had belonged to states defeated in the preceding War.”²⁶³



Crawford observes that “Termination of a Mandate involved compliance with the basic purpose of the Mandate and a determination of political fact—that effective self-government existed.”²⁶⁴ The independence of these territories could be recognized as consistent with the object and purpose of the Mandate, notwithstanding the absence of formal termination by the League.²⁶⁵

“The achievement of self-determination by territories under Mandate or Trusteeship was treated as finally resolving the question of status and associated issues of sovereignty over the territory as a whole.”²⁶⁶

4.22 Non-self- Governing Territory

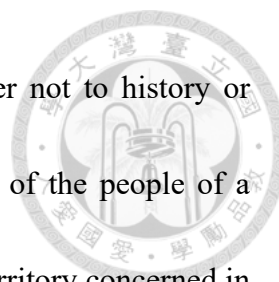
Article 73 of the Charter refers to “territories whose peoples have not yet attained a full measure of self-government”, which applies to United Nations Members “which have or assume responsibilities for the administration of territories” that are

²⁶³ Crawford, *supra* note 30, at 566.

²⁶⁴ *Id.* at 579.

²⁶⁵ *Id.* at 576-77.

²⁶⁶ *Id.* at 596.



non-self-governing. “The term ‘non-self-governing’ appears to refer not to history or geography, but to the status of (relative) subordination or freedom of the people of a territory.”²⁶⁷ When the administrating power arbitrarily places the territory concerned in a status of subordination, there is an obligation for it to transmit information under Article 73e of the Charter.²⁶⁸ “It is not limited to colonies in the strict sense: protectorates and other forms of colonial administration have also been included among the territories reported on.”²⁶⁹

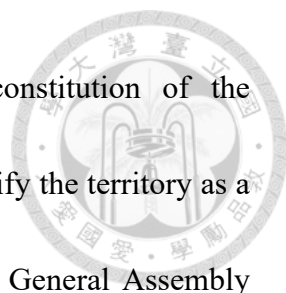
In 1961, the General Assembly established The Special Committee of Twenty-Four (the “Special Committee”) to implement the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514). Given wide-ranging powers to study and investigate all colonial situations and recommend action regarding the progress and extent of implementing the Declaration, the Special Committee compiled a list of sixty-four dependent territories, which it confirmed as Non-self-governing under the guidelines set forth under the Charter and Resolution.²⁷⁰

²⁶⁷ *Id.* at 606.

²⁶⁸ See Principle IV and V of GA res 1541 (XV), Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter, Dec.15, 1960, *available at* <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/153/15/PDF/NR015315.pdf?OpenElement> (Last visited May.2, 2022)

²⁶⁹ Crawford, *supra* note 30, at 613.

²⁷⁰ Dagati, *infra* note 955, at 164-5.



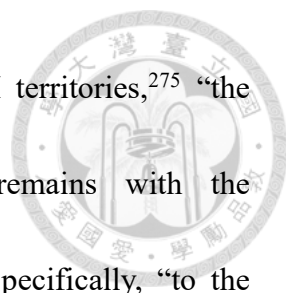
Even if there is some kind of autonomy provided by the constitution of the administering authority, the denial of equal suffrage could also qualify the territory as a non-self-governing territory. In the case of Southern Rhodesia, the General Assembly took the view that the degree of internal autonomy possessed by Southern Rhodesia in British constitutional law before 1965 did not prevented it from being non-self-governing.²⁷¹ The reason was that Britain’s effective control in Rhodesia was, in Fawcett’s words: “based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage.”²⁷²

Like mandated and trusteeship territories, “it is sometimes asserted that administering States are ipso facto not sovereign with respect to their Chapter XI territories, and the effect of colonial self-determination is to displace sovereignty rather than to qualify its exercise.”²⁷³ Sureda comments that “self-determination has become a peremptory norm of International Law whereby a state’s title to a territory having colonial status is

²⁷¹ See *The question of Rhodesia*, A/RES/1747, at <https://www.refworld.org/docid/3b00f1db4f.html>; *Question of Southern Rhodesia*, A/RES/2022, at <https://www.refworld.org/docid/3b00f1d312.html> (last visited at Jul.25, 2022)

²⁷² Fawcett, *supra* note 73, at 112.

²⁷³ Crawford, *supra* note 30, at 613.



void.”²⁷⁴ Although domestic jurisdiction is applied to Chapter XI territories,²⁷⁵ “the view that sovereignty over a non-self-governing territory remains with the administering State can be accepted only with reservations.”²⁷⁶ Specifically, “to the extent that sovereignty implies the unfettered right to control or to dispose of the territory in question, the obligation in Article 73b, and the associated principle of self-determination, substantially limit the sovereignty of an Administering State.”²⁷⁷

The Friendly Relations Declaration (1975) states that:

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter.²⁷⁸

It provides no termination functions to be exercised by United Nations organs. The administering power’s obligation to transmit information under Article 73e continues until the territory and its peoples attain a full measure of self-government.²⁷⁹ According

²⁷⁴ A.R. SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 353 (1973).

²⁷⁵ *See* R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UN*, 110–8 (1963).

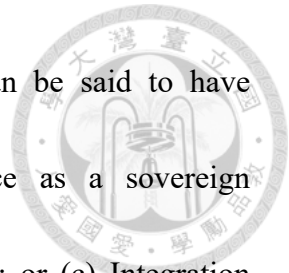
²⁷⁶ Crawford, *supra* note 30, at 613.

²⁷⁷ *Id.*, at 615.

²⁷⁸ Friendly Relations Declaration, *supra* note 34.

²⁷⁹ *See* GA res 1541 (XV), *supra* note 268.

to the General Assembly²⁸⁰, “a Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.”²⁸¹



4.3 Principle of Intertemporal Law

The doctrine of intertemporal law is defined by Judge Huber in the Island of Palmas arbitration, as “. . . a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”²⁸²

In the leading case on the subject of intertemporal- the Island of Palmas case, a dispute arose between the United States and the Netherlands over the US claim to the island of Palmas, which was based on Spain’s cession of the island to the United States in the Treaty of Paris of December 10, 1898. The United States contended that because Spain had acquired its original title to the Island by means of discovery, the United States as the successor to Spain must be regarded as the territorial sovereign over it. Judge Max

²⁸⁰ GA res 1541 (XV), Annex, Principle VI; cited in the Western Sahara Opinion, ICJ Rep 1975 p 12, 32. Available at <https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-00-EN.pdf> (Last visited May 2, 2022)

²⁸¹ *Id.*

²⁸² Island of Palmas Case, *supra* note 31.

Huber made it clear that the doctrine of intertemporal law is of general applicability in customary international law:



As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.²⁸³

The principle of intertemporal law recognized by the Island of Palmas arbitration received approval in the *Minquiers and Ecrehos* case.²⁸⁴ The dispute was between the United Kingdom and France regarding certain islands in the English Channel to which both the United Kingdom and France claimed an original feudal title going back to the Middle Ages. The ICJ adopted the principle laid down in the Island of Palmas arbitration that “the maintenance of the territorial title, not merely its acquisition in the abstract, was to be determined not only by the law contemporaneous with the creation

²⁸³ *Id.* at 845.

²⁸⁴ *See* the *Minquiers and Ecrehos* Case (France/United Kingdom), Nov.17, 1953, available at <https://www.icj-cij.org/public/files/case-related/17/017-19531117-JUD-01-00-EN.pdf> (Last visited May 2, 2022)

or acquisition of the title, but also by the rules governing the matter as they evolved through the period during which sovereign authority was purported to have been exercised by the party subsequently claiming the title.”²⁸⁵



There are therefore two elements regarding the principal of intertemporal law: first, acts should be judged in the light of the law contemporary with their creation, second, rights acquired in a valid manner according to the law contemporaneous with that creation may be lost if it is not maintained in accordance with the changes brought about by the development of international law.²⁸⁶ Elias points out that,

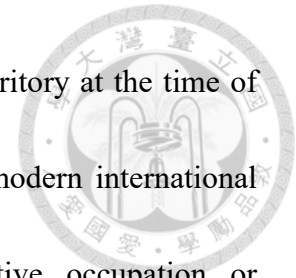
The second element of intertemporal law “would seem to modify or at least qualify the first element in the sense that it stipulates that, even though at an earlier stage of international law a valid title, once acquired, has conferred sovereignty, in order subsequently to prove a valid title the original acquirer must show that it has continuously maintained its authority and manifested it in an un- mistakable way up to the moment when a dispute arises for determination.”²⁸⁷

²⁸⁵ T. O. Elias, *The doctrine of Intertemporal law*, 74(2) AME.J.INT’L.L.285, 291 (1980).

²⁸⁶ *Id.* at 286.

²⁸⁷ *Id.* at 288.

In other words, the state which is in effective occupation of the territory at the time of the dispute “should be deemed to possess a superior title, since modern international law does not accept an abstract title unsupported by effective occupation or manifestation of authority over the territory or the right in question.”²⁸⁸



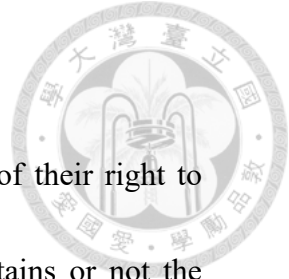
The issue arose indirectly when the Philippines applied to intervene in a dispute between Malaysia and Indonesia over two small islands off the coast of Borneo. The Philippines presented itself as the successor state of the Sultanate of Sulu, which retains a “dormant claim” on Eastern Sabah on the basis that the territory was only leased to the British North Borneo Company in 1878 without relinquishing its sovereignty over the territory.²⁸⁹ However, Malaysia interprets the 1878 agreement as the “cession”²⁹⁰ of the islands, and argues that the residents of Sabah (including Eastern Sabah) had exercised their right of self-determination when they joined to form the Malaysian federation in 1963.²⁹¹ Judge ad hoc Franck rejected Philippines’ request to intervene on the basis that no historic claim to title could prevail over the exercise of the right to

²⁸⁸ *Id.* at 292.

²⁸⁹ Jason Loh Seong Wei, *Sulu Sultanate had forever forfeited claim over Sabah*, NEW STRAIT TIMES, Mar. 16, 2022, at <https://www.nst.com.my/news/nation/2022/03/780650/sulu-sultanate-had-forever-forfeited-claim-over-sabah> (Last visited May.2, 2022)

²⁹⁰ Charlie Campbell, *Sabah Standoff: Diplomatic Drama After Filipino Militants Storm Malaysia*, TIME, Feb. 26, 2013, at <https://world.time.com/2013/02/26/sabah-standoff-diplomatic-drama-after-sulu-militants-storm-malaysia/> (Last visited May.2, 2022)

²⁹¹ JAMES WARREN GOULD, *THE UNITED STATES AND MALAYSIA* 106 (1969).



self-determination:

[I]n light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court. . . sustains or not the Philippines claim to historic title. Modern international law does not recognize the survival of a right of sovereignty based solely on historic title; not, in any event, after an exercise of self-determination conducted in accordance with the requisites of international law, the bona fides of which has achieved international recognition by the political organs of the United Nations.²⁹²

To conclude, the principle of intertemporal law requires that transactions completed at a particular time be judged in accordance with the law in force at that time, “so that concepts repugnant to modern international law may still produce important effects under that law.”²⁹³ For instance, even if the acquisition by force does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the colonial treaties concluded at a previous time be given effect today.²⁹⁴ Nevertheless, continued effective exercise in line with contemporary international law is

²⁹² Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 23 October 2001, separate opinion of Judge Franck, para 15. Available at <https://www.icj-cij.org/public/files/case-related/102/102-20011023-JUD-01-06-EN.pdf> (Last visited May 2, 2022)

²⁹³ Crawford, *supra* note 30, at 259.

²⁹⁴ *Id.* at 312.

necessary for the retention of rights that by modern standards were wrongfully acquired.²⁹⁵



5. Divided Nation

After World War II, certain states were divided into two separate states due to the cold war rivalry between the US and the Soviet Union, including Germany and Korea.

5.1 Two Germanys

Germany is seen as the prototype of the “divided State”.²⁹⁶ Following Germany's surrender, by June 5, 1945, there was no longer an effective or recognized government of Germany.²⁹⁷ The Allied Control Council, representing the United States, Britain, France, and the Soviet Union, assumed governmental authority in postwar Germany with a special Berlin area under quadripartite control.²⁹⁸ Economic demilitarization was the responsibility of each zone individually.²⁹⁹ Over time, however, the western zones

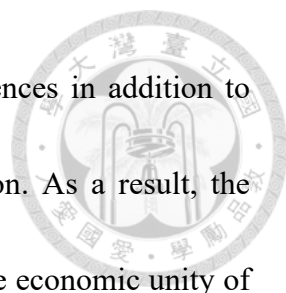
²⁹⁵ *Id.* at 259-60.

²⁹⁶ *Id.* at 450 with reference to G. CATY, LE STATUT JURIDIQUE DES ÉTATS DIVISÉS 17, 74 (1969).

²⁹⁷ See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers, June 5, 1945, available at <https://avalon.law.yale.edu/wwii/ger01.asp> (Last visited May 2, 2022)

²⁹⁸ See Statement on Control Machinery in Germany, 5 June 1945, available at <https://images.library.wisc.edu/History/EFacs/GerRecon/BackgrndDocs/reference/history.backgrnddocs.i0014.pdf> (Last visited May 2, 2022)

²⁹⁹ According to the Protocol of the Potsdam Conference, 1945, there was to be “a complete disarmament and demilitarization of Germany”, available at <https://2001-2009.state.gov/r/pa/ho/time/wwii/93275.htm> (Last visited May 2, 2022)



and the Soviet zone drifted apart due to growing economic differences in addition to developing political tensions between the US and the Soviet Union. As a result, the provisions of the Potsdam Agreement regarding reunification and the economic unity of Germany could not be implemented.³⁰⁰ In March 1948, the United States, Britain and France met in London and “agreed to unite the Western zones and to establish a West German republic. The Soviet Union responded by leaving the Allied Control Council, and prepared to create an East German state.”³⁰¹

On 23 May 1949, the three Western Allies established a subordinate government in their zones—the Federal Republic of Germany (FRG or the Western Germany).³⁰² The position of them was stated in the New York Declaration of 18 September 1950 as follows:

Pending the reunification of Germany, the three Governments consider the Government of the Federal Republic of Germany as the only German Government freely and legitimately constituted and therefore entitled to speak for Germany as the representative of the German people in international

³⁰⁰ See Melvyn P. Leffler, *The struggle for Germany and the origins of the cold war*, 1996, available at https://www.ghi-dc.org/fileadmin/publications/Occasional_Papers/The_Struggle_for_Germany.pdf (Last visited May 2, 2022)

³⁰¹ STEPHEN R. BURANT, *EAST GERMANY: A COUNTRY STUDY* 38 (1988).

³⁰² Crawford, *supra* note 30, at 454.

affairs.³⁰³



However, it has been argued that the above statement did not constitute recognition of the Government of the Federal Republic as the de jure Government of all Germany, since the Federal Republic had never exercised authority in eastern Germany.³⁰⁴ The authority of the Federal Republic was further enlarged by a Tripartite Convention on Relations of 26 May 1952.³⁰⁵ Under that Convention, the “Occupation regime” in the Federal Republic was purportedly terminated. Article 1(1) provided that, “The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs.”³⁰⁶ Article 2 provided that:

In view of the international situation, which has so far prevented the unification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement... The Convention was to remain in force only “until Germany

³⁰³ Communiqué by the Western Foreign Ministers Outlining Steps for Liberalization of Relations With the Federal Republic of Germany, Issued at New York and Washington, September 19, 1950, *available at* https://www.cvce.eu/content/publication/1999/1/1/b99fc411-cb50-48b6-b0b9-74597a363cb7/publishable_en.pdf (Last visited May 2, 2022)

³⁰⁴ *See* Single German Nationality (Teso) Case (1987), *available at* <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=569> (Last visited May 2, 2022)

³⁰⁵ Convention on relations between the Three Powers and the FRG (Bonn, 26 May 1952), *available at* https://www.cvce.eu/content/publication/2003/10/1/b1885d93-c91a-4fa7-80bd-e1d3b3171b87/publishable_en.pdf (Last visited May 2, 2022)

³⁰⁶ *Id.*

is re-united”.³⁰⁷



On the other hand, on October 7 1949, the Soviet Union created the German Democratic Republic (GDR or the Eastern Germany). Yet the western governments denied the GDR as a separate State,³⁰⁸ in light of the “democratic standards”, the absence of “free elections” and the continued “effective control of the Soviet Union”.³⁰⁹

If the two German States were to address the status of Berlin and of Germany as a whole, quadripartite consent was required.³¹⁰ “Pursuant to the agreements of 1971 to 1972 Berlin retained a separate status, even though it was administratively assimilated in part to the FRG and in part to the GDR. The Four Powers retained supreme authority with respect to Berlin, which they referred to as ‘another independent governmental authority and territory’.”³¹¹ Given that Berlin legislation required Allied approval, representation of Berlin was subject to an Allied veto.³¹²

On December 21, 1972, the Four Powers declared their acceptance of separate United

³⁰⁷ *Id.*

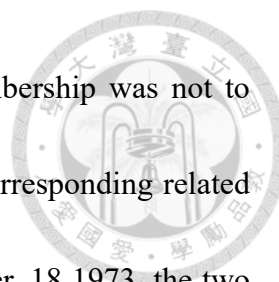
³⁰⁸ See the case of *Carl Zeiss Stiftung v Rayner & Keeler Ltd* in 1967, available at https://en.wikisource.org/wiki/Carl-Zeiss-Stiftung_v_Rayner_%26_Keeler_Ltd (Last visited May 2, 2022)

³⁰⁹ Crawford, *supra* note 30, at 456.

³¹⁰ *Id.* at 525.

³¹¹ *Id.* at 465.

³¹² *Id.* at 460.



Nations membership for the two Germanys.³¹³ However, the membership was not to affect “the rights and responsibilities of the Four Powers and the corresponding related Quadripartite agreements, decisions and practices.”³¹⁴ On September, 18 1973, the two German Republics were admitted to the United Nations without opposition.³¹⁵

In 1950, it was accurate to describe the FRG and GDR as “provisional”. But there was nothing provisional about the two German States’ being admitted as separate members to the United Nations in 1973.³¹⁶ Though in the case of the GDR, the grant of independence was a breach of applicable treaties,³¹⁷ it has been held that despite the initial international disapproval, GDR’s existence over a long period “must be regarded as having consolidated its separate statehood.”³¹⁸ Given that the State in the contemplation of international law is a primary fact, short of fundamental illegality, such as the use of force and self-determination, the continued existence of an East

³¹³ See Editorial, *Text of Communique Issued by Nixon and Brezhnev After Soviet Leader's Visit*, N.Y.TIMES.Jun.26, 1973, at <https://www.nytimes.com/1973/06/26/archives/text-of-communique-issued-by-nixon-and-brezhnev-after-soviet-leader.html>

³¹⁴ Letter dated 14 April 1975 from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General, available at <https://search.archives.un.org/uploads/r/united-nations-archives/d/a/0/da0c7a9df8fc045026f9d80226c0c2fe0f21d6ab86168918ea8be1fd1b28de7a/S-0904-0016-01-00001.PDF> (Last visited May 2, 2022)

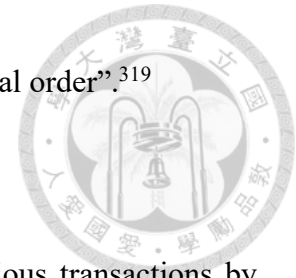
³¹⁵ See GA res 344, 22 June 1973, available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/288/71/PDF/NR028871.pdf?OpenElement>; GA res 3050 (XXVIII), 18 Sept 1973, available at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNMembers%20ARES3050%20XXVIII.pdf> (Last visited May 2, 2022)

³¹⁶ Crawford, *supra* note 30, at 682.

³¹⁷ *Id.* 458.

³¹⁸ *Id.* 457

German State was accepted as being “in conformity with international order”.³¹⁹



Once the FRG and GDR had emerged as separate States, the various transactions by which the Powers had accepted the territorial and administrative status quo in Germany might seem to have approximated a “final settlement”.³²⁰ Nevertheless, since no peace treaty with Germany had been made yet, quadripartite responsibility remained important in relation to any settlement they might propose encompassing Berlin and “Germany as a whole”.³²¹ In this sense, the German question remained open, and in practice, refusal to agree was hardly an option.³²² The stable situation has lasted for forty years until 1989-1990, when a number of social, economic and political incidents in the GDR and abroad eventually led to the fall of the Berlin Wall. The GDR ceased to function as a communist state,³²³ and “the groundwork was laid for a definitive resolution of the ‘German question’—including the absorption of Berlin and the GDR in the FRG and the termination of quadripartite authority.”³²⁴

³¹⁹ *Id.* 458

³²⁰ *Id.* 465

³²¹ *Id.* 525

³²² *Id.*

³²³ See PHILIP D. ZELIKOW & CONDOLEEZZA RICE, GERMANY UNIFIED AND EUROPE TRANSFORMED: A STUDY IN STATECRAFT 63–101 (1997); W. R. SMYSER, FROM YALTA TO BERLIN: FROM YALTA TO BERLIN: THE COLD WAR STRUGGLE OVER GERMANY 295-396 (2000).

³²⁴ Crawford, *supra* note 30, at 523.

Thereafter, both the Unification Treaty of 31 August 1990³²⁵ and the Treaty on the Final Settlement³²⁶ made it clear that the GDR would cease to exist on unification, with its territory being incorporated into the FRG, pursuant to Article 23 of the Basic Law.



The Treaty on the Final Settlement was concluded on September 12, 1990 by the two German States and the four Powers. It was an agreement between the two German parties and the four Powers to handle the final disposition of the “German question”.

Article 7 of the Final Settlement provided:

- (1) [The four Powers] hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole. As a result, the corresponding, related quadripartite agreements, decisions and practices are terminated and all related Four Power institutions are dissolved.
- (2) The united Germany shall have accordingly full sovereignty over its internal and external affairs.³²⁷

Accordingly, the united Germany would exist in perpetuity within the boundaries settled

³²⁵ Treaty on the Establishment of German Unity, 31 August 1990, available at https://ghdi.ghi-dc.org/sub_document.cfm?document_id=78 (Last visited May 2, 2022)

³²⁶ Treaty on the final settlement with respect to Germany, Sept.12, 1990, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201696/volume-1696-I-29226-English.pdf> (Last visited May 2, 2022)

³²⁷ *Id.* art.7.

by the post-War treaties.³²⁸



5.2 Two Koreas

During World War II, the Allied leaders fighting Japan considered the question of Korea's future after Japan's surrender in the war. The Cairo Declaration (1943) stated that: "[t]he aforesaid...powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent."³²⁹ The leaders then reached an agreement that Korea would be independent from Japan but would be placed under an international trusteeship until the Koreans be deemed as ready for self-rule.³³⁰ Towards the end of World War II, the Soviets accepted the US proposal and agreed to divide the Korean peninsula into two occupation zones (a US zone and a Soviet zone).³³¹ The assumption behind this division was that it was only a temporary arrangement until the wartime agreement on the Korean trusteeship could be implemented, and a unified Korean state over the entire peninsula would be established.³³² The Potsdam Proclamation made in 1945 reaffirmed the decision made in the Cairo Conference, which was later on accepted by the Japanese Instrument of

³²⁸ *Id.* art. 1(1).

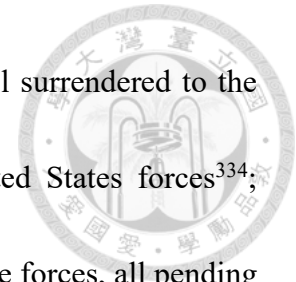
³²⁹ Cairo Declaration, Nov, 1943, available at <https://avalon.law.yale.edu/wwii/cairo.asp> (Last visited May 2, 2022)

³³⁰ See JONGSOO JAMES LEE, THE PARTITION OF KOREA AFTER WORLD WAR II: A GLOBAL HISTORY 5-7 (2006).

³³¹ *Id.* at 37-8

³³² *Id.*

Surrender.³³³ As a result, Japanese forces north of the 38th parallel surrendered to the Soviet forces; south of the 38th parallel surrendered to the United States forces³³⁴; Japanese forces in Taiwan and Pescadores surrendered to the Chinese forces, all pending the final settlement made by the Peace Treaty with Japan.³³⁵



In December 1945, at the Moscow Conference, the Allies agreed that the Soviet Union, the US, the Republic of China, and Britain would take part in a trusteeship over Korea for up to five years in the lead-up to independence.³³⁶ However, with the American government fearing Soviet expansion and the Japanese authorities in Korea warning of a power vacuum, MacArthur-the Supreme Commander for the Allied Powers ended up taking charge of the southern Korea from 1945 to 1948. From 1946 to 1947, a Soviet-US Joint Commission met to work towards a unified administration, but failed to make progress, due to the increasing Cold War antagonism and the Korean opposition to the trusteeship.³³⁷ The difference in policy between the occupying powers led to a polarization of politics.³³⁸

³³³ Surrender of Japan, Sep.2, 1945, *available* at <https://www.ndl.go.jp/constitution/e/etc/c05.html> (last visited April 6, 2022).

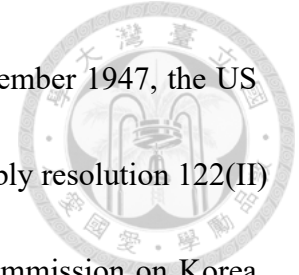
³³⁴ EDWARD A. OLSEN, *KOREA, THE DIVIDED NATION* 62 (2005).

³³⁵ As belligerent occupants, the Allies had no dispositive authority, apart from that to be exercised in the dispositions of the Japanese Peace Treaty, *see* Crawford, *supra* note 30, at 468.

³³⁶ ADRIAN BUZO, *THE MAKING OF MODERN KOREA* 59 (2002); CHRISTOPH BLUTH, *KOREA* 12 (2008).

³³⁷ *Id.*, Buzo, at 59–60, 65.

³³⁸ MICHAEL E. ROBINSON, *KOREA'S TWENTIETH-CENTURY ODYSSEY: A SHORT HISTORY* 108–9 (2007).



With the failure of the Joint Commission to make progress, in September 1947, the US brought the problem before the United Nations. The General Assembly resolution 122(II) passed by UN on November 14, 1947 established a Temporary Commission on Korea ((UNTCOK) and recognized “the urgent and rightful claims to independence of the people of Korea”.³³⁹ Machinery for the free election of representatives was established. However, as the Soviet Union and the local North Korean administration refused to cooperate, the implementation of the resolution was in effect confined to the south.³⁴⁰

As a matter of fact, a divided Korea with separate elections was unpopular among many Koreans. In April 1948, Jeju islanders rose up against the looming division of the country. South Korean troops were sent to repress the rebellion.³⁴¹ On May 10, 1948, the general election held in the south took place amid widespread violence and intimidation, as well as a boycott by the opponents of Syngman Rhee.³⁴²

The anti-communist Syngman Rhee, who had become the first president of the Provisional Government, pressured the American government to abandon the plan for a

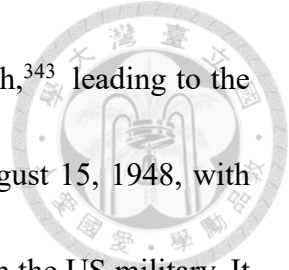
³³⁹ The Problem of the Independence of Korea, November 14, 1947, *available at* <https://digitalarchive.wilsoncenter.org/document/117705.pdf?v=a3874b9d71a874a981ff883863177503> (Last visited May 2, 2022)

³⁴⁰ Crawford, *supra* note 30, at s 467.

³⁴¹ See Editorial, *Ghosts of Cheju*, NEWSWEEK, June 19, 2000, at <https://www.newsweek.com/ghosts-cheju-160665> (Last visited May 2, 2022)

³⁴² MICHAEL PEMBROKE, KOREA: WHERE THE AMERICAN CENTURY BEGAN 47(2018).

trusteeship and create an independent Republic of Korea in the south,³⁴³ leading to the establishment of the Republic of Korea (ROK) in the South on August 15, 1948, with Syngman Rhee as the first president formally taking over power from the US military. It was promptly followed by the establishment of the Democratic People's Republic of Korea (DPRK) in the North on September 9, 1948, where Kim Il-sung consolidated his position as the leader of Soviet-occupied area. Since then, the United States supported the South; the Soviet Union supported the North, with each government claiming sovereignty over the whole Korean peninsula.



On December 12, 1948, the United Nations General Assembly accepted the report of UNTCOK and declared that:

there has been established a lawful government [the Government of the Republic of Korea] having effective control and jurisdiction over that part of Korea where the Temporary Commission was able to observe... and in which the great majority of the people of all Korea reside; that this Government is based on elections which were a valid expression of the free will of the electorate of that part of Korea... and that this is the only such Government in Korea.³⁴⁴

³⁴³ WILLIAM W. STUECK, *RETHINKING THE KOREAN WAR: A NEW DIPLOMATIC AND STRATEGIC HISTORY*, 55–7(2002).

³⁴⁴ General Assembly of the UN, *The problem of the independence of Korea*, GA res 195 (III), Dec.12, 1948, *available at*



Nevertheless, none of the members of UNTCOK considered the national parliament established by the election to be legitimate.³⁴⁵ In 1949, both governments applied for United Nations membership. The application of the north DPRK was not considered, and that of the ROK was vetoed by the Soviet Union.³⁴⁶

On June 25, 1950, after years of mutual hostilities, the military forces of the People's Republic (the North Korea) attacked the South Korea across the 38th parallel in an attempt to re-unify the peninsula under its communist rule, triggering the Korean War.³⁴⁷ The Security Council immediately authorized assistance to the South Korean Government, determining that "this action constitutes a breach of the peace; and Calls upon the authorities in North Korea to withdraw forthwith their armed forces to the 38th parallel"³⁴⁸ A United Nations force of considerable size was engaged.³⁴⁹ The South Korea (ROK), in turn, attempted to unify the country under its regime.³⁵⁰ As the US-led forces pushed into the north, China unleashed a counter-attack that drove them back into

<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/66/PDF/NR004366.pdf?OpenElement> (Last visited May 2, 2022)

³⁴⁵ Pembroke, *supra* note 342, at 47.

³⁴⁶ Crawford, *supra* note 30, at 467.

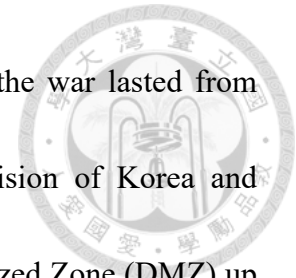
³⁴⁷ *Id.* at 468.

³⁴⁸ Complaint of aggression upon the Republic of Korea, SC res 82 (1950), June 25, 1950, available at <https://www.refworld.org/docid/3b00f15960.html> (Last visited May 2, 2022)

³⁴⁹ See R. HIGGINS, 2 UNITED NATIONS PEACEKEEPING 1946–1967 DOCUMENTS AND COMMENTARY 153–314 (1970).

³⁵⁰ BRUCE CUMINGS, KOREA'S PLACE IN THE SUN: A MODERN HISTORY 281-2(2005).

the south. Despite attempts by both sides to reunify the country, the war lasted from 1950 to 1953 and ended with a stalemate, perpetuating the division of Korea and leading to the two Korean states separated by the Korean Demilitarized Zone (DMZ) up to the present day.



On the other hand, by Article 2(a) of the Peace Treaty of 1951, Japan, “recognizing the independence of Korea, renounce[d] all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet,”³⁵¹ without designating the beneficiary of the title. Neither Korean government was a signatory to the Peace Treaty.³⁵²

On July 27, 1953, a Military Armistice Agreement was signed by the parties, establishing at the 38th parallel a ceasefire line and a Demilitarized Zone.³⁵³ Under Article 10, the civil and relief jurisdiction of each side was accepted with respect to its own territory.³⁵⁴ The South Korea (ROK) was not, however, a signatory.

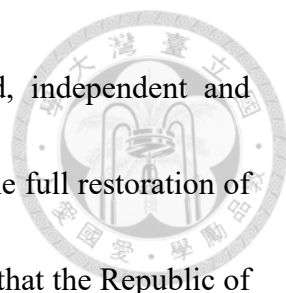
After 1953, the United Nations frequently reaffirmed that “the objectives of the United

³⁵¹ Treaty of Peace with Japan, *supra* note 244.

³⁵² Crawford, *supra* note 30, at 468.

³⁵³ Armistice agreement of 27 July 1953, (1953) UNYB136, available at https://www.unmultimedia.org/searchers/yearbook/page_un2.jsp?bookpage=136&volume=1953(Last visited May 2, 2022)

³⁵⁴ *Id.*



Nations remain the achievement by peaceful means of a unified, independent and democratic Korea under a representative form of government, and the full restoration of international peace and security in the area.”³⁵⁵ Nevertheless, given that the Republic of Korea had never exercised effective jurisdiction over the whole of Korea, and the Article 2(a) of the Japanese Peace Treaty does not readily lend itself to interpretation in terms of transfer but the renunciation of sovereignty, the date of the Korean ceasefire (July 1953) is considered as the point at which the boundary between the two entities became firmly established.³⁵⁶

Like the case of two Germanys, “The continuing existence of two Korean States eventually compelled the recognition of both.”³⁵⁷ On July 4, 1972, a Joint Communiqué on Basic Principles of National Unity made between the two Koreas noted that the unification was to be effected by peaceful means instead of the use of force,³⁵⁸ amounting to recognition by the parties of the situation created in 1953.³⁵⁹ In 1973,

³⁵⁵ General Assembly of UN, The Korea Question, GA res 811(IX), Dec.11 1954, *available at* <http://www.worldlii.org/int/other/UNGA/1954/55.pdf> (Last visited May 2, 2022); see also General Assembly of UN, Question of Korea, res 2668(XXV), Dec.7 1970, *available at* <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/349/33/IMG/NR034933.pdf?OpenElement> (Last visited May 2, 2022)

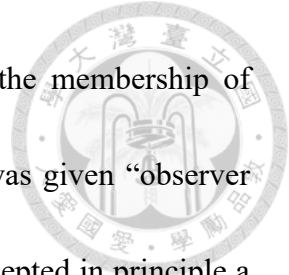
³⁵⁶ Crawford, *supra* note 30, at 470-72.

³⁵⁷ *Id.* at 471.

³⁵⁸ Question pertaining to Korea, (1972) UNYB 150, *available at* https://www.unmultimedia.org/searchers/yearbook/page_un2.jsp?bookpage=150&volume=1972 (Last visited May 2, 2022)

³⁵⁹ Crawford, *supra* note 30, at 471.

after extensive debate, the DPRK was admitted to the WHO,³⁶⁰ the membership of which, by Article 3 of its Constitution, is open to “all States”. It was given “observer status” at the United Nations in June 1973.³⁶¹ The United States accepted in principle a proposal that both Korean States be admitted to the United Nations,³⁶² and the two Korean States were eventually accepted in 1991.³⁶³



5.3 Characteristics of the Divided Nations

The characteristics of the two cases of Divided Nation mentioned above could be concluded as follows:

A. Immediately before the World War II, the divided nations constitute a single entity.

After the war, however, the expanded divisions and conflicts between Soviet Union and the US eventually led to the establishment of two states on each side of the former country/entity, despite that it violated the original international arrangement.

B. At the time, the democratic government supported by the west was thought to be legitimately formed and gained worldwide recognition. Yet considering that the formation of state is a matter of fact, the lack of fundamental illegitimacy regarding the

³⁶⁰ See Twenty-Sixth World Health Assembly, WHA 26.28 of 17 May 1973, available at https://apps.who.int/iris/bitstream/handle/10665/85858/Official_record209_eng.pdf?sequence=1&isAllowed=y (Last visited May 2, 2022)

³⁶¹ Crawford, *supra* note 30, at 471.

³⁶² *Id.*

³⁶³ SC res 702, Aug.8, 1991, available at <http://unscr.com/en/resolutions/702> (Last visited May 2, 2022) ; GA res 46/1, 17 Sept 1991, available at <https://digitallibrary.un.org/record/133631> (Last visited May 2, 2022)



formation of the socialist states and their consolidated statehood over a long period of time finally compelled the universal recognition and their memberships in the United Nation.

C. As the former entity/state was divided into two sections with almost equal areas, neither of the two states are able to claim continuity/identity of the pre-war state/entity.

The state extinction/ succession scenario therefore can hardly apply to the two cases.

D. Given that statehood takes priority over other kinds of territorial transference, the establishment of the two states in violation of the war-time arrangement or peace treaties eventually gained legitimacy over time.

E. The tenets of the Divided Nation “is not whether two entities are bound to work towards the reunification of the nation and their reabsorption into a single State; but whether they do actually constitute parts of a single State”³⁶⁴ or entity immediately before the war.

Caty excludes the Chinese situation from the rubric “divided State” on the ground that Taiwan is a separate State³⁶⁵. Crawford argued that no general conception of divided statehood is of value in analyzing the legal status of Taiwan.³⁶⁶

³⁶⁴ Crawford, *supra* note 30, at 451

³⁶⁵ G. CATY, *LE STATUT JURIDIQUE DES ÉTATS DIVISÉS* 23–30 (1969), cite in *Id.* at 477.

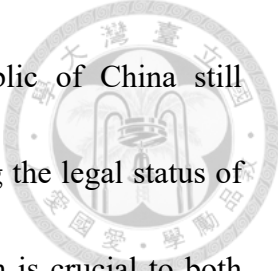
³⁶⁶ *Id.*



6. Applying the Statehood Theories to Taiwan

China has long claimed that Taiwan is its unrecovered territory, forcing other states to respect its territorial integrity and sovereignty by not establishing formal diplomatic relations with Taiwan. To examine the legitimacy of China's claim, this Chapter begins with the discussion of the legal concept of sovereignty; in consideration of the "Anti-secession Law" enacted by China in 2005 to prevent Taiwan from seeking independence and full attributes of statehood, the theories of independence, recognition and self-determination were discussed; because of the civil war scenario in China during 1945-1949, at the time of the conclusion of Peace Treaty with Japan in 1952, there was no government firmly controlling the whole territory of China to represent China. As a result, both the PRC government and the ROC government were excluded from the treaty. In light of this, the notion of the "failed state" is introduced. Although non-retroactivity is a general principle of law, and "failed state" is a new concept emerged in the 1990s, it has been observed that "interpreted rule is not a new rule and can therefore be retroactive"³⁶⁷; given that the current constitution name of Taiwan- the Republic of China has led to severe confusion about Taiwan's legal status, the theory of

³⁶⁷ João Grandino Bodas, *The Doctrine of Non-Retroactivity of International Treaties*, at 346-7, 1973, available at <https://core.ac.uk/download/pdf/268355415.pdf> (Last visited July 23, 2022)



state continuity/identity was introduced to examine if the Republic of China still continues on Taiwan; to explore the origins of the disputes regarding the legal status of Taiwan, the methods of territorial disposition was mentioned, which is crucial to both KMT and CCP's claim regarding Taiwan. Specifically, the principal of intertemporal law is extremely important in analyzing the PRC's claim of Taiwan, which has not even administered Taiwan for one day; last but not least, given that the constitutional reforms of Taiwan in the 1990s were insisted by some KMT hardliners to be based on the theory of Divided Nation, the circumstances that put states into the category of divided nations were therefore analyzed.

Chapter III: Historical Analysis of Taiwan's Statehood



About 10,000 years ago, Taiwan became an island in its present shape. Archaeological and anthropological evidence indicates that the indigenous people had inhabited on Taiwan since then.³⁶⁸ While Taiwan shares the continental shelf with China, it is part of the same island system as Japan.³⁶⁹ With a total area of some 13,836 square miles (35,834 kilometers), Taiwan's original inhabitants have been divided into fourteen groups of lowland peoples and nine groups of mountain peoples.³⁷⁰ Each of the mountain aboriginal tribes has their own languages, custom, culture and social organizations. Theories about their origins include: (1) the descendants of proto Malays who migrated to Taiwan from the Malay Peninsula and Indonesian archipelago, and Polynesian expansion; (2) descendants of Mongolia; (3) descendants of Miao tribes in Kweichow province of mainland China; and (4) the homeland of the Austronesians.³⁷¹ The first settlements of these groups - speakers of the earliest known Austronesian languages, dated back at least fifteen thousand years.³⁷²

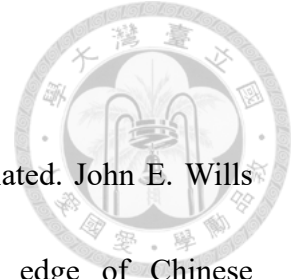
³⁶⁸ James Chun-I Lee et al, *Population study of polymorphic microsatellite DNA in Taiwan*, 1(1) FORENSIC SCI. J 31 (2002) with reference to National Printing Office, Introduction of Taiwan: historical section.

³⁶⁹ Andrew D. Morris, *Taiwan's history: an introduction*, in THE MINOR ARTS OF DAILY LIFE : POPULAR CULTURE IN TAIWAN1, 7 (David K Jordan, Andrew D Morris and Marc L Moskowitz eds., 2004)

³⁷⁰ Michael Stainton, *The Politics of Taiwan Aboriginal Origins*, in TAIWAN: A NEW HISTORY 27, 29-41(Murray A. Rubinstein eds., 2007).

³⁷¹ Lee et al, *supra* note 368, at 32.

³⁷² Morris, *supra* note 369, at 7.

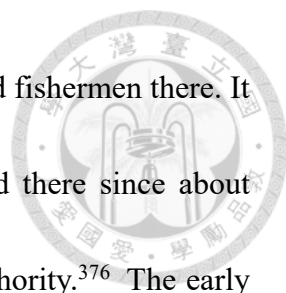


Until the 1500s, Taiwan had been commercially and culturally isolated. John E. Wills observed that even in 1600, Taiwan still “was on the outer edge of Chinese consciousness and activity”.³⁷³ In the 16th and 17th centuries, however, as Eurasia experienced an upswing in international trade, the importance of the island situating on the sea-lanes between Japan and southern China grew.³⁷⁴ Japanese and Chinese traders began trading with each other there. It was the Europeans, however, who first established the formal colonies: the Dutch in the Southwest in 1624, and the Spanish in the north in 1626.

Taiwan and the Penghu Archipelago (or the Pescadores known to the Europeans) were not treated as an integral entity under the name of Taiwan until 1895, when they were ceded to Japan by Qing as a whole. The 64 islands of the Penghu Archipelago lie in the Taiwan Strait 150 km from mainland China and 50 km from the main island of Taiwan. When Taiwan was still on the outer edge of Chinese consciousness and activity, the earliest Chinese record of Penghu can be found in Wang Ta-yuan’s Tao-I Chih-lueh

³⁷³ John E. Wills, Jr., *The Seventeenth-Century Transformations: Taiwan Under the Dutch and the Cheng regime*, in *TAIWAN: A NEW HISTORY* 84, 85 (Murray A. Rubinstein eds., 1999).

³⁷⁴ See Anthony Reid, *An “Age of Commerce” in Southeast Asian History*, 24(1) *MOD. ASIAN STUD.* 1-30(1990); Dennis O. Flynn & Arturo Giraldez, *Arbitrage, China, and World Trade in the Early Modern Period*, 38(4) *J. ECON. SOC. HIST. ORIENT* 429 (1995); William Atwell, *Ming China and the Emerging World Economy*, c. 1470-1650, in 8 *CAMBRIDGE HIST. CHINA* 376-416 (Denis Twitchett and Frederick W. Mote ed., 1998).



(1349).³⁷⁵ Wang found substantial settlements of Chinese traders and fishermen there. It was reported that Chinese officers occasionally had been stationed there since about 1170, but there was no record of Chinese settlement or political authority.³⁷⁶ The early Ming rulers reversed the positive policies toward seafaring characteristic of southern Sung and Yuan, and withdrew their officials from Peng hu, attempting to evacuate all the people, and forbade all Chinese maritime activities.³⁷⁷

In response to Hideyoshi's invasion of Korea, a Ming military presence was reestablished in Penghu. With the collapse of Ming maritime restrictions after 1550, there was a revival of Chinese fishing on Taiwan and Peng hu since then, yet very little can be known about it before the period documented by the Dutch. The Portuguese passing through the Taiwan Strait to Japan called the Penghu the Pescadores (Fisherman) islands.³⁷⁸ Still little records of Chinese activities can be found at this time except an early Dutch observer's comment's on the aborigine's meager fishing abilities and dependence on Chinese traders for supplies of salt in Penghu.³⁷⁹

³⁷⁵ Laurence G. Thompson, *The earliest Chinese accounts of the Formosan Aborigines*, 23 MONUM. SERICA 163-204 (1963).

³⁷⁶ Wills, *supra* note 373, at 86.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*



1. Dutch (1624-1662)

In 1622, a Dutch fleet besieging Macao was repelled and landed on the Penghu Islands.³⁸⁰ The Dutch East India Company (VOC) began building a base there,³⁸¹ but Ming dynasty officials pushed them farther east to an island³⁸² not considered as imperial territory, known to the early seventeenth-century Chinese officials as Taiyuan, Dayuan, Taiwan, or Dawan.³⁸³

Taiwan's "position at the heart of the Pacific trade routes made it a natural haven for smugglers, pirates, outlaws, foreign adventurers and a few hardy settlers from China's coastal provinces... the island's aboriginal inhabitants had developed a fearsome reputation for their hostility to outsiders."³⁸⁴ As the Japanese maritime trade expanded, the Japanese and Chinese sometimes met and traded in the harbors of Taiwan.³⁸⁵ The Chinese traders bought deer hides from the aborigines for sale in Japan.³⁸⁶ As early as 1582, the survivors of a Portuguese shipwreck landed on the island of Taiwan and

³⁸⁰ TONIO ANDRADE, HOW TAIWAN BECAME CHINESE: DUTCH, SPANISH, AND HAN COLONIZATION IN THE SEVENTEENTH CENTURY 41 (2008).

³⁸¹ *Id.*, at 41-2

³⁸² *Id.*

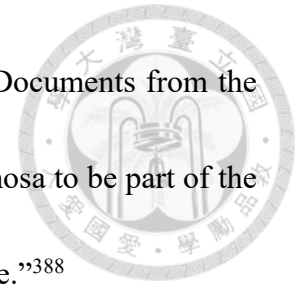
³⁸³ Morris, *supra* note 369, at 8 with reference to Nakamura Takashi, *Taiwan-shi gaiyo* (the modern history of Formosa), 18 (1-2) MINZOKUGAKU KENKYU (Anthropological Research) 114 (1954).

³⁸⁴ Editorial, *How to remember Koxinga: Contested legacy*, THE ECONOMIST, Jul.27, 2012, at <https://www.economist.com/analects/2012/07/27/contested-legacy> (Last visited at May 2, 2022)

³⁸⁵ Wills, *supra* note 373, at 86.

³⁸⁶ *Id.*

stayed for ten weeks, they call Taiwan Formosa (“beautiful”).³⁸⁷ “Documents from the late sixteenth century suggest that Spanish officials considered Formosa to be part of the Philippine Archipelago and thus a possession of the Crown of Castile.”³⁸⁸



Because of the endemic conflict and political instability along China’s southern coastland, a few of Chinese people moved to what would become Taiwan in the hopes of finding stability by the time of the Dutch settlement.³⁸⁹ When the Dutch arrived in southern Taiwan in 1622, it was estimated that the populations comprised of a thousand Chinese sojourners and traders, when Taiwan was inhabited largely by the Malayo-Polynesian peoples, or aborigines in the English-language literature.³⁹⁰ At the time, about seventy thousand plains aborigines could be found on the western Taiwan coast.³⁹¹

The arrival of the Dutch East India Company (herein after the Company) which represents the Dutch state in maritime Asia on the shores of what is now the city of

³⁸⁷ C.R. BOXER, THE GREAT SHIP FROM AMACON: ANNALS OF MACAO AND THE OLD JAPAN TRADE, 1555-1640 44(1959).

³⁸⁸ Andrade, *supra* note 380, at 121.

³⁸⁹ Hirano et al, *infra* note 402, at 198.

³⁹⁰ Wills, *supra* note 373, at 85.

³⁹¹ *Id.* at 87-8; M. Laurence Hauptman & Ronald G. Knapp, *Dutch-aboriginal interaction in New Netherlands and Formosa: An historical geography of empire*, 121(2) P. AM. PHILOS. SOC. 166, 175 (1977).

Tainan marked the beginning of Aboriginal interactions with foreign colonizers.³⁹²

“The Dutch had come to the region looking for a base from which to seek to trade with China and Japan, and to wage war on their enemies.”³⁹³ The first Dutch post- Fort Zeelandia was built on a sandbar bought from the local aborigines at the mouth of a coastal bay.³⁹⁴

In 1629, a party of Dutch soldiers were attacked by the people of Ma-tou (known as Tainan today).³⁹⁵ This conflict lasted until 1635, when more than four hundred Dutch soldiers arrived to burn Ma-tou to the ground. The elders came to the castle to sue for peace,³⁹⁶ and more and more villages submitted thereafter. In February 1636, “representatives of twenty-eight villages met in a council, a practice that would be regularized as the Dutch sphere of control widened.”³⁹⁷

On the other hand, the Dutch’s actions in Taiwan alarmed the Spanish government in the Philippines, which outfitted an expedition that landed in Keelung and Tam-sui of northern Taiwan in 1626.³⁹⁸ “The Spanish hoped to counter the strategic dominance of

³⁹² Andrade, *supra* note 380, at 169.

³⁹³ Wills, *supra* note 373, at 89.

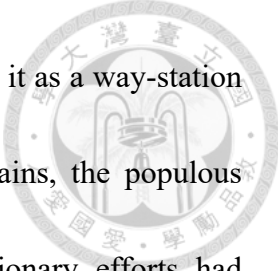
³⁹⁴ *Id.*

³⁹⁵ *Id.* at 90.

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 90-1.

³⁹⁸ Andrade, *supra* note 380, at 264.



the Dutch in East Asia, attract Chinese trade to their outpost, and use it as a way-station for missionary penetration of China.”³⁹⁹ Closely ringed by mountains, the populous plain of Tam-sui river produced a surplus of rice. Spain’s missionary efforts had inevitably led to wars between tribes, and the hostile tribesmen crossing over the ridge in the Tan-sui valley made the Spanish very uncomfortable, whose effort to levy a tax of chickens and rice from every household caused more trouble.⁴⁰⁰ As the incessant winter rains caused much sickness, the Tam-sui garrison was abandoned in 1638. In 1642, a force of more than five hundred Dutch soldiers took it. There, the Dutch facing a good deal of resistance sent reinforcements that brought it under control in 1644. The Dutch then marched southward overland, crushing occasional resistance and receiving the submission of many villages. The number of villages over which the Dutch claimed sovereignty rose from 44 in 1644 to 315 in 1650.⁴⁰¹

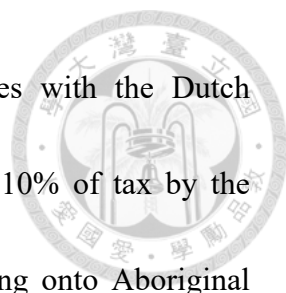
The Dutch imposed a number of taxes on subjugated villages, limited movements between them, and involved themselves in village affairs by appointing chieftains.⁴⁰² Headmen were named for each village, and summoned to annual regional councils where their disputes were mediated. They were exhorted to keep the peace among

³⁹⁹ Wills, *supra* note 373, at 91.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² Katsuya Hirano, Lorenzo Veracini and Toulouse-Antonin Roy, *Vanishing natives and Taiwan’s settler-colonial unconsciousness*, 50(2) CRIT. ASIAN STUD. 196, 197 (2008).



themselves and not attack the Chinese who were in the villages with the Dutch permission.⁴⁰³ The Chinese fishing along the coast were claimed 10% of tax by the Dutch in their zone.⁴⁰⁴ As the Chinese hunters routinely trespassing onto Aboriginal lands had caused conflicts,⁴⁰⁵ the Company reached peace treaties with aboriginal villages, requiring the villagers to help control the Chinese. A treaty of February 1630, for example, contained two clauses that mentioned the Chinese. One prohibited the villagers from harboring pirates. The other stated that the villagers must “agree, without any dispute, that all Chinese living in their villages or their adjoining lands will come every three months to obtain a new residency permit.”⁴⁰⁶

At least two aboriginal languages were Romanized, and basic Christian instructional materials were prepared in them.⁴⁰⁷ “Much attention was given to schools, in the hope that a properly educated younger generation would be purer Christians.”⁴⁰⁸ In outlying villages, missionary ministers and schoolmasters were sent to abolish head-hunting, to change the marriage customs entirely, and to wipe out the culturally mandatory practice of abortion. In some villages they succeeded.⁴⁰⁹ Near the end of Dutch rule in 1659,

⁴⁰³ Wills, *supra* note 373, at 91.

⁴⁰⁴ *Id.* at 92

⁴⁰⁵ Hauptman & Knapp, *supra* note 391, at 177; *See also* John Robert Shepherd, STATECRAFT AND POLITICAL ECONOMY ON THE TAIWAN FRONTIER 1600–1800 47-91 (1993).

⁴⁰⁶ Andrade, *supra* note 380, at 441.

⁴⁰⁷ Wills, *supra* note 373, at 91.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 92.

many of the big villages under their authority had a school, and it was reported that half the people could recite their catechism.⁴¹⁰ By the end of the Dutch period (1662), a good portion of plains groups like the Siraya had nominally converted to Christianity.⁴¹¹

Initially with the aim of trading Chinese silk for Japanese silver, the Dutch soon realized that Taiwan could become a thriving land colony to produce hides, venison, rice, and sugar.⁴¹² Nevertheless, since the Austronesian were not interested in raising crops for sale, and to bring settlers from Europe was too costly, in 1636, the Dutch colonial administration began farming land out to Chinese sojourners in order to acquire a more consistent food supply and regular tax revenue.⁴¹³ Attracted by the Dutch promises of oxen, tools, and seeds for Chinese farm workers, by 1650, some twenty-five thousand Chinese had come to the Dutch colony to grow and sell rice, vegetables, sugarcane, and indigo, as well as to fish and hunt.⁴¹⁴

The Dutch drew income from the profits of selling the goods abroad that it bought on

⁴¹⁰ *Id.*

⁴¹¹ I-Shou Wang, *Cultural Contact and the Migration of Taiwan's Aborigines: A Historical Perspective*, in CHINA'S ISLAND FRONTIER: STUDIES IN THE HISTORICAL GEOGRAPHY OF TAIWAN 31, 35-6 (Ronald G. Knapp ed., 1980).

⁴¹² Tonio Andrade, *The rise and fall of Dutch Taiwan, 1624-1662: cooperative colonization and the statist model of European expansion*, 17(4) J. WORLD HIST. 429, 430 (2006).

⁴¹³ *Id.*

⁴¹⁴ Ernst Van Veen, *How the Dutch ran a seventeenth-century colony: the occupation and loss of Formosa, 1624-1662*, 20 ITINERARIO 59, 65-7 (1996).

Taiwan.⁴¹⁵ “From 1634 to 1660, the Company purchased between 20,000 and 150,000 deerskins for export, mainly to Japan, where samurai used them for their armor.”⁴¹⁶

Initially, the Dutch merchants acquired hides directly from Aborigines. Later, in order to increase exports, the Dutch authority issued licenses to the Chinese hunters, and collected a tenth of their take as a tax, buying much of the rest to sell them in Japan.⁴¹⁷

“In 1645 the Company shifted to a system of competitive bidding for a ‘tax farming’ license to the Chinese for the monopoly of trade in each aboriginal village that included all forms of trade, not just deer-hunting.”⁴¹⁸

Some Chinese were moving into the plains near the Dutch fort and building up a zone of Chinese-style intensive agriculture, growing rice and other food crops for local consumption, and sugar cane for sale to the Company for the world market.⁴¹⁹ The sugar was sold in Europe, Persia, and India. These products of Taiwan, and the taxes imposed on Chinese trade and Chinese residents had made marvelous supplements and supports for the Dutch presence in Taiwan.⁴²⁰ “The market was very strong until the mid-1650s, when production began to revive in Brazil, followed by the West Indies.”⁴²¹

⁴¹⁵ Andrade, *supra* note 380, at 440.

⁴¹⁶ Hauptman & Knapp, *supra* note 391, at 177.

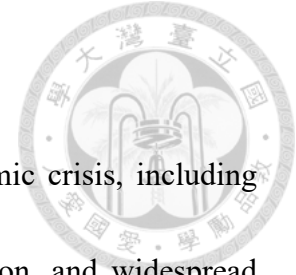
⁴¹⁷ Wills, *supra* note 373, at 93.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*



On the other side of the strait, the Ming state was in deep systemic crisis, including bankruptcy, court factionalism and eunuch power, Manchu invasion, and widespread rebellion, which paid little attention to what had happened on the South China coast.⁴²² Only under the Qing in the mid-seventeenth century was the name “Taiwan” officially adopted to refer to the whole island.⁴²³ The would-be Sealord, often called pirates by both the Dutch and the Ming officials, were contending for control of the coast and its rich trade. Eventually, it was Cheng Chih-lung who made himself indispensable to the Ming. He received office from the Ming, and came to dominate the South China coast with his fleets, controlling most of its trade. Chih-lung had mediated the beginning of the Dutch presence on Taiwan and used his connections with them to advance his own power and trade.⁴²⁴ In the late 1620s, Chih-lung retained some forms of influence and a few sources of revenue on Taiwan, under the nose of the Dutch or outside their sphere of power.⁴²⁵ Due to the competitions between Cheng and the Dutch on the trade between China and Japan, conflicts were recorded in 1633.⁴²⁶ In 1635-36, the Dutch and Chih-lung had finally negotiated a deal for peaceful competition in the importation of Chinese goods to Japan and stable supply of Chinese goods to the Dutch on

⁴²² *Id.*, at 89.

⁴²³ Nakamura, *supra* note 383, at 114.

⁴²⁴ Wills, *supra* note 373, at 89.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 90.

Taiwan.⁴²⁷



The collapse of the Ming in 1644 and the disorders that followed along the South China coast produced a wave of Chinese refugees to Taiwan.⁴²⁸ There was another surge in the 1650s as Cheng Cheng-kung (or Koxinga), Cheng Chih-lung's son consolidated his base on the Fujian coast and the Qing increased their efforts to crush him,⁴²⁹ increasing the Dutch incomes from the work of all these Chinese and their head taxes.⁴³⁰ In 1658, the governor on Taiwan, Fredrek Coyet, was reporting many rumors that Koxinga planned to expel the Dutch and take refuge in Taiwan, but the Batavia authorities, advised by an old factional opponent of Coyet, paid little attention.⁴³¹ Coyet's enemy in Batavia is a man named Nicholas Verburg. From 1649 to 1653, Verburg had been governor of Taiwan with Coyet being his number two. The two men had a bitter feud with each other, becoming heads of two warring factions. Batavia had ultimately sided with Coyet and rebuked Verburg, who had resigned his position as governor and returned to Batavia, and eventually became a member of the High Council of the Indies.⁴³²

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 94.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² TONIO ANDRADE, *LOST COLONY: THE UNTOLD STORY OF CHINA'S FIRST GREAT VICTORY OVER THE WEST* 202 (2011).



In 1660, when Coyet warned Batavia of an invasion by Koxinga, Verburg saw a chance for revenge. What Verburg seized on were Coyet's actions toward the Chinese merchants and entrepreneurs on Taiwan. Coyet had arrested them and brought them in for questioning; trying to find out if they knew about a possible invasion.⁴³³ The result of these tensions and instabilities was the rebellion in 1652 led by Kuo Hua-yi.⁴³⁴ With the 4000 rebels being very poorly armed and trained, the Company soldiers joined by enthusiastic aborigine auxiliaries killed more than 2000 Chinese.⁴³⁵

Verburg accused Coyet of ruining Taiwan by unjustly and unnecessarily harming its Chinese inhabitants, telling everyone that Coyet was dangerously paranoid. Coyet had justified his actions by saying that they were necessary in the context of Koxinga's imminent invasion.⁴³⁶ There were rumors that Kuo Huai-yi and the other rebels were linked to Koxinga.⁴³⁷ It was possible, since "Koxinga had prepared the way to his invasion carefully, sending out advance agents to drum up support."⁴³⁸ However, the High Council of the Indies decided that Verburg was right and that Coyet's fears of an

⁴³³ *Id.*

⁴³⁴ Wills, *supra* note 373, at 94 referencing to Coyet to Governor-General Jan Maetsuycker, 10 March 1660, VOC 1233: 700–714, fol. 711.

⁴³⁵ *Id.*

⁴³⁶ Andrade, *supra* note 432, at 202.

⁴³⁷ Wills, *supra* note 373, at 94.

⁴³⁸ Andrade, *supra* note 432, at 168.

attack had been “from beginning to end nothing more than a bunch of false and frivolous fantasies propagated by a few evil Chinese.”⁴³⁹



On April 30, 1661, a huge Cheng fleet with hundreds of ships carrying more than 25,000 men, appeared off Casteel Zeelandia. Koxinga made his first landing not far from the fields where the Kuo Huai-yi rebels had been mowed down,⁴⁴⁰ “hundreds of Chinese who’d lived on Taiwan under Dutch rule greeted them with wagons full of weapons and supplies. It seemed as though they’d pledged allegiance long before.”⁴⁴¹ Koxinga claimed that his father lent Taiwan to the Dutch and he came here to reclaim it, asking the Dutch to surrender. The Dutch said that Formosa belonged to the Netherlands, and his father knew that. They brought out a peace treaty that his father had signed with the company in 1630 to prove that the Cheng clan had agreed that the Dutch should hold Taiwan in perpetuity and that the Cheng clan made no claim on it.⁴⁴² In the following days, the fight began.

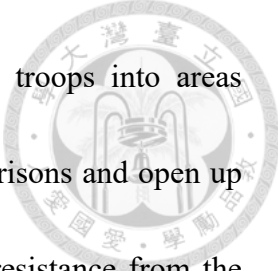
Koxinga took residence in Fort Provintia and declared it the seat of government of the

⁴³⁹ *Id.* at 203.

⁴⁴⁰ Wills, *supra* note 373, at 95.

⁴⁴¹ Andrade, *supra* note 432, at 122.

⁴⁴² Iperen and Leonardis don’t mention showing Koxinga the treaty in their account, but a Resolution of the Council of Formosa notes that they put it “in front of his eyes.” Resolution of the Council of Formosa, 4 May 1661, VOC 1235: 360v. It’s not clear which 1630 document they might be referring to here. Cited in *id.* at 145.



Eastern Ming Capital.⁴⁴³ He dispatched his six thousand Chinese troops into areas where there were no Chinese or Dutch towns, “establish frontier garrisons and open up the land for cultivation.”⁴⁴⁴ The troops sent by Koxinga met stiff resistance from the natives.⁴⁴⁵ The lands in north central Taiwan were an aboriginal kingdom ruled by a man called the Prince of the Middagh (Vorst van de Middagh).⁴⁴⁶ When the Dutch ruled Taiwan, the kingdom was independent and at peace with them. Koxinga sent his troops to end its independence. The natives attacked, killing fifteen hundred or so.⁴⁴⁷ In southern Taiwan, the forces loyal to an indigenous ruler had killed seven hundred soldiers of Koxinga.⁴⁴⁸ As the summer stretched on, Koxinga’s people began to starve. He ordered troops to ravage the countryside and forced the aborigines and the Chinese settlers to hand over their food stores.⁴⁴⁹ The Chinese settlers chafing under Koxinga’s rule did not trust and cooperate with him any longer.⁴⁵⁰

In the fall of 1661, Qing proposed an alliance between the Qing Dynasty and the Netherlands, telling the Dutch the great assault they were planning against Koxinga and

⁴⁴³ Andrade, *supra* note 432, at 184.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at 187.

⁴⁴⁶ It’s possible that “Middagh” should be translated as “south,” although since the kingdom was located north of the main Dutch settlement, this, too, seems problematic. The fullest reference to the King of the Middagh comes from a now-lost account by a Scotsman named David Wright. See CAMPBELL, FORMOSA UNDER THE DUTCH: DESCRIBED FROM CONTEMPORARY RECORDS, WITH EXPLANATORY NOTES AND A BIBLIOGRAPHY OF THE ISLAND 6–7 (1903). Cited in *Id.*

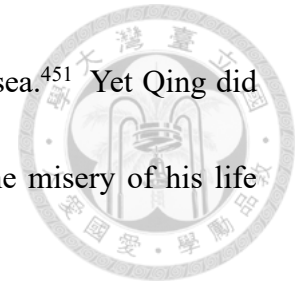
⁴⁴⁷ Andrade, *supra* note 432, at 187.

⁴⁴⁸ *Id.* at 188.

⁴⁴⁹ *Id.* at 189.

⁴⁵⁰ *Id.* at 235.

hoped that the Dutch could coordinate a joint action with them by sea.⁴⁵¹ Yet Qing did not receive positive response from Coyet, who was so mired in the misery of his life under siege.⁴⁵²



Koxinga's army was well trained in the wars in China. After a bitter nine-month siege, He forced the Dutch garrison to surrender on February 1, 1662.⁴⁵³ A treaty was concluded and the Dutch were permitted to withdraw in peace, leaving all their goods and records. Hostages were exchanged to ensure that the terms were carried out properly.

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After their rule of the island ended, the Dutch had made efforts to maintain a presence on Taiwan. In July 1663, part of a Dutch squadron went on to reoccupy the old fortress at Keelung. A Dutch garrison of 200 to 300 held on there until 1668, when Chengching, Koxinga's son took their presence as a threat and moved troops to drive them. The Dutch garrison was withdrawn in the same year.⁴⁵⁵

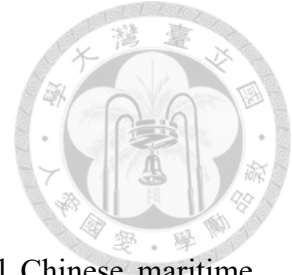
⁴⁵¹ *Id.* at 268.

⁴⁵² *Id.*

⁴⁵³ Wen-Hsiung Hsu, *From aboriginal island to Chinese frontier: the development of Taiwan before 1683*, in *CHINA'S ISLAND FRONTIER: STUDIES IN THE HISTORICAL GEOGRAPHY OF TAIWAN* 1, 21 (Ronald G. Knapp ed., 1980).

⁴⁵⁴ WILLIAM CAMPBELL, *FORMOSA UNDER THE DUTCH* 318-328, 383-492 (1967).

⁴⁵⁵ Wills, *supra* note 373, at 98.



2. Cheng Regime (1662-1683)

Unlike Southern Sung and Yuan, the early Ming state forbade all Chinese maritime activities. The pirate-merchant at the South China coast were contending for the control of the coast and its rich Trade.⁴⁵⁶ In the 1620s, Cheng Chih-lung emerged as the largest pirate-merchant of the western Pacific sea lanes, whose “economic power was intrinsically associated with his political supremacy in the Fujian area and his control over the southeastern seas”.⁴⁵⁷

After the capital of the Ming Empire fell in 1644, the Chinese provinces fell under Qing (the Manchus) domination one after another, except some of the southern provinces, such as Fujian, Guangdong, and Guangxi remaining under the control of the weakened Ming survivors. The Ming people in southern China created a new court to stop the advance of the Manchus and preserve the autonomy of the Ming dynasty.⁴⁵⁸ It was in the southern province of Fujian, where the Cheng family forged their strength.⁴⁵⁹

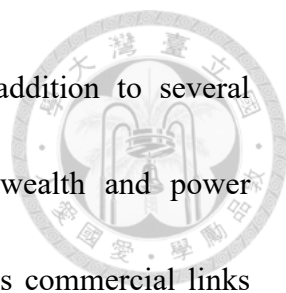
Cheng Chhi-lung, and later his son Koxinga, had forged extensive business ties with the

⁴⁵⁶ *Id.* at 89.

⁴⁵⁷ Xing Hang, *Eleven Bridging the Bipolar: Zheng Jing's Decade on Taiwan, 1663–1673*, in *SEA ROVERS, SILVER, AND SAMURAI: MARITIME EAST ASIA IN GLOBAL HISTORY, 1550–1700* 238, 239 (Andrade et al ed., 2016).

⁴⁵⁸ Anne Busquets, *Nine Dreams in the Chinese Periphery: Victorio Riccio and Zheng Chenggong's Regime*, in *SEA ROVERS, SILVER, AND SAMURAI: MARITIME EAST ASIA IN GLOBAL HISTORY, 1550–1700* 202, 205 (Andrade et al ed., 2016).

⁴⁵⁹ *Id.* at 203.



Europeans (especially the Portuguese, Dutch, and Spanish), in addition to several countries neighboring China.⁴⁶⁰ According to Riccio, Cheng's wealth and power derived mainly from his organization's mercantile activities and his commercial links with most of the countries in East and Southeast Asia.⁴⁶¹ Since Cheng's ships were used for both commercial activities and as warships, it also controlled the activities of the pirates who roamed the southern seas.⁴⁶²

Cheng Chih-lung surrendered to the Manchus in 1646, but his eldest son, Cheng Cheng-kung, chose the path of resistance toward the new ruler. The weak authority of the Southern Ming emperor, Longwu, led him to submit to the Cheng family power in Fujian. Cheng Cheng-kung was granted with the imperial surname of Zhu. Hence, he was known as Koxinga, which literally means "Lord of the Imperial Surname".⁴⁶³ Koxinga was born in Nagasaki, whose mother was the daughter of a Japanese lord. Like China, Japan has also treated him as a Japanese son. In Chikamatsu's play, Koxinga is a great warrior fighting battles on exotic Chinese shores, whose martial spirit and courage

⁴⁶⁰ *Id.* at 205.

⁴⁶¹ *Id.* at 206.

⁴⁶² See ACTA PEKINENSIA, WESTERN HISTORICAL SOURCES FOR THE KANGXI REIGN 294 (2013).

⁴⁶³ MONZAEMON CHIKAMATSU, MARK VAN DOREN AND DONALD KEENE, THE BATTLES OF COXINGA: CHIKAMATSU'S PUPPET PLAY, ITS BACKGROUND AND IMPORTANCE 45(1951).

is endowed by his Japanese blood. In the words of Tonio Andrade, Koxinga was raised “with a samurai sword in his hand.”⁴⁶⁴



In 1648, Koxinga threw his support behind the Ming pretender Zhu Youlang in southwestern China, recognizing his Yongli reign title. He was fighting for the return to China of “the legitimate king.”⁴⁶⁵ Monopoling China’s foreign trade, Koxinga’s commercial fleets had shipped silk and other products to Nagasaki. Between 1650 and 1662, the average annual revenue realized by Koxinga and his affiliated merchants was more than twice of the revenue of their biggest competitor in the region, the Dutch East India Company (VOC).⁴⁶⁶ Koxinga had managed to strengthen the economic, commercial, and naval power of his family, whose armies even reached a total strength of one hundred thousand men.⁴⁶⁷

In the 1650s, Koxinga decided to intervene in China’s civil war, aiming to restore the Ming dynasty. Yet his great invasion in 1659 was a spectacular failure.⁴⁶⁸ The “Qing gradually consolidated its hold over the empire, eliminating the various Ming loyalist

⁴⁶⁴ Editorial of the Economist, *supra* note 384.

⁴⁶⁵ Busquets, *supra* note 458, at 210.

⁴⁶⁶ See XING HANG, CONFLICT AND COMMERCE IN MARITIME EAST ASIA: THE ZHENG FAMILY AND THE SHAPING OF THE MODERN WORLD, c. 1620–1720 (2015).

⁴⁶⁷ Busquets, *supra* note 458, at 209.

⁴⁶⁸ Wills, *supra* note 373, at 94.

movements and finally hunting down and executing the Yongli pretender in 1662.⁴⁶⁹

To deprive Cheng's organization of food and supplies, the Manchu court banned all overseas trade and brutally evacuated the residents of the entire coastline⁴⁷⁰, many of whom joined Koxinga's forces. In 1661, with his old bases becoming increasingly untenable, Koxinga envisioned a new location for the survival of his regime, the Dutch colony of Formosa. He then launched an invasion, and after a bitter nine-month siege, assisted by the large Chinese immigrant community, Koxinga forced the Dutch garrison to surrender on February 1, 1662.⁴⁷¹

Koxinga named Casteel Zeelandia Tung-tu (Eastern Capital), as if it might be the seat of an emperor.⁴⁷² Once he conquered Taiwan, Koxinga intended to extend his sovereignty over the maritime territories of Philippine.⁴⁷³ However, in contrast to the relatively easy campaign in Taiwan, Koxinga encountered an established opposition coming from the Spanish government in the Philippines. Koxinga was dead four months after he occupied Taiwan. Bitter struggle for succession within the family deeply shook the organization's morale. The Qing took advantage of this internecine conflict and allied

⁴⁶⁹ Hang, *supra* note 457, at 240.

⁴⁷⁰ See Dahpon David Ho, *Sealords Live in Vain: Fujian and the Making of a Maritime Frontier in Seventeenth-Century China* (PhD diss., University of California–San Diego, 2011).

⁴⁷¹ See generally Andrade, *supra* note 432.

⁴⁷² Wills, *supra* note 373, at 95

⁴⁷³ Busquets, *supra* note 458, at 211.



with the vengeful VOC. In early 1664, the combined force of Qing and Dutch attacked and seized nearly all of the remaining coastal bases, with one-fourth of the whole Cheng force surrendering to the Qing.⁴⁷⁴

In April 1664, Koxinga's son, Cheng Jing abandoned the family's bases in Fujian Province and withdrew completely to Taiwan with a small group of core generals, gentry, and Ming imperial descendants and no more than fifty junks and four thousand soldiers. There, they joined the twenty thousand men who had arrived with Koxinga in 1661.⁴⁷⁵ The Qing rulers sought to put an end to the maritime resistance by sending an expedition to conquer Taiwan. Shih Lang, who had defected from Koxinga's regime in 1646, was one of the very few maritime experts in the very continental early Qing regime.⁴⁷⁶ In September 1664, Shih Lang cooperated with ships of the Dutch East India Company in an assault on Taiwan, but they were scattered by a storm.⁴⁷⁷

In 1664, Cheng Jing changed Cheng regime's official title from Dongdu Mingjing (Ming Eastern Capital) to Dongning (Eastern Pacification). The counties of Tianxing

⁴⁷⁴ Wills, *supra* note 373, at 96.

⁴⁷⁵ Young-tsu Wong, *Security and Warfare on the China Coast*, 35 *MONUMENTA SERICA* 111, 149–153(1981); see also JOHN E. WILLS JR., *PEPPER, GUNS, AND PARLEYS: THE DUTCH EAST INDIA COMPANY AND CHINA, 1662–1681* 29-100 (1974).

⁴⁷⁶ Wills, *supra* note 373, at 96.

⁴⁷⁷ *Id.* at 97.

and Wannian established by his father were elevated to the status of sub-prefectures.⁴⁷⁸

These changes imparted the impression of settled permanency and a long-term commitment to Taiwan.⁴⁷⁹ “Although he steadfastly refused to alter the Yongli reign name and accorded the deceased emperor with great respect and honor, he kept the throne empty, despite the presence of many Ming imperial descendants qualified to succeed the pretender.”⁴⁸⁰ Cheng Jing reversed his father’s deep respect for the prince of Ningjing, “Zhu Shugui (1617–1683), the likeliest candidate for the succession, cutting off all assistance and forcing him to grow his own food on a heavily taxed plot of land in the suburbs of Tainan.”⁴⁸¹

Chengera Taiwan gradually evolved into a fully formed state.⁴⁸² The government was staffed largely with merchants from Fujian Province in China, so that it was defined as a “merchant nation.”⁴⁸³ Most of the Dutch structure of monopolies of trade with aborigines villages and collections of tax was maintained, but with fixed quotas, not competitive bidding. The Dutch had even given his father lists of their lease-holders and

⁴⁷⁸ Hang, *infra* note 508, at 158.

⁴⁷⁹ XING HANG, THE ZHENG “STATE” ON TAIWAN: BETWEEN TRADE AND LEGITIMACY, MARITIME AND CONTINENT: THE ZHENG ORGANIZATION IN SEVENTEENTH-CENTURY EAST ASIA 209 (2010).

⁴⁸⁰ Hang, *supra* note 457, at 243.

⁴⁸¹ *Id.* at 242.

⁴⁸² See generally SO KWAN-WAI, JAPANESE PIRACY IN MING CHINA DURING THE 16TH CENTURY (1975).

⁴⁸³ See Hsu, *supra* note 453, at 25-7.

debtors.⁴⁸⁴



Over the next decade, Cheng Jing turned away from China, focusing instead on achieving political and economic dominance in the maritime Asian trading lanes.⁴⁸⁵ By taxing the Han peasant population and sending his troops to open new land, Cheng Jing “dramatically increased the arable acreage of the island.”⁴⁸⁶ Nevertheless, the surplus agricultural production had spawned the specialization of crops and limited the development of manufacturing and infrastructure.⁴⁸⁷

As a result, the Cheng organization managed to achieve self-sufficiency in food and basic supplies, which had never been accomplished on Mainland China under Koxinga, who mainly depended on plunder and other arbitrary exactions.⁴⁸⁸ During this period, the Chinese population, concentrated in the southwestern coastal plain, began to rival the Austronesian natives on Taiwan, doubling to roughly a hundred thousand after 21 years.⁴⁸⁹ The Cheng regime sought to expand land cultivation, and the culture, economy,

⁴⁸⁴ Wills, *supra* note 373, at 98

⁴⁸⁵ Hang, *infra* note 508, at 242.

⁴⁸⁶ See Shepherd, *supra* note 405, at 99.

⁴⁸⁷ Hang, *infra* note 508, at 242.

⁴⁸⁸ As Admiral Shi Lang observed after he had landed to claim Taiwan for the Qing in 1683, “It has no shortage of all the daily necessities . . . people live closely together, families are numerous, and the peasants, artisans, and merchants all follow their pursuits.” In *Id* with reference to Shi Lang, Jinghai jishi, 13TWC 60-1 (1958).

⁴⁸⁹ Morris, *supra* note 369, at 9.

polity, and agriculture of Taiwan were transformed according to Chinese models.

Chinese schools and Confucian temples were established in settler and native areas.⁴⁹⁰

As the foreign policy was pursued by Cheng according to trading needs, Taiwan's

position as a commercial center in maritime East Asia continues. Formal relations were

established with Japan, the Ryukyuan Kingdom, Vietnam, Thailand, the Philippines, and

even England, as the British East India Company attempted to trade with the Cheng

regime since 1670.⁴⁹¹ They thought that a good trade with Taiwan might open up proxy

sales of English and Southeast Asian goods via Chinese merchants to Japan, Manila,

and China. A detailed contract on procedures was signed, whereby Cheng Ching "gave

the English a list of goods that he would buy from them every year."⁴⁹² Based on the

taxation and monopolization of maritime trade, Cheng sent trade promotion emissaries

to as far as Banten, monopolizing the export of sugar and deer hides to Japan.⁴⁹³

Between 1664 and 1683, of 186 Asian ships recorded as reaching Manila, 46 came from

Taiwan.⁴⁹⁴

From 1667 to 1669, Cheng Jing entered into a series of negotiations with the Qing court,

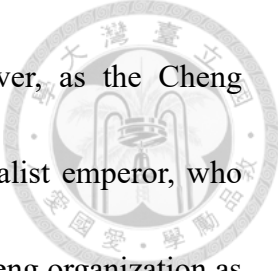
⁴⁹⁰ *Id.* referencing to Lin Heng-tao, *Origins of Taiwanese place names*, 5ECHO 5 (1975).

⁴⁹¹ Wills, *supra* note 373, at 105.

⁴⁹² *Id.* at 99.

⁴⁹³ See ANTHONY REID, 2 SOUTHEAST ASIA IN THE AGE OF COMMERCE, 1450-1680 CHAP3(1993).

⁴⁹⁴ Wills, *supra* note 373, at 100.



demanding treatment as a tributary vassal like Korea.⁴⁹⁵ However, as the Cheng regime had continued to use the reign period of the last Ming Loyalist emperor, who was executed in Yunnan in 1662,⁴⁹⁶ the Kangxi emperor saw the Cheng organization as part of the Ming loyalist resistance,⁴⁹⁷ and demanded that Cheng shave his head in the Manchu style to demonstrate his loyalty to the Qing dynasty.⁴⁹⁸ As Cheng Jing was unwilling to budge, the inability of the two sides to reach a compromise led to the breakdown of talks in 1669.⁴⁹⁹

On the other hand, the increasingly unfriendly economic environment in Japan, the severe Qing restrictions on overseas trade, in addition to the Dutch hostility on the seas in revenge for their loss of Taiwan, had heralded the beginning of a long-term decline in the trade of this area.⁵⁰⁰ By 1672, Cheng Jing had laid the groundwork for the transition of his organization from one fixating upon China and Japan to a more diversified economic entity orienting westward to Southeast Asia and the Indian Ocean.⁵⁰¹

Cheng Jing had gained the support of a new generation of officials, merchants, and

⁴⁹⁵ Hang, *supra* note 479, at 6 with reference to Jiang Risheng, *Taiwan waiji* (An Unofficial Record of Taiwan), TWWXCK, 238(1960).

⁴⁹⁶ Wills, *supra* note 373, at 97.

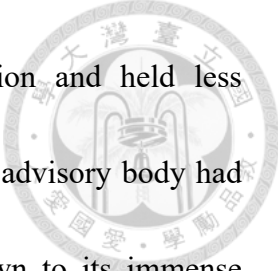
⁴⁹⁷ Hang, *supra* note 479, at 59.

⁴⁹⁸ *Id.* at 25.

⁴⁹⁹ See XING HANG, A QUESTION OF HAIRDOS AND FASHION, 246-80 (2008).

⁵⁰⁰ Hang, *supra* note 508, at 245.

⁵⁰¹ *Id.* at 247.



military men who were still infants during the dynastic transition and held less attachment to Ming loyalism.⁵⁰² From the middle of 1670, Cheng's advisory body had deliberated seriously over a full-scale invasion of Manila.⁵⁰³ Drawn to its immense territory and agricultural potential, they touted the military campaign as a means of "expanding the land".⁵⁰⁴ However, the idea of invasion encountered stiff resistance from the older group who remained committed to the recovery of the Ming Dynasty in China.⁵⁰⁵ As the intergenerational debates raged, the ambitious young Kangxi emperor attempted to abolish the semi-independent power bases of his three feudatories: Wu San-gui in the southwest, Geng Jing-zhong in Fujian, and Shang Zhi-xin in Guangdong. In response, they rose up in rebellion, one after another since 1674.⁵⁰⁶ With the restoration of Ming Dynasty appearing imminent, the old group dominated the discourse and pressured Ching to redirect his forces to confront the Manchus in Mainland China.⁵⁰⁷

From 1675 to 1680, Cheng Jing launched a massive offensive on the mainland and his forces occupied most of Fujian and Guangdong.⁵⁰⁸ At the end of 1679, the new

⁵⁰² *Id.*

⁵⁰³ See THE ENGLISH FACTORY IN TAIWAN: 1670-1685 68 (Hsu-chung Chang et al eds,1995).

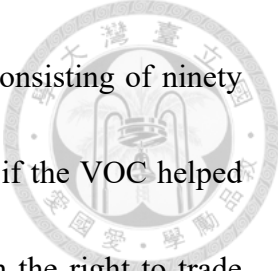
⁵⁰⁴ Hang, *supra* note 508, at 246.

⁵⁰⁵ *Id.* at 249.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 238.

⁵⁰⁸ SEE WEICHUNG CHENG, WAR, TRADE, AND PIRACY IN THE CHINA SEAS, 1622–1683 241(2013); XING HANG, CONFLICT AND COMMERCE IN MARITIME EAST ASIA (2016)



governor general of Fujian, Yao Chi-sheng dispatched an embassy consisting of ninety people to Batavia.⁵⁰⁹ In Yao's letter to the VOC, he guaranteed that if the VOC helped him to fight against Cheng, the emperor would not only grant them the right to trade freely forever, but also help the Dutch to reoccupy Taiwan.⁵¹⁰ However, he was told by Governor General Rijcklof van Goens frankly that the VOC did not need Taiwan at the time, which was more interested in obtaining a status to trade at Fuzhou.⁵¹¹

Cheng Jing's campaigns on Mainland China soon encountered severe grain shortages, as a huge amount of manpower, grain and other provisions were drawn away from Taiwan to fight a "formidable adversary that commanded the agrarian resources of an entire landed empire."⁵¹² Meanwhile, as the Qing gradually turned the tide against the feudatories, Geng Jingzhong and Shang Zhixin were forced to surrender and Wu's forces were pushed further into the southwest. In 1680, facing increasingly acute resource shortages, Cheng Jing and his forces abandoned their remaining possessions on the mainland and fled back to Taiwan.⁵¹³ The mainland venture had accomplished nothing except diverting manpower and resources from the building up of Taiwan. The

⁵⁰⁹ See Wills, *supra* note 475, at 179–89.

⁵¹⁰ Weichung Cheng, *Thirteen Admiral Shi Lang's Secret Proposal to Return Taiwan to the VOC*, in SEA ROVERS, SILVER, AND SAMURAI: MARITIME EAST ASIA IN GLOBAL HISTORY, 1550–1700 290, 298 (Andrade et al eds., 2016).

⁵¹¹ *Id.* at 299.

⁵¹² *Id.*

⁵¹³ *Id.*

regime was desperately short of funds, and unable to pay its troops. The Cheng regime dissolved in family melodrama, and Cheng Ching died in March 1681.⁵¹⁴



In 1682, Shih Lang was sent from Beijing to resume his command over Qing maritime forces and plan for the conquest of Taiwan. On July 9, 1683, taking advantage of a famine on Taiwan, Shih engaged the Cheng navy near the Pescadores, Taiwan's first line of defense, winning a decisive victory which almost obliterated the enemy fleets. When news of the battle reached the thirteen-year-old ruler Cheng-koshuang, who had just succeeded his father, he lost the will to fight. On September 1, 1683, together with Feng Xifan and other civil and military officials, koshuang surrendered unconditionally to the Qing.⁵¹⁵ Shih Lang's army entered Tung-ning, evicting all the great men from their houses, and began extorting large sums of money from them.⁵¹⁶ The Kangxi emperor ordered all the people under Cheng authority to be evicted from Taiwan and transported to the mainland.⁵¹⁷ Cheng and Feng lived out the remainder of their life in Beijing, where they joined the Eight Banners and received honorary titles.⁵¹⁸ In early November of 1683, as the transfer of the Cheng regime gradually completed, the debate

⁵¹⁴ Wills, *supra* note 373, at 101.

⁵¹⁵ Hang, *supra* note 457, at 251

⁵¹⁶ Wills, *supra* note 373, at 102.

⁵¹⁷ Cheng, *supra* note 510, at 291.

⁵¹⁸ *Id.* at 293.

about whether to keep Taiwan or abandon it remained.⁵¹⁹



Shih Lang sent off the Dutch prisoners left behind by the VOC when it surrendered to Cheng koshuang's grandfather Koxinga in 1662. One of the prisoners, Alexander van Gravenbroek, claimed that he was discovered by Shih Lang soon after the Qing troops landed.⁵²⁰ Shih Lang asked him to ask his masters in Batavia how much they would pay to get Taiwan back.⁵²¹ Considering that the Qing court had very limited resources for obtaining necessary knowledge concerning maritime affairs, Shih Lang betted that the VOC threat would force Beijing to rely on his naval forces in Fujian, creating a privileged status for the Fujianese merchants. The role Shih Lang wanted to play was "the merchant-mediator-admiral pattern in the service to continental power"⁵²², which was successfully embodied by the Cheng family during the period of Dutch Taiwan. "The potential return of Taiwan to the VOC was Shi's biggest bargaining chip in pursuit of this goal."⁵²³

Shih Lang's proposal was delivered to Governor-General Johannes Camphuys, but the

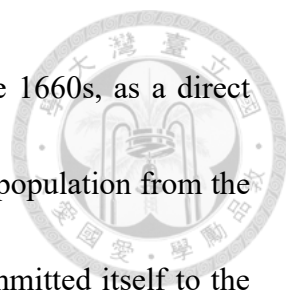
⁵¹⁹ *Id.* at 295.

⁵²⁰ *Id.*

⁵²¹ JOHN E. WILLS, JR., *EMBASSIES AND ILLUSIONS: DUTCH AND PORTUGUESE ENVOYS TO K'ANG-HSI, 1666-1687* 148, 151 (1984).

⁵²² John E. Wills, Jr., *Maritime China from Wang Chih to Shih Lang: Themes in peripheral history*, in *FROM MING TO CH'ING: CONQUEST, REGION, AND CONTINUITY IN SEVENTEENTH-CENTURY CHINA* 229–30 (Jonathan D. Spence & John Elliot Wills eds., 1979)

⁵²³ *Id.*



Batavian authorities had lost interest in retrieving Taiwan.⁵²⁴ In the 1660s, as a direct consequence of the Chinese maritime ban and the evacuation of the population from the coast, the VOC gradually pulled out of the Chinese market and committed itself to the Japanese and Indian trade.⁵²⁵ The VOC's more and more investment in the Indian market had turned its ambitions away from any desire to reoccupy Taiwan as a transit port along the Chinese coast.⁵²⁶

On August 26, 1684, Shih Lang left Xiamen to meet with Wang Guoan in Fuzhou to discuss how to regulate the trade in Xiamen and Taiwan.⁵²⁷ Shih Lang proposed appropriating some of the Fujianese budget to pay for the garrison in Taiwan, but Wang insisted that the payment should be drawn from the income available in Taiwan.⁵²⁸

There was some talk of abandoning Taiwan and evacuating its entire Chinese population, yet Shih argued vigorously that it would not be feasible to evacuate all of them, and that a hostile power might move in and established a base here.⁵²⁹ The emperor made up his mind to prevent Taiwan from becoming an anti-Manchu base again during his reign.⁵³⁰

Kangxi “decided to hold it at arm's length for a time and see what would happen

⁵²⁴ Wills, *supra* note 521.

⁵²⁵ Leonard Blussé, *No Boats to China: The Dutch East India Company and the Changing Pattern of the China Sea Trade, 1635–1690*, 30(1) *MOD. ASIAN STUD.* 51, 71 (1996).

⁵²⁶ Cheng, *supra* note 510, at 304.

⁵²⁷ Chang et al, *supra* note 503, at 589.

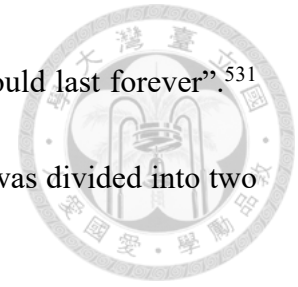
⁵²⁸ Cheng, *supra* note 510, at 302.

⁵²⁹ Wills, *supra* note 373, at 102.

⁵³⁰ Cheng, *supra* note 510, at 305.

because he had no reason to presume this occupation of Taiwan would last forever”.⁵³¹

As a result, Taiwan became a prefecture of Fujian province, which was divided into two counties.⁵³²



3. Chinese Qing Dynasty (1683-1895)

In contrast to the largely localized Cheng regime, the Qing rulers acquired and administered Taiwan according to their own needs and interests on the mainland to ensure its goal of security and stability.⁵³³ Seeing from the beginning that Taiwan would be a headache, the Qing administration decided to keep expenses and commitments as low as possible. This attitude toward Taiwan was a sharp contrast to that of the last two regimes, the Dutch and the Cheng, for whom Taiwan was an essential base at the time when they were not welcome on the mainland. Yet only the aborigines were completely committed to Taiwan.⁵³⁴

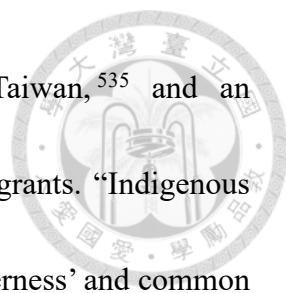
While the Dutch and Cheng had focused on international trade during their occupation,

⁵³¹ *Id.*

⁵³² Wills, *supra* note 373, at 103.

⁵³³ RUIPING YE, THE COLONISATION AND SETTLEMENT OF TAIWAN, 1684–1945: LAND TENURE, LAW AND QING AND JAPANESE POLICIES 5 (2019).

⁵³⁴ Wills, *supra* note 373, at 102.



the Qing authority attempted to establish a fiscal base on Taiwan,⁵³⁵ and an administrative control over the growing population of settler immigrants. “Indigenous communities agreed or were forced to agree to transform their ‘wilderness’ and common deer-hunting fields into lands subject to taxation, thereby allowing Chinese settlers to open these up for cultivation in exchange for settlers respecting Aboriginal land tenure.”⁵³⁶ On the western plains, which had been fully developed into farms by the Han settlers, the Qing government applied different tax policies for Han immigrants and the aboriginal people. It first sold farming rights to urban businessmen, and then some portions of the land were rent out by them to individual farm laborers from the mainland. For aboriginal groups, the Qing recognized aboriginal rights to land, but per-village tax was imposed. The tax was not paid directly, however, but paid by businessmen known as tax farmer who bought the right to collect taxes for themselves.⁵³⁷ These “tax farmers”, their interpreters and foremen, were known to be corrupt and commit abuses, especially against the aborigines.⁵³⁸

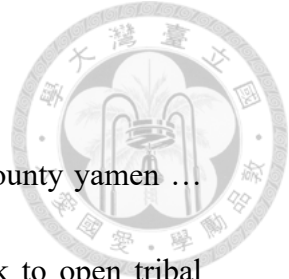
Illegal incursions of the Han Chinese continued apace. With no administrative mechanisms in place to police and track the behavior of the settlers, abuses were

⁵³⁵ Since the Yongzheng era, Taiwan had become the granary of Fujian Province, and regularly export rice to relieve the food shortage there. Text in Ye, *supra* note 533, at 49.

⁵³⁶ Hirano et al, *supra* note 402, at 200.

⁵³⁷ See Ye, *supra* note 533, at 126-28.

⁵³⁸ *Id.* at 131-33.



rampant. One official complained in 1717:

New settlers increase daily at ever greater distances from the county yamen ... [settlers] are violent, resist arrest, and steal. Cleverly they seek to open tribal lands, to occupy Aborigine homes, and take Aborigine wives. The Aborigines fear them and suffer patiently, but before long the enmity between settlers and Aborigines will bring disaster.⁵³⁹

The consensus was that “Indigenous social relations were governed by a violent hostility towards outsiders in response to centuries of Chinese depredations.”⁵⁴⁰ “Recounting the period of early settlement on Taiwan’s west coast, Davidson described how colonists used every form of violence, trickery, and deceit to force native groups to flee to remote upland jungles”⁵⁴¹:

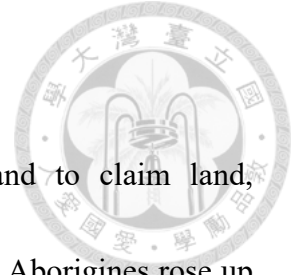
We are thus led to believe that the extreme antipathy with which the savages regarded the Chinese – a condition which has continued until the present day, and will last, we believe, as long as the two races come in contact – was due to the misdeeds of the celestial race, and that little blame should be attached to the savages.⁵⁴²

⁵³⁹ Cited in Shepherd, *supra* note 405, at 183.

⁵⁴⁰ Hirano et al, *supra* note 402, at 210.

⁵⁴¹ *Id.*

⁵⁴² JAMES WHEELER DAVIDSON, THE ISLAND OF FORMOSA, PAST AND PRESENT: HISTORY, PEOPLE,



With Han colonists pressing further into the aborigine hinterland to claim land, Aboriginal insurgencies became common. In the early 1700s, plains Aborigines rose up multiple times to protest excessive taxes and excessive corvée labor.⁵⁴³ For nearly a century, “Qing officials seemed in many ways to shut their eyes, hold their noses, cross their fingers, hoping that the officials judged to be ‘unfitted for responsible and administrative work’ and the corrupt troops stationed on this far-off island would be sufficient to maintain peace and regular rice shipments to Fujian.”⁵⁴⁴ The Qing administrators “had no wish to civilize the island,” and merely wanted to “retain it as it was”. Without a strong government presence, the “barbarous principle of the survival of the strongest reigned”, as the island “convulsed with periodic insurrections.”⁵⁴⁵ The endemic intra-settler rivalries and clan conflicts at times developed into large-scale fights.⁵⁴⁶ In the early 1700s, in an effort to prevent the Han Chinese farmers from trespassing onto Indigenous lands beyond Qing control, the Qing government formally established a “savage boundary” (fanjie) near the base of the central foothills, adopting “a policy of spatial segregation for Han, assimilated Aborigines, and unconquered

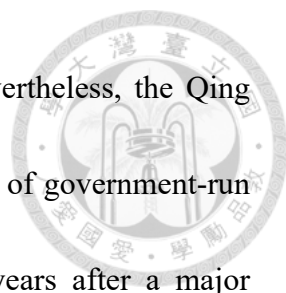
RESOURCES, AND COMMERCIAL PROSPECTS 67 (1903)

⁵⁴³ See Shepherd, *supra* note 405, at 125–32.

⁵⁴⁴ Morris, *supra* note 369, at 11 referencing to WILLIAM G. GODDARD, FORMOSA: A STUDY IN CHINESE HISTORY 129 (1966).

⁵⁴⁵ YOSABURŌ TAKEKOSHI, JAPANESE RULE IN FORMOSA 68 (George Braithwaite trans., 2010). Available at <https://archive.org/details/japaneseruleinf00takegoog/page/n50/mode/2up?view=theater> (Last visited May 2, 2022)

⁵⁴⁶ See Hsu, *supra* note 453.



mountain groups to keep frontier violence to a minimum.”⁵⁴⁷ Nevertheless, the Qing also attempted to erase Indigenous culture through the development of government-run academies promoting Chinese-style education.⁵⁴⁸ “In 1733, two years after a major revolt by the Ta-chia, Qing officials established forty-seven more community schools in the western plains. Sustained contact with Chinese colonists also contributed to assimilation efforts, leading to the slow death of plains Aboriginal languages.”⁵⁴⁹

“During the reign of the Qianlong Emperor (1736–1795), the Qing ‘savage boundary’ became more rigidly demarcated, with a designated Chinese area of settlement and a ‘buffer zone’ that straddled the system of earthen works and the foothills where ‘raw savage’ populations resided.”⁵⁵⁰ Meanwhile, the Chinese settler communities retained a significant degree of autonomy. Where new lands were opened by the Chinese settlers, there was a political vacuum.⁵⁵¹ As the Qing was unable to exert administrative control over the areas beyond the official border, a kind of provisional frontier diplomacy existed, which consisted of a network of “interpreters” who assisted with collecting taxes among plains Aborigines, and brokered trade between remote hill aborigine

⁵⁴⁷ Hirano et al, *supra* note 402, at 201.

⁵⁴⁸ *Id.* at 200.

⁵⁴⁹ *Id.* at 200-01 referencing to Hsu, Wen-Hsiung, *The Chinese Colonization of Taiwan*, PhD dissertation, University of Chicago 223-5 (1975).

⁵⁵⁰ *Id.* at 201.

⁵⁵¹ See Shepherd, *supra* note 405, at 137–214.

communities and agricultural settlements bordering the Qing perimeter.⁵⁵² Cross-border trade between the Chinese settlers and the Aboriginal communities implied “recognition of Indigenous independence.”⁵⁵³



In the 1850s-1870s, the Qing sovereignty over Taiwan was openly challenged by American, British, Japanese, and Germany in several humiliating incidents, especially with respect to the Austronesian-populated eastern territories of the island that the Qing admitted was “not yet entered in the maps”.⁵⁵⁴ Aboriginal people had slaughtered the shipwrecked crews of western ships⁵⁵⁵, and independently signed peace treaties with foreign governments.⁵⁵⁶ With the indifference of the Qing administration, the harbors were opened to foreign boats. With the Scottish Presbyterian Church in the South, and the Canadian missionaries in the North, the Christian cultural influence had taken roots in the Taiwanese society.⁵⁵⁷

⁵⁵² Hirano et al, *supra* note 402, at 202.

⁵⁵³ *Id.*

⁵⁵⁴ Morris, *supra* note 369, at 11.

⁵⁵⁵ HARRIS INWOOD MARTIN, THE JAPANESE DEMAND FOR FORMOSA IN THE TREATY OF SHIMONOSEKI, 1895 23 (1949).; RONALD STONE ANDERSON, FORMOSA UNDER THE JAPANESE: A RECORD OF FIFTY YEARS' OCCUPATION 63 (1946).; ANDREW JONAH GRAD, FORMOSA TODAY: AN ANALYSIS OF THE ECONOMIC DEVELOPMENT AND STRATEGIC IMPORTANCE OF JAPAN'S TROPICAL COLONY 16(1942); ANTONY BEST, ON THE FRINGES OF DIPLOMACY: INFLUENCES ON BRITISH FOREIGN POLICY, 1800-1945 185 (2011).

⁵⁵⁶ The Rover Incident occurred on 12 March 1867, the American Consul to Amoy Charles William Le Gendre negotiated a Memorandum of the Understanding with Tauketok guaranteeing the safety of shipwrecked American and European sailors with Tok-a-Tok (c. 1817–1874). See Su-Chiu Kuo, *From the Rover Incident to the Nanjia Treaty—Whose Conflict? Whose Treaty?*, 7(12)J. CULT. RELIG.STUD. (2019).

⁵⁵⁷ See Editorial, *Cultural Contacts of the Western World with Formosa*, TAIWAN TODAY, May 1, 1951, available at <https://taiwantoday.tw/news.php?unit=20,20,29,35,35,45&post=26049> (Last visited May 2, 2022)



After nearly a century of utter neglect, pressured by the growing presence of foreign merchants in the region and a Japanese incursion into southern Taiwan in the 1870s, the Qing decided to expand its control of the island.⁵⁵⁸ The Qing government turned active and launched campaigns to subjugate the mountain aborigines, implementing policies to establish effective control of the territories beyond the central mountains.⁵⁵⁹ Land settlement policies had changed from restriction to encouragement since 1875,⁵⁶⁰ when the Imperial High Commissioner Shen Bao-shen launched the “open the mountains and pacify the savages” policy (kaishan fufan).⁵⁶¹ The government mobilized its troops to establish a presence in the mountains.⁵⁶² Nevertheless, political vacuum persisted, especially in the camphor industry. Workers had to pay “mountain fees” to Aboriginal groups to ensure their safe passage into the forest.⁵⁶³

⁵⁵⁸ Hirano et al, *supra* note 402, at 203.

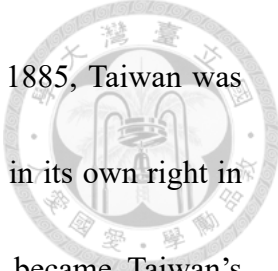
⁵⁵⁹ Ye, *supra* note 533, at 5 referencing to Inō Kanori (trans Taiwan Historica) *Taiwan wenhua zhi* (A History of Taiwan’s Civilisation) (Chinese trans Rev ed, Taiwan Shufang, Taipei, 2011), vol 3, at 284 and 300.

⁵⁶⁰ *Id* referencing to Part 14 “Tuozhi yange” (The History of Land Settlement), ch 1 and 2.

⁵⁶¹ Hirano et al, *supra* note 402, at 203.

⁵⁶² Lung-chih Chang, *From Frontier Island to Imperial Colony: Qing and Japanese Sovereignty Debates and Territorial Projects, 1874–1906*, PhD dissertation, Harvard University, 62-9 (2003)

⁵⁶³ The camphor industry emerged from the Qing Empire’s procurement system for gathering lumber used in the construction of ships. Later the system was dominated by European merchants, who used Han brokers and traders to secure a supply of camphor from deep in the interior. The Qing administration sought to control this system and limit foreigner access to the highlands, though they were only partially successful. Workers on the fringes of this system of production often came into direct contact with Aboriginal communities, with whom they negotiated a form of payment to avoid being attacked. Violence though was still commonplace, as the intensification of camphor logging activities led to increased hostilities over the course of the late 1860s and beyond. Text in Katsuya Hirano et al, *supra* note 402, at 204 referencing to A. Tavares, *Crystals from the savage forest: Imperialism and Capitalism in the Taiwan camphor industry, 1800–1945*, Ph.D. dissertation, Princeton University (2004).

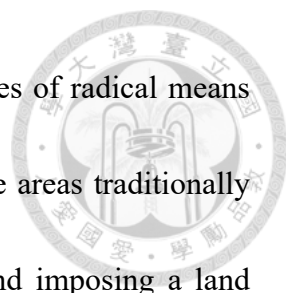


After an unsuccessful French invasion of northern Taiwan in 1884– 1885, Taiwan was upgraded in 1887 from a prefecture of Fujian Province to a province in its own right in an endeavor to enhance governmental control.⁵⁶⁴ Liu Ming-chuan became Taiwan's governor. Liu was a crucial promoter of the “open the mountains and pacify the savages” policy. Providing the loyal chiefs with food, clothing, and other items in exchange for their allowing of guard stations, roads, and other infrastructure to be built in areas under their control, Liu argued that the Chinese colonists should gradually settle in Aboriginal areas in order to encourage further assimilation of the aborigines. In a report on the advance of pacification operations, he wrote: “at present virgin land is abundant in central Taiwan on the east coast. It is essential that we find Chinese to develop it.”⁵⁶⁵ The overall goal of Liu was to extinguish Indigenous autonomy and cultural distinction.⁵⁶⁶ On the other hand, some saw modernization of Taiwan as Liu's main achievement. He encouraged the use of machinery and built military defense infrastructure, and promoted a series of Western-style architectural developments, including the headquarters of Taiwan's Telegraphy, Taipei Machinery Car Repair Factory, an iron bridge, Western Supervising Dormitory, and Western Schools.

⁵⁶⁴ Morris, *supra* note 369, at 12.

⁵⁶⁵ William Miller Speidel, *Liu Min Chu'an in Taiwan, 1884–1891*, PhD dissertation, Yale University 281 (1967).

⁵⁶⁶ Hirano et al, *supra* note 402, at 200.



Nevertheless, unsupported by the Qing court, Liu resorted to a series of radical means of funding his projects, including forcefully seizing control of some areas traditionally inhabited by aboriginal tribes in the northern part of the island and imposing a land census on the island's landowning class to increase tax revenues.⁵⁶⁷ Liu's policy had gradually diminished and alienated the aboriginal land rights, which laid a foundation for the Japanese rearrangement of aboriginal land.⁵⁶⁸ In 1886, in order to protect Han interests and the camphor trade, Liu sent his forces to attack the Atayal people. The fighting continued until 1891-1892, when the combined forces of the Mkgogan and Msbtunux lost to the Qing. Nevertheless, the fierceness of their resistance had led the colonial regime to stop its eastward expansion.⁵⁶⁹ Liu also met resistances from the Han Chinese communities. On October 6, 1888, a group of land-owning farmers and militia revolted in Changhua County, attacking the Qing officials led by Li Jia-tang, a county magistrate who had threatened to use death penalty when carrying out the land census.⁵⁷⁰

Liu's vision of modernizing the island and erasing the Indigenous presence through a mixture of violence and assimilation measures was short-lived. In 1895, with the defeat

⁵⁶⁷ See Ye, *supra* note 533, at 102.

⁵⁶⁸ *Id.* at 174.

⁵⁶⁹ Han Cheung, *Taiwan in Time: The fall of the northern Atayal*, TAIPEI TIMES, May 2, 2021, at <https://www.taipeitimes.com/News/feat/archives/2021/05/02/2003756677> (Last visited at May 2, 2022)

⁵⁷⁰ Davidson, *supra* note 542, at 253–55.

of the Qing military forces in the Sino-Japanese War (1894–1895), Japan acquired Taiwan as a colonial possession by the Shimonoseki Treaty.⁵⁷¹



During the Qing period, more than 100 rebellions were recorded in Taiwan.⁵⁷² This period was referred to as “Every three years an uprising, every five years a rebellion.”

⁵⁷³ Edward Said’s definition of colonialism - “the implanting of settlements on distant territory” has been employed to support the argument of Qing colonialism in Taiwan, since colonialism is characterized by expansion of territories and subjugation of peoples of different cultures.⁵⁷⁴ During the seventeenth and early eighteenth centuries, a fairly high rate of intermarriage occurred between the overwhelmingly male Han immigrants to southern Taiwan and plains Aborigine women, as it was stipulated at the time that no family members could accompany the migrant to Taiwan.⁵⁷⁵ Melissa J. Brown persuasively argues that identity is a contingent outgrowth of social experience, and classifications are contingent “on social experience, not cultural ideas or ancestry”⁵⁷⁶ In this sense, the Qing was also a colonial regime for both the Han Chinese and the

⁵⁷¹ Hirano et al, *supra* note 402, at 205.

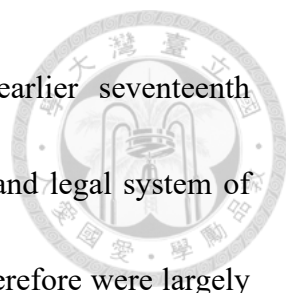
⁵⁷² Gerrit van der Wees, *Has Taiwan Always Been Part of China? The historical relationship is more complicated than Beijing would like to admit*, THE DIPLOMAT, Dec.1, 2020, at <https://thediplomat.com/2020/12/has-taiwan-always-been-part-of-china/> (Last visited at May 2, 2022)

⁵⁷³ IAN A. SKOGGARD, THE INDIGENOUS DYNAMIC IN TAIWAN'S POSTWAR DEVELOPMENT: THE RELIGIOUS AND HISTORICAL ROOTS OF ENTREPRENEURSHIP 10 (1996).

⁵⁷⁴ EDWARD W. SAID, CULTURE AND IMPERIALISM 9 (1994).

⁵⁷⁵ TAI, PAO-TSUN, THE CONCISE HISTORY OF TAIWAN 52 (2007).

⁵⁷⁶ MELLISA J. BROWN, IS TAIWAN CHINESE? THE IMPACT OF CULTURE, POWER, AND MIGRATION ON CHANGING IDENTITIES 211(2004).



aboriginal people that had long settled in Taiwan since the earlier seventeenth century.⁵⁷⁷ Given that it is generally accepted that the institutions and legal system of Qing were mainly inherited from the previous Ming Dynasty and therefore were largely Chinese,⁵⁷⁸ Taiwan can be certainly counted as a colony of imperial China during 1683-1895. It is important to note that, however, the Qing Empire had never been able to claim sovereignty of the whole island of Taiwan. By the end of the Qing period, while the western plains of Taiwan were fully developed as farmland and occupied by the Chinese settlers, two thirds of the island were still occupied and controlled by the aborigines.⁵⁷⁹

4. Japan (1895-1945)

In 1895, Taiwan was ceded to Japan by Qing in the Shimonoseki Treaty. During the early period of Japan's rule, the Taiwan Government General's policies were directly modeled on the Qing Governor Liu Ming-chuan.⁵⁸⁰ According to a Japanese survey conducted in 1896, the population of "islanders" was around 2.5 million.⁵⁸¹ About three

⁵⁷⁷ Hirano et al, *supra* note 402, at 214.

⁵⁷⁸ See Mark C Elliott, *Review of Pei Huang Reorienting the Manchus: A Study of Sinicization*, 54 J ECON. SOC. HIST. ORIENT 584, 585 (2011).

⁵⁷⁹ Takekoshi, *supra* note 545, at 218.

⁵⁸⁰ See PAUL D. BARCLAY, *OUTCASTS OF EMPIRE: JAPAN'S RULE ON THE "SAVAGE BORDER," 1874-1945* 114-61 (2017).

⁵⁸¹ Tay-sheng Wang, *The Modernization of Civil Justice in Colonial Taiwan, 1895-1945*, 36 J. JAPAN. L. 95, 96 (2013) referencing to S.CH'EN, T'ai-wan te jen-k'ou pien-ch'ien yü she-hui pien-ch'ien

percent of the total population of Taiwan was the mountain aborigines preserving their original culture. Like his predecessor, the Governor-General also took practical steps to enclose and occupy the highlands,⁵⁸² taking assimilatory measures to encourage the indigenous to submit to the new regime with the threat of force.⁵⁸³

The Japanese insistence on eradicating the Aboriginal peoples' way of life and exploiting the resources of their mountain homelands had provoked violent confrontations. In 1898 alone, the Aborigines killed 557 individuals in 303 assaults, which the Japanese government referred to as "damage inflicted by savages" (bangai).⁵⁸⁴ In August 1898, the colonial government launched a devastating invasion of Maibara village, which belonged to the Atayal tribe of north-central Taiwan. Government personnel were reportedly killed by one of the villagers, leading up to the assault. According to government records, security forces descended upon the village and "set their savage huts ablaze, and made them submit."⁵⁸⁵ Disproportionate assaults on poorly armed Indigenous communities became a recurring pattern thereafter, which reached a turning point in 1902, when the government suppressed a large-scale rebellion

(Population and Social Change in Taiwan) 95-8 (1979).

⁵⁸² Hirano et al, *supra* note 402, at 206.

⁵⁸³ *Id.*

⁵⁸⁴ Davidson, *supra* note 542, at 428.

⁵⁸⁵ Hirano et al, *supra* note 402, at 208 referencing to Riban shikō dai ichi-ni hen (A Record of Aborigines Administration Volume One–Two). Taihoku (Taipei): Taiwan sōtokufu keisatsu honsho 129 (Kanori Inō eds, 1918)

led by the Indigenous elder Ri Aguai (of the Saisiyat tribe) in the southern frontier town of Nanzhuang.⁵⁸⁶



As the Indigenous villages were invaded, occupied, and embargoed by the Japanese forces, “the former Qing ‘savage boundary’ was outfitted with electrified barbed wire, mines, and mounted guns to curtail Aboriginal incursions into government-controlled areas.”⁵⁸⁷ It has been recorded that,

By 1909, fighting further intensified with Governor General Sakuma Samata’s ‘Five-Year Plan to Pacify the Northern Savages.’ This military campaign, which aimed to suppress the last remnants of unincorporated Aborigines, included the use of especially destructive military tactics. Long-range artillery shelled Aboriginal villages for months at a time, while large numbers of police and imperial army troops encircled and eventually subjugated villages. Any semblance of native sovereignty was no longer tolerated; all populations would be subject equally to imperial control.⁵⁸⁸

The Japanese expedition slaughtered about 10,000 Taiwanese people within the first

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.* at 209.

⁵⁸⁸ *Id.*

year of the colonial war and the mass killing continued for several more years.⁵⁸⁹

Between 1898 and 1902, the organized military resistance ended, 11950 Taiwanese guerrillas were killed and a further 2918 people received the death sentence.⁵⁹⁰

“Between 1903 and 1941, 7318 families representing 43,112 individuals (about half the Indigenous population at the time), were forcibly resettled in lower-elevation areas.

Vital ties to ancestral homelands were permanently lost.”⁵⁹¹ The final years of Japanese rule had left a complex legacy, with the colonial government relaxing some of its authoritarian measures, dropping many of its references to “raw savages” in official parlance in favor of “hill people” (Takasagozoku).⁵⁹²

With regard to the Japanese governance of Taiwan, the Governor General had executive, legislative and judicial power on the basis of the so-called “63rd Law”. This allowed him to introduce orders with immediate legal effect. In addition, the governor general could enact ordinances based on delegated legislative power.⁵⁹³ This practice breached the basic premise of the Meiji Constitution, the idea that the executive, legislative and

⁵⁸⁹ KATUTUGU YOSHIDA, TAIWAN’S LONG ROAD TO DEMOCRACY: BITTER TASTE OF FREEDOM (Toshie Hwabu & Peter Hayes ed and trans., 2009) referencing to KATSUTSUGU YOSHIDA, TAIWAN SHIMINSHAKAINO CYOSEN (THE CHALLENGE TO TAIWANESE CIVIL SOCIETY) 99-106 (1996).

⁵⁹⁰ *Id.* referencing to TADAO YANAIHARA, TEIKOKUSYUGIKA NO TAIWAN (TAIWAN UNDER IMPERIALISM) 377 (1963).

⁵⁹¹ Hirano et al, *supra* note 402, at 211.

⁵⁹² See LEO CHING, BECOMING JAPANESE: COLONIAL TAIWAN AND THE POLITICS OF IDENTITY FORMATION 211 (2001).

⁵⁹³ Yoshida, *supra* note 589, at 44.

judicial powers were separate and that legislative power was exercised with the consent of the parliament.⁵⁹⁴



With the intention to transform Taiwan into the southern expansion of Japan's territory,⁵⁹⁵ the Japanese government tried to get the Taiwanese people to change and assimilate into the empire by means of the Imperial Rescript on Education. The establishment of Japanese language education was used as an effective measure to promote Japanese ideas and to raise the loyalty of the Taiwanese population. Inspired by the liberal spirit of the 1912-1925 Taisho era, wealthy Taiwanese were encouraged to study in Japan.⁵⁹⁶

At the end of World War I, the US President Woodrow Wilson's thoughts on self-determination for all the peoples of the world had become a guiding light for the Taiwanese political activists. In 1918, Taiwanese students and intellectuals in Tokyo founded an Enlightenment Society (Keihatsukai) in an effort to enhance Taiwanese equality within the Japanese Empire. They fought for "self-determination" to vote for

⁵⁹⁴ *Id.* at 45 referencing to TATSUKICHI MINOBE CHIKUJYO KENPOU SEIGI (interpreting the constitution article by article correctly) 41 (1927).

⁵⁹⁵ DENNY ROY, TAIWAN: A POLITICAL HISTORY 42 (2003).

⁵⁹⁶ Manuel Schilcher, Dress up the Nation: Taiwan under Japanese Rule 16 (2017), *available at* https://www.academia.edu/33693607/Dress_up_the_Nation_Taiwan_under_Japanese_Rule (Last visited May 2, 2022)



their own representatives in Japan's Imperial Diet, and the abolition of the hated Law No. 63 that institutionalized discrimination in Taiwan.⁵⁹⁷ In 1919, Tokyo dispatched a civilian to be Taiwan's governor for the first time.⁵⁹⁸

From World War I to the late 1920s, there was universal suffrage and party politics in Japan, a period seen as the most vital time in the age of Taisho Democracy.⁵⁹⁹ In 1921, the Taiwanese people started the first petition campaign for the establishment of a Taiwan assembly. The early political struggles of the Taiwanese were mainly developed by the Taiwan Cultural Association (TCA), established in 1921. The TCA's prospectus stated: "the Taiwan Strait is the gateway through which all ships pass, whether they are going East, West, South or North. At the same time it is a place where ideas that express world trends meet."⁶⁰⁰ Advocating for a Taiwanese parliament to check and balance the colonial administration, the organization "submitted petitions to the Diet annually requesting a parliament and a Taiwanese representative in the national legislature."⁶⁰¹ The Japanese authorities tolerated the group, "although they declared some of its

⁵⁹⁷ GEORGE H. KERR, *FORMOSA: LICENSED REVOLUTION AND THE HOME RULE MOVEMENT, 1895-1945*, 119-125 (1974). Available at https://www.jstor.org/stable/pdf/j.ctv9zckv6.12.pdf?refreqid=excelsior%3Af62d65d6725843f87b2c10024a5412a1&ab_segments=&origin=; https://www.jstor.org/stable/pdf/j.ctv9zckv6.13.pdf?refreqid=excelsior%3Af62d65d6725843f87b2c10024a5412a1&ab_segments=&origin=; (Last visited May 2, 2022)

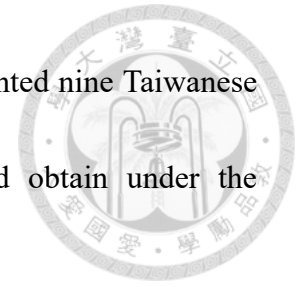
⁵⁹⁸ SHELLEY RIGGER, *POLITICS IN TAIWAN: VOTING FOR DEMOCRACY* 36 (1999).

⁵⁹⁹ Yoshida, *supra* note 589, at 45.

⁶⁰⁰ *Id.*

⁶⁰¹ Rigger, *supra* note 598, at 35.

activities illegal.”⁶⁰² “In 1921, the colony’s governor general appointed nine Taiwanese to his consultative council, the highest office Taiwanese would obtain under the Japanese empire.”⁶⁰³



In order to eliminate the influence of the principle of self-determination, the Japanese Empire decided to increase the push for assimilation.⁶⁰⁴ Since 1923, almost all of Japan’s modern codes took effect in colonial Taiwan under the policy of “extension of the homeland.”⁶⁰⁵ Throughout the nineteenth century, in an effort to prevent the European and North American empires from expanding into the east Pacific, Japan became the first country to transplant Western modern law in East Asia.⁶⁰⁶ “Like a common language, a single, uniform system of law was regarded as a tool of nation-building in the territories of the Japanese Empire.”⁶⁰⁷ The first Western modern codes implemented in Taiwan were therefore products of the modernization of Meiji Japan.⁶⁰⁸

⁶⁰² *Id.*

⁶⁰³ *Id.* at 36.

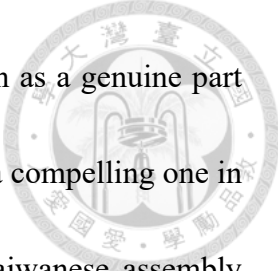
⁶⁰⁴ Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L & POL’Y J. 531,534 (2002).

⁶⁰⁵ Tay-sheng Wang, *Translation, Codification, and Translation, Codification, and Transplantation of Foreign Laws in Taiwan*, 25 WASH. INT’L L.J. 307, 315 (2016).

⁶⁰⁶ *Id.* at 308.

⁶⁰⁷ *Id.* at 315.

⁶⁰⁸ *Id.* at 308.



In the 1920s, there was a growing Japanese understanding of Taiwan as a genuine part of their nation, the issue of Taiwan's status within the empire became a compelling one in a maturing Japanese Empire.⁶⁰⁹ When the petition calling for a Taiwanese assembly was submitted to the Imperial Diet, "Ichiro Kiyose, one of the legislators who signed it, said that it was becoming increasingly difficult to postpone the discussion of the political rights of the Taiwanese."⁶¹⁰ Kiyose wrote:

The demand for national suffrage is a general trend in the world. If universal suffrage is justified for the Japanese inlands, it is very natural for fellows in new territories to ask for special legislation so that they too can participate. Of course, the structure and degree of this participation needs to be carefully studied. However, there is no reason to object to the suffrage itself. Japan is a member of the League of Nations. There is a provision which articulates the spirit of colonial governance in the Covenant [of the league]. It states that colonies are 'inhabited by peoples who are not yet able to stand by themselves under the strenuous conditions of the modern world. In these places there should be applied the principle that the well-being and development of such peoples forms a sacred trust of civilization. Exploiting and taking advantage of colonies is not

⁶⁰⁹ Morris, *supra* note 369, at 16.

⁶¹⁰ Yoshida, *supra* note 589, at 51.

in the spirit of colonial governance.⁶¹¹



In 1927, the moderate faction of the Taiwan Culture Society founded the Taiwanese People's Party, which "worked to legalize labor unions and win a larger role for Taiwanese in local governance."⁶¹² Instead of fighting for a parliament, the Taiwanese People's Party pushed for locally elected assemblies and councils at the prefectural level and below.⁶¹³ On the other hand, the Taiwanese Communist Party founded in 1928 dedicated to overthrowing the Japanese imperialism altogether and establishing an independent Taiwan Republic.⁶¹⁴ From 1921 to 1934, The League for the Establishment of a Formosan Parliament submitted fifteen official petitions, requesting formal self-governance on the island.⁶¹⁵ Despite the harassment and persecution by the colonial authorities, these petitions were signed by more than 17,000 Taiwanese people.⁶¹⁶

During this period, the Taiwanese people "managed to create their own media and

⁶¹¹ *Id* with reference to Ichiro Kiyono, *Kiyono Ichiro Seironsyu (Collection of the political discussion of Ichiro Kiyono)* 120-1 (1926).


⁶¹² LAI TSE-HAN, RAMON MYERS AND WEI WOU, A TRAGIC BEGINNING: THE TAIWAN UPRISING OF FEBRUARY 28, 1947 25 (1991).

⁶¹³ Rigger, *supra* note 598, at 36.

⁶¹⁴ A-CHIN HSIAU, CONTEMPRARY TAIWANESE CULTURE NATIONALISM 30-34 (2000); Frank S. T. Hsiao and Lawrence R. Sullivan, *A political history of the Taiwanese Communist Party, 1928-1931*, 4(2) J. ASIAN STUD. 269-89 (1983).

⁶¹⁵ Fulda Andreas Martin, *Reevaluating the Taiwanese democracy movement: A comparative analysis of opposition organizations under Japanese and KMT rule*, 34(3) CRIT. ASIAN STUD. 357, 366 (2002).

⁶¹⁶ Rigger, *supra* note 598, at 35.



expand this space for freedom of speech and journalism. In 1920, the magazine Taiwan Seinen (Taiwanese Youth) was started in Tokyo. This turned into Taiwan Minpo (Taiwan People's Journal), then Taiwan Shin Minpo (New Taiwan People's Journal). Its place of publication changed from Tokyo to Taiwan, and its frequency increased from monthly to weekly to daily.... Their work taught important lessons and freedoms of association, speech and journalism.”⁶¹⁷ According to an official publication, in 1926 alone, the TCA organized 315 lectures, and the average audience was 425 people.⁶¹⁸

As the leaders made a substantial concession by ceasing petition for a more radical form of self-government, and to back up the case for approving the budget for local system reform in the Imperial Diet,⁶¹⁹ things started to move towards a local election. In 1935, a mandate was handed by the central government of Japan to the colonial authorities to institute local elections, in which half of the members of local assemblies would be chosen by the voters, with the other half to be appointed. The assemblies' job was to “discuss and act on the local budget, certain local tax matters, and a few unimportant administrative questions.”⁶²⁰

⁶¹⁷ Yoshida, *supra* note 589, at 50.

⁶¹⁸ *Id.* at 46 referencing to 21Gendaishi Shiryo, Taiwan 269 (Morden history resources Vol.21, Part I: Taiwan)(Kwntaro Yamabe eds, 1971).

⁶¹⁹ *Id.* at 52 referencing to MASAOMI KONDO, SOURYOKUSEN TO TAIWAN (TOTAL WAR AND TAIWAN) 197 (1996).

⁶²⁰ Kerr, *infra* note 649, at 169.



Nevertheless, Rigger commented that,

the franchise for these early elections was extremely limited: only men over the age of 25 who paid more than five yen in taxes each year could vote, and voter rolls and campaign materials were subject to police approval. In 1935, 187,000 persons were qualified to vote, comprising 14.6 percent of Taiwan's Japanese residents and 3.8 percent of the Taiwanese population...The electoral process the Japanese instituted in Taiwan mimicked the system used in Japan itself... To equalize representation, the number of members elected from each district varied according to district population.⁶²¹

After 1935, Taiwan's assemblies had 172 members, of which 109 were Japanese (60 appointed and 49 elected), and 63 were Taiwanese (26 appointed and 37 elected). In 1937, there were another round of elections, and the Governor-general's advisory council was enlarged to 40 members with 17 Taiwanese.⁶²² The elections introduced Taiwanese to regular, peaceful political participation. "As of 1939, almost 300,000 Taiwanese were registered to vote, and more than 3,000 had held

⁶²¹ Rigger, *supra* note 598, at 36.

⁶²² *Id.* at 37.

elective office.”⁶²³



By the 1930s, Taiwan had been transformed to a relatively stable, peaceful, and prosperous Japanese colony.⁶²⁴ Thousands of college-educated Taiwanese “entered the ranks of Japanese [intellectuals], becoming almost indistinguishable from them.”⁶²⁵ Taiwan became a reliable “sugar bowl” and “rice basket”, providing foodstuffs and light industrial products for Japan’s homeland. During the period of 1901-1938, 81 percent of increase in land productivity had been achieved. ⁶²⁶ However, “The calm could be disrupted, as with the 1930 Musha (Chinese: Wushe) Rebellion, when Throko tribesmen killed 197 Japanese as revenge for the repeated sexual assaults carried out on local women by Japanese police.”⁶²⁷

During the assimilation phase, the campaigns were accelerated to de-emphasize the cultural and historical roots of Taiwan from China, turning Taiwan into a strategic bastion against southern China and Southeast Asia.⁶²⁸ After the assimilation period, which lasted until 1937, the Taiwanese people were encouraged to participate in

⁶²³ *Id.* at 38.

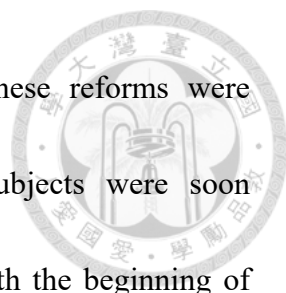
⁶²⁴ Morris, *supra* note 369, at 16.

⁶²⁵ *Id.*

⁶²⁶ KA CHIH-MING, JAPANESE COLONIALISM IN TAIWAN: LAND TENURE, DEVELOPMENT, AND DEPENDENCY, 1895-1945 61(1995).

⁶²⁷ Morris, *supra* note 369, at 16-7.

⁶²⁸ Schilcher, *supra* note 596, at 17.



activities that were reserved for Japanese citizens before.⁶²⁹ These reforms were short-lived, however. Taiwanese people's rights as Japanese subjects were soon accompanied by additional responsibilities as Japanese as well, with the beginning of Japan's "total war" against China in 1937.⁶³⁰ In Tokyo, civilian authorities were replaced by military adventurers, a development spilling over into Japan's colonial policy. In Taiwan, the tentative steps toward democracy were brushed aside by the policies promoting assimilation and mobilization for war and war production. Nonetheless, the Taiwanese people's brief experience with democracy had laid the foundation for the island's future political development. As George Kerr writes, "The Formosans... were becoming familiar with all the devices of political campaigns and electioneering...elements of training and experience that ultimately were to form a frame of reference for future (post-Surrender) demands and expectations."⁶³¹

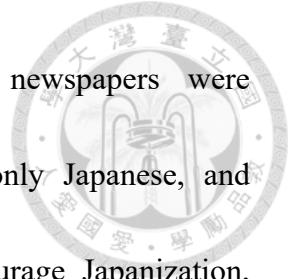
The following years were a dark age for Taiwan, which was subjected to the swaggering power of the special high police.⁶³² The colonial regime began to forcibly de-Sinicize Taiwan's ethnic Chinese population, replacing it with pure imperial Japanese culture in an intense Movement to Create Imperial Subjects (Kominka Undo). In order to mobilize

⁶²⁹ *Id.*

⁶³⁰ Morris, *supra* note 369, at 17.

⁶³¹ Kerr, *infra* note 649, at 171.

⁶³² WU SAN-LIEN AND CAI PEI-HUO ET.AL, TAIWAN MINZU YUNDONGSHI (HISTORY OF NATIONAL MOVEMENTS IN TAIWAN) 491(1971).



true Japanese sentiments during wartime, Chinese-language newspapers were eliminated, Taiwanese public servants were ordered to speak only Japanese, and Taiwanese language was forbidden on public buses.⁶³³ To encourage Japanization, Japanese-speaking Taiwanese families were eligible for a 50 percent raise in salary.⁶³⁴ Taiwanese Buddhist temples were transformed into official Shinto shrines; traditional puppet theater and the wearing of traditional Chinese clothing in public were banned.⁶³⁵ The colonial school system had played a crucial role in this movement. By 1944, 71.31 percent of Taiwan's school-age population was enrolled in elementary schools teaching in Japanese ways.⁶³⁶

During the war, some intellectuals were contemplating the possibility for an independent state of Taiwan after the war; their arguments were that because of Taiwan's colonial history, a unique Taiwanese consciousness is to be built upon a particular level of sociological and economic development fundamentally different from

⁶³³ Chou Wan-yao, *Taiwanren di yi ci de "Guoyu" jingyan: xilun Rizhi moqi de Riyu Yundong jiqi wenti* (the Taiwanese people's first experience with a "national language": An analysis of the Japanese language movement during late Japanese rule), 6(2)XIN SHIXUE (New historiography) 113, 126 (1995), available at <http://140.112.142.79/teacher/upload/1995.06%E3%80%88%E8%87%BA%E7%81%A3%E4%BA%BA%E7%AC%AC%E4%B8%80%E6%AC%A1%E7%9A%84%E3%80%8C%E5%9C%8B%E8%AA%9E%E3%80%8D%E7%B6%93%E9%A9%97%E2%94%80%E2%94%80%E6%9E%90%E8%AB%96%E6%97%A5%E6%B2%BB%E6%9C%AB%E6%9C%9F%E7%9A%84%E6%97%A5%E8%AA%9E%E9%81%8B%E5%8B%95%E5%8F%8A%E5%85%B6%E5%95%8F%E9%A1%8C%E3%80%89.pdf> (Last visited May 2, 2022) ; Wu Wenxing, *Riju shiqi Taiwan zongdufu tuiguang Riyu yundong chutan* (An investigation into the Taiwan colonial administration's Japanese language promotion campaigns during the Japanese occupation), 37(I,4), TAIWAN FENWU(Taiwan folkways)69 (1987).

⁶³⁴ See Wu Wenxing, *Riju shidai Taiwan* (Taiwan in the Japanese era) (1995)

⁶³⁵ Harry J. Lamley, *Taiwan under Japanese rule, 1895-1945: the vicissitudes of colonism*, in TAIWAN: A NEW HISTORY 241-2 (Murray A. Rubinstein ed., 1999).

⁶³⁶ Hsiau, *supra* note 614, at 46.

that of China. Sung Tse-lai was the first one to bring up this idea.⁶³⁷ Several Taiwanese intellectuals approached the Japanese authorities for their possible support for the independence of Taiwan, but they met with the stern opposition of the last Japanese governor of Taiwan, Ando Likichi.⁶³⁸



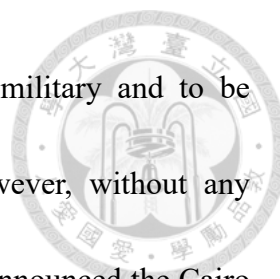
As the Pacific War broke out in 1941, as the supreme measure of equality as Japanese subjects, the Taiwanese men were encouraged to volunteer to serve and “die beautifully”, if needed, in the Imperial Japanese military. Between 1941 and 1945, some two hundred thousand Taiwanese men volunteered or were drafted into the armed services, with more than thirty thousand of these young men sacrificing for their emperor.⁶³⁹ This was accompanied by at least twelve hundred young Taiwanese women who were deceived or taken by force to war fronts in China, Indonesia, the Philippines, Burma, Singapore, Borneo, or Okinawa to serve as sex slaves that the Japanese military grotesquely called “comfort women”.⁶⁴⁰ This suffering characterized by the Japanese novelist Ozaki Hotsuki as “not to live as Japanese, but to die as Japanese”, had brought

⁶³⁷ Anne-Gaëlle Renaud, *Comparative study of Japanese colonialism in Taiwan and Hokkaido*, available at <https://www.soas.ac.uk/taiwanstudies/eats/eats2008/file43183.pdf> (Last visited May 2, 2022)

⁶³⁸ Morris, *supra* note 369, at 19 referencing to KONDO MASAMI, SORYOKUSEN TO TAIWAN: NIHON SHOKUMINCHI HOKAI NO KENKYU (TOTAL WAR AND TAIWAN: RESEARCH INTO THE COLLAPSE OF JAPANESE COLONIALISM) 666 (1996); ITO KIYOSHI, TAIWAN: YONHYAKUNEN NO REKISHI TO TENBO 133(1993).

⁶³⁹ LIN JIWEN, EIBEN JU TAI MOQI (1930-1945) ZHANZHENG DONGYUAN TIXI ZHI YANJIU (RESEARCH INTO THE WARTIME MOBILIZATION STRUCTURE OF THE LATE JAPANESE COLONIAL PERIOD (1930-1945)) 227 (1996).

⁶⁴⁰ Wang Ching-Feng & Chian Mei-fen, The Japanese government’s legal liability to Comfort Women: A note for Taiwanese Comfort Women’s request of restitution to Japan, Oct.31, 1997, available at https://taiwan.yam.org.tw/womenweb/conf_women/conf_japan2e.htm (Last visited May 2, 2022)



most Taiwanese people to anticipate the defeat of the Japanese military and to be liberated after five decades of colonialism.⁶⁴¹ Unexpectedly, however, without any reference to the wishes of the Taiwanese people, the Allied Forces announced the Cairo Declaration on November 27, 1943, and reaffirmed in the Potsdam Declaration of July 26, 1945 that Formosa would be returned to China after the war. Yet historical documents reveal that,

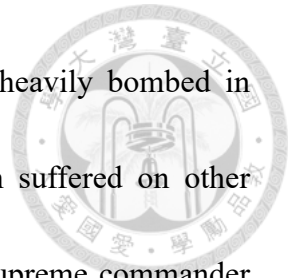
reports circulating in Chungking in late 1944 indicated that the Taiwanese were anxious to end Japanese rule but would welcome an American occupation...there were also reports that the population was reluctant to accept Chinese governmental control from the mainland and that “a large section of the Formosan populace” was “desirous of establishing an independent state or at the very least of preserving local autonomy.”⁶⁴²

In the early stage of the war, production expanded, creating an economic boom, but it was followed by a great deterioration in economic conditions. Large scale typhoons hit Taiwan in 1944 and 1945, damaging the irrigation system and agricultural

⁶⁴¹ Leo Ching, *Globalizing the regional, regionalizing the global: mass culture and Arianism in the age of late capital*, 12(1) PUBLIC CULT. 233, 252 (2000).

⁶⁴² Leonard Gordon, *American planning for Taiwan, 1942-1945*, 37 PAC.HIST.REV.201, 208 (1968) with reference to 219-220 with reference to the document of DS, Gauss, Chungking, to Sec. of State, Desp. 3042, Oct. 9, 1944. (894A.00).

production.⁶⁴³ In 1945, at the end of the war, Taiwan had been heavily bombed in American air strikes but largely spared from the hell of invasion suffered on other Japanese islands, such as Okinawa. General Douglas MacArthur, supreme commander of the Allied Command in the Pacific, authorized Taiwan's surrender to Generalissimo Chiang Kai-shek and his ROC government as a trustee on behalf of the Allied Powers.⁶⁴⁴ Vietnam was also surrendered to Chiang as a trustee on behalf of the Allied Powers.⁶⁴⁵



5. China (1945-1949)

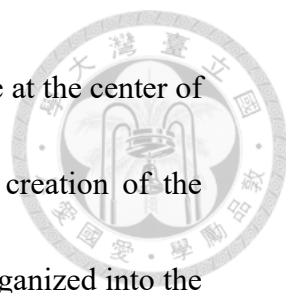
After their release from an oppressive colonial rule, the Taiwanese passion for freedom burst forth like a fountain. Katutugu Yoshida recorded the post-war Taiwanese political movements as follows:

In the last few months of 1945, civic activists in Taiwanese society worked quietly to lay the groundwork for substantial political organizations in a series of bottom-up initiatives. Activists of the Taiwan Cultural Association, the Taiwan

⁶⁴³ Yoshida, *supra* note 589, at 61.

⁶⁴⁴ Lung-chu Chen & W.M. Reisman, *Who owns Taiwan: a search for international title*, 81 YALE L.J. 599, 611 (1972), available at https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1867&context=fac_articles_chapters (Last visited May.2, 2022)

⁶⁴⁵ Morris, *supra* note 369, at 18.



People's Party and the Taiwan Local Autonomy Association were at the center of fast-moving discussions that resulted, in January 1946, in the creation of the Taiwanese People's Council. In April 1946, the Council was reorganized into the Taiwan political Reconstruction Association... In the short period before March 1947, the Association established more than 24 branches all over the islands and recruited more than 10000 members....The Association actively prepared for elections of township, county, city and provincial representatives... There is no doubt that the Taiwan Political Reconstruction Association represented the majority of Taiwanese society. ⁶⁴⁶

Immediately after the war, the Chinese government appointed Chen Yi as the first ROC Governor General of Taiwan Province and Garrison Commander of Taiwan, and on October 24, he arrived to take charge.⁶⁴⁷ The next day, Chenyi declared that Taiwan was a part of Chinese territory again, despite that the transference of the territory was not yet formalized by the Peace Treaty with Japan. The Governor General's Office, the new name for the Office of governor General (OGG), was seen as sufficient for Taiwan, reminiscent of re-imposition of colonial rule.

⁶⁴⁶ Yoshida, *supra* note 589, at 66.

⁶⁴⁷ *Id.* at 69.

Unexpectedly, the Chinese Nationalist troops who arrived were “a bedraggled, rag-tag lot, with far less spit-and-polish than the Japanese whose surrender they accepted.”⁶⁴⁸

George Kerr, a Taiwan specialist sent to Taipei by the US government from 1942 to 1947, describes the early contacts between the Taiwanese and the Chinese from the other side of the strait as follows:

Elements of the United States Seventh Fleet escorted troopships into Keelung and Kaohsiung on October 15. Aboard were the 62nd and 70th Divisions off the Chinese Nationalist Army, numbering in excess of 12,000 men. They were acutely conscious of the presence of Japanese troops concentrated inland somewhere near the ports. They flatly refused to go ashore.... Only a rancorous argument forced the Chinese to accept their fate and go ashore. It was an inauspicious beginning, made the more so because these incidents were witnessed by the Formosans. Word soon spread, and lost nothing in the telling. Formosans along the way laughed at the shambling, poorly disciplined, and very dirty Chinese troops. It was evident, they said, that the “victors” ventured into Formosa only because the United States stood between them and the dreaded Japanese. Much evil and many individual tragedies were to spring from these expressions of open scorn, for the mainland Chinese were losing face, dearer

⁶⁴⁸ Rigger, *supra* note 598, at 55.

than life itself.⁶⁴⁹



The Military administration of the new incoming regime, with Governor-General Chen Yi enjoying a broad mixture of civilian and military powers, was shockingly reminiscent of the early Japanese governors.⁶⁵⁰ In contrast to the very poor China, Japan had left behind a solid infrastructure for economic development, including schools, universities, rural electrification projects, roads and railroads.⁶⁵¹ “By the time the Japanese withdrew from the island in 1945, Taiwan outpaced China in nearly every measure of material development—per capita income, economic infrastructure, health, educational attainment, and so on.”⁶⁵² The new regime’s goal was to use Taiwan’s wealth to win their new civil war on the mainland against the Chinese Communist Party (CCP).⁶⁵³ The ROC’s takeover of Taiwan involved the establishment of control over all aspects of the Taiwanese economy. It seized all Japanese-owned businesses - almost the entire industrial economy and imposed trade restrictions and heavy taxes on the Taiwanese people.⁶⁵⁴ “In February 1947 the government-controlled Bank of Taiwan

⁶⁴⁹ GEORGE KERR, *FORMOSA BETRAYED* 73-4 (1965).


⁶⁵⁰ Steven Phillips, *Between assimilation and independence: Taiwanese political aspirations under Nationalist Chinese rule 1945-1948*, In *TAIWAN: A NEW HISTORY*, 275, 282 (Murray A. Rubinstein eds., 1999).

⁶⁵¹ Rigger, *supra* note 598, at 39.

⁶⁵² *Id.* at 34.

⁶⁵³ Morris, *supra* note 369, at 19- 20.

⁶⁵⁴ Kerr, *supra* note 649, at 248, 257-315; NANCY BERNKOPF TUCKER, *TAIWAN, HONG KONG AND THE UNITED STATES, 1945-1992* 28 (1994); Lai et al, *supra* note 612.



moved to confiscate the remaining independent businesses by recalling loans to private merchants.”⁶⁵⁵ The official “Taiwan Provincial Japanese Property Managing Committee” had enriched the ROC state and its officials by relieving governmental organizations, enterprises, and individuals of 50,856 pieces of property worth 10,990,900,000 yen, or some 17 percent of Taiwan’s 1946 net domestic product.⁶⁵⁶ The island was stripped of everything, from railway wiring and signal equipment to luggage on random rail baggage cars, industrial machinery, plumbing equipment, and entire factories, all of which were sent back to Shanghai, Xiamen, or other coastal mainland cities to support the Chinese civil war.⁶⁵⁷ This was in addition to a great amount of raw materials, sugar, coal, salt, and cement that were appropriated and shipped to the mainland in official fashion.⁶⁵⁸ Taiwan’s nascent industrial base, which was already damaged by US bombing during the World War II, was devastated further when the KMT officials ordered factories to be dismantled and transported across the Taiwan Strait. Unemployment and inflation skyrocketed. Inflation reached a rate of 350 percent during the first eight months of KMT rule.⁶⁵⁹ Among the officials of the “provincial” government, Mainlanders outnumbered Taiwanese nineteen to one.⁶⁶⁰ The Taiwanese

⁶⁵⁵ Nick Cullather, *Fuel for the Good Dragon: The United States and Industrial Policy in Taiwan, 1950–1965*, 20 *DIPL. HIST.* 1, 6 (1996).

⁶⁵⁶ Ito, *supra* note 638, at 141; Lai et al, *supra* note 612, at 71.

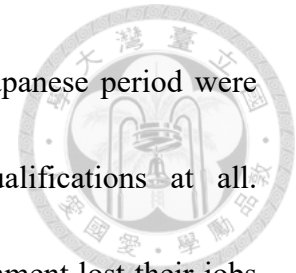
⁶⁵⁷ Kerr, *supra* note 649, at 132-5; PENG MINGMIN, *A TASTE OF FREEDOM: MEMOIRS OF A FORMOSAN INDEPENDENCE LEADER* 49 (1972).

⁶⁵⁸ Lai et al, *supra* note 612, at 73, 81.

⁶⁵⁹ *Id.*

⁶⁶⁰ Rigger, *supra* note 598, at 56.

people who had gained positions in the bureaucracy during the Japanese period were replaced by Mainlanders with lesser qualifications or no qualifications at all.



Approximately 36,000 Taiwanese employees of the colonial government lost their jobs under the new regime.⁶⁶¹ The Taiwanese people found them even more marginalized than before. “Compounding the problem, the KMT brought with it to Taiwan the epidemic of corruption that was sapping its strength on the mainland.”⁶⁶² In a ten-day period in early 1946, six incidents of corruption were reported by the Minpao newspaper.⁶⁶³ The Taiwanese people, who were accustomed to a strict but honest government, were especially outraged by the Chinese regime’s corruption and abuses of power.⁶⁶⁴ Minpao recorded that, “The mentality of the unemployed is deteriorating day by day. They are profoundly dissatisfied with debauched public officials and a landlord and business class that is growing rich off retrocession.”⁶⁶⁵

After just several months of the Chinese rule, the first cholera epidemic to strike Taiwan in twenty-seven years came in the summer of 1946, killing some 1,460 Taiwanese. Others were diagnosed with the bubonic plague, which had been totally eradicated by

⁶⁶¹ Lai et al, *supra* note 612, at 66.

⁶⁶² Rigger, *supra* note 598, at 57.

⁶⁶³ Li Hsiao-feng, TAIWAN MINZHU YUNDONG SISHI NIAN (Forty Years of Taiwan’s Democracy Movement) 29(1987). Cited in Rigger, *supra* note 598, at 57.

⁶⁶⁴ Rigger, *supra* note 598, at 56-7.

⁶⁶⁵ Li, *supra* note 663, at 32.

the Japanese thirty years before the arrival of Chinese forces.⁶⁶⁶



On the other hand, the government gave lip service to their promises of democracy. In 1946, public elections were held for village and town councils. Nevertheless, the Taiwanese soon found that they were given only “consultative” powers, which did little to relieve the frustration that was growing so rapidly.⁶⁶⁷ On 10 January, Chenyi made an announcement that the new ROC constitution with substantial democratic elements shall not be applied to Taiwan, since the mainland Chinese were superior to Taiwanese who had been contaminated the Japanese.⁶⁶⁸ Chenyi’s decision had generated an extremely politically tense situation, whereby the naked power of a government seized by minority foreign rulers was against a movement demanding autonomy whose social authority was based on people’s will. “The Taiwanese who waited enthusiastically for the Nationalists to accept the Japanese surrender were bitterly and irrevocably disappointed by those early experiences.”⁶⁶⁹ The Taiwanese people faced discrimination in education and public sector employment, and the Taiwanese language and culture were denigrated.⁶⁷⁰


⁶⁶⁶ Kerr, *supra* note 649, at 179-80.

⁶⁶⁷ Phillips, *supra* note 650, at 286.

⁶⁶⁸ See Yoshida, *supra* note 589, at 68.

⁶⁶⁹ Rigger, *supra* note 598, at 58.

⁶⁷⁰ *Id.* at 59.



The KMT created a physical base to support its regime, a base that was quite separate from Taiwan's indigenous economy. The KMT bureaucrats and the Taiwanese-Chinese (called the "half-mountain people") who had connections with the KMT on the other side of the strait cooperated with each other to hunt for concessions and windfalls. At the forefront of this scramble for concessions, the "half-mountain" people were strongly criticized by the Taiwanese. To make things worse, "the economy became destabilized by black-marketers and unscrupulous Chinese traders who arrived in junks. In a short period of time, modern Taiwan, built up assiduously over a long period, had been demolished by a corrupt and insolent robbery."⁶⁷¹

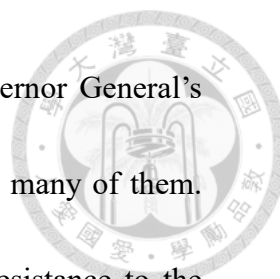
The growing anger felt by the Taiwanese people at the corruption and arrogance of the new KMT rulers finally unleashed in what became known as the "228 Incident".⁶⁷²

Yoshida recorded the incident:

The spark that led to the incident was the assault and wounding of a widowed cigarette vender in Taipei by an armed agent of the Taiwan Tobacco and Wine Monopoly Bureau on the evening of 27 Feb 1947. A crowd gathered. Another armed agent shot dead one of its members. The next day, on 28 February, angry citizens gathered at the governor General's Office to demand the prosecution of

⁶⁷¹ See Yoshida, *supra* note 589, at 70.

⁶⁷² *Id.*



the agent who had killed the persons the day before. The Governor General's office responded by firing a machine-gun into the crowd, killing many of them.

Furious citizens organized meetings, declared their complete resistance to the KMT and, through radio broadcasts, called for an uprising all over the islands.

That afternoon emergency martial law was announced. Within hours, violent collisions, beatings, gunfights, turbulence and armed confrontations spread everywhere...In some places veteran Taiwanese soldiers who had served in the Japanese Army engaged in provocation waving their combat hats....In Taichung there was an armed uprising led by the communist activist Hsieh Hsueh-hung.⁶⁷³

As this raw Taiwanese rage boiled over in the streets, elites in Taipei and other cities quickly founded the Committee to Resolve the "February 28 Incident", and negotiated between the Taiwanese majority and the Nationalist military government.⁶⁷⁴ On March 7, the Taipei Committee submitted a set of demands including self-government for the island.⁶⁷⁵ "In negotiations with the Taipei leaders, administrator-general Chen Yi took a conciliatory line, but when the Nationalist authorities (reinforced by troops from the mainland) returned to island on 8 March, they exacted a terrible revenge."⁶⁷⁶

⁶⁷³ *Id.* at 70-1.

⁶⁷⁴ Morris, *supra* note 369, at 21

⁶⁷⁵ Lai et al, *supra* note 612, at 120.

⁶⁷⁶ Rigger, *supra* note 598, at 58.



The Chinese troops began randomly killing Taiwanese as soon as they came ashore; many shooting guns were “loaded with soft-nosed dum-dum bullets designed to wound even more painfully.”⁶⁷⁷ As Peng Ming-min remembered:

As the Nationalist troops came ashore, they moved out quickly through Keelung streets, shooting and bayoneting men and boys, raping women, and looting homes and shops. Some Formosans were seized and stuffed alive into burlap bags found piled up at the sugar warehouse doors, and were then simply tossed into the harbor. Others were merely tied up or chained before being thrown from the piers.⁶⁷⁸

In the next several months, thousands of Taiwanese elites who were seen as posing a threat to the regime, including professors, doctors, lawyers, professionals, college and even high school students were systematically arrested and executed in cold blood.⁶⁷⁹

Mass executions were seen in Taipei, Kaohsiung and Keelung. “The troops targeted Taiwanese who had taken leadership positions, especially the members of Taipei’s Committee to Resolve the February 28 Incident, as well as students and community

⁶⁷⁷ Kerr, *supra* note 649, at 260.

⁶⁷⁸ Peng, *supra* note 657, at 69-70.

⁶⁷⁹ Morris, *supra* note 369, at 21 referencing to JUDITH VECCHIONE, TUG OF WAR: THE STORY OF TAIWAN (1998).

leaders.”⁶⁸⁰



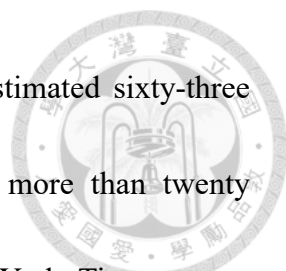
George Kerr, a US State Department official stationed in Taiwan at the time, described:

By March 17 the pattern of terror and revenge had emerged very clearly. First to be destroyed were all established critics of the Government. Then in their turn came Settlement Committee members and their principal aides, all youths who had taken part in the interim policing of Taipei, middle school students, middle school teachers, lawyers, economic leaders and members of influential families, and at last, anyone who in the preceding eighteen months had given offense to a mainland Chinese, causing him to “lose face”.⁶⁸¹

Those who were highly educated or accomplished in the Japanese language or culture could be targeted and blamed for the uprising (especially since so many of the protests and insurrectionary radio broadcasts had been in Japanese). The incoming regime described the Japanese influence on Taiwan as “poisonous”, cleansing and confiscating all the Japanese items-records, publications, flags, and so on. Over the next several months, Taiwan’s Japanese-educated elites were also “cleansed” in an effort to

⁶⁸⁰ Rigger, *supra* note 598, at 58.

⁶⁸¹ Kerr, *supra* note 649, at 299-300.



“Sinicizing” Taiwan for good.⁶⁸² An official government report estimated sixty-three hundred total casualties, while the activists’ own estimates that more than twenty thousand Taiwanese were killed in the suppression.⁶⁸³ A New York Times report estimated that at least 10,000 Taiwanese lost their lives during the atrocity.⁶⁸⁴ The 228 atrocity has transformed into a new rich sense of Taiwanese-centered social consciousness that became widely ingrained into Taiwanese society.⁶⁸⁵ “The terror cowed Taiwan’s educated class and social elite into a silence that lasted for decades.”⁶⁸⁶

The brutality of Chiang’s army of occupation in Taiwan⁶⁸⁷ led Secretary of State Dean Acheson to report on April 11 1947, in a letter to Senator Joseph H. Ball (R-MN), that the transfer of sovereignty over Formosa to China “has not yet been formalized.”⁶⁸⁸

In late 1948, American experts visited Taiwan and began surveying the island’s resources and potential for development. They found that it was promising that Taiwan,

⁶⁸² Hsiao, *supra* note 614, at 57-8.

⁶⁸³ Lai et al, *supra* note 612, at 158-9.

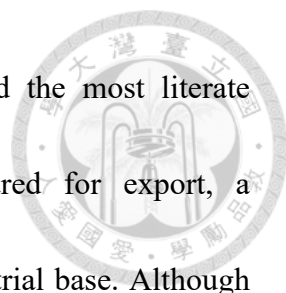
⁶⁸⁴ Tillman Durdia, *Formosa killings are put at 10,000; foreigners say the Chinese slaughtered demonstrators without provocation*, N. Y. TIMES, Mar. 29, 1947, at <https://www.nytimes.com/1947/03/29/archives/formosa-killings-are-put-at-10000-foreigners-say-the-chinese.html>

⁶⁸⁵ Yoshida, *supra* note 589, at 74.

⁶⁸⁶ Rigger, *supra* note 598, at 58.

⁶⁸⁷ William H. Newton, *Chinese Exploit Formosa Worse than Japs Did*, WASHINGTON DAILY NEWS, March 21, 1946, P.1, 3, cited in JOHN J. Tkacik, jr, *Understanding and Misunderstanding China Policy: A Primer*, in RETHINKING “ONE CHINA” 73,76 (John Tkacik ed., 2004).

⁶⁸⁸ *Id.* with reference to the Memorandum of the Department of State titled “the legal status of Taiwan” on Jul.13, 1971 from the Office of the Legal Advisor to the Director of Republic of China Affairs under the US Department of State.



as the Japanese Empire's agricultural heartland before 1945, had the most literate population in Asia, a commercialized agricultural system geared for export, a established rail and road networks, and a small but important industrial base. Although the port facilities, the fertilizer and cement factories, the oil refinery, and the aluminum smelter had all been damaged by the Allied Powers' bombing during World War II, skilled machinists and engineers were ready to run them once they had been repaired.

“When President Hap, S. Truman announced his Point IV. Economic aid program in January 1949, Harlan Cleveland, chief of ECA', Far eastern Division, suggested Taiwan as an ideal site for a pilot program that could be ‘successful enough to serve as a model’ for the rest of Asia.”⁶⁸⁹ “As thousands of undisciplined troops, corrupt bureaucrats, and refugees streamed into the island in the spring of 1949, American observers considered another rebellion likely.”⁶⁹⁰ Secretary of State, Dean Acheson hoped to establish a UN trusteeship in Taiwan with the help of a Formosan independence movement or Nationalist defectors.⁶⁹¹

Nevertheless, as history repeats itself, unexpected developments move us forward. The Martial law and the White Terror that followed brought an even colder political winter

⁶⁸⁹ Cullather, *supra* note 655, at 6.

⁶⁹⁰ *Id.*, at 7.

⁶⁹¹ *Id.*

to Taiwan than the Japanese colonial era.

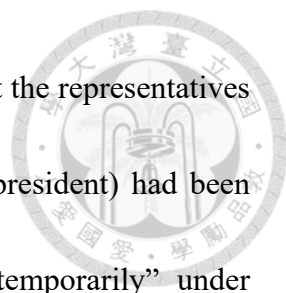


6. ROC Government in Exile (1949-1991)

The Republic of China was a party state, which is defined as follows: the organization of the KMT was made parallel to the state organization with the party leader and the head of state being the same person. The KMT Central Standing Committee (CSC) was the heavenly power over the Party and the state. The executive branch was no more than an organization to exercise CSC decision. The KMT was not just a coordinator of the whole state organization but was where party power was concentrated and had an authority which stood above that of the government. Even the representative and judicial organizations were subordinated to the party.⁶⁹²

After the KMT lost the civil war to the communists in 1949, it fled to Taiwan with tens of thousands of Chinese refugees. Nevertheless, the ROC government in exile and its leader, Chiang Kai-shek, continued to act as if Chinese history had stopped in 1949. Chiang Kai-shek denied that the ROC government was an “exile government.” Rather, it was a legitimate government ruling the whole China, a large part of which was

⁶⁹² KATSUTSUGU YOSHIDA, TAIWAN SHIMINSHAKAINO CYOSEN (THE CHALLENGE TO TAIWANESE CIVIL SOCIETY) 83-4 (1996).



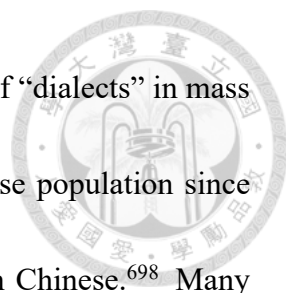
occupied by the rebellious communists.⁶⁹³ Based on the rationale that the representatives of the legislature and the National Assembly (which selected the president) had been elected in China in 1948, and that the Mainland China was “temporarily” under communist control, elections for those bodies were suspended. In Taiwan, public iconographical representations had been dedicated mainly to the founding fathers of the ROC- Sun Yat-sen and Chiang Kai-shek, and most of the street names of Taipei commemorate places on the mainland.⁶⁹⁴

As an incoming regime without popular support in Taiwan, the aim of the KMT government was to give substance to the fiction of the ROC, that is, not only to maintain an ideal but also to construct the identity of a nation corresponding to the ideology of the ROC. Beyond the myth lay a signification of the mainlanders through the banning of Japanese and local dialects, and Mandarin became the so-called national language.⁶⁹⁵ Through the control of the media, the KMT created a cultural imperialism through replacing the multi-cultural Taiwanese tradition with a new ethnocentric Chinese identity for the residents of Taiwan. Public performances of Taiwanese songs, music, and Taiwanese opera were banned, and be replaced with Chiang Kai-Shek’s

⁶⁹³ Tucker, *supra* note 654, at 54; *See also* GARY KLINTWORTH, *NEW TAIWAN, NEW CHINA: TAIWAN’S CHANGING ROLE IN THE ASIA-PACIFIC REGION* 81-91(1995).

⁶⁹⁴ STEVE TSANG & HUNG-MAO TIEN, *DEMOCRATIZATION IN TAIWAN: IMPLICATIONS FOR CHINA* 123 (1999).

⁶⁹⁵ *Id.* at 117.



favorite Beijing Opera.⁶⁹⁶ Not until 1987 was the restriction of use of “dialects” in mass media lifted.⁶⁹⁷ Most of the public offices were given to the Chinese population since most Taiwanese could not speak the national language of Mandarin Chinese.⁶⁹⁸ Many of the old books in Taiwanese and Japanese were confiscated and destroyed. Teachers and school administrators were instructed to make signs with “I spoke Taiwanese” for students to wear around their necks after they were caught speaking Taiwanese.⁶⁹⁹ Since the children who were non-native mandarin speakers were often punished for speaking their own language, psychologically, they automatically became second-class citizen.⁷⁰⁰ Moreover, “during the KMT education reform, Taiwanese literature, geography and history were abandoned, while Chinese history, geography and writings were glorified and promoted.”⁷⁰¹ “Children in the public school system from age 6 to 18 were taught military songs such as ‘Fight our way back to the Mainland’, ‘I am a Chinese’, ‘China will be Strong’, and ‘I love China’.”⁷⁰² Under the KMT martial law, merely to study Taiwanese language, history and culture was enough to attract surveillance from the state, since such activities were suspected of leading to secession

⁶⁹⁶ Ketty W. Chen, *Disciplining Taiwan: The Kuomintang’s Methods of Control during the White Terror Era (1947-1987)*, 4(4) TAIWAN INT. STUD. Q.185, 205(2008).

⁶⁹⁷ Feng-Fu Tsao, *Language Policy and Language Education in Taiwan*, in LANGUAGE POLICY AND LANGUAGE EDUCATION IN EAST ASIA, 285,288 (Wo Wah Kam and Ruth L. Wong eds., 2000).

⁶⁹⁸ *Id.* at 288.

⁶⁹⁹ Chen, *supra* note 696, at 203-4.

⁷⁰⁰ Tsao, *supra* note 697, at 291.

⁷⁰¹ Chen, *supra* note 696, at 202.

⁷⁰² *Id.*

and rebellion.⁷⁰³



From April 14, 1949, the KMT regime launched a series of land reform by carving the large pieces of land into small individual areas and establishing a payment system to collect “rent” from the “tenants” every month to profit the state. The state replaced the land owner to get the profits.⁷⁰⁴ According to the KMT, such a land reform was to extract as much resource as possible to fund the war against the Chinese communists and retake the mainland.⁷⁰⁵ In 1953, the KMT government went further by requiring the land owners to sell the tenants the land they had been renting.⁷⁰⁶ Through the land reform, the party-state ultimately made profits by charging the tenants rent and the selling of the land, with tens of thousands of Chinese populations that followed the KMT government to Taiwan being relocated to virtually all areas in Taiwan.⁷⁰⁷ “Military Villages” (Juancun) were created by the government to house the families of the Chinese soldiers and military personals.⁷⁰⁸

On the other hand, rents were reduced to a maximum of 37.5 percent of annual yields,

⁷⁰³ Yoshida, *supra* note 589, at 145.

⁷⁰⁴ Chen, *supra* note 696, at 198-99.

⁷⁰⁵ *Id.* at 199.

⁷⁰⁶ Richard L. Walker, *Taiwan's Development as Free China*, 321(1) ANN. AM. ACAD. POLIT. SOC. SCI 122, 130 (1959)

⁷⁰⁷ Chen, *supra* note 696, at 199.

⁷⁰⁸ *Id.* at 200.

and a vast expanse of public land was sold to tenant farmers.⁷⁰⁹ In a “Land to the Tiller” program urged by American aid officials,⁷¹⁰ stocks and bonds were used to purchase excess lands from wealthy landholders and then sent these lands to more than 194,000 tenant farming families.⁷¹¹ This reform has resulted in an important characteristic of Taiwan’s industrial development- a large number of small-scale factories could be set up and run by members of the rural lower middle classes.⁷¹²

Nevertheless, by taking the land away from the local Taiwanese land owners, the Party State inadvertently dismantled the influences the land owners had on the local communities, peasants and farmers, shifting the power struggle further to KMT’s favor.⁷¹³ All the important positions were given to the mainlanders, including posts in the military, the police, the schools and the public offices. “At the same time, mainlanders got state posts were deliberately contained in their own living areas called Juancun, military family villages.... they formed a peculiar social group; destined to join the military and the police and play a role in the mechanism of violence that propels a dictatorship.”⁷¹⁴ Ann Heylen observes that the Chinese people inhabiting in

⁷⁰⁹ Peter Chen-main Wang, *A bastion created, a regime reformed, an economy reengineered, 1949-1970*, in *TAIWAN: A NEW HISTORY* 320, 324 (1999).


⁷¹⁰ Cullather, *supra* note 655, at 17

⁷¹¹ MARTIN M.C. YANG, *SOCIO-ECONOMIC RESULTS OF LAND REFORM IN TAIWAN* 82 (1970).

⁷¹² Samuel P.S. Ho, *Decentralized industrialization and rural development: Evidence from Taiwan*, 28(1) *ECON. DEV. CULT. CHANGE* 77-96 (1979); Wang, *supra* note 709, at 333.

⁷¹³ Chen, *supra* note 696, at 200.

⁷¹⁴ Yoshida, *supra* note 589, at 129.



their diasporic communities could be categorized as colonizers, a privileged group who may not be so concerned about the impact their move has on the current local conditions and people.⁷¹⁵ “Mainlanders’ children with somewhat better qualifications obtained jobs in national enterprises or the media, areas of work that were completely controlled by the KMT government. In this way, they contributed to KMT rule over Taiwan’s economy and culture.”⁷¹⁶

At the same time, the Party State continued the confiscations of manufacturing enterprises owned by the Taiwanese people. In one case, Chiang seized a factory after exiling the owner and threatening the general manager with arrest.⁷¹⁷ Conflicts between mainlanders and Taiwanese continued.⁷¹⁸ Facing with exclusion from all authority in this discriminatory structure, the Taiwanese were, once again, relegated to second-class status.⁷¹⁹ However, protests were stymied by the proclamation of martial law, which criminalized political dissent and mandated that political “crimes” be tried in military courts. There ensued a period of intense repression of dissidents, known since as the

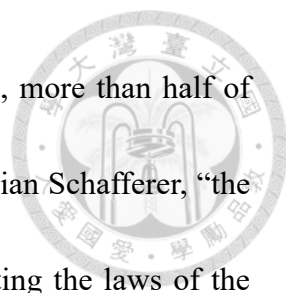
⁷¹⁵ Ann Heylen, *The Transnational in Taiwan History: A Preliminary Exploration*, 36(1) LITERARY AND CULTURAL STUDIES 9, 26 (2010), available at <https://www.concentric-literature.url.tw/issues/Transnational%20Taiwan/2.pdf> (Last visited May 2, 2022)

⁷¹⁶ Yoshida, *supra* note 589, at 129.

⁷¹⁷ TOMAS B. GOLD, STATE AND SOCIETY IN THE TAIWAN MIRACLE 65(1986); K. C. Wu, *Your Money Has Built a Police State in Formosa*, 18 LOOK 39-45 (1954).

⁷¹⁸ Each of the reforms increased the economic power of the mainlander-dominated state while reducing the power and wealth of potential rivals. Farm rent reduction, for instance, was followed by increases in taxes and the price of fertilizer supplied by a state monopoly. The income of Formosan landholders was thus simply transferred to the state. Text in Cullather, *supra* note 655, at 8.

⁷¹⁹ Yoshida, *supra* note 589, at 144.



“white terror.” Douglas Mendel found that between 1949 and 1955, more than half of the 90,000 political prisoners were executed.⁷²⁰ According to Christian Schafferer, “the number of people executed during the martial law period for violating the laws of the KMT is uncertain. Estimates go far beyond tens of thousands.”⁷²¹

The corruption of Chiang’s regime in Mainland China through World War II and the postwar period left the US with a bad impression, which was unremoved when Chiang’s troops were finally defeated by the Communists.⁷²² On the other hand, the US Congress kept on approving larger sums of aid for Taiwan. On June 5, President Truman signed a bill providing \$94 million to Taiwan for the next fiscal year. Twenty days later, the Korean War erupted, and on June 27, Truman’s decision was to use the Seventh Fleet to “neutralize” the Taiwan Straits.⁷²³ After the Korea War broke out, the immediate reaction of the Truman administration was to seek further ways of denying Taiwan to the Sino-Soviet bloc without aligning with the KMT government.⁷²⁴ This stance of “neutralizing Taiwan” is in line with the UN Trusteeship plan proposed by the Secretary of State, Dean Acheson. However, “This American posture continued until the PRC

⁷²⁰ DOUGLAS MENDEL, *THE POLITICS OF FORMOSAN NATIONALISM* 120 (1970).

⁷²¹ CHRISTIAN SCHAFERER, *THE POWER OF THE BALLOT BOX: POLITICAL DEVELOPMENT AND ELECTION CAMPAIGNING IN TAIWAN* 5 (2003).

⁷²² Tkacik, *supra* note 687, at 76.

⁷²³ Cullather, *supra* note 655, at 9.

⁷²⁴ JOHN W. GARVER, *THE SINO-AMERICAN ALLIANCE: NATIONALIST CHINA AND AMERICAN COLD WAR STRATEGY IN ASIA*, 24-31(1997).

entered the Korean War in October 1950. Beijing was then an enemy and alignment with Taiwan's KMT government was no longer avoided.”⁷²⁵



After Eisenhower took office in 1953, the US became aware of the KMT government's fragility. "Chiang's threat to collapse, and the warnings regarding potential domestic as well as international repercussions, did have an impact on certain aspects of American alliance policy."⁷²⁶ Earlier efforts to defend American interests on Taiwan without supporting the KMT had failed, considering that such a narrowly defined mission might erode the ROC government's morale and begin a chain of events undermining broader American goals in Asia.⁷²⁷ Washington believed that sustaining the regime on Taiwan required not only economic and military aid, but also the maintenance of morale and legitimacy of an exile government amid a non-supportive population. In this light, an NSC statement made in the late 1950s established that the goal of the American assistance was not simply to develop "the military potential" of ROC forces, but also "to sustain [their] morale."⁷²⁸ The US policy on freedom and human rights in international politics was therefore subordinated to its national interests.

⁷²⁵ STEVEN M. GOLDSTEIN, *THE UNITED STATES AND THE REPUBLIC OF CHINA, 1949–1978: SUSPICIOUS ALLIES* 6 (2000).

⁷²⁶ *Id.* at 17.

⁷²⁷ ROBERT ACCINELLI, *CRISIS AND COMMITMENT: UNITED STATES POLICY TOWARD TAIWAN, 1950-1955* 162(1996).

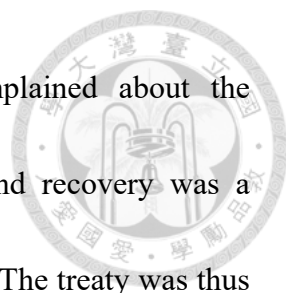
⁷²⁸ US State Department, *Statement of Policy by the National Security Council on US Policy toward Taiwan and the Government of the Republic of China*, October 4, 1957, available at <https://history.state.gov/historicaldocuments/frus1955-57v03/d288> (Last visited May 2, 2022)



After the Geneva Conference was held in July 1954, Beijing began a campaign to “liberate Taiwan”. By September, the offshore island- Quemoy was under artillery attack. Quemoy is one of several small island clusters along the coast of the Mainland China, which were not a part of the Taiwan/Pescadores formation, and remained part of China during the twentieth century. At the end of the Chinese civil war, the small islands of Quemoy and Matsu occupied by the KMT were vulnerable to Beijing’s attack and occupation. However, the KMT was unwilling to retreat from these outposts, but wanted to use the PRC attack as a pretense counterattack the mainland. ⁷²⁹

Although the defense of Quemoy and Matsu was considered unnecessary at the time, the US was deeply concerned of the psychological impact their loss would have on the KMT, in December 1954, the US signed a mutual defense treaty with the ROC government in exile. The American objectives in the alignment was the “maintenance of the security of Formosa, independent of communism [is]. . .an essential element within the US Far East defense position.” The “use of Chinese National military potential, including the availability of Formosa for use of US forces, in accordance with US

⁷²⁹ Goldstein, *supra* note 725, at 7.



national security policies” should be achieved.⁷³⁰ Chiang complained about the restrictive nature of the treaty, yet his assertion that the mainland recovery was a domestic issue of China was rejected to be covered by the treaty.⁷³¹ The treaty was thus part of a larger American policy intending to frustrate Chiang’s mainland ambitions.⁷³² Moreover, to secure a treaty as restrictive as possible, Washington brushed aside the objections from the ROC foreign minister and demanded a narrowly defined, defense-oriented document squarely in line with American preferences.⁷³³ Snyder has noted that, if an alliance is so restraining that there is only one dominating partner, it is in effect a unilateral commitment, where the senior ally determines when and under what conditions assistance would be provided.⁷³⁴ “On the American side, the alliance provided credibility for its anti-Communist posture in Asia and advanced its reputation of loyalty.”⁷³⁵

In August 1958, a second Taiwan Strait crisis was initiated by the PRC with a bombardment of Quemoy, amounting to a virtual artillery blockade.⁷³⁶ The American

⁷³⁰ US State Department, Oct. 4, 1957, *supra* note 728

⁷³¹ Goldstein, *supra* note 725, at 8.


⁷³² *Id.* at 11.

⁷³³ ROBERT ACCINELLI, *CRISIS AND COMMITMENT: UNITED STATES POLICY TOWARD TAIWAN, 1950-1955* 174 (1996).

⁷³⁴ GLENN H. SNYDER, *ALLIANCE POLITICS* 12 (1997).

⁷³⁵ Goldstein, *supra* note 725, at 19.

⁷³⁶ See THOMAS J. CHRISTENSEN, *USEFUL ADVERSARIES: GRAND STRATEGY, DOMESTIC MOBILIZATION AND SINO-AMERICAN CONFLICT, 1947-1958* CHAP. 6 (1996).



side concerning that it might be entrapped in a conflict with China supervised Chiang's activities closely. Finally, nuclear-capable Matador missiles were stationed in Taiwan in an attempt to bolster morale on the island.⁷³⁷ In 1962, Chiang Kai-shek complained bitterly that the mutual defense treaty was binding his "hand and foot" and preventing him from accomplishing his goals.⁷³⁸ The United States rejected all those arguments, and Taipei did not press the issue.⁷³⁹

On the other hand, given the fragility of the KMT regime on Taiwan, the US found it essential that the KMT regime did not simply survive, but thrive, while maintaining its international status.⁷⁴⁰ Since Taiwan's existence under American protection was critical to US security goals in Asia, from 1951 to 1963, the American aid had played an essential role in the reconstruction of Taiwan. "While military assistance helped to relieve the burden of a large military budget, various forms of civilian assistance further offset the impact of that budget, by providing funds to develop the island's economy, especially for costly infrastructural investments."⁷⁴¹

As the sudden increase in military spending sent prices into a death spiral, from March


⁷³⁷ Tucker, *supra* note 654, at 67.

⁷³⁸ Goldstein, *supra* note 725 at 15 referencing to FRUS, 1961-63, XXII, p. 311.

⁷³⁹ *Id.*

⁷⁴⁰ *Id.* at 11.

⁷⁴¹ *Id.* at 13.



1951, the Economic Cooperation Administration (ECA) was urged by the State Department to expand its role in directing Taiwan's recovery. "Over the next four months, the ECA placed advisers in virtually every branch of Taiwan's government and industry."⁷⁴² The ECA helped Taiwan to build its own aluminum rolling mill and fabricating plant, both owned by the state. Under the guidance of US, Taiwan employed a development strategy now known as "import substitution."⁷⁴³ Moreover, the ECA officials and J. G. White engineers helped to restore the state-owned factories of Taiwan to prewar production levels, while collaborating with the Chinese planners in creating the textile industry, one of the early triumphs of the "Taiwan miracle".⁷⁴⁴

As the largest army in proportion to population in the world, Chiang's oversized army had consumed 80 percent of Taiwan's budget, but only a third of these soldiers were combat effective.⁷⁴⁵ The US aid officials advised to reduce the military consumption, diverting sufficient resources to capital formation that would allow Taiwan to become self-supporting in a few years.⁷⁴⁶ But refused it was stubbornly refused by Chiang , who said that the reduction in military consumption would weaken the mainlanders' control of the Bank of Taiwan and state enterprises, impeding the KMT officials' joining

⁷⁴² *Id.* at 11.

⁷⁴³ *Id.* at 13.

⁷⁴⁴ *Id.* at 9.

⁷⁴⁵ *Id.* at 18.

⁷⁴⁶ *Id.* at 19

the ranks of upholding the pledge to return to the mainland, a mythic mission to justify the perpetual regimentation of the economy.⁷⁴⁷ To get Chiang to reduce his forces and recruit younger Taiwanese troops, the US created the Vocational Assistance Committee for Retired Servicemen (VACRS) to employ overage soldiers to build the highway and develop mines, businesses, and timberlands along its route.⁷⁴⁸

Taiwan's economy developed rapidly ahead in the following years, with the manufacturing growing eight-fold from 1950 to 1959. Local markets were flooded with aluminum pans, textiles, and electrical parts. Nevertheless, as the inward-looking manufacturing sector remained at the mercy of the US Congress, manufactured exports were considered by the US advisers as a solution to Taiwan's critical shortage of foreign exchange.⁷⁴⁹ American and Japanese firms transferred technology and capital to Taiwanese companies in return for their royalty, allowing Taiwan to retain domestic control of key industries and compelled foreign firms to share technology.⁷⁵⁰ After these economic reforms, US investment accelerated, growing from just over \$2 million in 1959 to around 50 million by 1965.⁷⁵¹ In January 1965, Agency for International

⁷⁴⁷ *Id.*

⁷⁴⁸ *Id.* at 20.

⁷⁴⁹ *Id.*

⁷⁵⁰ *Id.* at 23

⁷⁵¹ *Id.* at 22.

Development (AID) announced Taiwan's impending graduation.⁷⁵²



According to one estimate, from 1949 to 1963, US economic and military aid to Taiwan totaled approximately US \$3.7 billion, with another US \$1.3 billion provided in the form of loans. In a 1963 report to the Congress, the Kennedy administration estimated that non-military aid “equaled [sic] 43 percent of gross investment during the decade and accounted for nearly 90 percent of the flow of external capital and donations.”⁷⁵³

Furthermore, Washington's steadfast opposition to the PRC's entry into the United Nations had helped to both preserve the ROC's seat in the UN and its claim to represent all of China.⁷⁵⁴ Benefiting the substantial American support and aid, Taiwan had successfully transited from import substitution to a major exporter of inexpensive consumer goods. As the living standards of the Taiwanese people increased, the island grew into a major economic force in Asia.⁷⁵⁵ One US government study revealed that the justification for the provision of “economic and military aid” was to “ensure. . . [the] preservation of the necessary degree of US influence in key elements of government and society.”⁷⁵⁶

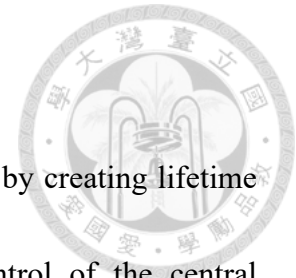
⁷⁵² Felix Belair, Jr., *US to Publicize Effects of Aid on Boom in Taiwan*, N.Y. TIMES, Jan.13 1965, at <https://www.nytimes.com/1965/01/13/archives/us-to-publicize-effects-of-aid-on-boom-in-taiwan.html> (Last visited at May 2, 2022)

⁷⁵³ David W. Chang, *US Aid and Economic Progress in Taiwan*, 5 (3) ASIAN SURV. 152-153 (1965). See also Tucker, *supra* note 654, at 57-60.

⁷⁵⁴ Goldstein, *supra* note 725 at 13.

⁷⁵⁵ *Id.* at 21.

⁷⁵⁶ *Id.* at 29 referencing to FRUS, 1964-1968, XXX, pp. 58, 141, 239-40, 266-69, and 405.



Despite all the economic advances driven by the US aid, however, by creating lifetime members of the National Assembly, the KMT had grasped control of the central organization which was supposed to represent the people's will. They cruelly suppressed all independent activities, including the Chinese local Autonomy Study Group of Provincial Council, and the movement to create an opposition party, the Chinese Democratic Party, a shared initiative of Taiwanese-born and Chinese-born politicians, such as Lei Chen.⁷⁵⁷ Nevertheless, the people knew that it was essential for Chiang, if he was to prolong his regime under the cold war blockading the communist China, to make some show of democracy by holding local elections.⁷⁵⁸ Out of these local elections, there gradually arose dissenting voices and slogans: "Abolish the Temporary Provisions", "have an election for the National Assembly", and "change the constitution."⁷⁵⁹ The KMT responded with a new tactic by penetrating Taiwanese society through affiliated organizations such as anti-communist youth organizations, and women's organizations.⁷⁶⁰ It scattered enough money to buy all the votes it needed through local factions and in this way gained prefectural and city councilor seats. Money-brokering politics became the norm. No more than ten Taiwan seats could be

⁷⁵⁷ Yoshida, *supra* note 589, at 81.

⁷⁵⁸ *Id.* at 82.

⁷⁵⁹ *Id.* at 83.

⁷⁶⁰ *Id.* at 83-4.

gained at the central and prefectural level, despite all the advances at that had been made in the local elections since 1950.⁷⁶¹ The disappointment of the Taiwanese people at the stalled effort to pursue change through parliamentary pluralism was reflected in A Declaration of Formosan Self-Salvation in 1964, which was endorsed by Peng Ming-min, Roger Hsieh and Wei Ting-chao at risk of their lives.⁷⁶²

In addition to the culturally barren atmosphere created by promoting the pseudo-culture of Sino centrism and of Sun Yat-sen's Three Principles of the People, the KMT laced indigenous society under active government surveillance by the divisive use of informers and secret agents from within that society.⁷⁶³ Inspired by Foucault's Panopticism, Mitchell makes the argument that "the panopticon, the model institution, whose geometric order and generalized surveillance serve as the motif for this kind of power, was a colonial invention".⁷⁶⁴

Externally, as Washington's involvement in Vietnam increased from 1964 to 1968, Washington strengthened its ties with Taipei.⁷⁶⁵ During the Vietnam War, Taiwan was

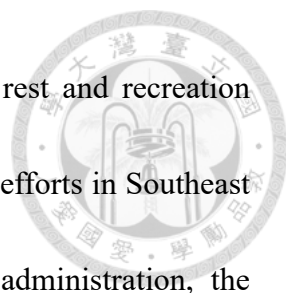
⁷⁶¹ *Id.*

⁷⁶² A Declaration of Formosan Self-salvation, available in Peng's autobiography at <http://www.romanization.com/books/peng/chap08.html> (last visited May 2, 2022)

⁷⁶³ Yoshida, *supra* note 589, at 131.

⁷⁶⁴ TIMOTHY MITCHELL, COLONIZING EGYPT 35 (1988).

⁷⁶⁵ Goldstein, *supra* note 725, at 20.



treated as an offensive base, which was used as a repair facility, rest and recreation center, and a base for transport and tanker planes supporting the US efforts in Southeast Asia.⁷⁶⁶ During the Johnson and the early years of the Nixon administration, the alliance between Washington and Taipei was enhanced. The US continued to support the ROC's international political status, and increased its support for Taiwan's integration into the international economic system.⁷⁶⁷ In 1964, a policy planning document approved by the Secretary of State Rusk expressed the hope that, over the next ten years, the ROC government might orient itself more toward the development of Taiwan than toward the recapturing of the Mainland China.⁷⁶⁸ American embassy observers remarked that some officials "below the top level" did not share Chiang's eagerness to take back the mainland but "were quite pleased with their undoubted success of making a going concern of Taiwan."⁷⁶⁹ By early 1967, the United States embassy in Taipei was reporting that the mood in Taiwan was turning away from the mainland recovery, and Chiang Kai-shek's son, Chiang Ching-kuo was conceding that domestic and international conditions were no longer favorable for actions against the mainland.⁷⁷⁰

In the years that followed, the US support for Taiwan's development further accelerated.

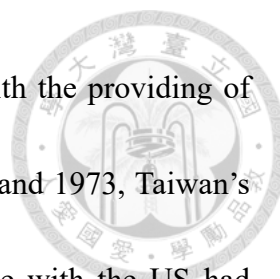
⁷⁶⁶ RALPH CLOUGH, ISLAND CHINA 23-4(1978).

⁷⁶⁷ Goldstein, *supra* note 725 at 24.

⁷⁶⁸ *Id.* at 30-1 referencing to FRUS, 1964-1968, XXX, pp. 86-96.

⁷⁶⁹ *Id.* at 27 referencing to FRUS, 1964-1968, XXX, pp.27

⁷⁷⁰ *Id.* at 28.



While actual aid was limited, other kinds of support flourished. With the providing of extensive advice, low interest loans, and investment, between 1965 and 1973, Taiwan's exports had grown by 33 percent, and by 1972, the two-way trade with the US had grown to US \$1.8 billion.⁷⁷¹


However, with an increasing restlessness over the Vietnam War, "improved relations with the PRC were seen as a way to calm the anti-war feelings at home, and to quiet criticism abroad."⁷⁷² After Henry Kissinger's secret trip in July 1971, President Nixon visited China. With the US increasingly intimate dealings with Beijing, other countries were released from any obligation to support the fiction of the Republic of China. In 1971, ROC's claim to represent "Free China" was eroded on the international stage. The United Nations General Assembly voted to award China's UN seat to the PRC and to "expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations."⁷⁷³

Chiang's legitimacy in Taiwan was undercut thereafter. Opponents of Chiang's regime that favor Taiwan's independence from any Chinese rule took advantage of this

⁷⁷¹ Clough, *supra* note 766, at 27-8; See also ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION 82-4 (1990).

⁷⁷² Clough, *id.* at 21-5.

⁷⁷³ G.A. Res. 2758, *infra* note 850.



development with coordinated protests all over the world, chaining themselves together in public places to call for international recognition of Taiwan as an independent state to have a seat in the UN.⁷⁷⁴ In an endeavor to counter PRC's drive to isolate Taiwan internationally, the Foreign vice Minister Yang Hsi-kun, as well as the mainland liberalists Lei Chen⁷⁷⁵, advocated for the establishment of the Chinese Republic of Taiwan, giving up all Mainland claims and pretensions. Yang advised Chiang to use his emergency powers to set aside the Constitution and dissolve all of the parliamentary type bodies, and set up a new unicameral provisional representative body to be composed of two-thirds Taiwanese and one-third Mainlanders. Yet Chiang was pressured by his wife, Madame Chiang, not to budge an inch from the old claims, pretensions and “return to the Mainland” slogans.⁷⁷⁶

In the following years, the US continued to lend legitimacy to the ROC government in exile. Trade offices were established in the US to promote Taiwanese exports. In these years, Taiwan has become a leading customer of the Export–Import Bank; from 1972 to 1975, the number of US companies permitted to establish branches in Taiwan grew

⁷⁷⁴ Peng, *supra* note 657, at 259.

⁷⁷⁵ Han Cheung, *The opposition party that never happened*, *TAIPEI TIMES*, Oct. 4, 2015, at <https://www.taipeitimes.com/News/feat/archives/2015/10/04/2003629214> (Last visited May 2, 2022)

⁷⁷⁶ Yang was supported by the retired Foreign Minister George K. C. Yeh and future premier Y. S. Tsiang, *In Foreign relations of the united states, 1969–1976, Volume XVII, China, 1969–1972, available at https://history.state.gov/historicaldocuments/frus1969-76v17/d174 (last visited Feb.22, 2022).*



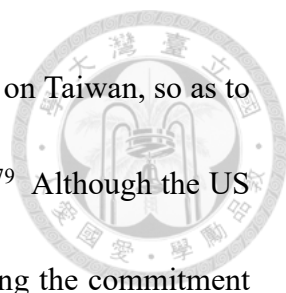
from 60 to 200; and joint ventures with American oil companies were approved. By 1978, Taiwan was the eighth largest trading partner of the US, with the two-way trade reaching US \$7.2 billion.⁷⁷⁷ During this period, the “Ten Major Construction Projects” and the “Twelve New Development Projects” contributed to the “Taiwan Miracle”, accelerating the process of economic modernization that gave Taiwan a 13% growth rate, \$4,600 per capita income, and the world’s second largest foreign exchange reserves. Taiwan’s growing economic boom was, of course, essential to KMT’s legitimacy.⁷⁷⁸

Chiang Kai-shek died in 1975, and his son, Chiang Ching-kuo became president in 1978. In an attempt to give the government greater legitimacy as a result of the economic success, Chiang junior launched the policy of Taiwanization. More and more Taiwan-born intellectuals were recruited into the government. The shift from hard authoritarianism to the soft authoritarianism came to characterize the party state system under Chiang Ching-kuo. Nevertheless, Chiang maintained many of his father’s autocratic policies, continuing to rule Taiwan through the one-party dictatorship under martial law.

From January 1, 1979, the US formally granted diplomatic recognition to the PRC and

⁷⁷⁷ YUFAN HAO, DILEMMA AND DECISION 51(1997).

⁷⁷⁸ Goldstein, *supra* note 725, at 37.



broke its diplomatic relations with the ROC government taking exile on Taiwan, so as to strategically align with the PRC as a check on the Soviet activities.⁷⁷⁹ Although the US relations with China were favored by domestic public opinion, ending the commitment to the defense of Taiwan was also strongly opposed.⁷⁸⁰ The US Congress therefore suggested a continued American commitment to Taiwan's security through the Taiwan Relations Act (TRA) of April 1979, whereby the United States made a unilateral declaration of its determination to protect Taiwan, not only from armed invasion but from any action that threatened its "social or economic system."⁷⁸¹

As the fiction of the ROC government in exile representing the whole China broke, the KMT government had no excuse to deny the representatives of the Taiwanese people any more. In August 1979, outside party activists decided to launch a political review magazine called "Formosa" to propagate democratic ideas in preparation for the elections that were scheduled for the following year, calling for a large-scaled protest against the KMT regime.⁷⁸² The incident would later be called the "Formosa (or Kaohsiung) Incident." The leaders were charged with rebellion, tried in a military court and sentenced to terms of imprisonment from 12 years to life. Following the incident,

⁷⁷⁹ *Id.* at 26.

⁷⁸⁰ See JAW-LING JOANNE CHANG, UNITED STATE—CHINA NORMALIZATION: AN EVALUATION OF FOREIGN POLICY DECISION MAKING 121-30 (1986).

⁷⁸¹ Goldstein, *supra* note 725, at 23.

⁷⁸² Yoshida, *supra* note 589, at 90.

the KMT organized a series of terror attacks against outside party members and their families to ensure that the anger of the Taiwanese was repressed.⁷⁸³



During these years, the Taiwanese identity was suppressed in promotion of a Chinese identity on the island, on the basis of the “One China Doctrine” and the belief that the ROC was the one and only legitimate “China” which would eventually regain control of the mainland under the KMT rule. Nevertheless, it became increasingly obvious that the Nationalist army would never succeed at reclaiming the mainland.⁷⁸⁴ The calling for democratic reforms rose one after another. The rise of Taiwanese nationalism was facilitated by a movement that originated from calls by students for campus democracy and autonomy that appeared at National Taiwan University in 1982.⁷⁸⁵

In response, the Iron Blood Patriots, a radical gang associated with Chiang Ching-kuo and one of his sons, showed their own kind of justice by murdering the twin daughters and mother of one of the defendants, Lin Yi-xiong in 1980. The same son was also found to be behind the Bamboo Gang’s murder of Henry Liu, author of an unflattering

⁷⁸³ *Id.* at 91.

⁷⁸⁴ Y-H Chu, *Taiwan’s National Identity Politics and the Prospect of Cross-Strait Relations*, 44(4) *ASIAN SURV.* 497 (2004).

⁷⁸⁵ PI HSIAO-HUA, *TAIWAN MINJIAN JIAOYU GAIGE YUNDONG: GUOJIA YU SHEHUI DE FENXI (TAIWAN’S CIVIL MOVEMENT FOR EDUCATION REFORM: ANALYSIS OF STATE AND SOCIETY)* 128-98 (1996).

biography of President Chiang, in Daly City, California in 1984.⁷⁸⁶ In July 1981, Chen Wen-cheng, an assistant professor of Carnegie-Mellon University, was also murdered during a temporary home visit in Taiwan.



After these incidents, with the adoption of the Reagan administration's foreign policy to promote democracy abroad, Chiang announced that his family would not dominate the politics in Taiwan any longer after his death. In September 1986, the outside party opposition declared itself to be a political party (technically a violation of law), but Chiang did not order a response. Furthermore, in order to gain support from the US to prevent military attacks from China, Chiang was taking steps to guarantee that he would be succeeded by a Taiwanese leader who could carry on a pro-Taiwan KMT legacy, rather than the mainlanders with more loyalty to the long-lost mainland China than to the KMT's Taiwan base. This mission eventually led Chiang to make three decisions before his death in early 1988, including lifting the martial law, legalizing political parties, and ending restrictions on public assembly and freedom of speech.⁷⁸⁷

⁷⁸⁶ JAY TAYLOR, *THE GENERALISSIMO'S SON: CHIANG CHING-KUO AND REVOLUTIONS IN CHINA AND TAIWAN* 357, 386 (2000).

⁷⁸⁷ Chen, *supra* note 696, at 188.

7. Self-Government (1991-Present)

After Chiang Ching-kuo passed away in January 1988, Lee Teng-hui, a native Taiwanese succeeding him as the president had launched a series of democratic reforms.



There then ensued a complex and incremental process in which the DPP and other opposition groups used demonstrations to keep up the pressure, while negotiating with the authorities. The Temporary Provisions⁷⁸⁸ were lifted in 1991, restoring the civil and political rights embedded in the constitution. Through a millstone judicial review in the 1991, those members who were representing Mainland China districts were removed and replaced with individuals who were elected on equal basis by the Taiwanese people. The first popular election for the National Assembly and the Legislative Yuan took place in 1991 and 1992 respectively, and a constitutional amendment in 1994 instituted direct, popular elections for president. China announced a round of missile tests in the Taiwan Strait from August through December 1995, which was widely seen as a way to intimidate Taiwan's populace before the island's first-ever presidential election to be held on March 19, 1996.⁷⁸⁹ In response to this Chinese aggressiveness, two US Navy aircraft-carrier battle groups were ordered by President Clinton to the Taiwan Strait, and

⁷⁸⁸ Temporary Provisions, *infra* note 993.

⁷⁸⁹ Tkacik, *supra* note 687, at 92

there were no further Chinese missile tests in the Strait.⁷⁹⁰ The first presidential election happened in March 1996 with Lee Teng-hui being elected as the first president of democratic Taiwan.



Despite all the flaws of the democracy resulting from the compromised constitutional reforms in the 1990s, Taiwan thereafter has undergone two rounds of party alternations through direct-voting elections, passing Samuel Huntington's two-turnover test of democratic consolidation.⁷⁹¹

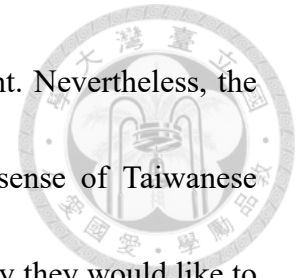
On the other hand, the relationship with China continued to dominate Taiwan's politics. Beijing was more and more aggressive about incorporating Taiwan into the PRC system. It "has used a multi-pronged approach involving money, propaganda, cyber operations, civic groups, and organized crime to influence public discourse in Taiwan on cross-Strait issues in directions favorable to the mainland's preference for peaceful integration."⁷⁹² Beijing hoped to use the huge Chinese market and economic potential

⁷⁹⁰ Art Pine, *US Faces Choice on Sending Ships to Taiwan*, L.A. TIMES, Mar. 20, 1996, A1, available at <https://www.latimes.com/archives/la-xpm-1996-03-20-mn-49233-story.html> (Last visited May 2, 2022); See also Steven Mufson, *China Blasts US for Dispatching Warship Groups*, THE WASHINGTON POST, Mar. 20, 1996, p. A1, available at <https://www.washingtonpost.com/archive/politics/1996/03/20/china-blasts-us-for-dispatching-warship-groups/58e7ea42-380f-4c50-9614-36123ab876cc/> (Last visited May 2, 2022)

⁷⁹¹ See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE 20TH CENTURY* (1991).

⁷⁹² Richard Bush & Ryan Hass, *Taiwan's democracy and the China Challenge*, BROOKINGS, Dec. 2018, available at https://www.brookings.edu/wp-content/uploads/2018/12/FP_20190226_taiwan_bush_hass.pdf (Last

as baits to negotiate a political deal with the Taiwanese government. Nevertheless, the increasing threat from China has only helped to strengthen the sense of Taiwanese identity, and awaken the Taiwanese people to find out what a country they would like to live in.



Chapter IV Statehood Evolvement of Taiwan



1. Background Review

1.1 1941-1951 (World War II and Postwar Period)

Since the cession of the Taiwan to Japan by the Treaty of Shimonoseki in 1895, China had not shown any interest in getting control of Taiwan until 1941, when the Pacific War broke out in December, “the involvement of the United States and Great Britain in the war in East Asia promptly stirred the Chinese ambitions to regain it.”⁷⁹³ The United States Ambassador to China, C. E. Gauss, reasoned that “public attention regarding future Korean independence from Japanese gave direct impetus to China to initiate similar suggestions for Taiwan “independence.”⁷⁹⁴ “This would be accomplished by fostering organizations advocating Taiwan’s return to China and publicly stressing the ‘Chinese racial ties’ with the island’s population.”⁷⁹⁵

In May 1943, “Chungking’s leading newspaper, Ta Kung Pao, asserted that Taiwan ‘must be returned unconditionally to China after the war’ and refuted a suggestion by John K. Jessup, an American journalist, that Taiwan be placed under an ‘international

⁷⁹³ Gordon, *supra* note 642, at 201.

⁷⁹⁴ “Independence” meant freedom from Japanese domination. Cited in *id.* at 202.

⁷⁹⁵ *Id.* referencing to Foreign Relations of the United States, Diplomatic Papers, 1942: China 732(1956).

mandate.”⁷⁹⁶ In July and August 1943, the Country and Area Committees (CAC) were established in the US Department of State to prepare policy papers on postwar problems relative to all areas occupied by Japan.⁷⁹⁷



While the Pacific War was in progress, from November 22 to 26, 1943, the US President Franklin D. Roosevelt, British Prime Minister Winston Churchill, and China's Generalissimo Chiang Kai-shek met in Cairo, Egypt, to discuss the strategy for defeating Japan. A matter closely related to the long-range American interests, was the strategic value Taiwan would have for the United States in the western Pacific. The establishment of American bases on Taiwan was discussed by Roosevelt and Harry Hopkins in mid-November, 1943, during the preparatory talks for their meeting with Chiang Kai-shek at Cairo. Their discussion, however, was not conclusive.⁷⁹⁸

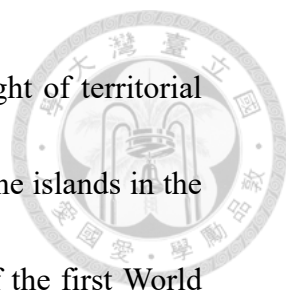
The three governments issued a joint statement dealing with the future of Formosa and Korea, which later came to be known as the Cairo Declaration. It proclaimed:

The three great Allies are fighting this war to restrain and punish the aggression

⁷⁹⁶ Editorial, *Return of Formosa to China Demanded; Chungking Paper Rejects Plan for Pacific Defense Mandate*, N. Y. TIMES, May 16, 1943, p28, at <https://www.nytimes.com/1943/05/16/archives/return-of-formosa-to-china-demanded-chungking-paper-rejects-plan.html> (Last visited May 2, 2022)

⁷⁹⁷ Gordon, *supra* note 642, at 205.

⁷⁹⁸ US Foreign Relations, *The Conferences at Cairo and Teheran, 1943*, 259, available at <https://history.state.gov/historicaldocuments/frus1943CairoTehran/d259> (Last visited May 2, 2022)



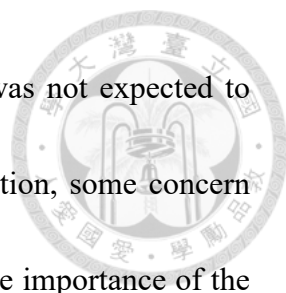
of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan, shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.⁷⁹⁹

During November 28 to December 1, 1943, at the conference at Teheran, Harry Hopkins, Roosevelt's closest confidante, "made note of United States interest in bases on Taiwan, but admitted that 'the size, character, and duties of occupying forces on such bases would have to be worked out.'"⁸⁰⁰

In spring 1944, rumors reached Washington that the Chinese Nationalists had formed a provisional government for Taiwan in Chungking and were prepared to administer the

⁷⁹⁹ Cairo Declaration, *supra* note 329.

⁸⁰⁰ Gordon, *supra* note 642, at 211 referencing to US Foreign Relations, The Conferences at Cairo and Teheran 570 (1943).



island as a province of China.⁸⁰¹ While the Chinese government was not expected to establish any government prior to the end of the American occupation, some concern arose, with the department's policy makers emphatically stressing the importance of the American preeminence in Taiwan.⁸⁰² Nevertheless, the CAC reasoned that, the preeminent US military occupation of Taiwan "would not be in accord with the Open Door policy, the Nine-Power Pact, and the Cairo Declaration which in no way placed limitations on the transfer of Taiwan to China."⁸⁰³ This argument was questioned by the navy, which "regarded any circumstance that could transfer sovereignty wholly or partially into Chinese hands as contrary to decisions made earlier regarding exclusive American responsibility for the occupation."⁸⁰⁴ For the US, Taiwan in friendly hands could be convenient, but more importantly, Taiwan had great strategic value.⁸⁰⁵ At the time, American Intelligence was fully cognizant that Taiwan served both as a base for Japan's military operations in Southeast Asia and the southwest Pacific and as an important unit in Japan's war economy.⁸⁰⁶ "While the image of China among Americans during World War II remained one of a viable and trusted ally, confidential

⁸⁰¹ *Id.* at 208 referencing to USDS, documents of the Area Committee on the Far East (CAC) and Postwar Program Committee (PWC), CAC-152, April 20, 1944.

⁸⁰² *Id.* referencing to DS, CAC-292, Sept. 27, 1944; Kerr, *supra* note 649, at 31.

⁸⁰³ Gordon, *supra* note 642, at 211.

⁸⁰⁴ *Id.* at 209.

⁸⁰⁵ *Id.* at 203 referencing to DS, Division of Far Eastern Affairs, "Formosa", Part II, Feb. 17, 1942 (894A.014/2).

⁸⁰⁶ *Id.* at 203-04

and public reports portrayed 'Chiang Kai-shek's regime as poor, selfish and failing.'⁸⁰⁷

After some debate and deliberation, the CAC recommended that "the sovereignty of Formosa will remain with Japan until such time as it is transferred to China by legal means."⁸⁰⁸


Meanwhile, a detailed plan formulated by the CAC for the restoration of postwar Taiwan was in pipe. In an effort to utilize the existing institutions and to prevent the disruption of political life on Taiwan, it was proposed that local administrative organizations, including the established legal structure, be retained. Tax laws and the existing private law, for example, would continue and be administered by local courts; but military proclamations would take precedence over existing law. Certain discrepancies, such as tax laws favoring Japanese against Taiwanese, would be discontinued.⁸⁰⁹ Furthermore, since the Chinese currency was then greatly depreciated, and there were no economic, political, or military grounds for the adoption of Chinese currency, the committee recommended establishing a stable medium wholly independent of the Chinese currency.⁸¹⁰ However, the question of Taiwan's currency

⁸⁰⁷ HERBERT FEIS, CHINA TANGLE: THE AMERICAN EFFORT IN CHINA FROM PEARL HARBOR TO THE MARSHALL MISSION 274 (1953).

⁸⁰⁸ Gordon, *supra* note 642, at 209 referencing to DS, CAC-161 (Draft 2), April 24, 1944.

⁸⁰⁹ 7DS, CAC-133a, June 28, 1944. The taxes collected would be expended primarily for local needs of the civil government. In *id.* at 214

⁸¹⁰ *Id.* at 217.



had greatly concerned the Chinese. In the summer of 1945, the Chinese government communicated with the US Embassy in Chungking, revealing extensive fiscal plans for Taiwan and inquiring broadly about the US occupation plans. “The Americans, however, played the same game of attempting to learn about Chinese plans without revealing their own.”⁸¹¹

On Taiwan, the Taiwanese political activists were encouraged by President Woodrow Wilson’s self-determination for all the peoples of the world.⁸¹² US reports circulating in Chungking in 1944 indicated that the Taiwanese people were anxious to end the Japanese rule and would welcome an American occupation. There were also reports, that the population was reluctant to accept Chinese governmental control and that “a large section of the Formosan populace” was “desirous of establishing an independent state or at the very least of preserving local autonomy.”⁸¹³

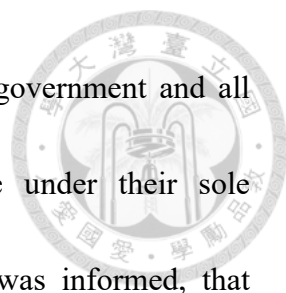
In August 1944, the CAC declared that “Chinese sovereignty will not be restored to Formosa until the conclusion of military government by the United States.”⁸¹⁴ The statement further stated that “the Chinese Government will have no authority over

⁸¹¹ *Id.* referencing to DS, US Treasury At- tach6, Chungking, to Hoo Leng Lin, Aug. 11, 1945 (800)

⁸¹² Kerr, *supra* note 597, at 119-25.

⁸¹³ Gordon, *supra* note 642, at 219-20 referencing to DS, Gauss, Chungking, to Sec. of State, Desp. 3029, Oct. 1, 1944 (800).

⁸¹⁴ *Id.* at 210 referencing to DS, CAC-292 (Prelim.), Sept. 7, 1944.



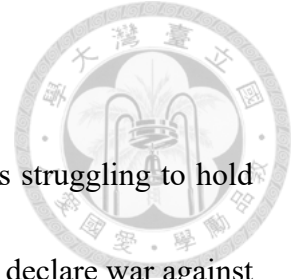
governmental functions in Formosa during the period of military government and all Chinese personnel employed by the occupying forces will be under their sole authority.”⁸¹⁵ In late summer of the year, the State Department was informed, that Chiang Kai-shek required a three-power conference with the United States and Great Britain to make clear in such an agreement that the civil administration be transferred to the Chinese national authorities rather than local authorities.⁸¹⁶

After Germany surrendered in May 1945, the US President Harry Truman, British Prime Minister Winston Churchill, and the Soviet Premier Joseph Stalin convened in Potsdam, Germany, from July 17 to August 12 to discuss the postwar disposition of Europe. During the conference, on July 26 the heads of governments of the United States, the United Kingdom, and the Republic of China issued a joint statement called “the Proclamation Defining Terms for Japanese Surrender,” which became part of the Potsdam Proclamation announced at the end of the Conference. Article 8 of the Potsdam Proclamation reaffirmed those commitments made in the Cairo Declaration with respect to the future of Formosa and Korea.⁸¹⁷

⁸¹⁵ Cited in *id.*

⁸¹⁶ *Id.*, at 218-9 referencing to DS, US Embassy, Chungking, to USDS, Sept. 19, 1944 (Tel. 1581, 800.0146).

⁸¹⁷ The Potsdam Proclamation deals with the postwar disposition of Germany, Italy, Japan, Poland, etc. While Truman and Churchill signed the Proclamation Defining Terms for Japanese Surrender, President Jiang (Chiang) Kai-shek of the Republic of China, not in attendance at the conference, only concurred by dispatch. Text in Chiang, *supra* note 236, at 189.



In the Chinese war zone, the ROC's army, with the help of US, was struggling to hold down the advance of the Japanese army in China. The USSR did not declare war against Japan until August 8, 1945, after it had learned that Japan was negotiating surrender.⁸¹⁸

It was the US Army as well as the two nuclear bombs deployed by it over the two Japanese cities of Hiroshima and Nagasaki had forced Japan to surrender at the Asia front of World War II. General Mac Arthur, the Commander of the US South-West Pacific Forces, led the American Forces fighting the Japanese army, recalled later that “none of these powers [Russia and the United Kingdom] had been forthcoming with troops to fight the Pacific war when we needed them.”⁸¹⁹

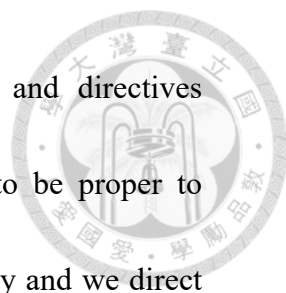
After Japan lost the war, President Truman appointed General Douglas MacArthur as “the Supreme Commander for the Allied Powers in the Pacific” to accept the surrender of Japan.⁸²⁰ In the Japanese Instrument of Surrender, Japan announced that:

We... hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China, and Great Britain on 26 July 1945 at Potsdam...We hereby command all civil, military and naval

⁸¹⁸ See Soviet War Declaration of War on Japan, Aug.8, 1945, available at <https://www.history.com/this-day-in-history/soviets-declare-war-on-japan-invade-manchuria> (Last visited May 2, 2022)

⁸¹⁹ DOUGLAS MACARTHUR, REMINISCENCES 219 (1964).

⁸²⁰ Chiang, *supra* note 236, at 312.



officials to obey and enforce all proclamations, and orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority and we direct all such officials to remain at their posts and to continue to perform their non-combatant duties unless specifically relieved by him or under his authority.⁸²¹

It could therefore be inferred that the disposition power of the territories conquered from Japan during the World War II was in the hands of the Allied Power. General MacArthur assigned the task of accepting the surrender of the Japanese commanders in Formosa and Vietnam to Chiang Kai-shek on behalf of the Allied Powers; Manchuria and North Korea to the Joseph Stalin of USSR as another such trustee; South Korea to US General John Hodge as another, and so on.⁸²² Because the war had lasted too long since the Japanese attack of Pearl Harbor, the US Government wanted to recall its troop home as soon as possible.⁸²³ Besides, most US State Department officials believed that Formosa would be returned to China in a postwar settlement pursuant to the Cairo

⁸²¹ Surrender of Japan, Sep.2, 1945, available at <https://www.ndl.go.jp/constitution/e/etc/c05.html> (last visited April 6, 2022).

⁸²² Chen & Reisman, *supra* note 644, at 611; Morris, *supra* note 369, at 18-9; The Surrender of Japanese Forces in China, Indochina, and Formosa, available at <http://www.taiwandocuments.org/japansurrender.htm> (Last visited May 2, 2022)

⁸²³ Kerr, *supra* note 649, at 43.

Declaration at that time,⁸²⁴ The US Navy sent ships to transport the Chinese army under Chiang Kai-shek from China to occupy Formosa in October 1945.



In early October of 1945, an advance group of eighty Chinese officials arrived in Taiwan to establish the Chinese administration led by Governor Chen Yi.⁸²⁵ On October 24, 1945, Chen Yi arrived to take charge.⁸²⁶ The next day, Chen Yi in a ceremony declared that Taiwan was a part of Chinese territory again.⁸²⁷ This declaration is invalid. As Professor Quincy Wright asserted in 1955 “the Japanese surrender [based on the Cairo and Potsdam Declarations] was not a definitive renunciation of the islands but a commitment to renounce them in the Treaty of Peace.”⁸²⁸

The military occupation of Chinese Nationalist Army in Taiwan was the same case as the military occupation of the US Army in Korea; both were pending the final arrangement by the Peace Treaty with Japan. This intention was clearly expressed by the Allied Power. In 1949, British Foreign Secretary Mayhew of the Attlee (Labor Party) Administration said in the House that “the Chinese Nationalist authorities are in control

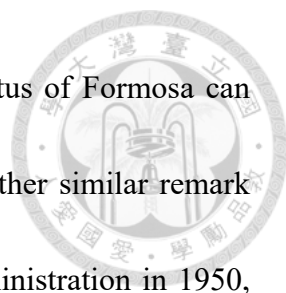
⁸²⁴ *Id.* at 44.

⁸²⁵ Gordon, *supra* note 642, at 226.

⁸²⁶ Yoshida, *supra* note 589, at 69.

⁸²⁷ *Id.* at 64.

⁸²⁸ Quincy Wright, *the Chinese Recognition Problem*, 49 (3) AM.J.INT’L L 332 (1955).



of the island [of Formosa]. However, [any] change in the legal status of Formosa can only be formally affected in a treaty of peace with Japan.”⁸²⁹ Another similar remark was made by British Foreign Secretary Younger of the Attlee Administration in 1950, stated that “Formosa is still de jure Japanese territory. Following on the surrender of Japan, the Chinese Government of the day assumed, with the consent of the remaining Allies, the provisional administration of the territory pending the final determination of its status at a peace settlement.”⁸³⁰

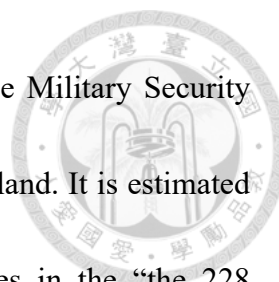
The above statements were echoed by MacArthur, on May 4, 1951, in response to a question raised by the Chairman of the US Senate Foreign Relations Committee, Senator Richard Russell, MacArthur noted that “[t]he Allies turned over the administration and the trusteeship of Formosa to China [the ROC], just as Japan was turned over to us, and it is still in that status.”⁸³¹

Nevertheless, the Chinese Nationalist Government immediately established a military authority to rule Taiwan. As early as the end of 1945, reports of growing resentment by the Taiwanese population toward the Chinese administration were made to

⁸²⁹ 469 PARL. DEB., H.C. (5th ser.) (1949) at 1679, cited in Chiang, *supra* note 236, at 226.

⁸³⁰ 478 PARL. DEB., H.C. (5th ser.) (1950) at 60, cited in *id.*

⁸³¹ *Id.* referencing to The General Declines to Say That the US Has Lost the Initiative in Foreign Policy Matters (Statement of General Douglas MacArthur before a congressional hearing), N. Y. TIMES, May, 5, 1951, at A7.



Washington.⁸³² In less than 2 years, a conflict between the Chinese Military Security Guards and the Taiwanese civilians led to bloodshed in the whole island. It is estimated that more than ten thousands of Taiwanese people lost their lives in the “the 228 Incident” or “the 228 Massacre.”⁸³³

In Less than two years after the establishment of Chinese administration in Taiwan, Major General Albert C. Wedemeyer clearly confirmed the rumored corruption of Taiwan’s governor-Chen Yi. Wedemeyer declared that “Ch’en Yi and his henchmen ruthlessly, corruptly and avariciously imposed their regime upon a happy and amenable population. The Army conducted themselves as conquerors. Secret police operated freely to intimidate and to facilitate exploitation by Central Government officials....”⁸³⁴


The 228 Incident was followed by the era of “White Terror”, during which thousands of people accused as communists were arrested, tortured, imprisoned, and murdered, or simply disappeared, well into the 1970s.⁸³⁵

⁸³² Gordon, *supra* note 642, at 226 referencing to DS, Memo for the Charge d’Affaires, US Embassy, Chungking, Dec. 12, 1945.

⁸³³ Tillman Durdia, *Formosa killings are put at 10,000; foreigners say the Chinese slaughtered demonstrators without provocation*, N. Y. TIMES, Mar.29, 1947, at <https://www.nytimes.com/1947/03/29/archives/formosa-killings-are-put-at-10000-foreigners-say-the-chinese.html> (Last visited May 2, 2022)

⁸³⁴ United States Relations with China, With Special Reference to the Period 1944-1949, USDS Pub. 3573, Far Eastern Series 30 309(1949). US Senate, Military Situation in the Far East 2426-2427(1951). Cited in Gordon, *supra* note 642, at 226.

⁸³⁵ LUNG-CHU CHEN, THE US-TAIWAN-CHINA RELATIONSHIP IN INTERNATIONAL LAW AND POLICY 15 (2016).

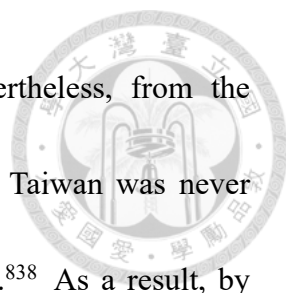


On the other hand, after more than three years of civil war, the Chinese Nationalist government was chased out of mainland China by a victorious Chinese Communist Party, and was forced to take exile in Taiwan on December 8, 1949, followed by tens of thousands of Chinese refugees. When the Korean War erupted in 1950, launching the first hot war of the Cold War era, the importance of keeping Taiwan a potential “unsinkable aircraft carrier” out of the Communist Chinese hands became crucial. United States President Harry S. Truman said that it would be a direct threat to the United States’ security in the western Pacific area if the Communist forces occupied Taiwan; thus, he ordered the 7th Fleet to enter the Taiwan Strait to prevent any attack on the island. On June 27, 1950, two days after the Korean War broke out, Truman reconfirmed the CAC’s declaration in 1944, that “The determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations.”⁸³⁶

The Peace Treaty with Japan was signed on September 8, 1951 by Japan and forty-eight Allied Powers excluding the USSR and China.⁸³⁷ At the time, the ROC government was taking exile in Taiwan, while the PRC government was not yet firmly established;

⁸³⁶ Harry S. Truman, *Statement by the President on the Situation in Korea* (Jun.27, 1950), available at <https://history.state.gov/historicaldocuments/frus1950v07/d119> (last visited Feb.22, 2022).

⁸³⁷ Treaty of Peace with Japan, *supra* note 244.



the Allied Powers did know which government to invite. Nevertheless, from the statements of the US and UK governments, it is confirmable that Taiwan was never supposed to be put into the hands of the Communist China (PRC).⁸³⁸ As a result, by Article 2(b) of the Treaty Japan merely renounced “all right, title and claim to Formosa and the Pescadores.”⁸³⁹

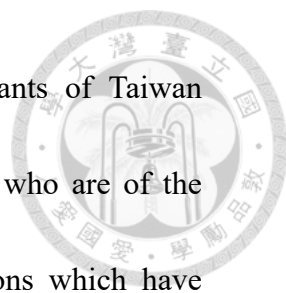
On the other hand, Japan was pressured by the US to recognize the government of ROC led by Chiang Kai-shek as the legitimate government of the whole China, which signed a peace treaty with Taipei as a proof to this close tie. Under the Article 2 of the Treaty of Taipei signed in 1952,⁸⁴⁰ it is recognized that under Article 2 of the Treaty of Peace which Japan signed at the city of San Francisco on 8 September 1951, Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratley Islands and the Paracel Islands. Article 4 recognized that all treaties, conventions, and agreements concluded before December 9, 1941 between Japan and China have become null and void as a consequence of the war. Article 10 states that:

for the purposes of the present Treaty, nationals of the Republic of China shall

⁸³⁸ See Garver, *supra* note 724, at 24-31.

⁸³⁹ Treaty of Peace with Japan, *supra* note 244, art 2 (b).

⁸⁴⁰ Treaty of Peace between the Republic of China and Japan Signed at Taipei, April 28, 1952. Entered into force, 5 August 1952, available at <http://www.taiwandocuments.org/taipei01.htm> (Last visited May 2, 2022)



be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) and their descendants who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).⁸⁴¹

After the Chinese seat in the UN occupied by the ROC government in exile was replaced by People's Republic of China in the United Nations by the UN res 2758 in 1971, the Government of Japan and the Government of the People's Republic of China issued a Joint Communiqué in Beijing on September 29, 1972,⁸⁴² whereby,

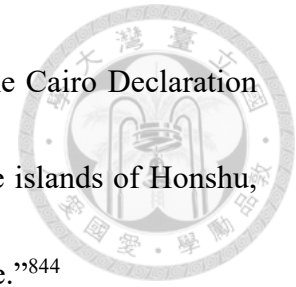
the Government of Japan recognizes that Government of the People's Republic of China as the sole legal Government of China; the Government of the People's Republic of China reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China, the Government of Japan fully understands and respects this stand of the Government of the People's Republic of China, and it firmly maintains its stand under Article 8 of the Potsdam Proclamation.⁸⁴³

⁸⁴¹ *Id.* art.4 and art.10.

⁸⁴² Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Sept, 29, 1972, available at <https://www.mofa.go.jp/region/asia-paci/china/joint72.html> (Last visited May 2, 2022)

⁸⁴³ *Id.* art.2 and art.3.

Article 8 of the Potsdam Proclamation stated that “The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.”⁸⁴⁴

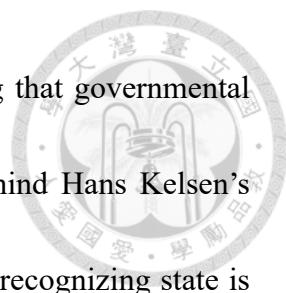


As the Government of Japan recognizes that Government of the People’s Republic of China as the sole legal Government of China, the Treaty of Taipei signed between Japan and the ROC government taking exile in Taiwan regulating the relationship between Japan and China should be automatically terminated. However, as there are always gaps between theory and reality in international law, it was not terminated until 1978, when Japan and the PRC government signed the Treaty of Peace and Friendship; Japan terminated the Treaty of Taipei with the ROC government in exile.

1.2 1951-1979 (Cold War Period)

As the cold war between the western countries and the Sino-Soviet bloc was unfolding, the US took the opportunity of Chiang’s claim of “Free China” to contain the Communist China (Peoples Republic of China). For thirty years, the US government recognized the Republic of China (ROC) Government taking exile on Taiwan, which administrated only one to two hundred and sixty areas in proportion to that of China, as

⁸⁴⁴ Proclamation Defining Terms for Japanese Surrender Issued at Potsdam, July 26, 1945, *available at* <https://www.ndl.go.jp/constitution/e/etc/c06.html> (Last visited May 2, 2022)



the only legitimate government of China. Nevertheless, considering that governmental recognition is a highly political affair, it is important to bear in mind Hans Kelsen's argument that political governmental recognition provides that "the recognizing state is willing to enter into political and other relations with the recognized [...] government [...] has no legal effect whatsoever' and is therefore 'not constitutive for the legal existence of the recognized state or government".⁸⁴⁵

After the armistice of the Korean War, the proposal to discuss China's representation in the General Assembly annual meeting was resurrected. Each year from 1953 to 1960, a member of Soviet bloc states made the proposal. Each time the proposal was rejected by a majority vote.⁸⁴⁶ A crucial international event occurred in 1965, when France broke its diplomatic ties with the ROC and accorded its recognition to the PRC. Soon after that, other Western States began to follow. By the early 1970s, the PRC had been recognized by a considerable majority of States, although the ROC continued to be recognized by some, including the United States.⁸⁴⁷ In September 1971, when the General Assembly convened, the US Government proposed a dual representation

⁸⁴⁵ Kelsen, *supra* note 78, at 605.

⁸⁴⁶ Chiang, *supra* note 236, at 148.

⁸⁴⁷ No State has ever had formal diplomatic relations with, or recognized, the two governments at the same time. Cited in Crawford, *supra* note 30, at 201

putting both the PRC and the ROC in the UN General Assembly, but failed.⁸⁴⁸

Members who spoke in opposition to the draft resolution presented by the US and other members calling for the seating of both the People's Republic of China and the Republic of China included Ceylon, Chile, Cuba, France, Hungary, Mali, Norway, Sierra Leone, Uganda, the Union of Soviet Socialist Republics (the USSR) and the United Kingdom. They made the point that:

...the precise issue of the restoration of the lawful rights of the People's Republic of China in the United Nations did not imply a question of admission or expulsion. Rather, the issue was one of credentials. The vacating of the seat of China by the Chiang Kai-shek régime was a legal, logical consequence of the restoration of the lawful rights of the People's Republic of China. Moreover, Taiwan had never been a Member State of the United Nations. There was only one Chinese State that was entitled to a seat at the United Nations. To have an additional seat would require as a prior condition the creation of a second Chinese State which would have to apply for membership under the Charter.⁸⁴⁹

When Albania's proposed resolution to replace the ROC with the PRC was presented

⁸⁴⁸ Chiang, *supra* note 236, at 152.

⁸⁴⁹ United Nations, Yearbook of the United Nations 131 (1971), available at <https://www.un-ilibrary.org/content/books/9789210601986/read> (last visited Feb.22, 2022).

for voting, the US government voted against Albania's proposal. But Albania's proposed resolution was carried by a large margin. Resolution No. 2758 of the General Assembly stated:



The General Assembly ... decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.⁸⁵⁰

The Resolution became effective immediately and the representatives of the ROC left the UN Headquarters. By Resolution No. 2758, the ROC government was expelled from the from the United Nations, and the seat of China was given to the PRC government. Since then, the number of the States recognizing the ROC as the representative government of China decreased dramatically. As a matter of fact, the so-called "ROC on Taiwan" as the representative government of China had been increasingly questioned even before 1971. For example, at the Olympic Games of 1959, the ROC government in exile was informed that because it did not control the sport on Mainland China, it could not continue to be recognized as the "Chinese National Olympic Committee", and all

⁸⁵⁰ The full Resolution is entitled, "Restoration of the Lawful Rights of the People's Republic of China in the United Nations." G.A. Res. 2758, GAOR, 26th Sess., Supp No. 29, at 2, UN Doc. A/8439 (1971).

applications under a different name would be considered.⁸⁵¹



The US Government, however, continued to recognize the ROC taking exile on Taiwan as the representative government of China until 1979.⁸⁵² By July 1971, the PRC government had already been established for more than 20 years, and it was clear that the ROC government had lost any chance and ability to “recover the mainland” as Chiang Kai-shek had repeatedly claimed ever since he retreated to Taiwan. In September 1970, implementing a policy of aligning the second enemy (China) to fight the biggest enemy (Soviet Union), the Nixon Administration began to change from a policy favoring containment of the PRC to a rapprochement with the regime.⁸⁵³ In 1972, President Nixon made a friendly visit to Beijing to negotiate an end to the enmity between the two countries.


On December 30, 1978, the Carter Administration finally accorded recognition to the PRC while simultaneously withdrawing its recognition of the ROC.⁸⁵⁴ Nevertheless,

⁸⁵¹ Catherine Kai-Ping Lin, Nationalism in international politics: the Republic of China’s sports foreign policy-making and diplomacy from 1972 to 1981, Dissertation of Georgetown University, 2008, at 26, available [at https://media.proquest.com/media/hms/ORIG/2/HTqLK?s=CZl6hfCy75PIZcNmZVr6%2FS5P%2BLc%3D](https://media.proquest.com/media/hms/ORIG/2/HTqLK?s=CZl6hfCy75PIZcNmZVr6%2FS5P%2BLc%3D) (Last visited May 2, 2022)

⁸⁵² See Ruan Ming, *Time to Put an End to Fallacy of “One China”*, *TAIPEI TIMES*, Nov. 14, 2003, at <https://www.taipeitimes.com/News/editorials/archives/2003/11/14/2003075810> (Last visited May 2, 2022)

⁸⁵³ For the the background for the US Government and the PRC government to make contact, see HENRY KISSINGER, *OBSERVATIONS: SELECTED SPEECHES AND ESSAYS* 141 (1982).

⁸⁵⁴ The United States established diplomatic tie with the PRC and terminated the tie with the ROC on



the United States immediately enacted the Taiwan Relations Act (TRA) in 1979, an unprecedented measure to employ a domestic law to implement its foreign policy toward Taiwan. The TRA implements the policy of “maintaining unofficial relations with the people on Taiwan” expressed in the Executive Order No 12143 of 22 June 1979. It provides, *inter alia*, that “[t]he absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan”, as they applied before the de-recognition, and that laws of the United States that refer or relate to foreign “countries, nations, states, governments, or similar entities” shall apply with respect to Taiwan.⁸⁵⁵ Treaties previously in force between the United States and “the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978” are to continue in force.⁸⁵⁶

According to the TRA, Taiwan was treated as a State for the purposes of sovereign immunity and the act of state doctrine under United States law,⁸⁵⁷ and treaties in force

January 1, 1979. See President’s Memorandum for All Departments and Agencies: Relations with the People of Taiwan, reprinted in 1979 USC.A.N. 36, at 75.

⁸⁵⁵ 22 USC §3303 (a), (b).

⁸⁵⁶ 22 USC §3303 (c).

⁸⁵⁷ *Millen Industries Inc v Coordination Council for North American Affairs*, 855 F 2d 879 (DC Cir, 1988). Cf *Parent v Singapore Airlines Ltd* (Superior Court of Quebec, 22 October 2003) (2003) JQ 18086. In Singapore a foreign ministry certificate was treated as determinative and sovereign immunity not afforded: *Civil Aeronautics Administration v Singapore Airlines Ltd* (2004) SGCA 3. Cited in Crawford, *supra* note 30, at 205.

before 1979 have continued to be given effect.⁸⁵⁸ The US maintains an unofficial presence in Taipei via the American Institute in Taiwan, a private corporation in name carrying out diplomatic activities indeed.



In the arena of the national courts of the US, in the *Mingtai Fire and Marine Insurance Co Ltd v United Parcel Service* case,⁸⁵⁹ a question arose about whether the PRC's adherence to the amended Warsaw Convention on Carriage of Goods by Air applied to a carriage of goods by air from Taiwan. If it did, liability for the loss of the package in question would have rested with the insurer rather than the carrier, both of which were non-Taiwanese entities. Consistent with the 1979 Act and United States policy towards Taiwan, the 9th Circuit noted that “despite the absence of official relations, the United States continues to deal separately with Taiwan ...that China's adherence to the Convention does not bind Taiwan”.⁸⁶⁰

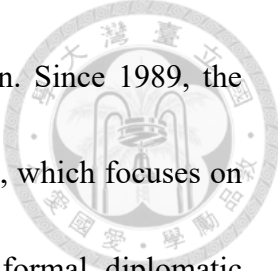
1.3 1979-Now (Post General De-recognition of ROC)

Nonetheless, China has continuously exerted pressure to prevent Taiwan from joining international organizations where statehood is a requirement, including the United

⁸⁵⁸ *New York Chinese TV Programs Inc v UE Enterprises Inc*, 954 F 2d 847 (2nd Cir, 1992), available at <https://www.casemine.com/judgement/us/591487e9add7b049344ebb8e> (Last visited May 2, 2022)

⁸⁵⁹ 117 F 3d 1142 (O'Scannlain, CJ) (9th Cir, 1999), 38 ILM 1274, cited in Crawford, *supra* note 30, at 205.

⁸⁶⁰ *Id.* at 1277.



Nations and its subsidiaries, such as the World Health Organization. Since 1989, the government of Taiwan has taken on a policy of “flexible diplomacy”, which focuses on creating informal relations or “substantial relations” rather than formal diplomatic relations. In any event, Taiwan continues to maintain strong informal and trade relations with some sixty other States.⁸⁶¹

The “ROC on Taiwan” participates in various international organizations and events, including the World Trade Organization, the Olympic Games, the Metre Convention, and international pageants. Although originally many international organizations urged the ROC government in exile to use “Taiwan” as its official name, so as to avoid conflicts with PRC’ status as the sole representative of China, as the KMT in power continue to claim to be the rightful government of China in its entirety, the name of Taiwan implying a de jure independence of Taiwan apart from China was unacceptable.

For example, in the 1976 Montreal Olympic Games, the IOC proposed to allow the ROC to use its national flag and anthem but under the name “Taiwan,” or under the Olympic or no-name plaque. The then-premier Chiang Ching Kuo declared that each element of the “trinity” — national name, flag and anthem — was de rigueur. On May 4,

⁸⁶¹ Crawford, *supra* note 30, at 201.

1978, a letter coming from International Amateur Athletic Federation (IAAF) honorary treasurer Fred Holder to the secretary-general of the ROC Track and Field Association,

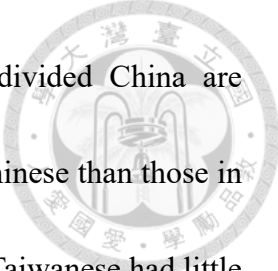


Chi Cheng, pointed out that:

My concern is that if both the Beijing organization and the Taipei organization insist on being considered the only governing body for all-China, the majority view is likely to support Beijing, simply because of the huge difference in population between the mainland and Taiwan. On the other hand, if your association can accept the change of name to Taiwan, there will be widespread support for your association as the only effective governing body in the “territory” of Taiwan ... A refusal to change is likely to be interpreted as a refusal to accept a limitation of your jurisdiction to the island of Taiwan. Many member federations of the IAAF find it difficult to understand the reluctance to affiliate as Taiwan, when the name Taiwan is so widely used in promoting and identifying trade products. Under the name Taiwan there can be no doubt or confusion, and you have a clear right to continue in IAAF membership.⁸⁶²

However, instead of accepting the name of “Taiwan,” the Chinese Nationalist government finally formulated the name “Chinese Taipei.” Considering that “Chinese

⁸⁶² Catherine K. Lin, *How “Chinese Taipei” came about*, TAIPEI TIMES, Aug. 5, 2008, at 8, at <http://www.taipeitimes.com/News/editorials/archives/2008/08/05/2003419446> (Last visited May 2, 2022)

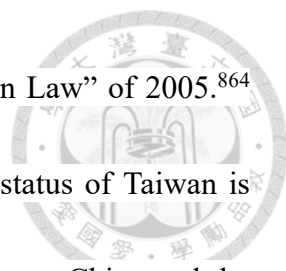


Taipei” signified an uncertain boundary implying both parts of divided China are Chinese territories, and the people in one part of China are no less Chinese than those in the other. As a result, throughout the 1970s, a time during which the Taiwanese had little say in the government’s foreign policy decision-making, all opportunities for Taiwan to have gained recognition as “Taiwan” in international organizations were spurned.⁸⁶³ Today, when the Taiwanese are finally able to exert influence in their government, any effort to change its official name back to Taiwan will be deemed again by the PRC as a provocative action of seeking independence.

For the PRC, it is a Godsend opportunity that Taiwan had been governed by the KMT preventing Taiwan’s independence by sticking to the “One China Doctrine”. To add fuel to the fire, the KMT government strongly promoted Chinese nationalism as an official ideology in Taiwan. They established school curricula to implant the Chinese identity by emphasizing the history, geography and culture of Mainland China while de-emphasizing those of Taiwan. Since the erosion of the legitimacy of ROC on the international stage in the 1970s, this political slogan was taken over and exploited to the extreme by the PRC to suppress Taiwan’s identity and participation on the international stage. The PRC pressed almost all states upon their recognition of China for accepting a

⁸⁶³ *Id.*

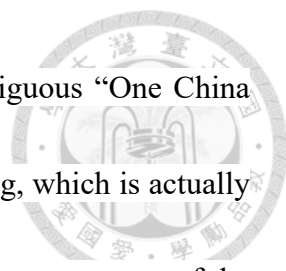
“One China Principle”, which was made clear in its “Anti-Secession Law” of 2005.⁸⁶⁴



Accordingly, the PRC’s view in respect of the present political status of Taiwan is that mainland China and Taiwan belong to one China; there is only one China and the sovereignty of that one China is indivisible; the “Taiwan issue” is a residual problem of the Chinese civil war and is an internal affair of China. Beijing emphasized that there is a “1992 Consensus” between both sides of the Taiwan Strait recognizing there is only one China—both mainland China and Taiwan belong to the same China but agree to differ on the definition of which China. But whether there was a “1992 Consensus” between the KMT and CCP is not without disputation.

Few of the Taiwanese people, who had been brain washed by KMT’s decades of education of the “One China Doctrine”, however, have realized that the name-Republic of China, and the symbolism carried by the “white sun, blue sky” flag and the ROC nation father- Sun Yat-sen, have merely lent colors to PRC’s intimidation and aggression, since PRC’s continuity as the state of China has never been questioned in the international legal academia. The Taiwanese People’s insensibility to this fallacy has made them susceptible to China’s infiltration in their everyday life.

⁸⁶⁴ Chinese Government, “Anti-secession Law”, Mar. 15, 2005, available at <https://www.mfa.gov.cn/ce/ceus/eng/zt/999999999/t187406.htm> (Last visited May 2, 2022)



On the other hand, since 1979, Washington has taken a more ambiguous “One China Policy” instead of Beijing’s “One China Principle” to appease Beijing, which is actually not an endorsement of Beijing’s position. Washington stated that the government of the People’s Republic of China was “the sole legal Government of China,” and maintains a “robust unofficial” relationship with Taiwan, including continued arms sales to the island so that it can defend itself.⁸⁶⁵ The implications behind the language could be that the US does not recognize the government under the name of ROC, but for the purpose of keeping the status quo of Taiwan’s foreign relations with the US, it grants the entity of Taiwan with de facto recognition. The US is reluctant to speak the language unequivocally, since its thirty years purely political recognition of ROC in lack of legal foundation put it at an embarrassing position to openly refute the legitimacy of the so called ROC government. In the years following 1979, however, all US documents referring to the island called it “Taiwan” without mentioning the name of ROC.

In light of the ambiguous language of One China Policy that put Taiwan at a disadvantage due to the international community’s misunderstanding, the US

⁸⁶⁵ Editorial, *What is the ‘One China’ policy?*, BBC NEWS, oct.6, 2021, at <https://www.bbc.com/news/world-asia-china-38285354> (Last visited May 2, 2022)

Democratic Party platform drops “One China” language on Taiwan in August 2020.⁸⁶⁶

Moreover, during a telephone interview with a radio program in November 2020, the US Secretary of State Mike Pompeo said it was important to “get the language right.”

Taiwan has not been a part of China, and that was recognized with the work that the [former US president Ronald] Reagan administration did to lay out the policies that the United States has adhered to now for three-and-a-half decades, and done so under both administrations,” he said, referring to Reagan’s “six assurances” made to Taipei in 1982.⁸⁶⁷ This is the clearest statement the US government has ever made on the legal status of Taiwan since 1979.

No other country has enacted legislation or adopted policies as explicit as the United States, but there are equivalents to it,⁸⁶⁸ such as the Foreign Corporations (Application of Laws) Act 1989 (Cth) of Australia, and the Foreign Corporations Act 1991 (UK).

Although not mentioned Taiwan by name, the law of Taiwan is treated as the law of a recognized State in determining the existence and capacity of such corporations.

Accordingly, Taiwanese corporations are allowed to do business in these states as if

⁸⁶⁶ Bill Gertz, Democratic Party platform drops “One China” language on Taiwan, WASH TIMES, Aug. 23, 2020, at <https://www.washingtontimes.com/news/2020/aug/23/democratic-party-platform-drops-one-china-language/> (Last visited May 2, 2022)

⁸⁶⁷ Lin Chia-nan, *Taiwan not part of China, Pompeo says*, TAIPEI TIMES, Nov.14, 2020, at <https://www.taipeitimes.com/News/front/archives/2020/11/14/2003746883> (Last visited May 2, 2022)

⁸⁶⁸ Crawford, *supra* note 30, at 202.

Taiwan were a recognized State. Nevertheless, these Acts differs in many respects from the Taiwan Relations Act 1979 (USA). It is limited in its substantive application, since it only deals with the question of corporate status.⁸⁶⁹

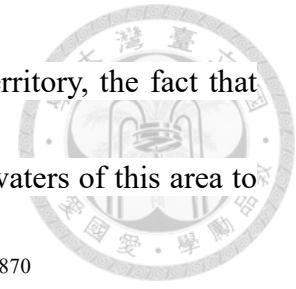


One exception is Japan. Since Japan ended diplomatic ties with Taipei and normalized relations with Beijing in 1972, it sought to limit bilateral ties with Taipei to the spheres of economy, trade and culture. However, Japanese investment in Taiwan continues to increase following the end of formal diplomatic ties, and the actual relationship between the two sides grew extraordinarily close. There is a strong mutual friendship in place, as seen by the ¥20 billion in Taiwanese donations that poured forth following the March 11, 2011, earthquake and tsunami in Japan.

During the term of Taiwan's pro-Chinese President Ma Ying-jeou, to solve disputes in East Asia Seas, Japan signed a fisheries agreement with Taiwan on April 10, 2013 as a measure to drive a wedge between Taipei and Beijing to prevent the two from becoming too close. Given that Japan is highly concerned about the security situation around the Ryūkyū Islands-the Japanese island chain south of the main four islands with Okinawa as their largest member, considering Taiwan as an actor is important. Since the Chinese

⁸⁶⁹ *Id.*

view is that the Senkaku Islands are part of the Chinese Taiwan territory, the fact that Taiwan and Japan have managed to conclude an agreement on the waters of this area to siting China out is, to a certain degree, a refutation of China's claim.⁸⁷⁰



On the other hand, the relationship between US and Taiwan has not made a major breakthrough until the Trump Administration. With China's increasing threat toward the democratic world and pacific region's stability, in March 2018, President Donald Trump signed the "Taiwan Travel Act"⁸⁷¹ into law. The Act allows high-level officials of the United States to visit Taiwan and vice versa, which is considered as a substantial upgrade to the Taiwan-US relations, making them official though still sub-diplomatic. As such, the law was harshly criticized by the PRC for violating its One-China principle, which holds that Taiwan is an inalienable sovereign part of China. In August 9, US Health and Human Services Secretary Alex Azar used this act to make a historic visit to Taiwan. Azar became the highest-ranking American cabinet official to travel to the island since 1979, and the first cabinet-level official from the United States to visit Taiwan since 2014 -- Secretary of Health and Human Services (HHS). During the COVID-19 virus pandemic, the purpose of the trip is to "highlight Taiwan's

⁸⁷⁰ Kawashima Shin, *The Implications of the Japan-Taiwan Fisheries Agreement*, NIPPON, Jun.5, 2003, at <https://www.nippon.com/en/currents/d00081/> (Last visited May 2, 2022)

⁸⁷¹ Taiwan Travel Act, March 16, 2018, available at <https://www.congress.gov/bill/115th-congress/house-bill/535/text> (Last visited May 2, 2022)

success in combatting the COVID-19 and cooperating with the US to prevent, detect, and respond to health threats,”⁸⁷²



In spite of China’s protests, in march 2020, President Donald Trump signed another act into law, the “Taiwan Allies International Protection and Enhancement Initiative (TAIPEI) Act of 2019,”⁸⁷³ requiring the US Department of State to report to the Congress on steps taken by the US government to strengthen Taiwan’s diplomatic relations with other US partners in the Indo-Pacific region, and alter US engagement with countries that undermine the security or prosperity of Taiwan.

Furthermore, on December 23, 2020, The US Congress approved the Taiwan Assurance Act⁸⁷⁴ to support Taiwan’s defense capacity and its participation in international organizations. The Taiwan Assurance Act of 2019 reinstates US commitments to Taiwan “under the Taiwan Relations Act in a manner consistent with the ‘Six Assurances,’” but it is also “in accordance with the United States ‘One China policy.’ Recognizing Taiwan as “a vital part of the Free and Open Indo-Pacific Strategy,” the United States should

⁸⁷² Teng Pei-ju, *US health secretary slams Beijing for pandemic crisis during speech at Taiwan university*, TAIPEI NEWS, Aug.11, 2020, at <https://www.taiwannews.com.tw/en/news/3985186> (Last visited May 2, 2022)

⁸⁷³ Taiwan Allies International Protection and Enhancement Initiative (TAIPEI) Act of 2019, March 26, 2020, available at <https://www.congress.gov/bill/116th-congress/senate-bill/1678> (Last visited May 2, 2022)

⁸⁷⁴ Taiwan Assurance Act of 2019, May 7, 2019, available at <https://www.congress.gov/bill/116th-congress/house-bill/2002> (Last visited May 2, 2022)



“conduct regular sales and transfers of defense articles to Taiwan in order to enhance its self-defense capabilities,” the Taiwan Assurance Act read, which include “undersea warfare and air defense capabilities.”⁸⁷⁵

The Taiwan Travel Act, Taipei Act, and the Taiwan Assurance Act are aiming to authorize specific US actions and call for oversight to help Taiwan maintain its sovereignty in the face of rising Chinese pressure.⁸⁷⁶

To counter Beijing’s efforts to alter the cross-strait status quo, it is likely that legislation favorable to Taiwan will continue, since all the Taiwan-related congressional initiatives had bipartisan support. There is no indication that this support is likely to fade in the near future.⁸⁷⁷

2. Relationship between ROC and Taiwan

⁸⁷⁵ Editorial, *US Congress Includes Taiwan Assurance Act in US\$2.3 Trillion Spending Bill*, THE NEWS LENS Dec.23, 2020, at <https://international.thenewslens.com/article/145100> (Last visited May 2, 2022)

⁸⁷⁶ Derek Grossman, *Secretary Azar's Taiwan Visit Should Be Celebrated—for the Right Reasons*, THE RAND BLOG, Aug.21, 2020, at <https://www.rand.org/blog/2020/08/secretary-azars-taiwan-visit-should-be-celebrated-for.html> (Last visited May 2, 2022)

⁸⁷⁷ Mercy A. Kuo, *US Presidential Elections 2020: The Taiwan Factor*, THE DIPLOMAT, Oct.5, 2020, at <https://thediplomat.com/2020/10/us-presidential-elections-2020-the-taiwan-factor/> (Last visited May 2, 2022)



2.1 Implications of the UN Resolution 2758

At the beginning of the United Nation era, Norway's suggestion that the member states vest in the United Nations an exclusive authority to recognize new states had attracted little support.⁸⁷⁸ As the United States' Permanent Representative famously referred to recognition as a "high political act" which "no country on earth can question", the traditional position that recognition is a unilateral and discretionary act was left undisturbed.⁸⁷⁹

Membership of United Nation is restricted to "States" that requires substantial support from existing Member States, and admission is a strong evidence of the necessary status. In its advisory opinion on Condition of Admission of a State to the United Nations⁸⁸⁰, the ICJ opined that if a State is admitted as a member of the UN, it will only amount to collective recognition by those States who voted in the favor of the admission of such a State. Although collective recognition cannot play a predominant role in matters of territorial status, it is well established that, in considering close questions of statehood, recognition is a probative factor.⁸⁸¹

⁸⁷⁸ Tom Grant, *How to recognize state (and not): some practical considerations*, in SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY: ESSAYS IN HONOUR OF JAMES CRAWFORD 192 (Christine Chinkin and Freya Baetens eds., 2015) referencing to United Nations Conference on International Organization, Amendments and Observations on the Dumbarton Oaks Proposals (Norway), 4 May 1945, NUCIO Doc.2,G/7(n 1), 2-3.

⁸⁷⁹ *Id.* at 193.

⁸⁸⁰ Admission of a State to the United Nations, *supra* note 90.

⁸⁸¹ Grant, *supra* note 878, at 196.



Nonetheless, purely political considerations often intrude in decisions concerning admission. In considering of admission under Article 4 of the Charter, legal and political factors are difficult to separate, as the Court noted in the Admissions Opinion.⁸⁸² There were instances in pre-1963 practice of premature recommendations for admission. For example, the Republic of Vietnam in 1950, which was then neither formally independent of France nor had a stable and effective government in the territory it claimed to govern.⁸⁸³

It is observed that a regime controlling the majority of a state's territory is the most important indication of the need to recognize that regime,⁸⁸⁴ and that recognition based on other considerations in absence of effective control of territory is premature and illegal under international law.⁸⁸⁵ Furthermore, international law "has traditionally accorded the challenged government the privilege to speak and act in the name of the

⁸⁸² Admission of a State to the United Nations, *supra* note 90.

⁸⁸³ FELICE MORGENSTERN, *LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS* 50 (1986). It also has been suggested that the admissions of Georgia, Moldova and Bosnia and Herzegovina were premature: See Roger O'Keefe, *The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States*, 1 *BALTIC YEARBOOK OF INTERNATIONAL LAW* 167, 171–6 (2001).

⁸⁸⁴ M. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-1995* 36 (1997).

⁸⁸⁵ M. SHAW, *INTERNATIONAL LAW* 460-462 (2008): "Any recognition of the NTC as the de jure government of the State of Libya, while Qaddafi forces are still in control of the capital, seems premature and would arguably constitute an illegal interference in the internal affairs of Libya". In Talmon, Stefan A. G., *Recognition of the Libyan National Transitional Council* (June, 20 2011). *ASIL Insight*, Vol. 15, No. 16, 2011, Oxford Legal Studies Research Paper No. 38/2011, Available at SSRN: <https://ssrn.com/abstract=1868032> (Last visited May 2, 2022)



State as long as it has not lost effective control to such an extent that the prospect for the re-establishment of its authority has become marginal.”⁸⁸⁶ In the Cold War period, however, political tensions made it difficult to separate extraneous political factors from considerations.⁸⁸⁷

At the end of World War II, China joined the United Nations as an original member under the name of “The Republic of China” (ROC) in 1945. Since the KMT government was defeated by the CCP in the Chinese Civil war and took exile in Taiwan in 1949, the People’s Republic of China(PRC) established by the CCP attempted to replace the ROC’s Chinese membership in the United Nations for 22 years. It claimed that it was entitled to represent an existing member- China, in the United Nations, on the ground that it was China’s sole legitimate government.⁸⁸⁸

In the cold war period following the Korea war, under the influence of the US, no proposal to replace the ROC government with the PRC government had received the required two-thirds majority vote, regardless of the fact that the KMT government

⁸⁸⁶ Georg Nolte, *Secession and external intervention in SECESSION: INTERNATIONAL LAW PERSPECTIVES* 65, 79 (Marcelo G. Kohen ed., 2006) referencing to L. Doswald Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BR. YEAR B. INT. LAW 197(1985); S. Talmon, *Recognition of Governments: An Analysis of the New British Policy and Practice*, 63 BRIT. YEAR B. INT. LAW 253,163 (1992); see also Grant, *supra* note 878, at 42.

⁸⁸⁷ Crawford, *supra* note 30, at 196.

⁸⁸⁸ Chiang, *supra* note 236, at 147.

taking exile on the island of Taiwan had only administered territories accounting for 1 to 260 areas in proportion to the that of China.



By 1970, with the communists firmly controlling the territories of mainland China, there was no hope for Chiang to recover the lost territories. More than one half of the UN members finally recognized the PRC as the one and only government of China in light of the changed international situation.⁸⁸⁹ Since there could be only one legitimate and recognized government of a State at a particular point of time,⁸⁹⁰ the number of the States recognizing the ROC decreased correspondingly.

When the General Assembly convened in 1971, the representation of China in the United Nations was discussed. The first draft resolution, submitted on September 25, 1971, was sponsored by the following 23 States: Albania, Algeria, Burma, Ceylon, the Congo, Cuba, Equatorial Guinea, Guinea, Iraq, Mali, Mauritania, Nepal, Pakistan, the People's Democratic Republic of Yemen, Romania, Sierra Leone, Somalia, Sudan, the Syrian Arab Republic, the United Republic of Tanzania, Yemen, Yugoslavia and Zambia.

⁸⁸⁹ There were 125 members at the 1970 UN General Assembly plenary session. The ROC government "is recognized diplomatically by more than 60 of the members of this organization." Christopher H. Phillips, Twenty-fifth General Assembly Rejects Move to Change Representation of China in the United Nations, Plen. Statement Before the General Assembly (Nov. 12, 1970), in DEP'T ST. BULL., Dec. 1970, at 734, cited in *id.* at 148.

⁸⁹⁰ S. TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW; WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 105 (1998).



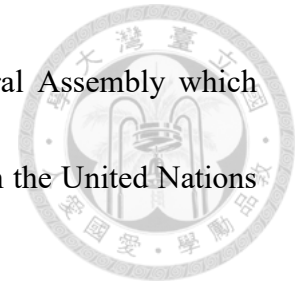
This draft made the point that:

the restoration of the lawful rights of the People's Republic of China was essential both for the protection of the Charter and for the cause the United Nations must serve under the Charter, and recognize that the representatives of the People's Republic of China were the only lawful representatives of China to the United Nations and that the People's Republic of China was one of the five permanent members of the Security Council. By the operative paragraph of the text, the General Assembly would decide to restore to the People's Republic of China all its rights, to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations and to expel forthwith the representatives of Chiang Kai-shek from the seat which they unlawfully occupied in the United Nations and in all the organizations related to it.⁸⁹¹

The second draft resolution, submitted on September 29, 1971, was sponsored by the following 22 States: Australia, Bolivia, Colombia, Costa Rica, the Dominican Republic, El Salvador, Fiji, the Gambia, Guatemala, Haiti, Honduras, Japan, Lesotho, Liberia, Mauritius, New Zealand, Nicaragua, the Philippines, Swaziland, Thailand, the United

⁸⁹¹ United Nations, Yearbook of the United Nations 127 (1971), available at <https://www.un-ilibrary.org/content/books/9789210601986/read> (last visited Feb.22, 2022).

States and Uruguay. It requested “that any proposal in the General Assembly which would result in depriving the Republic of China of representation in the United Nations was an important question under Article 18 of the Charter.”⁸⁹²



The third draft resolution submitted on September 29, 1971, was sponsored by 19 States, namely: Australia, Bolivia, Chad, Costa Rica, the Dominican Republic, Fiji, the Gambia, Haiti, Honduras, Japan, Lesotho, Liberia, Mauritius, New Zealand, the Philippines, Swaziland, Thailand, the United States and Uruguay.⁸⁹³ “The 19-power proposal recommended that the People’s Republic of China take over China’s place as a permanent member of the Security Council and provided representation both for the People’s Republic and for the Republic of China in the General Assembly.”⁸⁹⁴

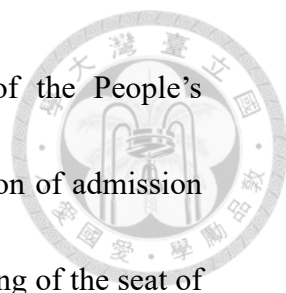
However, members who spoke in opposition to the draft resolution presented by the US and other members calling for a two-thirds majority and the seating of both the People’s Republic of China and the Republic of China included Ceylon, Chile, Cuba, France, Hungary, Mali, Norway, Sierra Leone, Uganda, the USSR and the United Kingdom.

They made the point that:

⁸⁹² *Id.* at 128.

⁸⁹³ *Id.*

⁸⁹⁴ *Id.* at 130.



...the precise issue of the restoration of the lawful rights of the People's Republic of China in the United Nations did not imply a question of admission or expulsion. Rather, the issue was one of credentials. The vacating of the seat of China by the Chiang Kai-shek régime was a legal, logical consequence of the restoration of the lawful rights of the People's Republic of China. Moreover, Taiwan had never been a Member State of the United Nations. There was only one Chinese State that was entitled to a seat at the United Nations. To have an additional seat would require as a prior condition the creation of a second Chinese State which would have to apply for membership under the Charter.⁸⁹⁵

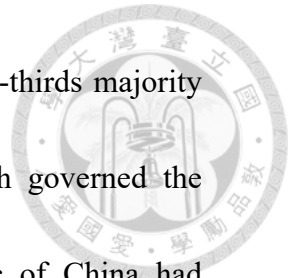
Alternatively, the United States filed a motion for a separate vote on the provision in the 23-power proposal whereby the Assembly would expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupied at the United Nations and in all the organizations related to it. This motion was defeated by a recorded vote of 61 against to 51 in favor, with 16 abstentions.⁸⁹⁶

Thereupon, the representative of China (ROC), speaking on a point of order, made a declaration:

⁸⁹⁵ *Id.* at 131.

⁸⁹⁶ *Id.* at 132.

The rejection of the 22-power draft resolution calling for a two-thirds majority was a flagrant violation of the United Nations Charter which governed the expulsion of Member States. The delegation of the Republic of China had decided not to take part in any further proceedings of the General Assembly.⁸⁹⁷



As a result, the Assembly did not proceed to a vote on the 19-power draft text, and adopted the 23-power text, by a roll-call vote of 76 to 35, with 17 abstentions, as resolution 2758(XXVI).⁸⁹⁸ Resolution No. 2758 of the General Assembly stated:

The General Assembly ... decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.⁸⁹⁹

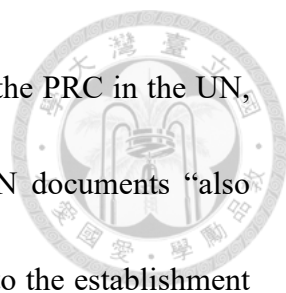
The language of the G.A. Res.2758 clearly indicates that it was a resolution of collective government recognition dealing with the question of which government, the ROC or the PRC was to represent the original member-China.⁹⁰⁰ After the

⁸⁹⁷ *Id.*

⁸⁹⁸ *Id.*

⁸⁹⁹ G.A. Res. 2758, *supra* note 850.

⁹⁰⁰ Chiang, *supra* note 236, at 153.



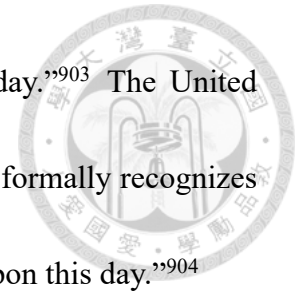
representatives of the ROC were replaced by the representatives of the PRC in the UN, the member state China's seat was given to the PRC, and the UN documents "also indicate that China was admitted on October 24, 1945, a date prior to the establishment of the PRC. The name plate on the desk where the representatives of the PRC to the UN sit states 'China,' not 'the People's Republic of China' or 'the PRC'."⁹⁰¹ Therefore, when the United Nations expelled the ROC, what it expelled was a representative government of China, not the State of China; the identity and continuity of the state of China had been replaced and succeeded by PRC in retroactive to PRC's establishing date on 1 Oct 1949, as Brownlie noted "[O]nce statehood is firmly established, it is justifiable, both legally and practically, to assume the retroactive validation of the legal order during a period prior to general recognition...when some degree of effective government existed . . . [T]he principle of effectiveness dictates acceptance, for some legal purposes at least, of continuity before and after statehood is firmly established."⁹⁰²

On the contrary, when a state's statehood instead of government is recognized, the language of recognition would be clear. For instance, when the Republic of South Sudan is recognized, Japan, through a statement by its foreign minister, said as follows "Japan

⁹⁰¹ *Id.*

⁹⁰² IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 77 (6th ed., 2003).

recognized the Republic of South Sudan as a new state as of today.”⁹⁰³ The United States, in a statement through its president, said “The United States formally recognizes the Republic of South Sudan as a sovereign and independent state upon this day.”⁹⁰⁴



It is important to realize that once a De facto regime is recognized as the government of its parent state, it automatically means that its old government is no longer recognized.⁹⁰⁵ In the case of ROC and PRC, when the de facto regime of PRC government controlling the majority of Chinese territory for over two decades was finally recognized by the majority of international community in retroactive to its establishing date on 1 Oct 1949, the old Chinese government of ROC in exile was automatically derecognized.

Thus, it could be speculated that the 30 years of recognition of the ROC government taking exile on Taiwan in lack of substantiality was purely out of political consideration without any legal foundation.⁹⁰⁶ Kelsen argues that “the political act of recognition,

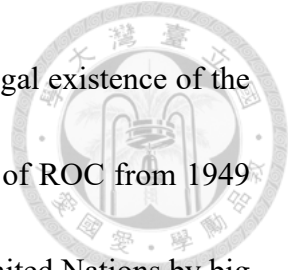
⁹⁰³ Statement of the Foreign Minister of Japan on the Independence of the Republic of South Sudan (provisional trans.), para. 2, July 9, 2011, available at: https://www.mofa.go.jp/announce/announce/2011/7/0709_01.html (Last visited May 2, 2022)

⁹⁰⁴ White House, Office of the Press Secretary, Statement of the President: Recognition of the Republic of South Sudan, 9 July 2011.

⁹⁰⁵ Van Essen, Jonte, De Facto Regimes in International Law (February 27, 2012). Merkourios, Vol. 28, No. 74, pp. 31-49, 2012, Available at SSRN: <https://ssrn.com/abstract=2017736> (Last visited May 2, 2022)

⁹⁰⁶ H. Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 390 (1944).

since it has no legal effect whatsoever, it is not constitutive for the legal existence of the recognized state or government.”⁹⁰⁷ So that the general recognition of ROC from 1949 to 1971 has clearly demonstrated the political manipulation of the United Nations by big powers defying international law in the cold war period.



In the case of a civil war, the recognition of belligerency with all the rights attaching thereto is considered to be a matter of political convenience on the part of foreign States.⁹⁰⁸ Yet with the changing of geopolitical politics, the majority of states could not be oblivious to the fact that the ROC government in exile was not competent to represent or speak for the Chinese people any longer.

The legal effects of recognition have traditionally been divided between the constitutive view and the declaratory view. The constitutive view holds that “an entity’s very legal existence as part of the international system is ‘constituted’ by the recognition of the other entities making up that system”.⁹⁰⁹ Following the constitutive theory, the de facto regime of the PRC government is effectively transformed into China’s government by the recognitions of other governments. Conversely, those defending a declaratory theory

⁹⁰⁷ Kelsen, *supra* note 78, at 605.

⁹⁰⁸ Lauterpacht, *supra* note 906, at 390.

⁹⁰⁹ B. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 124 (2000).

argue that “the authority of a new Government exists prior to recognition and the act of recognition is merely a formal acknowledgement or admission of an already existing fact”.⁹¹⁰ Accordingly, the PRC government acquired a dominant position vis-vis the former government of ROC on 1 Oct 1949, which was later confirmed by third states through recognition.

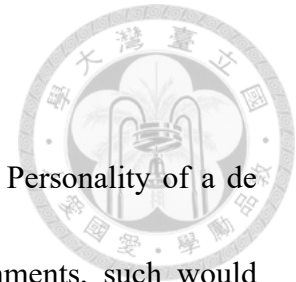
The main objection to the constitutive view is that, if a State is recognized by some states and not by others, it is in effect both a State and a non-State.⁹¹¹ Clearly such uncertainty is undesirable. The political nature of recognition has prompted support for the declaratory school,⁹¹² which accepts that an entity becomes a State as long as it meets the requirements of statehood, regardless of recognition. However, it has been argued that an entity receiving recognition by none or very few States can hardly demonstrate its capacity to enter into relations with other States and thus from point of view of the well-established 1933 Montevideo Convention, cannot be described as a State.⁹¹³

⁹¹⁰ P. MENON, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW* 18 (1994); See also Josef L. Kunz, *Critical Remarks on Lauterpacht's "Recognition in International Law"*, 44 *AM.J.INTL.L* 713-9 (1950).

⁹¹¹ Dugard & Raic, *supra* note 73, at 97.

⁹¹² The Badinter Arbitration Commission, charged with the task of monitoring compliance with the European Community's guidelines for the recognition of States following the dissolution of Yugoslavia, found that “the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory”: Opinion 1 in *ILR* 92, p. 163. Available at <https://www.legal-tools.org/doc/79ffd1/pdf/> (Last visited May 2, 2022)

⁹¹³ In *Caglar v Billingham (Inspector of Taxes)* the Tribunal stated: “In view of the non-recognition of the Turkish Republic of Northern Cyprus by the whole of the international community other than Turkey we conclude that it does not have functional independence, as it cannot enter into relations with other



To solve the controversy, it has been held that if the International Personality of a de facto regime changes after it was recognized by existing governments, such would evidence a constitutive system. Conversely, if governmental recognition does not change the International Personality of a De facto regime, it would indicate a declaratory theory.⁹¹⁴ This method is preferred by this work, as it succinctly solved the long controversy of constitutive and declaratory theory by linking it to the very concept of International Personality.

The concept of International Personality was analyzed by the International Court of Justice (ICJ) in its Advisory opinion of April 11, 1949 issued at the request of the U.N. General Assembly, in the case “Reparations for injuries suffered in the Service of the United Nations.” It is stated that “a subject of international law...possessing international rights and duties...can only be explained based on it possessing to a greater extent the international legal personality and the capacity to act internationally.” “An international person...is capable of possessing international rights and duties”.⁹¹⁵

States’, ILR108, p.545, para.182. Available at <https://www.uniset.ca/microstates/1996STCSCD150.htm> (Last visited May 2, 2022); Contra, see M. SHAW, INTERNATIONAL LAW 245, 371(5th ed. 2003), Shaw states that if an entity were totally unrecognized “this would undoubtedly hamper the exercise of its rights and duties . . . but it would not seem in law to amount to a decisive argument against statehood itself”.

⁹¹⁴ Van Essen, *supra* note 905.

⁹¹⁵ For details refer to “Reparation for Injuries Suffered in the Service of the United Nations. Advisory Opinion”, in ICJ Reports, 1949, p.179, available at <https://www.icj-cij.org/public/files/case-related/4/004-19490411-ADV-01-00-EN.pdf> (Last visited May 2,

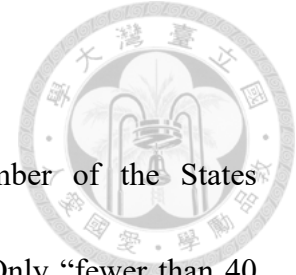


It has been held that in a civil war scenario, the international personality, governmental capacity, and the competence to exercise the rights of a belligerent, “must all be determined primarily by reference to the actual conditions of power and effectiveness of the authorities claiming recognition in these various capacities. Law must be based on facts-insofar as such facts are not in themselves contrary to law.”⁹¹⁶

Thus, as the international personality of the PRC government had not changed between its establishment on 1 Oct 1949 and its acceptance of general recognition in 1971, a declaratory should be applied, that is to say the act of recognition is merely a formal acknowledgement of an already existing fact that the PRC government exists. On the contrary, considering that the international personality of ROC has changed fundamentally after 1949 in spite of the recognition by the international community during 1949-1971, a constitutive theory of recognition is preferable. Given the retroactivity of recognition, the ROC extinguished as a subject of international law in retroactive to 1949 once it had been generally derecognized. That is to say after 1949, the ROC government was no longer qualified as the government of China but a Chinese government in exile.

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⁹¹⁶ Lauterpacht, *supra* note 906, at 390.



By the late 1980s, there were already an overwhelming number of the States recognizing the PRC as the representative government of China. Only “fewer than 40 States still recognized the ROC as the representative government of China. All of those States were small and, except the Holy See (the Vatican), had received significant financial aid from the ROC government.”⁹¹⁷ As James Crawford pointed out, “An entity is not a State because it is recognized; it is recognized because it is a State. At least where the recognizing government is not acting in a merely opportunistic way, recognition is important evidence of legal status.”⁹¹⁸ Following Crawford, it could therefore be inferred that these opportunistic recognitions of those states due to financial interest regardless of the ROC’s losing of substantial Chinese territories and people cannot be taken as evidence to prove the existence and legitimacy of the Republic of China.

The legal effect here could be that, the state/government of the Republic of China had been succeeded and replaced by the People’s Republic of China since the ROC government took exile on Taiwan, which extinguished as a subject of international law in retroactive to PRC’s establishing date on 1 Oct 1949. We should bear in mind

⁹¹⁷ Chiang, *supra* note 236, at 154.

⁹¹⁸ Crawford, *supra* note 30, at 93.

Kelsen's persuasive argument that "the political act of recognition, since it has no legal effect whatsoever, it is not constitutive for the legal existence of the recognized state or government."⁹¹⁹

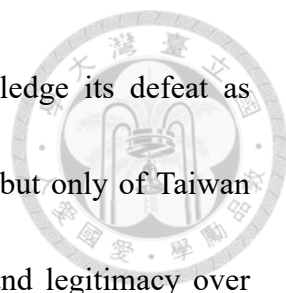


It is settled that when governmental authorities are driven into exile, the powers themselves continue to exist pending a settlement of the conflict by a peace treaty or its equivalent.⁹²⁰ In the case of ROC, however, since the ROC government taking exile on an island that does not belong to its successor state, the settlement of the civil war between the ROC government in exile and PRC should have nothing to do with the legal status of Taiwan. With Japan renouncing its title to Formosa, the legal status of the ROC government in exile was nothing but the administrating government delegated by the Allied Powers. The delegation relationship and continuity/identity of the state of China has already been discussed. The nature of the ROC government in exile will not change until it makes a peace treaty with the communist party in PRC or is transferred into a local representative government of Taiwan.

2.2 Entangled State Name Issue

⁹¹⁹ Kelsen, *supra* note 78, at 605.

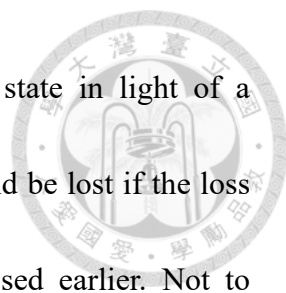
⁹²⁰ Crawford, *supra* note 30, at 73.



After Chiang's regime retreated to Taiwan, it refused to acknowledge its defeat as permanent, and that it did not have control of the whole of China, but only of Taiwan and the offshore islands. The KMT government's predominance and legitimacy over Taiwan was entirely dependent upon the shaping of the ROC's national identity and validity, which could only be achieved through the imposition of the constitution of ROC on the Taiwanese people and the creation of an imagined community of the ROC comprising of both the mainland China and Taiwan.⁹²¹ Accordingly, the representatives of the legislative branch elected by the people in China following the government to Taiwan were proportional to the size of its population in each province of China. By designating Taiwan as a province of China, the KMT government was able to deny equal representation to the Taiwanese people and dominate the political life of them as long as possible.

To create the fiction of ROC, the symbols of ROC has infiltrated into Taiwanese people's everyday life, such as the flag, the national anthem and the portrait of its founding father- Sun Yat-sen. Even the chronology of ROC is maintained in Taiwan up until today. For example, the year of 2022 was calculated as ROC Year 111, dating from the year of its establishment in 1912.

⁹²¹ See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983).



Nevertheless, even the scholars presuming the continuance of a state in light of a continued legal order admitted that a state's continuity/identity would be lost if the loss of territory and people is total or very considerable,⁹²² as discussed earlier. Not to mention the continuity of the legal order of ROC is also questionable, which will be discussed in the next Chapter.


Although it is generally assumed that it is for each State to freely decide on its name and that the changes of name have no relevance to the continuity of the State.⁹²³ A proposal in Uzbekistan to change the name of that State to "Turkestan" or "Turania" was considered as implying a claim to the territory of the neighboring Central Asian States, and was not implemented.⁹²⁴ Thus, it is imaginable why the so called government of Republic of China, which by itself indicating a governing body for all-China could not be accepted by the international community as legitimate.

Just as the letter came from International Amateur Athletic Federation (IAAF) honorary treasurer Fred Holder to the secretary-general of the ROC Track and Field Association, Chi Cheng in 1978, pointed out:

⁹²² Marek, *supra* note 201, at 15-24.

⁹²³ Cited in Crawford, *supra* note 30, at 680.

⁹²⁴ See KAREN DAWISHA & BRUCE PARROTT RUSSIA, THE NEW STATES OF EURASIA: THE POLITICS OF UPHEAVAL 85 (1st ed. 1994).



My concern is that if both the Beijing organization and the Taipei organization insist on being considered the only governing body for all-China, the majority view is likely to support Beijing, simply because of the huge difference in population between the mainland and Taiwan. On the other hand, if your association can accept the change of name to Taiwan, there will be widespread support for your association as the only effective governing body in the ‘territory’ of Taiwan ... A refusal to change is likely to be interpreted as a refusal to accept a limitation of your jurisdiction to the island of Taiwan. Many member federations of the IAAF find it difficult to understand the reluctance to affiliate as Taiwan, when the name Taiwan is so widely used in promoting and identifying trade products. Under the name Taiwan there can be no doubt or confusion, and you have a clear right to continue in IAAF membership.⁹²⁵

Even the divided states of Germany and Korea were referred to as Western and Eastern Germany, Northern and Southern Korea respectively to emphasize the geographical difference of the two states. The Republic of China government in exile administrating only 1 to 260 areas of territories in proportion to that of China, however, is not even

⁹²⁵ Lin, *supra* note 862.

qualified to call itself southeastern China, not to mention the KMT government had no legal title over the island of Taiwan.

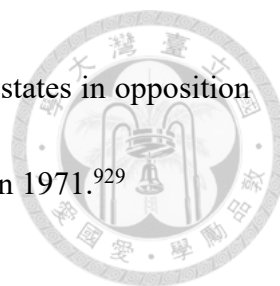


Furthermore, in state practice, once the international personality of an entity has changed, it cannot continue automatically the membership of the former state, and has to reapply for membership in the UN. For instance, on 19 September 1992, the General Assembly adopted the recommendation of the Security Council⁹²⁶, considering that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly.⁹²⁷ Furthermore, it is implied that the constitution name is another consideration of recognition. The United States, on November 5, 2004, recognized Macedonia under its own constitutional name, “Republic of Macedonia”.⁹²⁸ By the same token, if Taiwan wanted to be granted a membership in the UN, it had to submit in

⁹²⁶ SC res 777, 19 September 1992, para 1, available at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNMembers%20SRES777.pdf> (Last visited May 2, 2022)

⁹²⁷ GA res 47/1, para 1, 22 September 1992, available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/023/69/IMG/NR002369.pdf?OpenElement>; The FRY was also excluded from participating in the work of ECOSOC: SC res 821, 28 April 1993 available at <http://unscr.com/en/resolutions/doc/821> (Last visited May 2, 2022)

⁹²⁸ Cited in Crawford, *supra* note 30, at 67.



the name of Taiwan. This view was unequivocally expressed by the states in opposition to the proposal of Two Chinas in the General Assembly convened in 1971.⁹²⁹

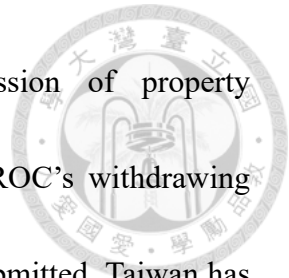
Considering the state name being the key issue here, following the expulsion from UN, most of Chiang's top advisers saw the need for some sort of sweeping move to counter PRC's drive to isolate ROC internationally and force general recognition of PRC's right to take over Taiwan as an integral part of China. Yang Hsi-kun, the Foreign Vice Minister of ROC made a suggestion to issue in a formal declaration to the world that the government on Taiwan is entirely separate and apart from the government on the Mainland with a new state name of "the Chinese Republic of Taiwan." Yang advised Chiang to set up a new unicameral provisional representative body to be composed of two-thirds Taiwanese and one-third Mainlanders. Not surprisingly, however, Chiang determined not to budge an inch from the old claims, pretensions and "return to the Mainland" slogans.⁹³⁰ As a result, Taiwan lost the chance to submit an application to UN as a new member in the 1970s.

The effects of de-recognition in multilateral relations are most significant in three areas: the derecognized government can no longer participate in multilateral treaties or

⁹²⁹ United Nations, Yearbook of the United Nations 131 (1971), available at <https://www.un-ilibrary.org/content/books/9789210601986/read> (last visited Feb.22, 2022).

⁹³⁰ Yang was supported by the retired Foreign Minister George K. C. Yeh and future premier Y. S. Tsiang, see Foreign relations of the united states, 1969–1976, Volume XVII, China, 1969–1972, available at <https://history.state.gov/historicaldocuments/frus1969-76v17/d174> (last visited Feb.22,2022).

intergovernmental organizations, meanwhile losing the possession of property previously held by the government,⁹³¹ such as embassies. With ROC's withdrawing from the UN, and no new application in the name of Taiwan was submitted, Taiwan has become an international orphan since then.



2.3 Taiwan's legal status as a self-determination Unit

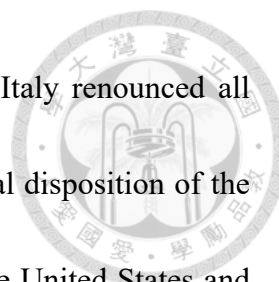
In the Peace Treaty with Japan signed in 1952, Japan merely renounced “all right, title and claim to Formosa”.⁹³² Nevertheless, it could be inferred from remarks of Britain and US government that there was an agreement then that Taiwan could never be put into the hands of a communist China. Since there was little hope for the KMT government taking exile in Taiwan to recover its lost territories in mainland China, the Allied Powers decided to take the advantage of its claim to contain the communist China, while leaving the legal status of Taiwan unsettled. ⁹³³

In formal circumstances, when no agreement was reached in a peace treaty, the question was referred to the UN. For example, with Italy's defeat in World War II, Italy's colonies - Eritrea, Italian Somaliland and most of “Libya” were placed under temporary

⁹³¹ Lauterpacht, *supra* note 906, at 46.

⁹³² Treaty of Peace with Japan, *supra* note 244, art. 2.

⁹³³ Tkacik, *supra* note 687, at 191-92 with reference to the 1970 State Department Hearings before the subcommittee on United States Security Agreements and Commitments Abroad of the Senate Committee on Foreign Relations (91st Cong., 2d Sess.).

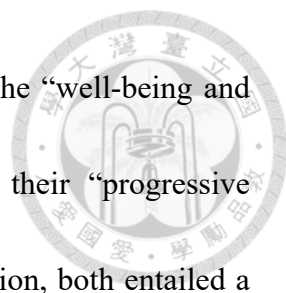


British administration. In the Treaty of Peace with Italy of 1947, Italy renounced all claims to the three territories. However, it further stated that the final disposition of the territories was to be determined by France, the United Kingdom, the United States and Soviet Union before 15 September 1948. If no agreement was reached by that time, the Treaty provided for the question to be taken by UN. Because no agreement was reached among the signatories of Peace Treaty with Italy, the question was referred to the UN. In 1952, the UN tried to satisfy the Eritrean demand for self-determination by creating an Ethiopian/Eritrean federation.⁹³⁴

To facilitate the transition of territories renounced in a war to a full-self-government entity, three systems have been created by international organizations: the mandate, trusteeship and non-self-governing territories.

The mandate and trusteeship systems were established for the disposition of colonial territories that had belonged to states defeated in the preceding War respectively under Article 22 of the League of Nations Covenant post World War I and Chapters IX and XIII of the Charter post World War II. Despite some minor differences, the mandate and

⁹³⁴ Peace Treaty with Italy, *supra* note 243; See also General Assembly Resolution 390 (V) of 2 December 1950, *available at* <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/059/88/PDF/NR005988.pdf?OpenElement> (Last visited May 2, 2022)



trustee systems had the same general aims: the encouragement of the “well-being and development” of the peoples of the various territories, and of their “progressive development towards self-government or independence”⁹³⁵ In addition, both entailed a rejection of annexation of the colonial territories that had belonged to states defeated in the preceding War.⁹³⁶ In particular, the principle of self-determination, as the International Court has repeatedly reaffirmed, was made applicable to Mandates and Trust territories, which became the first distinct category of self-determination territory.⁹³⁷ “The crux of the non-sovereign position of the Mandatory or Administering Authority was that it could not unilaterally decide the legal status of these territories”⁹³⁸, and formal “securities for performance” were established by the mandate and trusteeship agreements.⁹³⁹

In the case of Taiwan, however, as the Korean War broke out, the western league leading by the US decided to take the opportunity of recognizing the ROC government taking exile in Taiwan as the “Free China” to contain the Communist China for thirty years, despite that Chiang’s regime in Taiwan was not only authoritarian but also


⁹³⁵ UN Charter, art. 76b.

⁹³⁶ Status of South West Africa Case, *supra* note 257, at 131.

⁹³⁷ Namibia Opinion, ICJ Rep 1971 p 6, 31, available at <https://www.icj-cij.org/public/files/case-related/53/053-19710621-ADV-01-00-EN.pdf> (Last visited May 2, 2022); Western Sahara Opinion, *supra* note 134, at 31–3.

⁹³⁸ Crawford, *supra* note 30, at 573.

⁹³⁹ *Id.* at 566.



colonial. If a colonial regime is defined as “rule by outsiders for the benefit of the outsiders”, with the central government not being a representative government of the indigenous people, the Chiang’s regime was also a colonial government for the Taiwanese people.

The delegation relationship between the Allied Powers and Chiang’s regime has already been discussed. Even though there was no written agreement, the relationship between the ROC government in exile and Taiwan is similar to that of the mandate/trusteeship systems. As a matter of fact, in the National Security Council Report titled “The US Policy toward Taiwan and the Government of the Republic of China” released by the US Department of State in October 4, 1957, the ROC government in exile was supposed to among other things maintain “the security of Taiwan and the Penghus as a part of the Pacific off-shore island chain, which is an element essential to US security” and develop “a stronger Taiwan economy.”⁹⁴⁰ It was made clear that the political halo was given to the Chiang’s regime in order to contain the Communist China. This relationship was decided by the US unilaterally, because the ROC government in exile substantially depending on the aid of the US then had no other choice but to accept whatever the US

⁹⁴⁰ US State Department, Statement of Policy by the National Security Council on US Policy toward Taiwan and the Government of the Republic of China, October 4, 1957, *available at* <https://history.state.gov/historicaldocuments/frus1955-57v03/d288> (Last visited May 2, 2022)

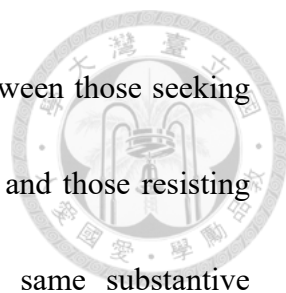
government required.



Nevertheless, while the mandate/trustee systems are revocable for fundamental abuse of human rights on the Mandatory/administration authority's part, the Taiwanese had endured the martial law imposed by the ROC government in exile for around four decades without any systematic international surveillance in place.

The adoption of the GA Resolution 1514 (XV) in 1960 had granted "Independence to all Colonial Countries and Peoples"⁹⁴¹. Even if there was no unequivocal written agreement of Mandate/Trusteeship, Taiwan was also qualified as a non-self-governing territory under Article 73e of the Charter. In Chapter XI of the Charter, Non-self-governing territories apply to "territories whose peoples have not yet attained a full measure of self-government". Article 73 applies to United Nations Members "which have or assume responsibilities for the administration of territories which are non-self-governing." It has been held that the phrase "responsibilities for the administration of" includes colonies, but it is not limited to colonies in the strict sense: protectorates and other forms of colonial administration have also been included among

⁹⁴¹ Declaration on the granting of independence to colonial countries and peoples, GA Res 1514 (XV), *available at* <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/PDF/NR015288.pdf?OpenElement> (Last visited May 2, 2022)



the territories reported on.⁹⁴² Chapter XI reflects a compromise between those seeking an extension of the Trusteeship system to all “colonial” territories, and those resisting such a change.⁹⁴³ The result was an acceptance of much the same substantive obligations as those under the Mandate and Trusteeship systems—in particular of “the principle that the interests of the inhabitants of these territories are paramount”, and of an obligation “to develop self-government.”⁹⁴⁴

Given the above definition, virtually all the territories qualified as non-self-governing under the twin criteria of geographical separateness and political subordination of the population have been treated as such, at least for a time. Moreover, the principle of self-determination has continued to be regarded as relevant to those territories, even when they were no longer reported on under Article 73(e).⁹⁴⁵

The Mandate, Trust and Non-self-governing territories share a denominator that there was no local governmental autonomy and the administering authorities had plenary powers of government. Self-government or independence of the mandated people was

⁹⁴² Crawford, *supra* note 30, at 613.

⁹⁴³ RUTH B. RUSSELL & JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES, 1940-1945 813-24 (1958).

⁹⁴⁴ UN Charter, art.73.

⁹⁴⁵ Crawford, *supra* note 30 ,at 118

the principal purpose of these territories.⁹⁴⁶ According to the US National Security Council Report mentioned above, the ROC government was also supposed to develop into a representative government of Taiwan.

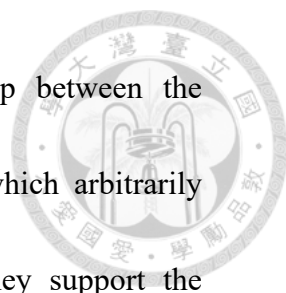


The ROC government began to administrate Taiwan in 1945 pending the Peace treaty with Japan, which was unexpectedly driven out of China and took exile in Taiwan in 1949. The island of Taiwan, as a former colony of Japan geographically separate from China and politically subordinated to the mainlanders, was certainly qualified as a non-self-governing territory under Article 73 of the UN charter. Normally, in such territories with colonial administration, the United Nations should hold the administering power to strict accountability.

In 1960, the UN Resolution 1541 had set principals to guide Members in determining whether or not an obligation exists to transmit the information called for under article 73e of the Charter of the United Nations. According to UN resolution 1541 (XV):

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from

⁹⁴⁶ H. DUNCAN HALL, MANDATES, DEPENDENCES AND TRUSTEESHIP 265–6 (1948); S.H. LONGRIGG, SYRIA AND LEBANON UNDER FRENCH MANDATE 362(1958).



the country administering it...If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.⁹⁴⁷

Furthermore, the UN Resolution 2625 (XXV) stated that “the territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it”.⁹⁴⁸ It is indicated that the obligation in Article 73b, as well as the associated principle of self-determination, substantially limit the sovereignty of an Administering State.⁹⁴⁹


Even in the case of Southern Rhodesia, which had some internal autonomy in British constitutional law, the General Assembly rejected to accept that the degree of internal autonomy possessed by Southern Rhodesia before 1965 prevented it from being non-self-governing.⁹⁵⁰ Since Britain’s effective control in Rhodesia was, on Fawcett’s

⁹⁴⁷ UN GA. Res. 1541 (XV), *supra* note 268.

⁹⁴⁸ Friendly Relations Declaration, *supra* note 34.

⁹⁴⁹ Crawford, *supra* note 30, at 615.

⁹⁵⁰ UN Security Council, Security Council resolution 217 (1965) (Southern Rhodesia), 20 November 1965, S/RES/217 (1965), *available at*: <https://www.refworld.org/docid/3b00f20f78.html> (Last visited May 2, 2022)



accounts “based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage.”⁹⁵¹ “As a territory, it may have been self-governing in the sense of governed from within, but its people as a whole were not involved in its government.”⁹⁵²

By the same token, with the Taiwanese people under the martial law of the KMT government being denied equal representatives in the central government, there is no reason to deny Taiwan’s legal status as a non-self-governing territory.

2.3.1 Limitations on the Right of Self-determination

On the other hand, it has been held that if a separate area of land such as an island had been part of a State for as long as the State had existed can neither be self-governing or non-self-governing. These kinds of territories are mere “colonial enclaves”⁹⁵³ created by colonizers on the territory of a surrounding State and having no legitimate separate identity. In such cases, it is argued that the principle of self-determination has no

⁹⁵¹ Fawcett, *supra* note 73, at 112.

⁹⁵² Crawford, *supra* note 30, at 611-2.

⁹⁵³ Sureta, *supra* note 274, at 214-9; T.M. Franck & P. Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U.J.INT’L L.&POL.331(1976).

application when the transference of the territory is concerned.⁹⁵⁴ In decolonization practice, various territories have been transferred to the claiming State rather than being treated as self-determination units, Hong Kong is cited as one of them.⁹⁵⁵ As Rigo Sureda noted:

This attitude of the General Assembly towards colonial enclaves contrasts with the stand taken . . . on small colonial territories which are not enclaves but islands, to which it recognizes a fully-fledged right of self-determination, while in the case of enclaves it appears to deny this right to the present population of the enclave and favours a delimitation of the subject of self-determination based on the assumption that the territory concerned is already part of the state surrounding it.⁹⁵⁶

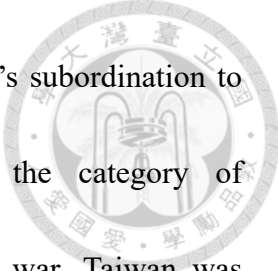
In Taiwan's over 400 civilized histories, however, China had only loosely controlled one third of its territory at most for around 200 years.⁹⁵⁷ By definition, it is definitely not a

⁹⁵⁴ The Court in *Western Sahara* by inference approved the Assembly's treatment of Ifni as a colonial enclave: ICJ Rep 1975 p 12, 34, 35 (para 63), cited in Crawford, *supra* note 30, at 646

⁹⁵⁵ *Id.* at 637; In 1961, the General Assembly established The Special Committee of Twenty-Four (the "Special Committee") to implement the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514), which compiled a list of sixty-four dependent territories that it confirmed as Non-Self Governing under the guidelines set forth under the Charter and Resolution, Hong Kong was included on this list. With the adoption of resolution 2908 (XXVII) on 2 November 1972, the General Assembly among other things approved the report of the Special Committee to remove Hong Kong and Macau from the list of Non-Self-Governing Territories as a result of a letter to the Special Committee from the People's Republic of China. See Patricia A. Dagati, *Hong Kong's lost right to self-determination: A denial of due process in the United Nations*, 13 (1) NYLS. J. INTEL.COMP.LAW 153-79 (1992).

⁹⁵⁶ Sureda, *supra* note 274, at 176-7.

⁹⁵⁷ For the historical of analysis of the statehood of Taiwan, see Chapter III.



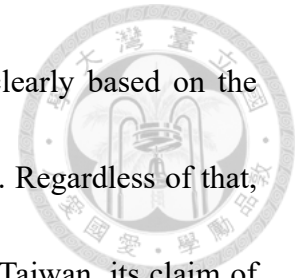
colonial enclave having no separate identity. The Taiwanese people's subordination to the ROC government in exile certainly put Taiwan under the category of non-self-governing territory. Nonetheless, as a victim of the cold war, Taiwan was neither transferred to UN trusteeship system nor listed as non-self-governing-territory under Article 73(e) for international surveillance. The human rights of the Taiwanese people were neglected without any systematic supervising by international organizations.

As the majority of states finally decided to face the reality and withdrew their recognitions of the ROC, the UN GA Res. 2758 made in 1971 dealing with the representation of China did not even mention the legal status of Taiwan, leaving it in a legal limbo.

2.3.2 Legitimacy of the “ROC on Taiwan”

Given that the government of ROC still retained China's seat in the UN with a majority of states recognizing it as the government of China From 1949 to 1971, after the democratic reforms of Taiwan in the 1990s, the KMT government insisted that, since it retreated to Taiwan in 1949, the territory of ROC had been narrowed down to the islands of Taiwan, Penghu, Quemoy and Matzu. Thus, the “ROC on Taiwan” has been

with no doubt a sovereign state since 1912. This argument was clearly based on the legitimacy of the transference of the sovereignty of Taiwan in 1945. Regardless of that, assuming the ROC government legitimately got the sovereignty of Taiwan, its claim of “ROC on Taiwan” will be examined as follows.

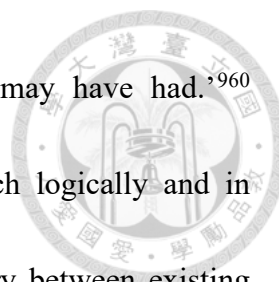


As aforementioned, an entity does not become a state because it is recognized, but is recognized because it is a state. Thus, recognition does not provide an entity with statehood, but is only of probative value to the evaluation of statehood. In the Report of the Commission of Jurists on the Åland Islands⁹⁵⁸ dealing with the independence of Finland, regarding the several of recognitions given to Finland, the Commission accepts that recognition has probative value, but not conclusive, and what important is the “conditions required for the formation of a sovereign State.”⁹⁵⁹

With regard to the transference of sovereignty, as James Crawford pointed out: “The criteria for statehood take priority over other forms of territorial transfer...In any event if the Powers were to influence situations, they had to act more quickly than the

⁹⁵⁸ Report Of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question, Oct,1920, available at <https://www.ilsa.org/Jessup/Jessup10/basicmats/aaland1.pdf> (Last visited May 2, 2022)

⁹⁵⁹ *Id.*



timetable for treaty-making allowed, whatever status their acts may have had.⁹⁶⁰

“There is thus a primary regime associated with statehood, which logically and in practice takes priority over the rules relating to transfer of territory between existing States.”⁹⁶¹

Following Crawford, if the ROC on Taiwan had attained statehood by the time of the conclusion of the Peace Treaty with Japan in 1952, any dispositive arrangement would be superseded by the statehood of “ROC on Taiwan”. Therefore, it all comes down to decide whether the so called “ROC on Taiwan” had attained statehood by 1952.

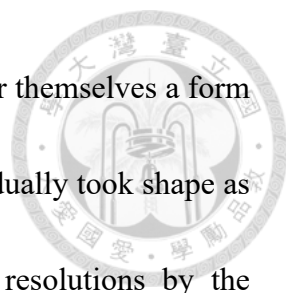
The best known formulation of the basic criteria for statehood is that laid down in Article I of the Montevideo Convention on the Rights and Duties of States, 1933 “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.”⁹⁶² These criteria must be based on the principle of effectiveness among territorial units.⁹⁶³

⁹⁶⁰ Crawford, *supra* note 30, at 531.

⁹⁶¹ *Id.* at 665.

⁹⁶² Montevideo Convention, *supra* note 55.

⁹⁶³ Crawford, *supra* note 30, at 46.



Furthermore, as self-determination-the right of a people to choose for themselves a form of political organization and their relations with other groups⁹⁶⁴ gradually took shape as customary international law. Thanks to the adoption of various resolutions by the General Assembly that provided guidelines for international practice,⁹⁶⁵ it has “become little by little one of the fundamental principles given the legal force typical of *jus cogens*”⁹⁶⁶. State practice⁹⁶⁷ indicates that statehood will be denied and recognition withheld if a political entity is created in violation of self-determination.⁹⁶⁸ Namely, “the obligation of respecting for the right of self-determination, including the prohibition of abuse of this right, has entered the law of statehood and may now be seen as a constitutive condition for statehood.”⁹⁶⁹ This is potentially the most significant exception to the traditional view that the creation of States is a matter of fact and not of law.⁹⁷⁰

The principle of self-determination “in its positive form requires not a democratically organized government but rather a system of government instituted with the approval of the majority of the people concerned.”⁹⁷¹ Thus, it is probably incorrect to deny the

⁹⁶⁴ IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* 599 (5th ed.1998).

⁹⁶⁵ Espinosa, *supra* note 100, at 14.

⁹⁶⁶ *Id.* at 15.

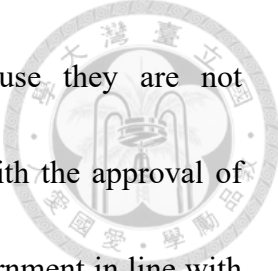
⁹⁶⁷ As in the cases of Southern Rhodesia, Katanga and Abkhazia.

⁹⁶⁸ Dugard & Raic, *supra* note 73, at 109.

⁹⁶⁹ *Id.*

⁹⁷⁰ Crawford, *supra* note 30, at 108.

⁹⁷¹ *Id.* at 150.



statehood of communist states such as PRC and USSR because they are not fundamentally democratic. As long as the government is formed with the approval of the majority of the people concerned, it is also a representative government in line with the principle of self-determination. It has been argued that “where a particular people has a right of self-determination in respect of a territory, no government will be recognized which comes into existence and seeks to control that territory as a State in violation of self-determination. It may be concluded that an entity may not claim statehood if its creation is in violation of an applicable right to self-determination.”⁹⁷²

Although the ROC government had imposed the constitution of ROC on the Taiwanese people, who were since then called nationals of the Republic of China, international practice shows that the grant of nationality is a matter that only States by their domestic law can perform, which do not necessarily or automatically have international effect.⁹⁷³

Nationality is dependent upon statehood, not vice versa.⁹⁷⁴

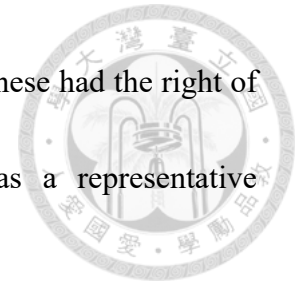
Not to mention the ROC government substantially depending on the US at the time has neither firmly controlled the territory of Taiwan nor established an effective government

⁹⁷² *Id.* at 131.

⁹⁷³ Nottebohm Case, *infra* note 1134.

⁹⁷⁴ Crawford, *supra* note 30, at 52.

on Taiwan, the critical point here is to determine whether the Taiwanese had the right of self-determination and if the ROC government on Taiwan was a representative government in line with the self-determination by 1952.⁹⁷⁵



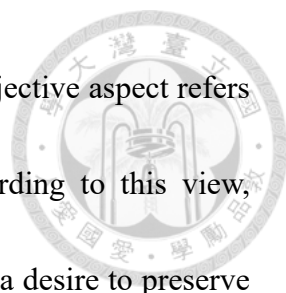
The principle of self-determination applies as a matter of right only after the unit of self-determination has been determined.⁹⁷⁶ In practice, the beneficiaries of an external right to self-determination are identified as a “people”, understood as “the entire population living in the territory subject to illegal domination.”⁹⁷⁷ Hence, if the Taiwanese were qualified as a people in the 1940s, the ROC on Taiwan could not claim statehood if it was in violation of self-determination. To define the features of a people, in 1981, the Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Aureliu Cristescu, presented a study which concluded with a proposal for a synthesis of the features defining what constitutes a people fit to enjoy and exercise the right of self-determination.⁹⁷⁸ A consensus has been reached on at least two elements that a people involves a “social entity possessing a clear identity”, and a sufficiently large number of members with the joint features such as race, ethnicity, nationality, culture,

⁹⁷⁵ Although self-determination had not yet become *jus cogens* in 1952, it has been observed that interpreted rule is retroactive, *see* Bodas, *supra* note 367.

⁹⁷⁶ Crawford, *supra* note 30, at 127.

⁹⁷⁷ Tancredi, *supra* note 115, at 91.

⁹⁷⁸ Cristescu, *supra* note 117, at 41.



history, religion, language, or a common economic base.⁹⁷⁹ The subjective aspect refers to the existence of a shared identity held by the group.⁹⁸⁰ According to this view, individuals feel themselves to be members of the group and express a desire to preserve their signs of identity.⁹⁸¹ It could be stated that having longstanding roots in a given territory provides a sufficient criterion for identifying the presence of a people.⁹⁸² As the US Court of Appeals in *Rogers v. Cheng Fu Sheng*⁹⁸³ stated, “Formosa is a well-defined geographical, social and political entity.”⁹⁸⁴ The 50 years of Japanese colonial rule are perceived as the formative period of Taiwanese consciousness.⁹⁸⁵ Following above definition, the inhabitants of Taiwan in the 1940s were definitely qualified as a people possessing a shared identity.

Hence, the “ROC on Taiwan” cannot claim statehood by the time of the conclusion of

⁹⁷⁹ Hannum, *supra* note 122, at 35; Raič, *supra* note 56, at 262; The Events in East Pakistan, 1971. A Legal Study by the Secretariat of the International Commission of Jurists (Geneva: International Commission of Jurists, 1972), 98, p. 70, available at <https://www.icj.org/wp-content/uploads/1972/06/Bangladesh-events-East-Pakistan-1971-thematic-report-1972-eng.pdf> (Last visited May 2, 2022); Final Report and Recommendations. International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO, Paris, 27-30 November 1989, UNESCO Doc. SHS-89/CONF.602/7, 22 February 1990, 18, p. 7, para. 22, available at <https://unesdoc.unesco.org/ark:/48223/pf0000085152> (Last visited May 2, 2022); S. Oeter, *Secession, Territorial Integrity and the Role of the Security Council*. In *KOSOVO AND INTERNATIONAL LAW: THE ICJ ADVISORY OPINION OF 22 JULY 2010* 109,115 (P. Hilpold eds., 2012)

⁹⁸⁰ Hannum, *Id.* at 35; C. Ryngaert & C. Griffioen, *The Relevance of the right to Self-Determination in the Kosovo matter: in partial response to the Agora Papers*, 8 *CHL.J.INT'L L* 573,575 (2009).

⁹⁸¹ Cristescu, *supra* note 117, at 41; Hannum, *Id.* at 35.

⁹⁸² Jaber, *supra* note 116, at 933; G. Lauwers & S. Smis, *supra* note 123, at 57.

⁹⁸³ *Cheng Fu Sheng v. Rogers*, Oct.6, 1959, available at <https://law.justia.com/cases/federal/district-courts/FSupp/177/281/1884676/> (Last visited May 2, 2022)

⁹⁸⁴ *Id.*

⁹⁸⁵ Hermann Halbeisen, *Taiwanese Consciousness (T'ai-wan I-Shih): Facets of a continuing Debate*, in, *TAIWAN: ECONOMY, SOCIETY AND HISTORY* 235-50 (E.K.Y.Chen et al eds.,1991).

the Peace Treaty with Japan in 1952. The legal status of Taiwan was therefore unsettled at that point of Time.



2.3.3 National Unity V.S. Self-determination

Opponents of the above position argue that the respect of national unity and territorial integrity must take priority over the principle of self-determination. This argument derives from the Colonial Declaration, Article 2 provides that “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . .” Yet Article 6 of the same Declaration states that “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter...” It is therefore observed that, at least in the case of fragments of territory claimed by a contiguous State, Article 6 takes priority over Article 2, so that “the only option for decolonization of the territory is its transfer to the Claimant State”.⁹⁸⁶

Even if China legitimately got the sovereignty of Taiwan in 1945, according to UN Resolution 2625 (XXV), its right to territorial integrity is contingent upon a

⁹⁸⁶ Crawford, *supra* note 30, 638; Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res.1514), *supra* note 103.

representative government “without distinction as to race, creed or colour”,⁹⁸⁷ respecting the right of peoples to “internal self-determination”,⁹⁸⁸ including the right to political participation.⁹⁸⁹ Indeed, the non-discrimination clause was re-affirmed in two documents of great importance, the Declaration of the UN World Conference on Human Rights held in Vienna in June 1993⁹⁹⁰ and the GA Declaration on the Occasion of the Fiftieth Anniversary of the UN,⁹⁹¹ where the non-discrimination clause was extended to distinctions of “any kind”.

When the KMT government took exile in Taiwan in 1949, it continued to maintain its claim to govern the whole China. To sustain this myth, the constitution of ROC was imposed on Taiwan, which was designated as a province of China. It soon became a tool for denying equal representation to the Taiwanese people. For 40 years, the representatives elected by the Chinese people in 1948 were in fact permanent members of the “congress” of Taiwan until the 1991 amendment of the Constitution. As a result,

⁹⁸⁷ Friendly Relation Declaration, *supra* note 34.

⁹⁸⁸ “Internal” self-determination affirms the continuing nature of the right beyond decolonization, relating to “the rights of all peoples to pursue freely the economic, social and cultural development without outside interference”, *see* CERD, General Recommendations on self-determination, *supra* note 146; *see* generally A. Rosas, *Internal Self-Determination*, in MODERN LAW OF SELF-DETERMINATION 225 (C. Tomuschat ed., 1993)

⁹⁸⁹ *See* Katangese Peoples’ Congress vs. Zaire, African Comm. Hum. & Peoples’ Rights, Comm. No. 75/92, available at <http://hrlibrary.umn.edu/africa/comcases/75-92.html> (Last visited May 2, 2022)

⁹⁹⁰ Vienna Declaration and Programme of Action, June, 14-25, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G93/142/33/PDF/G9314233.pdf?OpenElement> (Last visited May 2, 2022)

⁹⁹¹ GA Res. 50/6 of 24 October 1995, para. 1, available at https://digitallibrary.un.org/record/200425?ln=zh_CN (Last visited May 2, 2022)

the 85% percent of the population who were Taiwanese were allotted just 3% percent of the legislative seats on the island, while KMT members who fled from China were given 97% of the seats to represent their so-called “lost” constituencies on the China mainland, now under the PRC’s communists’ rule.⁹⁹²

As aforementioned, the four criteria for statehood (people, government, defined territory, foreign relations) established by the 1933 Montevideo Convention must be based on effectiveness. With a considerable loss of people and territory on the mainland China and the government in Taiwan being severely unrepresentative, the ROC on Taiwan could never meet the criteria for statehood by 1952. In addition, in April 1948, many of the constitution’s provisions were suspended with the adoption of the Temporary Provisions Effective During the Period of Communist Rebellion, which allowed the President to enlarge his power without following certain procedural requirements prescribed by the Constitution and eliminated term limits for the president and the vice president.⁹⁹³ Furthermore, Chiang declared on May 19, 1949, a permanent state of martial law on the island, which would last for thirty eight years, until June 1987.

⁹⁹² Chen, *supra* note 835, at 16.

⁹⁹³ Temporary Provisions Effective During the Period of Communists Rebellion Act (Temporary Provisions Act) was adopted by the ROC National Assembly on April 18, 1948, and promulgated on May 10, 1948. The Act was repealed on May 1, 1991 when the 1991 Amendment to the Constitution was adopted. See Han Cheung, *Taiwan in Time: The ‘communist rebellion’ finally ends*, TAIPEI TIMES, April 25, 2021, at 8, available at <https://www.taipeitimes.com/News/feat/archives/2021/04/25/2003756299> (Last visited May 2, 2022)

Special penal laws were also enacted to suppress opposition. In this sense, the ruling of the exile government of KMT was not only colonial but also authoritarian.



2.3.4 Sub Conclusion

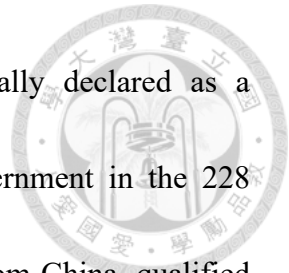
In any case, Taiwan was established as a self-determination unit by the time of the conclusion of the Peace Treaty with Japan in 1952, the objective of which is for the Taiwanese people to attain full scale of self-determination. Taiwan's legal status was similar to either a mandated/ trusted territory under administration of the ROC government in exile or a non-self-governing territory under article 73 of the Charter. It has been argued that the fact that a territory is not reported on is not decisive for its legal status as a non-self-governing territory.⁹⁹⁴ As James Crawford observes in the discussion of the case of East Bengal:

Though never formally declared a non-self-governing territory, the geographic separation of Bangladesh from the administering State, its ethnic distinctness and the arbitrary subordination of the territory to Pakistani rule built the case for its special status. Gross abuses amounting to genocide or crimes against humanity effectively made the separation irreversible.⁹⁹⁵

⁹⁹⁴ Cited in Crawford, *supra* note 30, at 127.

⁹⁹⁵ *Id.* at 145.

By the same token, despite that Taiwan had never been formally declared as a non-self-governing territory, the abuse of right by the ROC government in the 228 atrocity in 1947, as well as the geographic separation of Taiwan from China, qualified Taiwan as a non-self-governing territory and a self-determination unit.



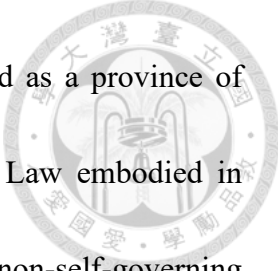
The achievement of self-determination by territories under Mandate/Trusteeship was treated as finally resolving the question of status and associated issues of sovereignty over the territory as a whole.⁹⁹⁶ It is inherent in the right to establish an independent State.⁹⁹⁷ Notwithstanding the disregarding of the international community toward this matter, the rights of the Taiwanese must be guaranteed in line with the legal principals embedded in the UN charter.

3. Sovereignty of Taiwan after 1949

The uniqueness of the case of Taiwan is that the administrating power was not delegated by the central government of a state, but a belligerent government delegated by the leading Allied Power of US. Even though the ROC government in exile imposed the

⁹⁹⁶ Northern Cameroons Case, ICJ Rep 1963, available at <https://www.icj-cij.org/public/files/case-related/48/048-19631202-JUD-01-00-EN.pdf> (Last visited May 2, 2022)

⁹⁹⁷ Dugard & Raic, *supra* note 73, at 136.



constitution of Republic of China on Taiwan, which was designated as a province of China, according to the Declaration of Principles of International Law embodied in UNGA Resolution 2625 (XXV) “the territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it.”⁹⁹⁸ Furthermore, James Crawford argues that, whether a territorial unit has separate international standing, or is merely a subordinate constitutional unit of a metropolitan State, is not a matter of domestic jurisdiction of the latter State, nor is it determined conclusively by the municipal law of that State.⁹⁹⁹

The Mandate/trusteeship/non-self-governing territories have sometimes been criticized as disguised colonies of the administering authority, and no consensus was reached as to exactly where the sovereignty over such territories resided.¹⁰⁰⁰ Since there was no such local governmental autonomy, the administering authorities had plenary powers of government, it is not unusual for the administering government to impose its laws on the mandate/trustee/non-self-governing territory; the crux here is that it has a separate legal status. In the Italian Trusteeship over Somaliland, it is stated that:

It is clearly wrong to say that acts performed by the State which has the power

⁹⁹⁸ Friendly Relations Declaration, *supra* note 34.

⁹⁹⁹ Crawford, *supra* note 30, at 353.

¹⁰⁰⁰ *Id.* at 568



of administration over a Trust Territory can be regarded as foreign in relation to its own legal system, even though they concern another subject of international law. . . The Trusteeship Administration which has been entrusted to Italy comes within the limits and scope of the Italian legal system . . . ¹⁰⁰¹

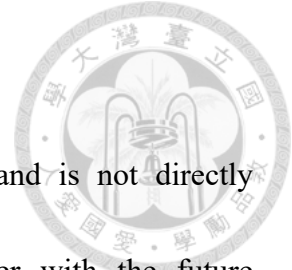
In the UN trusteeship system, which has largely shared the essential features of the mandate system under the League of Nations, did not grant the Trustee the sovereignty of the territory. The trustee only has the right to exercise some sovereign powers in the interest of the indigenous communities. By its very nature, The UN trusteeship was only a temporary system, which was designed to lead the populations concerned “towards self-government or independence”.¹⁰⁰² Hence, all forms of annexation by the administering Powers were deemed illegal and prohibited.¹⁰⁰³ For instance, pursuant to the Geneva Agreement of January 27, 1950 on the trusteeship administration of Somali territory by Italy, “the Administering Authority shall Foster the development of free political institutions and promote the development of the inhabitants of the Territory towards independence.”¹⁰⁰⁴

¹⁰⁰¹ *Id.* at 572.

¹⁰⁰² UN Charter, art. 76(b)

¹⁰⁰³ Distefano, *supra* note 24, at 36.

¹⁰⁰⁴ See UN GA, Draft Trusteeship Agreement for the territory of Somaliland under Italian administration: special report of the Trusteeship Council, Jan. 27, 1950, available at <https://digitallibrary.un.org/record/704661> (Last visited May 2, 2022)



The non-self-governing territory in Chapter XI, on the other hand is not directly concerned with the question of sovereignty as such, but rather with the future development of the territory and people concerned. Nonetheless, it is sometimes asserted that administering States are “ipso facto not sovereign with respect to their Chapter XI territories”.¹⁰⁰⁵ To the extent that sovereignty implies the unfettered right to control or to dispose of the territory in question, the Administering authority’s sovereign power is substantially limited by the obligation in Article 73b, and the associated principle of self-determination, substantially limit the.¹⁰⁰⁶

Either Taiwan was a quasi-mandated/trusted territory or a non-self-governing territory under the administration of the ROC government in exile, the sovereignty of Taiwan during this period did not reside in the ROC government. Even if it temporarily imposed the constitution of ROC on the Taiwanese people, it had no right to decide the legal status of Taiwan, since The consensus view came to be that the concept of sovereignty was simply inapplicable to mandated and trust territories.¹⁰⁰⁷ As Lord McNair stated in

¹⁰⁰⁵ Judge Ammoun, Western Sahara Opinion, *supra* note 134, at 31–2; Sureda, *supra* note 274, at 353 comments that: “The idea of trust not being acceptable, the presence of the metropolis in its colonies has gradually been considered illegal unless confirmed by an act of self-determination. This seems to indicate that, within the context of colonialism, self-determination has become a peremptory norm of International Law whereby a state’s title to a territory having colonial status is void.”

¹⁰⁰⁶ Crawford, *supra* note 30, at 615.

¹⁰⁰⁷ *Id.* at 571.



his separate opinion in South West Africa (Status):

The Mandates System (and the “corresponding principles” of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to the new system. Sovereignty over a Mandated Territory is in abeyance; if, and when the inhabitants of the Territory obtain recognition as an independent State...sovereignty will revive and vest in the new State. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate...¹⁰⁰⁸

Thus the establishment of a Mandate (or Trusteeship) over a territory did not constitute cession of that territory to the Mandatory.¹⁰⁰⁹

By the same token, the administration of the ROC government in exile and the imposition of ROC constitution on the Taiwanese people did not constitute cession of

¹⁰⁰⁸ See International status of South-West Africa, *supra* note 257.

¹⁰⁰⁹ *Id.*

Taiwan to the ROC government in exile. Sovereignty over Taiwan is therefore in abeyance, and when Taiwan emerges as a new state, the sovereignty of Taiwan will revive and vest in the Taiwanese people.



3.1 Nature of the 1954 US-Sino Defense Treaty

Opponents of the above discussion would argue that the conclusion of the 1954 US-Sino Defense Treaty implied that the sovereignty of Taiwan resided in the ROC government. After the armistice of the Korean War, in order to defend Taiwan against a possible invasion by the Chinese Communists, the Eisenhower Administration signed a mutual defense treaty with the ROC government taking exile on Taiwan in 1954.¹⁰¹⁰ In February 1955, Secretary of State John Foster Dulles said that the Eisenhower Administration “does not regard the sovereignty of Formosa and the Pescadores as settled and the [Mutual Defense T]reaty would not give General Chiang sovereignty over these islands.”¹⁰¹¹ The US Senate Foreign Relations Committee Chairman, Senator Walter F. George, commented that the committee’s “understanding” of the treaty was that “Senate approval of the Treaty would neither strengthen nor weaken the Chiang [the ROC] Government’s claim to sovereignty over Formosa, the international

¹⁰¹⁰ See the Mutual Defense Treaty, Dec. 2, 1954, United States-China (the ROC government), 6 UST. 433, available at https://avalon.law.yale.edu/20th_century/chin001.asp (Last visited May 2, 2022)

¹⁰¹¹ James Reston, *New Formosa Bid*, N. Y. TIMES, Feb.7, 1955, at A1, available at <https://www.nytimes.com/1955/02/07/archives/new-formosa-bid-aggression-watch-plan-will-go-to-assembly-to-avoid.html?searchResultPosition=1> (Last visited May 2, 2022)

status of which is yet to be decided.”¹⁰¹²



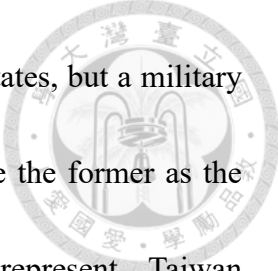
Since the statehood of ROC was lost in retroactive to October 1, 1949, and the statehood of the “ROC on Taiwan” was also denied, the ROC government in exile was not even a competent party to make treaty, because a treaty can only be made between two sovereign states. Then what is the nature of the 1954 US-Sino Defense Treaty?

Article 2 (1)(a) of the 1969 Vienna Convention on the Law of Treaties provided that a “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. In adverse interpretation, if an international agreement was concluded between States, it is not a treaty in nature, even if it is designated as a treaty.

Given the delegation relationship between the Allied power and the ROC government in exile, it could be inferred that the 1954 Sino-US defense treaty was merely a political gesture to boost the morale of the KMT military forces¹⁰¹³ and contain the communist

¹⁰¹² William S. White, Senate Approves Formosa Treaty, N.Y. TIMES, Feb.10, 1955 , at A1,*available at* <https://www.nytimes.com/1955/02/10/archives/senate-approves-formosa-treaty-vote-is-646-reservations-by-morse-to.html?searchResultPosition=1> (Last visited May 2, 2022)

¹⁰¹³ For a detailed background of the 1954 defense treaty, *see* Chap III, P.169-71.



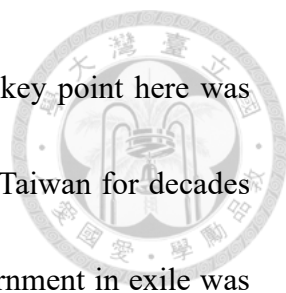
China. Strictly speaking, it was not an international treaty between states, but a military defense agreement between the KMT government and the US, since the former as the administering government of a mandated territory could represent Taiwan internationally until the Taiwanese achieved full scale of self-determination. As Snyder noted, when the alliance is so restraining that there was only one dominating partner, it is no more than a unilateral commitment, where the senior ally determines when and under what conditions assistance would be provided.¹⁰¹⁴ When Chiang Kai-shek complained in 1962 that the mutual defense treaty was binding his “hand and foot” and preventing him from accomplishing its goals,¹⁰¹⁵ the United States rejected all those arguments and Taipei did not press the issue.¹⁰¹⁶ In this sense, the fact that the terms of the 1954 Sino-US defense treaty agreement was almost entirely dictated by the US further proved the delegation relationship between the US and the ROC government in exile.

After the termination of the US-Sino Mutual Defense Treaty in the 1970s, the unilateral commitment of the US was again reflected in the enactment of the Taiwan Relation Act (TRA) in 1971. Clearly, it made no difference for the US to enact a domestic law to offer

¹⁰¹⁴ Snyder, *supra* note 734, at 12.

¹⁰¹⁵ Goldstein, *supra* note 725 at 15 referencing to FRUS, 1961-63, XXII, p. 311.

¹⁰¹⁶ *Id.*



military support to Taiwan or in the name of a defense treaty. The key point here was that the KMT government was not able to take effective control of Taiwan for decades without the military protection of US.¹⁰¹⁷ Therefore, the ROC government in exile was nothing but administrating power delegated by the leading Allied Power- the US, at least before it developed into a representative of the Taiwanese people.

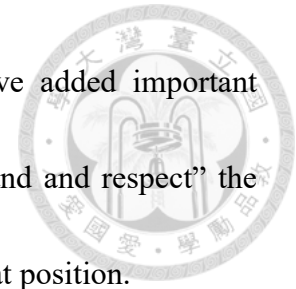
In conclusion, the US-Sino Mutual Defense Treaty signed in 1954 did not constitute the cession of Taiwan. The ROC government in exile acquired only a limited title to the territory of Taiwan entrusted to it, and the measure of its powers was what was necessary for the purpose of carrying out the military protection and administration tasks delegated by the US.

3.2 Recognition under the “One China Policy”

Since the ROC’s UN seat was replaced by the PRC, the PRC had launched a “One China Principle”, the central element of which states “there is only one China and that is the People’s Republic of China, and Taiwan is a part of China.” Nevertheless, as Pasha L. Hsieh pointed out in 2009, while most countries do indeed recognize the PRC as the legal government of China, “they almost uniformly disagree with the PRC’s territorial

¹⁰¹⁷ Similar view point, *see* Chiang, *supra* note 236, at 309: “The ROC government in Taiwan could not have survived for so long without the military support of the US Government.”

claim over Taiwan”¹⁰¹⁸. He then notes that individual states have added important qualifiers – they may “take note of,” “acknowledge,” or “understand and respect” the PRC’s position that Taiwan is part of China but they do not share that position.



Besides, it is observed that while most of the western powers were pressured by the PRC to abandon Taiwan during the 1969–1970 negotiations, no comparable pressure appears to have been exerted on Turkey, Austria, Mexico, or Equatorial Guinea, all of which recognized the PRC in 1971 without having to mention Taiwan.¹⁰¹⁹ It was probably due to the importance of the western powers in shaping international political structure, in addition to China’s desperation to align as many third world states as possible to break the blockade of the western league in the cold war.

3.2.1 Positions of the western powers

Given the importance of the positions of the western powers, the following discussion will focus on the positions of the Group of Seven (G7) members (Canada, France, Germany, Italy, Japan, United Kingdom and United States), the economy volume of

¹⁰¹⁸ Pasha L. Hsieh, *The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum*, 84(3) DIE FRIEDENS-WARTE 59, 63 (2009).

¹⁰¹⁹ Der-yuan Wu, *Institutional Development and Adaptability: Canada, Taiwan and the Social construction of “One China”* 245 (2001) (PhD dissertation, University of Carleton), available at https://curve.carleton.ca/system/files/etd/e4ac546a-7d13-4852-be2b-3e7db839f89c/etd_pdf/76b564d7c2fffd7b6462ce7324629cd/wu-institutionaldevelopmentandadaptabilitycanada.pdf (last visited Feb.22,2022).

which accounts for over 80 percent and 30 percent of the Global Gross Domestic Product (GDP) in 1980s and 2019 respectively¹⁰²⁰.



United States:

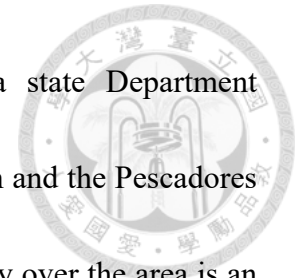
Whenever Beijing is irritated by Washington's contacts with Taipei, it alleges that the US has violated its "commitments" in "the three communiqués", despite that the Normalization Communique simply "acknowledges the Chinese position that there is but one China and Taiwan is part of China."¹⁰²¹ When questioned on this point during the hearings on the Taiwan Relations Act of 1979, the Carter Administration agreed that it had acknowledged the "Chinese position" that Taiwan is part of China but emphasized that "The United States has not itself agreed to this position."¹⁰²² In 1982, President Ronald Reagan gave the so-called Six Assurances to Taiwan. The Fifth Assurance was that "the US has not changed its long-standing position on the matter of sovereignty over Taiwan." And what was that "long-standing" position? In September of 1982, the State Department wrote a letter to Senator John East that "The US takes no position on

¹⁰²⁰ See M. Szmigiera, *Breakdown of global GDP share from G7 and G20 countries 2020 and 2026*, Statista (Feb.7, 2022), <https://www.statista.com/statistics/722962/g20-share-of-global-gdp/> (last visited Feb.22).

¹⁰²¹ Known as the "Normalization Communique" of December 16, 1978, available at <https://www.ait.org.tw/our-relationship/policy-history/key-u-s-foreign-policy-documents-region/u-s-prc-joint-communicue-1979/> (last visited Feb.22, 2022).

¹⁰²² Robert Andrews & Steve Chabot, *Two Congressmen Look at "One China"*, Heritage Foundation Lecture No.821, Feb.6, 2004, available at <https://www.heritage.org/asia/report/two-congressmen-look-one-china> (last visited Feb.22, 2022).

the question of Taiwan's sovereignty.” It was explicated in a state Department memorandum to the US Senate in 1970, which said that “As Taiwan and the Pescadores are not covered by any existing international disposition; sovereignty over the area is an unsettled question subject to future international resolution.”¹⁰²³



United Kingdom:

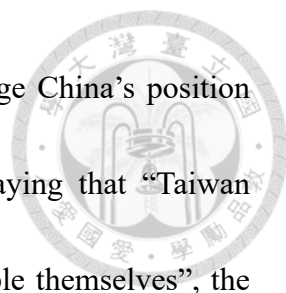
The United Kingdom and France granted China recognition without saying anything about Taiwan in 1950 and 1964 respectively, with ROC still retaining its seat in the UN.¹⁰²⁴

In 1972, in announcing the exchange of ambassadors with the PRC, the Foreign Secretary of UK stated the position as: “The Government of the United Kingdom acknowledge the position of the Chinese Government that Taiwan is a province of the People’s Republic of China . . . We think that the Taiwan question is China’s internal affair to be settled by the Chinese people themselves...”¹⁰²⁵

¹⁰²³ JOHN J. Tkacik, jr, *Understanding and Misunderstanding China Policy: A Primer*, in RETHINKING “ONE CHINA” 191-2 (John Tkacik ed., 2004) with reference to the 1970 State Department Hearings before the subcommittee on United States Security Agreements and Commitments Abroad of the Senate Committee on Foreign Relations (91st Cong., 2d Sess.).

¹⁰²⁴ ERIC LERHE, RETHINKING THE TAIWAN QUESTION: HOW CANADA CAN UPDATE ITS RIGID “ONE-CHINA” POLICY FOR THE 21ST CENTURY 12 (2018).

¹⁰²⁵ 833 HC Deb cols 31–8, 32, 13 March 1972.



The UK also took the same position as the US to only acknowledge China's position instead of recognizing China's title over Taiwan by itself. By saying that "Taiwan question is China's internal affair to be settled by the Chinese people themselves", the UK did not necessarily mean the sovereignty of Taiwan could only be settled by the Chinese people themselves. It could refer to the civil war between the KMT in exile and the PRC. Furthermore, the UK could not violate the principle of estoppel, which has already agreed in 1952 in the Peace Treaty with Japan that its titles were renounced to Formosa.

France:

In 1994, with some ambiguity in the language, France publicly accepted "the Government of the People's Republic of China as the sole legal government of China and Taiwan as an integral part of the Chinese territory."¹⁰²⁶

First, Chinese Territory does not necessarily mean PRC's territory; it could refer to a Chinese Territory in linguistic and cultural senses. When the Foreign Vice Minister of ROC Yang Hsi-kun Yang made a suggestion to change the name of ROC on Taiwan to

¹⁰²⁶ Roger Cohen, *France Bars Taiwan Sales, Warming China Ties*, N. Y. TIMES (Jan.14, 1994), at <https://www.nytimes.com/1994/01/13/world/france-bars-taiwan-sales-warming-china-ties.html>(last visited Feb.22,2022).

“Chinese Republic of Taiwan”, he in particular emphasized that the term Chinese did not have any political connotation but was used merely as a generic term stemming from the Chinese ethnic origin of the populace on Taiwan.¹⁰²⁷ This might also be the true intention of France.

The above judgement had been confirmed by the actual deeds of France post 1994. French maintained high-level technical support in Taiwan for its past arms sales, trained Taiwanese pilots in France, and worked in Taiwanese ports supporting the frigates¹⁰²⁸ after the 1994 commitment. Furthermore, France, alongside the United Kingdom, conducted contingency planning with the US military should the situation of 1996 Taiwan Strait crisis deteriorate.¹⁰²⁹ If France recognized Taiwan as a part of China, it would not do such things in light of the territorial integrity of China.

Canada

Canada “neither challenge nor endorse” PRC’s insistent claim to Taiwan, but to “take note” of it. The recognition announced by the 1970 Canada-China joint communiqué

¹⁰²⁷ Foreign relations of the United States, 1969–1976, Volume XVII, China, 1969–1972, *available at* <https://history.state.gov/historicaldocuments/frus1969-76v17/d174> (last visited Feb.22, 2022).

¹⁰²⁸ Jean-Pierre Cabestan, France’s Taiwan Policy: A case of shopkeeper diplomacy. Paper presented at “The Role of France and Germany in Sino-European Relations,” Hong Kong Baptist University, June 22-23, at 14-5. *Available at* <https://www.sciencespo.fr/cei/sites/sciencespo.fr/cei/files/jpcabest.pdf> (Last visited May 2, 2022)

¹⁰²⁹ Lerhe, *supra* note 1024, at 12.

did accept the PRC as the sole government of China instead of the “Chinese people” as Beijing initially demanded, and agreed to support PRC’s entry into the United Nations.¹⁰³⁰ According to the Statement made to the House of Commons on October 13, 1970 by the Secretary of State for External Affairs, the honorable Mitchell Sharp:

2. The Chinese reaffirms that Taiwan is an inalienable part of the territory of the People’s Republic of China. The Canadian government takes note of this position of the Chinese government. 3. The Canadian government recognizes the government of the People’s Republic of China as the sole legal government of China.¹⁰³¹

Canada’s rejection to accept the PRC as the sole government of the Chinese people as Beijing demanded had further proved that the word “Chinese” is just a generic term stemming from the Chinese ethnic origin of the populace on Taiwan, instead of any sovereignty claim.

Japan:

Japan’s 1972 recognition of the PRC followed the US and UK’s approach by only acknowledging the PRC’s claim to Taiwan: “Japan fully understands and respects this

¹⁰³⁰ Quoted in Wu, *supra* note 1019, at 455.

¹⁰³¹ *Id.*, at 455-6.

stand of the Government of China” without supporting it itself.¹⁰³²



In consideration of its own security, three months after China announced its “Anti-Secession Law”, the US and Japan (2005) issued a joint statement indicating that one of their common strategic objectives was to “encourage the peaceful resolution of issues concerning the Taiwan Strait through dialogue.” Some argues¹⁰³³ that this could be interpreted as that the security of Taiwan was now within the US-Japanese alliance, while others pointed out¹⁰³⁴ that the joint statement raises the possibility that Japan will join the US in defending Taiwan if it is attacked. Furthermore, it is reported that, as the US Seventh Fleet is based in Japan together with over 39,000 US military personnel, Japan was going to be engaged in the defense of Taiwan under any scenario considering its own geographic security.¹⁰³⁵

In 2013, Japan signed a fisheries agreement with Taiwan to solve disputes in East Asia Seas. The inclusion of Taiwan’s security in the US-Japanese alliance and Japan’s acknowledgement of Taiwan’s capability to conclude an agreement on the neighboring waters siting out China were both decisive refutations to China’s title over Taiwan.

¹⁰³² *Id.* at 247.

¹⁰³³ Linus Hagström, *Sino-Japanese Relations: The ice that won't melt*, 64(1) INTEL’L L. J.225 (2008).

¹⁰³⁴ JONATHAN MANTHORPE, FORBIDDEN NATION: A HISTORY OF TAIWAN 255 (2002).

¹⁰³⁵ Lerhe, *supra* note 1024, at 24.



Germany:

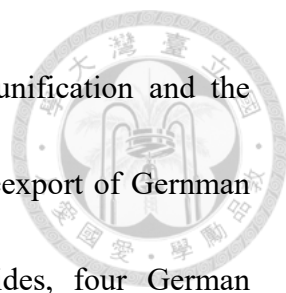
After World War II and the division of Germany into two states, only the Eastern German Democratic Republic (GDR) immediately established official relations with the People's Republic of China in October 1949. The Western Federal Republic of Germany (FRG), in spite of strong US pressure to support the KMT regime in Taiwan, opted for neutrality and recognized neither Beijing nor Taiwan, since it was important for the FRG "not to prejudice the German Question through becoming involved in the 'China complex'."¹⁰³⁶

The FRG established official relations with the PRC in October 1972. However, in the Communiqué, there was no explicit acknowledgement that Taiwan is an integral part of China. In order not to provoke the FRG's insistence on a "Berlin-Clause", the PRC probably stepped back in advance in order not to anger East Berlin.¹⁰³⁷ Walter Scheel, then Foreign Minister, during his trip to China in October 1972, promised that the FRG would not upgrade its relations to the ROC.¹⁰³⁸

¹⁰³⁶ Gunter Schubert, *the European Dimension of German-Taiwanese Relations* 4, conference paper, The Role of France and Germany in Sino-European Relations, Hong Kong, Jun. 22-23, 2001, available at <https://www.sciencespo.fr/cei/sites/sciencespo.fr/cei/files/schubert.pdf> (last visited Feb.22, 2022).

¹⁰³⁷ *Id.*

¹⁰³⁸ *Id.*



FGR's position have not changed very much after the German unification and the disappear of the GDR. However, in 1993, Bonn had agreed to the reexport of German components for Patriot missiles from the US to Taiwan. Besides, four German minesweepers were spotted in Traiwan in mid-1992.¹⁰³⁹ The millitary support of Germany to Taiwan evidenced its rejection to recognize Taiwan as a part of China.

Italy:

On November 6, 1970, Italy and the Communist China announced their agreement to establish diplomatic relations. The Foreign Ministry of Italy stated that Italy had taken note of Beijing's claim to sovereignty over Taiwan and recognized that "the Government of the Chinese Peoples Republic is the sole legal Government of China."

In a separate declaration, the Italian Government explained that it did not consider itself qualified to express any judgment on the question of Taiwan.¹⁰⁴⁰

The fact that Italy had deliberately made separate statements about Taiwan and China implied that the ROC and Taiwan had separate legal status and that the legal status of Taiwan had nothing to do with its One China commitment.

¹⁰³⁹ *Id.*

¹⁰⁴⁰ Paul Hofmann, *Rome and Peking in Accord on Ties*, N.Y. TIMES (Nov.7, 1970), at <https://www.nytimes.com/1970/11/07/archives/rome-and-pekings-in-accord-on-ties-nationalist-link-to-italy-is.html> (last visited Feb.23,2022)

3.2.1.1 Sub Conclusion

To conclude, all the G7 members only recognized China's claim that there is only one China, the People's Republic of China; yet rejected to accept the second claim of PRC in respect of Taiwan. Indeed, they treated the legal status of Taiwan as a matter separate from the ROC/PRC question, which is in line with the arguments stated earlier that the trustee/non-self-governing territory has, under the Charter, a status separate and distinct from administrating government or state, and it is illegal for the administrating authority to annex the mandated territory.

3.3 State Practices after the De-recognition of ROC

Historically, recognition has been divided into recognition de jure and recognition de facto. Recognition de jure can be regarded as the "pure" and full form of recognition. De jure recognition "follows where the recognizing state accepts that the effective control displayed by the [new] government is permanent and firmly rooted and that there are no legal reasons detracting from this".¹⁰⁴¹ Whereas de facto recognition is used as "a simple acknowledgement that a government exists and wields effective control over people and territory",¹⁰⁴² it should be understood as abstention from

¹⁰⁴¹ Shaw, *supra* note 885, at 460.

¹⁰⁴² Talmon, *supra* note 890, at 88.

recognition, but the acknowledgement of a factual situation.¹⁰⁴³ While recognition de jure provides the answer to the question about whether the new government claiming to represent the State is in fact the government of the whole country,¹⁰⁴⁴ recognition de facto does not.¹⁰⁴⁵

Therefore, when PRC had been generally recognized by the 1980s, it means that the effective control on the territory of China displayed by the PRC government is permanent and firmly rooted and that there are no legal reasons detracting from this. The KMT government taking exile in Taiwan, on the contrary, in spite of its claim to represent the whole China, the majority of states only granted a simple acknowledgement that the administrating government exists and wields effective control over the Taiwanese people and the territory of Taiwan. As Lauterpacht argues in 1947, de facto and de jure recognition are both legal acts without any judgment upon the legitimacy of the recognized authority from the perspective of the constitutional law of the State concerned; recognition is about the judgement of an entity's claim to be considered as validly and effectively representing the State or territory in question.¹⁰⁴⁶

¹⁰⁴³ Lauterpacht, *supra* note 906, at 42

¹⁰⁴⁴ H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 98 (reprinted from Yale Law Journal, 1947).

¹⁰⁴⁵ Lauterpacht, *supra* note 906, at 43.

¹⁰⁴⁶ Lauterpacht, *supra* note 1044, at 330.



As a matter of fact, “on a European level, respect of internal self-determination – including respect of human and minority rights, representative government, respect for the rule of law – has been elevated to a necessary condition before any right to external self-determination is recognized.”¹⁰⁴⁷

Hence, after 1971, Taiwan under the name of Republic of China was rejected to be granted with de jure recognition. As O’Connell pointed out in 1956, “a government is only recognized for what it claims to be”.¹⁰⁴⁸ With the name –Republic of China in itself indicating a claim to represent the whole territory of China, it could be speculated that the authoritarian administration of the KMT government and the lack of equal Taiwanese representatives in the central government all stand in the way of other states’ granting de jure recognition to Taiwan. Nevertheless, by 1971, when ROC’s UN seat was replaced by PRC, a political community had been formed between the mainlanders and the Taiwanese through thirty years of common life. As Brown states “if people have grouped together for a political purpose, on a given territory, and are independent, it would be obviously absurd to say that they do not exist”.¹⁰⁴⁹ While most of states have maintained a “one China policy” to only establish formal “diplomatic” relations with

¹⁰⁴⁷ Photini Pazartzis, *Secession and international law: the European Dimension in SECESSION: INTERNATIONAL LAW PERSPECTIVES* 355, 372 (Marcelo G. Kohen ed., 2006).

¹⁰⁴⁸ D.P. O’Connell, *The status of Formosa and the Chinese recognition problem*, 50 AME.J.INT’L.L 405, 415 (1956).

¹⁰⁴⁹ P. Brown, *The effects of recognition*, 36 AME. J. INT’L L 107 (1942).

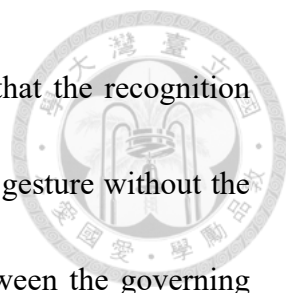
the one and only China in the world-the PRC, and cutting official ties with the ROC government in exile, Taiwan continues to maintain strong informal and trade relations with some sixty other States. However, with the constitution and symbols of Republic China imposed on Taiwan still being kept intact, most of these states had only offered unofficial relations with the Taiwanese people or governing authorities on Taiwan in the non-political areas of trade, science, and culture.



At any rate, Taiwan has been treated by the international community as a separate entity from ROC. For example, in the Taiwan Relations Act (TRA) that was introduced by the US immediately after the De-recognition of ROC, it provides, that “[t]he absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan”, as they applied before de-recognition, and that laws of the United States that refer or relate to foreign “countries, nations, states, governments, or similar entities” shall apply with respect to Taiwan.¹⁰⁵⁰ Treaties previously in force between the United States and “the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978” are to continue in force.¹⁰⁵¹ The fact that the US could make a domestic law to regulate the putative foreign relationship between

¹⁰⁵⁰ 22 USC §3303 (a), (b).

¹⁰⁵¹ 22 USC §3303 (c).




it and the government authority in Taiwan had reflected the truth that the recognition granted by the US during 1949 and 1979 was just a purely political gesture without the legal effect of recognition de jure. The delegation relationship between the governing authorities on Taiwan and the US was treated as an internal affair of the latter.

Furthermore, other states' reluctance to follow US approach to enact a domestic law to regulate the foreign relations with Taiwan has also proved the speculation that, the ultimate authority of Taiwan resides in the leading Allied Power of US until full scale of self-determination is attained by the Taiwanese people, so as to gain de jure recognition.

Yet in order to maintain its justification of domination over the Taiwanese people's political life, the KMT government was reluctant to use the name of Taiwan to participate in international organizations after 1971. As a result, Taiwan participates in the Asian Development Bank as "Taipei, China", the World Trade Organization as the "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu", the Asia-Pacific Economic Cooperation forum Olympic Games as "Chinese Taipei."¹⁰⁵²

In any event, the fact that Taiwan carries out unofficial relations with most countries via

¹⁰⁵² See Lin, *supra* note 862.



de facto embassies and consulates has indicated the other states' attitude to take Taiwan as a de facto regime. This accords Taiwanese the possibility of basic consular relations with the recognizing government. As stated earlier, recognition de jure provides the answer to the question whether the new government claiming to represent the State is in fact the government of the country,¹⁰⁵³ whereas de facto recognition does not.¹⁰⁵⁴ The de facto recognition offered by other states at least indicates that the recognizing governments see the De facto regime of Taiwan under the administration of the ROC government in exile as a separate entity from China,¹⁰⁵⁵ since the old Chinese regime of the ROC has already been replaced and succeeded by the PRC, which is generally recognized as the one and only China in the world.

3.4 Independence of Taiwan

It has been held that a de facto state is a geographical and political entity that has all the features of a state,¹⁰⁵⁶ but is “unable to achieve any degree of substantive recognition and therefore remains illegitimate in the eyes of international society”.¹⁰⁵⁷ The entity that constitutes a de facto state seeks “full constitutional independence and widespread

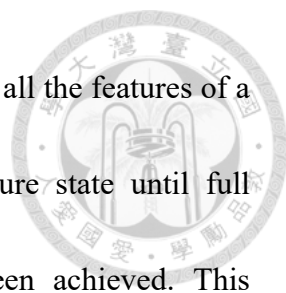
¹⁰⁵³ Lauterpacht, *supra* note 1044, at 98.

¹⁰⁵⁴ Lauterpacht, *supra* note 906, at 43

¹⁰⁵⁵ *Id.*

¹⁰⁵⁶ S. PEGG, INTERNATIONAL SOCIETY AND THE DE FACTO STATE 26 (1998).

¹⁰⁵⁷ *Id.*



recognition as a sovereign state”.¹⁰⁵⁸ In other words, if an entity has all the features of a state, it is only qualified as a de facto state rather than a de jure state until full constitutional independence and widespread recognition have been achieved. This argument seems to side with the constitutive theory of recognition, which takes an entity’s very legal existence as being “constituted” by the recognition of the other entities.¹⁰⁵⁹ Nevertheless, as aforementioned, this thesis takes the view that if the international personality of an entity has not changed after recognition, a declaratory theory is preferable. Thus, considering that the international personality of Taiwan would not change after it is granted recognition, a declaratory theory should be applied here. In other words, Taiwan would become an independent sovereign state once it attained all features of a state as well as full constitutional independence,¹⁰⁶⁰ regardless of recognition.

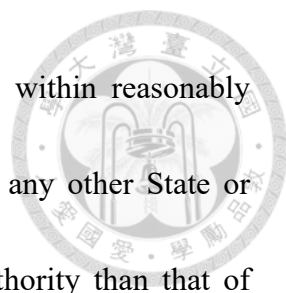
Since it has been observed that that actual independence is a central prerequisite for statehood,¹⁰⁶¹ before the discussion of the statehood of Taiwan, the actual independence of Taiwan has to be examined first. To achieve independence, two main requirements must be met, first, it must be a separate entity upon the exercise of substantial

¹⁰⁵⁸ *Id.*

¹⁰⁵⁹ Roth, *supra* note 909, at 124.

¹⁰⁶⁰ For a detailed analysis of the constitutional independence of Taiwan, see Chapter V.

¹⁰⁶¹ Crawford, *supra* note 30, at 62.



governmental authority with respect to some territory and people within reasonably coherent frontiers; and it is not being “subject to the authority of any other State or group of States”, which is to say that it has over it “no other authority than that of international law.”¹⁰⁶² In the International arena, independence is expressed in a state’s ability to manage its external affairs, independently and, at its own discretion, determine its foreign policy. According to Ferdross: “independence is an ability to solve all the cases on their own without obeying the instructions of another state”¹⁰⁶³ In the case of a protectorate state, it has been held that as long as restrictions from others do not place the State under the legal authority of another State, the former remains independent however extensive and burdensome those obligations may be.¹⁰⁶⁴ To prove lack of real independence one must show “foreign control overbearing the decision-making of the entity concerned on a wide range of matters and doing so systematically and on a permanent basis.”¹⁰⁶⁵

Before the KMT government took exile in Taiwan in 1949, Taiwan and Penghu (Pescadores) were colonies of Japan, whereas the Quemoy and Matsu groups were off

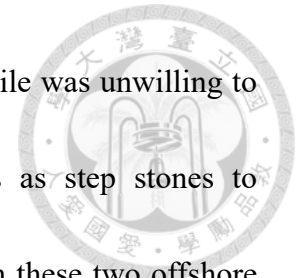
¹⁰⁶² *Id.* at 67

¹⁰⁶³ KAREN A. GEVORGYAN, CONCEPT OF STATE SOVEREIGNTY: MODERN ATTITUDES 445 (2014) referencing to Ferdross A. International Law 120 (1959). Available at https://www.yzu.am/files/Karen_Gevorgyan.pdf (Last visited May 2, 2022)

¹⁰⁶⁴ Customs Regime between Germany and Austria, *supra* note 37, para 84.

¹⁰⁶⁵ Brownlie, *supra* note 40, at 76.

the coast of Fujian Province of China. Yet the ROC government in exile was unwilling to retreat from these outposts, which wanted to use these islands as stepping stones to counterattack the PRC.¹⁰⁶⁶ Since 1949, Taiwan, Penghu, along with these two offshore islands has become a common political community under the administration of the ROC government in exile.



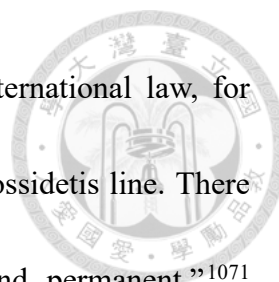
To discuss the independence of the four islands as a political community under a single authority, the concept of *uti possideti* has to be introduced first, which means “you shall possess as you possess”.¹⁰⁶⁷ “The doctrine provides that new States will come to independence with the same borders that they had when they were administrative units within the territory or territories of one colonial power, and the fundamental aim of which is to underline the principle of the stability of State boundaries.”¹⁰⁶⁸ Its effect is to “freeze the territorial title”, protecting stability and peace.¹⁰⁶⁹ *Uti possideti* is recognized as a general principle of international law today, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between

¹⁰⁶⁶ Goldstein, *supra* note 725, at 7.

¹⁰⁶⁷ On the *uti possideti* principle see Eritrea-Yemen Arbitration, Phase I Award, 9 October 1998, paras 96–100, available at https://legal.un.org/riaa/cases/vol_XXII/209-332.pdf (Last visited May 2, 2022); Land and Maritime Boundary between Cameroon and Nigeria, ICJ Rep 2002, available at http://www.worldcourts.com/icj/eng/decisions/2002.10.10_boundary.htm (Last visited May 2, 2022)

¹⁰⁶⁸ Shaw, *supra* note 28 referencing to OPPENHEIM’S INTERNATIONAL LAW, VOL.1 670 (Jennings and Watts eds., 9th ed. 1992).

¹⁰⁶⁹ See Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554, at 567. Available at <https://www.icj-cij.org/public/files/case-related/69/069-19861222-JUD-01-00-EN.pdf> (Last visited May 2, 2022)



Burkina Faso and Mali.¹⁰⁷⁰ “There is a strong presumption in international law, for reasons of international policy, in favor of the existence of an *uti possidetis* line. There are also strong presumptions that this line is both complete and permanent.”¹⁰⁷¹

However, it is important to note that *uti possidetis juris* does not operate after the formation of a new State, but during its process of creation. After the birth of a new state, the principle to respect is a State’s territorial integrity. In effect, the principle of territorial integrity has been construed as linking to the fundamental rule prohibiting the threat or use of force that governs international relations.¹⁰⁷²

Uti possidetis provides an alternative basis of legitimation for independence focusing on territoriality instead of ethnicity or religion or historic ties. It provides the new State with a territorial legitimation.¹⁰⁷³ Namely, the doctrine of *uti possidetis* dealt with independence before the statehood of an entity is achieved. In the boundary disputes of Mandates and Trust territories, the administering authority is not allowed to unilaterally alter those boundaries at the close of colony period.¹⁰⁷⁴ As the Chamber in the Burkina

Fasol Mali case noted:

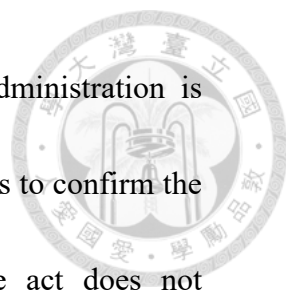
¹⁰⁷⁰ *Id.* at 565.

¹⁰⁷¹ Shaw, *supra* note 28, at 152-53.

¹⁰⁷² S.F. Van den Driest, S.F., *Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, 62 NETH. INTEL’L REV. 329, 353 (2015); Peters, *supra* note 145, at 106.

¹⁰⁷³ *Id.* at 98.

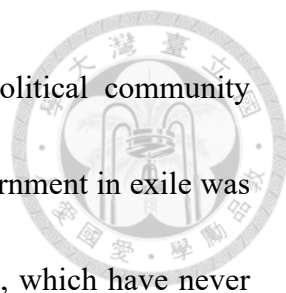
¹⁰⁷⁴ See Kasikili/Sedudu Island (Namibia/Botswana), ICJ Rep 1999 p 1045, available at http://www.worldcourts.com/icj/eng/decisions/1999.12.13_kasikili.htm (Last visited May 2, 2022)



Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of effectioites is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing a legal title, preference should be given to the holder of the title. In the event that the effectioites does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The effectioites can then play an essential role in showing how the title is interpreted in practice.¹⁰⁷⁵

Since 1949, the *Uti Possidetis* line lies on the border separating the political community comprising of the Taiwan/Pescadores formation, Quemoy and Matzu from China, which were since then under the administration of the ROC government in exile. Nevertheless, the ROC government in exile has no legal title over the self-determination unit of Taiwan/Pescadores formation, and took Quemoy and Matzu away from China by force. It seems that preference should be given to the holder of the title over Quemoy and

¹⁰⁷⁵ Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554, at 586-7. Available at <https://www.icj-cij.org/public/files/case-related/69/069-19861222-JUD-01-00-EN.pdf> (Last visited May 2, 2022)



Matzu – China, at least before the democratic reforms of the political community comprising these two islands in the 1990s. Given that the ROC government in exile was hardly a colonial government for the people of Quemoy and Matzu, which have never been established as self-determination units as the Taiwan/Pescadores formation entitling to become an independent sovereign state after exercising self-determination, it is suggested that the people of Quemoy and Matzu should have be granted right to decide their future through referendum. The relationship between *uti possidetis* and self-determination was addressed by the Arbitration Commission. In Opinion No.2, adopted on January 11, 1992, the Commission noted:

...in the context of a question as to whether the Serbian population in Croatia and Bosnia-Herzegovina possessed the right to self-determination, that: it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.¹⁰⁷⁶

As stated earlier, the statehood of Taiwan would be withheld until the constitutional and governmental structure of the Taiwan is brought into line with the principle of

¹⁰⁷⁶ Conference on Yugoslavia Arbitration Commission, opinions on question arising from the dissolution of Yugoslavia, Jan.11 and Jul.4, 1992, available at https://www.pf.uni-lj.si/media/skrk_mnenja.badinterjeve.arbitrazne.komisije.1_.10.pdf (Last visited May 2, 2022)

self-determination, which has now been seen as a constitutive condition for statehood.

The political community comprising of Taiwan, Pescadores, Quemoy and Matzu has become an entity separate from China upon the exercise of substantial governmental authority by the ROC government in exile within reasonably coherent frontiers since 1949. Though the US had played a crucial role in the military and foreign relation policy decisions of the authority in Taiwan, there is little evidence showing that the foreign control of US overbearing the decision-making of the government of Taiwan concerned on a wide range of matters systematically and on a permanent basis, at least after the democratic reforms in the 1990s. In spite of the mandate/trustee/delegation nature of the ROC government in exile, it has been established that the exercise of governmental power by another international person on behalf of and by delegation from a State is not inconsistent with formal independence. The powers delegated to neighboring States by the European “microstates” are cited as examples.¹⁰⁷⁷

Therefore, it could be concluded that the political community comprising of Taiwan, Penghu, Quemoy and Matzu has become independent in the eyes of international law as lately as the 1990s. Even if the delegation relationship between the KMT government and US derogate from the independence of Taiwan before that, Taiwan was an entity

¹⁰⁷⁷ Crawford, *supra* note 30, at 70.

dependent on the US rather than China. Therefore, once the political community emerged as an independent sovereign state, if the people of Quemoy and Matzu want to exercise their right of self-determination through referendum, it has to be with the consent of the new state of Taiwan.



4. Critical Reappraisals of the Positions of Relevant Parties

4.1 Positions of China

The first claim of PRC was Zhou (Chou) En-lai's telegram to the UN Secretary-General in 1950. Immediately after North Korea attacked South Korea, to deter the invasion of the Chinese Communists, the US President Truman sent the US Navy Seventh Fleet to the Taiwan Strait and the US military contingents to station in the island of Taiwan.¹⁰⁷⁸

On August 24, 1950, the PRC's Minister of Foreign Affairs Zhou (Chou) En-Lai sent a cablegram to the UN Secretary-General Trygve Lie, claiming that the United States had violated China's territory.¹⁰⁷⁹ The telegram stated:

Taiwan is an integral part of China. This is not only **a fact based on history,**

¹⁰⁷⁸ The day after the United States sent its Navy Seventh Fleet toward the Taiwan Strait, the United Nations went to war with North Korea. The UN Security Council, by a resolution, recommended that its members "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack." S. C. Res. 83, UN SCOR, 5th Sess., 474th mtg. at 5, UN Doc. S/INF/5/Rev.1 (1950). Cited in Chiang, *supra* note 236, at 193.

¹⁰⁷⁹ Cablegram from Peiping Foreign Minister (Chou En-lai) to Secretary-General, Trygve Lie (Aug. 24, 1950), DEP'T ST. BULL., Oct. 16, 1950, at 607. Cited in Chiang, *supra* note 236, at 182.

confirmed by **the situation since the surrender of Japan**, but it is also **stipulated in the Cairo Declaration of 1943 and the Potsdam Communiqué of 1945 as binding international agreements** which the United States Government has pledged itself to respect and observe.¹⁰⁸⁰

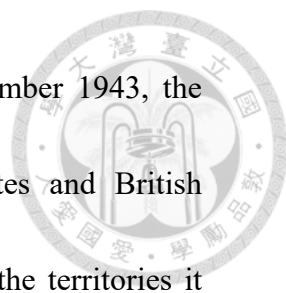


The second document setting forth the grounds of China's claim was the PRC's White Paper on Taiwan. On February 21, 2000, the PRC government released a position paper called the "White Paper—the One China Principle and the Taiwan Issue".¹⁰⁸¹ It stated:

Taiwan is an inalienable part of China. All the facts and laws about Taiwan prove that Taiwan is an inalienable part of Chinese territory. **In April 1895, through a war of aggression against China, Japan forced the Ching government to sign the unequal Treaty of Shimonoseki, and forcibly occupied Taiwan.** In July 1937, Japan launched an all-out war of aggression against China. **In December 1941, the Chinese government issued the Proclamation of China's Declaration of War Against Japan, announcing to the world that all treaties, agreements and contracts concerning Sino-Japanese relations, including the Treaty of Shimonoseki, had been**

¹⁰⁸⁰ *Id.*

¹⁰⁸¹ "White Paper-The One-China Principle and the Taiwan Issue (2000)" issued by the PRC government State Council and the Taiwanese Affairs Office on February 21, 2000, *available at* <http://www.taiwandocuments.org/white.htm> (Last visited May 2, 2022)



abrogated, and that China would recover Taiwan. In December 1943, the **Cairo Declaration** was issued by the Chinese, United States and British governments, stipulating that Japan should return to China all the territories it had stolen from the Chinese, including Northeast China, Taiwan and the Penghu Archipelago. **The Potsdam Proclamation** signed by China, the United States and Britain in 1945 stipulated that ‘The terms of Cairo Declaration shall be carried out.’ **In August of that year, Japan declared surrender and promised in its instrument of surrender that it would faithfully fulfill the obligations laid down in the Potsdam Proclamation.** On October 25, 1945, the Chinese government **recovered** Taiwan and the Penghu Archipelago, resuming the exercise of sovereignty over Taiwan.¹⁰⁸²

Hence, the PRC’s claim that Taiwan is China’s territory is based on the following four grounds:

- a. The past ownership and recovering of lost territory.
- b. China’s proclamation to abrogate the unfair Treaty of Shimonoseki
- c. The Cairo Declaration, the Potsdam Proclamation and the Japanese Instrument of Surrender,

¹⁰⁸² *Id.*

d. Chinese Government's exercising of sovereignty over Taiwan

e. Since the USSR government and the PRC government were excluded from the Peace

Treaty with Japan signed in 1952, the treaty is not binding on China.¹⁰⁸³



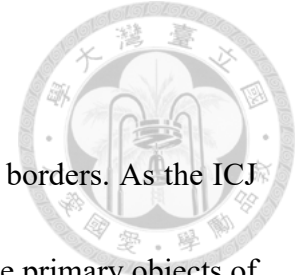
Rebuttals:

a. Past ownership and recovering of lost territory.

First, as explored already, Taiwan's indigenous peoples had inhabited on Taiwan thousands of years before the arrival of the Han Chinese. The island fell to Dutch and Spanish colonial settlers in the early 1600s, followed by the arrival of exiles led by Koxinga in the late 1600s. The Chinese Qing dynasty nominally claimed Taiwan as its territory in 1683, but had never established effective control or governance over the indigenous territories in the eastern part of the island. The Qing did not make Taiwan an official province until 1887, and ceded the island in perpetuity to Japan in the Treaty of Shimonoseki eight years later. Taiwan had become a Japanese colony for the next fifty years. Amid Taiwan's over 400 hundred civilized histories, China has occupied nearly one third of Taiwan's whole territory for around 200 years,¹⁰⁸⁴ Taiwan is therefore not historically an integral part of China.

¹⁰⁸³ Zhang shuling, Guotaiban: Jiu jinshan heyue Beijing Weil Canyu Feifa Wuxiao (PRC: the San Francisco Treaty is void for the absence of the PRC), Central News Agency (Taiwan), April 24, 2022, available at <https://www.cna.com.tw/news/acn/202204240188.aspx> (Last visited May 2, 2022)

¹⁰⁸⁴ For the Historical analysis of the legal status of Taiwan, see Chapter III.



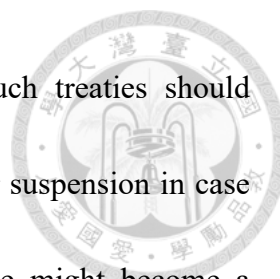
Second, the Treaty of Shimonoseki is a territorial treaty establishing borders. As the ICJ had observed in *The Temple of Preah Vihear Case* in 1962, one of the primary objects of a treaty establishing a frontier is to secure “Stability and Security.” Judge Ajibola asserted, “the special rule of interpretation of treaties regarding boundaries is that it must, failing contrary evidence, be supposed to have been concluded in order to ensure peace, stability and finality”.¹⁰⁸⁵ Thus, there is a presumption that courts will favor an interpretation of a treaty creating a boundary that holds that a permanent, definite and complete boundary has been established.¹⁰⁸⁶ Furthermore, in the *Tunisia/Libya Continental Shelf Case* in 1982, the ICJ again stressed the principle of the stability of frontiers. This was in line with its prior emphasis on the continuity of frontiers,¹⁰⁸⁷ and the degree of immutability conferred upon territorial or boundary treaties by general international law. The characteristic of finality of a territorial treaty is reflected in Article 62(a) of the Vienna Convention, which stipulates that the *rebus sic stantibus* rule¹⁰⁸⁸ would not be invoked “if the treaty establishes a boundary”. From the

¹⁰⁸⁵ *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 7 (Feb. 3) , separate opinion of Judge Ajibola, para 53 available at http://www.worldcourts.com/icj/eng/decisions/1994.02.03_jamahiriya.htm (Last visited May 2, 2022)

¹⁰⁸⁶ See James R. Crawford, *The General Assembly, the International Court and Self-determination*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 585,601 (Lowe and Fitzmaurice eds., 1996).

¹⁰⁸⁷ *Tunisia/Libya Continental Shelf Case* I.C.J. Rep. 1982, 18, 66, para.84; *Frontier Dispute Case* I.C.J. Rep. 1986, 554, 563, para.17. Available at <https://www.icj-cij.org/public/files/case-related/63/063-19820224-JUD-01-00-EN.pdf> (Last visited May 2, 2022)

¹⁰⁸⁸ The concept of *rebus sic stantibus* (Latin: “things standing thus”) stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminate the treaty in question.



International Law Commission's Commentary, it is clear that such treaties should constitute an exception to the general rule permitting termination or suspension in case of fundamental change of circumstances, since otherwise the rule might become a source of dangerous frictions.¹⁰⁸⁹

Regarding China's claim of reversing its lost territory after the war, it has been held that there is no principle of reversion to some earlier and superseded territorial formation.¹⁰⁹⁰

The rejection of reversion in the context of territorial claims was stated in the Eritrea-Yemen Arbitration.¹⁰⁹¹ Furthermore, the International Law Commission after some debate deleted the notion of reversion from its draft Article 7 ("Date of Transfer of public property") of its Draft Articles on State Succession in Respect of Matters other than Treaties.¹⁰⁹² According to Crawford, "whatever the validity or usefulness of reversion as a political claim, there is little authority and even less utility for its existence as a legal claim."¹⁰⁹³

Crawford also notes that, "claims based on ethnic identity or on some real or asserted territorial integrity at some earlier date are excluded: there is no principle of reversion to

¹⁰⁸⁹ United Nations, Yearbook of the International Law Commission, 259 (1966), available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (last visited Feb.18, 2022).

¹⁰⁹⁰ Crawford, *supra* note 30, at 644.

¹⁰⁹¹ Eritrea / Yemen (Oct. 9, 1998), (1998) XXII RIAA 211, paras 114–44, 145–99, 441–50, available at https://legal.un.org/riaa/cases/vol_XXII/209-332.pdf (last visited Feb.18, 2022).

¹⁰⁹² Crawford, *supra* note 30, at 698.

¹⁰⁹³ *Id.* at 699.

some earlier and superseded territorial formation.”¹⁰⁹⁴



b. China’s proclamation to abrogate the unfair Treaty of Shimonoseki

As has discussed in Chapter II, the principle of intertemporal law¹⁰⁹⁵ requires that the legal effect of transactions be determined by the law in force at the time of the transaction.¹⁰⁹⁶ The prohibition on the use of force to the acquisition of territory did not become a preemptory law until the Pact of Paris of 1929; even if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the colonial treaties concluded at that time be given effect today,¹⁰⁹⁷ thus the territorial treaty signed by means of war between China and Japan in 1895 could not be proclaimed as null and void on the ground of unfairness by China alone.

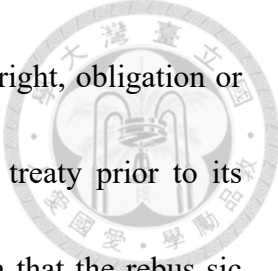
Although Article 64 of Vienna Convention on the Law of Treaties stipulates that “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” Article 71(2)(b) emphasizes

¹⁰⁹⁴ *Id.* at 644.

¹⁰⁹⁵ For the principle of intertemporal law, *see* P.67-72.

¹⁰⁹⁶ *Island of Palmas*(1928) 2 RIAA 829, 845 (‘(a) judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled’), *available at* https://legal.un.org/riaa/cases/vol_II/829-871.pdf (Last visited May.2, 2022)

¹⁰⁹⁷ Crawford, *supra* note 30, at 312.



that the termination of a treaty under Article 64 does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. In addition, the Article 62(a) of the Vienna Convention that the *rebus sic stantibus* rule would not be invoked “if the treaty establishes a boundary”, and it is clear from the International Law Commission’s Commentary that such treaties should constitute an exception to the general rule permitting termination or suspension in case of fundamental change of circumstances, since otherwise the rule might become a source of dangerous frictions.¹⁰⁹⁸

Thus, China’s proclamation to unilaterally abrogate the unfair Treaty of Shimonoseki is void and null in the eyes of international law.

c. The Cairo Declaration, Potsdam Proclamation and the Japanese Instrument of Surrender

First, both the Cairo Declaration and the Potsdam Proclamation were made during the World War II. The Cairo Declaration stated, in part, “The Three Great Allies ... covet no gain for themselves and have no thought of territorial expansion. It is their purpose that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and

¹⁰⁹⁸ United Nations, Yearbook of the International Law Commission, 259 (1966), *available at* https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (last visited Feb. 18, 2022).

the Pescadores, shall be restored to the Republic of China. The aforesaid three great powers are determined that in due course Korea shall become free and independent.”¹⁰⁹⁹

The Potsdam Proclamation in 1945 reconfirmed the Cairo Declaration. The Cairo and Potsdam documents only outlined the intentions of the United States, the United Kingdom, and the ROC for territories held by Japan after the conclusion of the war. As Professor Quincy Wright asserted in 1955 “the Japanese surrender [based on the Cairo and Potsdam Declarations] was not a definitive renunciation of the islands but a commitment to renounce them in the Treaty of Peace.”¹¹⁰⁰

Second, the two declarations did not affect the transference of Taiwan to China. At the time when the two declarations were issued, the United States was winning the war, but had not yet defeated Japan. A general rule of law accepted by civilized nations is: one cannot give something that he does not have.¹¹⁰¹ None of the three States could force Japan to transfer the title of Taiwan before Japan surrendered. The two declarations were more like political commitment than legal documents. Customary international law required that territory transference could only be made at a postwar settlement in a treaty only after Japan surrendered and between the victory parities and Japan.¹¹⁰²

¹⁰⁹⁹ Cairo Declaration, *supra* note 329.

¹¹⁰⁰ Wright, *supra* note 828, at 334.

¹¹⁰¹ Chiang, *supra* note 236, at 202.

¹¹⁰² *Id.*



It is true that in the Japanese Instrument of Surrender, Japan accepted the provisions set forth in the Potsdam Declaration. Yet it further stated that “We hereby command all civil, military and naval officials to obey and enforce all proclamations, and orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority and we direct all such officials to remain at their posts and to continue to perform their non-combatant duties unless specifically relieved by him or under his authority.”¹¹⁰³ It could therefore be inferred that the right of the disposition of territories renounced as a result of the war belong to the Allied Powers as a whole instead of certain single waring party.

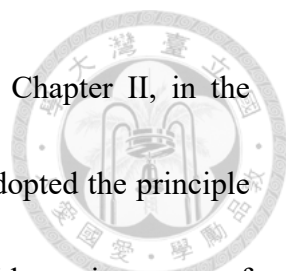
James Crawford argues that even though the terms of the treaty have been in part pre-arranged in binding form between the belligerents, the cession of territory at the end of a war must await the peace treaty.¹¹⁰⁴ Accordingly, Taiwan¹¹⁰⁵ and Korea¹¹⁰⁶ remained formally Japanese territories until the Peace Treaty with Japan was signed in 1952.

¹¹⁰³ Surrender of Japan, Sep.2, 1945, available at <https://www.ndl.go.jp/constitution/e/etc/c05.html> (last visited April 6, 2022).

¹¹⁰⁴ See Crawford, *supra* note 30, at 208.

¹¹⁰⁵ *Id.* at 207

¹¹⁰⁶ *Id.* at 468-69



Even if the two documents are bounding treaties, as explored in Chapter II, in the *Minquiers and Ecrehos* case¹¹⁰⁷, the International Court of Justice adopted the principle laid down in the *Island of Palmas* arbitration¹¹⁰⁸ to the effect that “the maintenance of the territorial title, and not merely its acquisition in the abstract, was to be determined not only by the law contemporaneous with the creation or acquisition of the title, but also by the rules governing the matter as they evolved through the period during which sovereign authority was purported to have been exercised by the party subsequently claiming the title”¹¹⁰⁹.

Therefore, as the PRC undoubtedly continuing as the state of China had never maintained any authority over Taiwan since 1949, once Taiwan has achieved statehood, its title to the territory would be superseded by the territory integrity of Taiwan.


d. Chinese government’s exercising of sovereignty over Taiwan

This ground of China is clearly based on state succession. It is true that the ROC government (then the legitimate government of China) had administrated Taiwan for four years from 1945 to 1949, but its military occupation was delegated by the Allied

¹¹⁰⁷ The *Minquiers and Ecrehos* Case (France/United Kingdom), (1953) ICJ, *available at* <https://www.icj-cij.org/public/files/case-related/17/017-19531117-JUD-01-00-EN.pdf> (Last visited May 2, 2022)

¹¹⁰⁸ *Island of Palmas* Case, *supra* note 31.

¹¹⁰⁹ *Elias*, *supra* note 285, at 291.



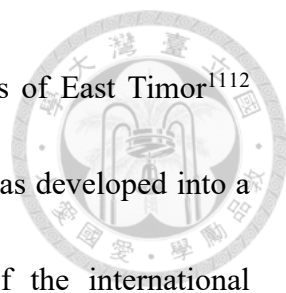
Powers as a trustee, just as the US military occupation of Korea from 1945 to 1948. The sovereignty of Taiwan is decided by the peace treaty with Japan. By Article 2(b) of the Peace Treaty with Japan signed in 1952, Japan renounced “all right, title and claim to Formosa”.¹¹¹⁰

Nevertheless, the confirmable intentions of relevant parties at the time were that Taiwan could never be put into the hands of the Communist China (PRC).¹¹¹¹ Furthermore, the only possible explanation of why the peace treaty with Japan did not include the same language as the Peace Treaty with Italy, which put its renounced territories into the hands of the allied power or UN, is that the ROC government in exile with its tens of thousands of Chinese refugees had no elsewhere to go, and their exile in Taiwan seems permanent at that point of time.

As there are always gaps between theories and realities in international law, the arrangements of the territories abandoned by the defeated Japan must be explained in line with the general principals of international law. According to the Vienna Convention on the Law of Treaties Article 64, “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm

¹¹¹⁰ Treaty of Peace with Japan, *supra* note 244, art.2.

¹¹¹¹ See Garver, *supra* note 724, at 24-31.



becomes void and terminates.” According to the ICJ in the matters of East Timor¹¹¹² and the Palestinian Wall Advisory Opinion,¹¹¹³ self-determination has developed into a right *erga omnes*, and guaranteeing it concerns all members of the international community.¹¹¹⁴ Given that “new peremptory norms of general international law (in particular, the principle of self-determination), or new conventional rules, may require some degree of restitution of defeated rights or interests”,¹¹¹⁵ the legal principles appropriated to interpret the 1952 Peace Treaty must include the principle of self-determination. Since self-determination is about inhabitants deciding the fate of the territory instead of the other way around, when Japan” renounces all right, title and claim to Formosa and the Pescadores”, the beneficiary of the sovereignty of Formosa and the Pescadores could be no one else but the people of Formosa and the Pescadores.

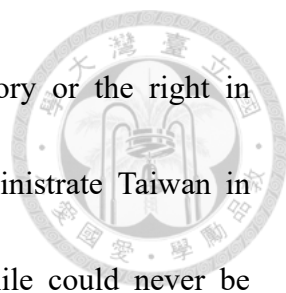
Finally, as aforementioned, if the exercise or manifestation of authority or sovereignty over the territory has not been constantly kept up by whoever wants to claim a valid title subsequently, modern international law does not accept an abstract title unsupported by

¹¹¹² East Timor (Portugal v. Australia), Judgment, I. C.J. Reports 1995, p. 90, 102, para. 29, *available at* <https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf> (last visited Feb. 22, 2022).

¹¹¹³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 183, para. 118. *Available at* <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>(last visited Feb.22, 2022).

¹¹¹⁴ For the discussion of self-determination, *see* P.24-30.

¹¹¹⁵ Crawford, *supra* note 30, at 259.

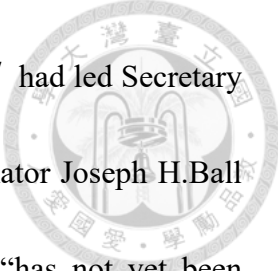


effective occupation or manifestation of authority over the territory or the right in question.¹¹¹⁶ Not to mention the ROC government came to administrate Taiwan in 1945 on behalf of the Allied Power, the ROC government in exile could never be qualified as a representative government of China in both law and fact since 1949. Hence, since no effective occupation or manifestation of China's authority can be found in Taiwan today, the claim of China Government's historical exercising of sovereignty over Taiwan is without any foundation.

e. The Peace Treaty with Japan signed in 1952 is not binding on China because of the absence of the USSR government and the PRC government in the treaty.

First, Article 37(2) of the Vienna Convention on the Law of Treaties 1969 stipulates that “When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.” As aforementioned, the Cairo and Potsdam documents only outlined the intentions of the United States, the United Kingdom, and the ROC for territories held by Japan after the conclusion of the war. Even if the above two documents have binding effects,

¹¹¹⁶ Island of Palmas case, *supra* note 31, at 839.



considering that the brutality of the Chinese occupation of Taiwan¹¹¹⁷ had led Secretary of State Dean Acheson to report on April 11 1947, in a letter to Senator Joseph H. Ball (R-MN), that the transfer of sovereignty over Formosa to China “has not yet been formalized”,¹¹¹⁸ the Allied Powers are entitled to reject the executing the specific terms of the Cairo and Potsdam documents by invoking the “abuse of right” under article 38 (the general principles of law recognized by civilized nations) of the Statute of the International Court of Justice. Since the PRC has never argued its identity/continuity of China, and the ROC government was the legitimate government of China then, the PRC had succeeded not only ROC’s right but also its obligations.

Second, by 1952, the People’s Republic of China has not yet firmly established, and there was hardly a Chinese government competent to represent the whole China, which fell into the category of a failed state. As their capacity to celebrate international treaties is diminished, and when it comes to the fulfilment of treaty obligations, the lack of effective government makes the application of the norms contained in the Vienna Convention on the Law of the Treaties difficult to occur in practice.¹¹¹⁹ This is why

¹¹¹⁷ William H. Newton, *Chinese Exploit Formosa Worse than Japs Did*, WASH. DAILY NEWS, March 21, 1946, P.1, 3, cited in Tkacik, *supra* note 687, at 76.

¹¹¹⁸ *Id.* with reference to the Memorandum of the Department of State titled “the legal status of Taiwan” on Jul.13, 1971 from the Office of the Legal Advisor to the Director of Republic of China Affairs under the US Department of State.

¹¹¹⁹ For the discussion of failed state, *see* P.45-48.



both the PRC government and ROC government were not invited to attend the meeting.

The North Korea and South Korea governments were also excluded in the Peace Treaty with Japan. Furthermore, it could be inferred from the statements of representatives of both the US and UK that they had no intention to put Taiwan into the hands of a communist China. Even if the Cairo and Potsdam documents have binding effects, the *rebus sic stantibus* of Article 62 of the VCLT¹¹²⁰ refers to the occurrence of an event that, according to the ICJ, “radically transform[s] the extent of the obligations.”¹¹²¹ It appears that the Article 62 would qualify as an unforeseeable external change which has affected the circumstances that formed the basis for concluding the treaty.¹¹²² Moreover, the 31(1), (3) of Vienna Convention provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose; any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” From the CAC documents during 1943 and 1944 mentioned above, it was clear that the true intention of the US was to put Taiwan into a friendly hand and ensure

¹¹²⁰ Vienna Convention, *supra* note 196, art. 62(1) reads: “A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty”..

¹¹²¹ Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997. ICJ Reports 1997, p. 61, para. 104, *available at* <https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf> (Last visited May.2, 2022)

¹¹²² Koskenmäki, *supra* note 195, at 20-1.

US predominance in the Asia Pacific region.¹¹²³ Therefore, the change of Chinese government after 1949 and the true intentions expressed by the relevant parties are also valid causes to reject the executing the specific terms of the Cairo Proclamation and the Potsdam declaration.



Last, the USSR did not declare war against Japan until August 8, 1945, after it had learned that Japan was negotiating surrender.¹¹²⁴ The absence of the USSR, which was hardly a warring party of the Asia-Pacific war zone and not a relevant party of the disposition of Taiwan, should not affect the validity of the terms regarding the legal status of the Peace Treaty with Japan.

4.2 Positions of the ROC Government in Exile

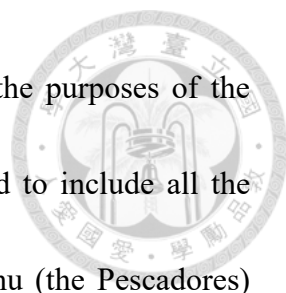
a, Pursuant to the Cairo Declaration and Potsdam Proclamation, Japan returned the island of Taiwan to the ROC by the surrender of the Japanese military authority to the Chinese authority in Taipei in 1945.¹¹²⁵

b. According the Article 10 of the Taipei Treaty signed between the Japanese

¹¹²³ For discussion of the CAC documents during 1943 and 1944, *see* P.186-97.

¹¹²⁴ Chiang, *supra* note 236, at 105.

¹¹²⁵ The Ministry of foreign affairs of Republic of China, Waijiaobu Chengqing Shuoming Kailuoxuanyan Xi Juyou Falv Jushuli De Tiaoyue Xieding (The Ministry of foreign affairs clarifies that the Cairo Proclamation is a binding treaty), Jan.21, 2014, *available at* https://www.mofa.gov.tw/News_Content.aspx?n=8742dce7a2a28761&sms=491d0e5bf5f4bc36&s=5d55072ef963cba6



government and the ROC government in 1952, it states that “for the purposes of the present Treaty, nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) and their descendants who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).” This article in effect restored the sovereignty of Taiwan to the Republic of China.¹¹²⁶

c. Even if the Cairo Declaration and Potsdam Proclamation are just documents of intention, ROC also acquired the territory of Taiwan by occupying *territorium nullius* in 1952. Since Japan did not denote the beneficiary of the title of Taiwan, the regime administering it simultaneously acquired it upon Japan’s denouncement.

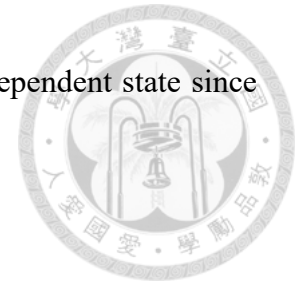
d. After the KMT was forced to exile in Taiwan, it created some political slogans collectively characterized here as the “one China dogma.” which is, “There is only one China; China means the Republic of China; the Republic of China’s territory consists of China proper and the island of Taiwan; and the People’s Republic of China (PRC) illegally occupies the Republic of China’s territory.”¹¹²⁷

e. After the democratization of Taiwan, the Government of the so called ROC claimed

¹¹²⁶ The Ministry of foreign affairs of Republic of China ,*Zhongriheyue Yu Taiwan De Falv Diwei* (the Taipei Treaty and Taiwan’s legal status), Aug.16, 2012, available at <https://www.mofa.gov.tw/cp.aspx?n=204> (Last visited May 2, 2022)

¹¹²⁷ Chiang, *supra* note 236, at 136.

that the Republic of China has been without doubt a sovereign independent state since 1912, which relocated its regime to Taiwan in 1949.¹¹²⁸



Rebuttals:

a. Pursuant to the Cairo Declaration and Potsdam Proclamation, Japan returned the island of Taiwan to the ROC by the surrender of the Japanese military authority to the Chinese authority in Taipei in 1945.

This claim can be refuted by the same reasons given to PRC's Claim. Taiwan had been a territory of Japan until the conclusion of Peace Treaty between Japan and the Allied Power signed in 1952. Thus, the two documents are overridden by the Peace Treaty with Japan in 1952, whereby Japan only denounced the title to the Formosa.

In the Instrument of Surrender, it was noted as follows:

We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that

¹¹²⁸ Interview with the Taiwan President Lee Teng-hui, Deutsche Welle (July.9, 1999), transcript available at <https://www.taiwandc.org/nws-9926.htm> (Last visited Feb.22, 2022).

Declaration.¹¹²⁹

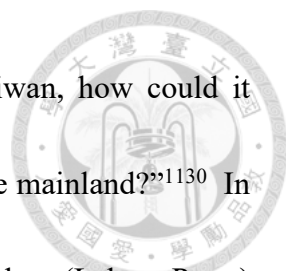


From the wording of the instrument, it is clear that the party holding the right of disposition of Taiwan is the Allied Power as a whole, and the representatives of the Allied Powers designated to accept Japan's surrender in different war zones were only acting in the name of Allied Power pending the final disposition by the Peace Treaty with Japan. The ROC government was just a mandatory delegated by General Douglas MacArthur-the Supreme Commander for the Allied Powers in the Pacific.

Even if the Cairo Declaration and Potsdam proclamation are bounding documents as the KMT government claimed, as the general rule of interpretation of treaties, the 31(1),(3) of Vienna Convention provides: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose; any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

In a declassified letter from Chiang Kai Shek to Chen Cheng in November 1949, Chiang stated: "Before the Peace Treaty with Japan is concluded, the ROC government is just a

¹¹²⁹ Japanese Instrument of Surrender, Sept.2, 1945, available at <https://www.ndl.go.jp/constitution/e/etc/c05.html> (Last visited May 2, 2022)



mandatory power delegated by the Allied Power to take over Taiwan, how could it possible for us to take Taiwan as a steppingstone to counterattack the mainland?”¹¹³⁰ In the same year, British Foreign Secretary Mayhew of the Attlee (Labor Party) Administration said in the House that “the Chinese Nationalist authorities are in control of the island [of Formosa]. However, [any] change in the legal status of Formosa can only be formally effected in a treaty of peace with Japan.”¹¹³¹ In addition, Truman reiterated the CAC’s declaration on June 27, 1950, two days after the Korean War broke out, that “The determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations.”¹¹³² There was clearly an agreement among the three parties of Cairo Declaration and Potsdam Proclamation that the administration of ROC over Taiwan is provisional pending a final arrangement between the Allied Powers and Japan.

b. According to the Taipei Treaty signed between the Japanese government and the ROC government in 1952, nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan and the Pescadores. It

¹¹³⁰ Zhong Lihua, *Guoshiguan Jiemi Jiangjieshi Ceng Yan Taiwan Buguo Wei Woguo Yi Tuoguan* (Academia Historica Revealing Chiang Kai Shek’s Acknowledgement of Taiwan’s Legal Status as a Mandated Territory) LIBERTY TIMES (Jan. 4, 2017), at <https://news.ltn.com.tw/news/politics/paper/1068163> (last visited Feb.22,2022).

¹¹³¹ 469 PARL. DEB., H.C. (5th ser.) (1949) at 1679, cited in Chiang, *supra* note 236, at 226.

¹¹³² Harry S. Truman, *Statement by the President on the Situation in Korea* (Jun.27, 1950), available at <https://history.state.gov/historicaldocuments/frus1950v07/d119> (last visited Feb.22, 2022).

in effect restored the sovereignty of Taiwan to the Republic of China.¹¹³³

International practice shows that the grant of nationality is a matter that only States by their domestic law can perform, which do not necessarily or automatically have international law effect.¹¹³⁴ Nationality is dependent upon statehood, not vice versa.¹¹³⁵

Regarding the Taipei Treaty, in 1964, Japanese Minister for Foreign Affairs Masayoshi Ōhira explained in the House of Councilors:

This note of exchange has nothing to do with the Republic of China's territorial sovereignty... The effect of this provision is under the prerequisite of the Republic of China's actual administration over these territories and clearly does not mean its Government has the territorial sovereignty over these territories. We used the word "control" to make such a connotation obvious.¹¹³⁶

The above statement of Masayoshi Ōhira is in line with international law and state practice. As observed in Chapter II, the Mandatory possesses the right to exercise the

¹¹³³ The Ministry of foreign affairs of Republic of China ,Zhongriheyue Yu Taiwan De Falv Diwei (the Taipei Treaty and Taiwan's legal status), Aug.16, 2012, *available at* <https://www.mofa.gov.tw/cp.aspx?n=204> (Last visited May 2, 2022)

¹¹³⁴ *Nottebohm Case (second phase), Judgment of April 6th, 19 55: I.C. J. Reports 1955, p. 4, 21, available at* <https://www.icj-cij.org/public/files/case-related/18/018-19550406-JUD-01-00-EN.pdf>(last visited Feb.22, 2022).

¹¹³⁵ Crawford, *supra* note 30, at 52.

¹¹³⁶ The 46th House of Councilors Budget Committee No.3 (Feb.12, 1964), *available at* <https://kokkai.ndl.go.jp/#/detail?minId=104615261X00319640212> (in Japanese) (last visited Feb.22, 2022).

powers of sovereignty over a territory without having sovereignty.¹¹³⁷ For example, in French Togoland, the natives could acquire French nationality; this was also the case in Ruanda-Urundi in South-West Africa, in Western Samoa and in the Japanese Islands.¹¹³⁸

Thus, KMT's claim of sovereignty over Taiwan based on nationality and administration is groundless.

c. The ROC had acquired the territory of Taiwan by occupying territorium nullius in 1952. With Japan not denoting the beneficiary of the title of Taiwan, the regime administering it simultaneously acquired it upon Japan's renouncement.

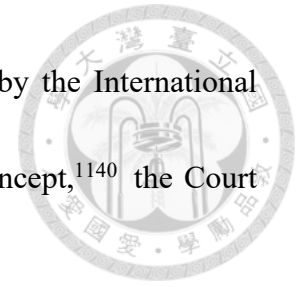
There have been a consensus among legal scholarship in contemporary international law that an area inhabited by a political society is not territorium nullius, where a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards.¹¹³⁹

¹¹³⁷ Hales, *supra* note 26, at 94.

¹¹³⁸ *Id.* at 110.

¹¹³⁹ M.F. Lindley, Acquisition and Government of Backward Territory in International Law 22–3 (1926); A.N. Allott, *Boundaries and the Law in Africa*, in African Boundary Problems 15 (C.G. Widstrand eds., 1969); D.P. O'Connell, *International Law and Boundary Disputes*, 54 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 77, 80–1 (1960).

The restrictive view of the concept of terra nullius was affirmed by the International Court in the Western Sahara case. After succinctly defining the concept,¹¹⁴⁰ the Court continued:



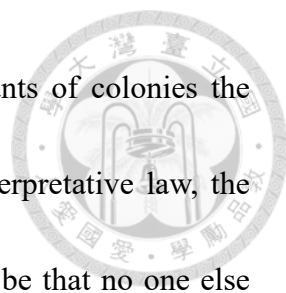
The State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through ‘occupation’ of *terra nullius* by original title but through agreements concluded with local rulers. Such agreements with local rulers, whether or not considered as an actual ‘cession’ of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.¹¹⁴¹

The theories mentioned above in addition to the Western Sahara Opinion provide a decisive refutation to ROC’s claim of acquiring the title of Taiwan by occupying *territorium nullius*.

Furthermore, ROC’s claim is in violation of the principal of self-determination

¹¹⁴⁰ Western Sahara Opinion, *supra* note 134, at 39 (para 79): “a determination that Western Sahara was a “*terra nullius*” at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of “occupation”.

¹¹⁴¹ *Id.*, at 39 (para 80).



developed during decolonization process, which grant the inhabitants of colonies the right to form their own government. Given the retroactivity of interpretative law, the interpretation of the wordings in the Peace Treaty with Japan must be that no one else but the Taiwanese people had simultaneously acquired the sovereignty of Taiwan upon Japan's renouncement.

d. There is only one China; China means the Republic of China; the Republic of China's territory consists of China proper and the island of Taiwan; and the People's Republic of China (PRC) illegally occupies the Republic of China's territory. At any rate, the constitution in use in Taiwan today does not stipulate otherwise.

As observed in Chapter II, the creation of statehood is a matter of fact instead of a matter of law except for the right of self-determination. The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.(e) self-determination of the inhabitants. These criteria have to be based on the principle of effectiveness among territorial units.¹¹⁴²

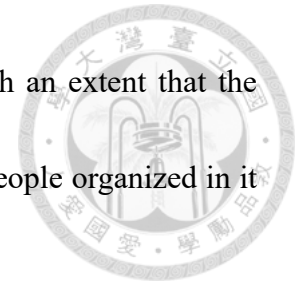
¹¹⁴² For theories about statehood, *see* P.17-45.

By late 1950s, the PRC government had been firmly established, controlling China proper except for two small offshore islands (Kinmen and Matsu). In contrast, the ROC government only controlled the two Chinese small offshore islands and the island of Taiwan which was not its territory.



As has discussed in the state identity/continuity section of Chapter II, scholars have long stressed the artificial or imagined character of nations, which are the result of projection rather than the work of an authentic national essence. According to the aforementioned theories, state identity is not lost due to territorial changes, except if the loss is “total or very considerable”; due to internal changes, whether brought about by constitutional means or revolution; the procedural approach using statehood paradigm based the state identity/continuity on the formal elements of statehood in the context of claim, recognition and acquiescence. Accordingly, a state continues as such as a matter of international law as long as an identified polity exists with respect to a significant part of a given territory and people; relying on the traditional elements of statehood in their material form, typically population and territory, state’s historical interconnection continuity is based on the material element of the people, which constitutes the international personality of the state, notwithstanding changes in the legal order or government of the state. The international legal capacity of a State, however, remains

the same unless its substrate (territory and people) changes to such an extent that the continuity of the state as the historical-political form of life of the people organized in it is interrupted.¹¹⁴³



Following the above theories, in the case of USSR and Russia, as the “core” State of Russia occupying three fourths territories of the USSR is able to retain the identity of the former Union, the Russian Federation’s claim to continue the legal personality of the USSR and retain its seat in the UN is generally accepted.¹¹⁴⁴ In contrast, the Federal Republic of Yugoslavia’s claim to continue the international legal personality of the SFRY was rejected by the UN Security Council, which declared in 1992 that:

[T]he state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist [...] [The Security Council] [c]onsiders that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in

¹¹⁴³ For theories about state identity/continuity, see P. 45-56.

¹¹⁴⁴ Crawford, *supra* note 30, at 677-8.

the work of the General Assembly [...] ¹¹⁴⁵



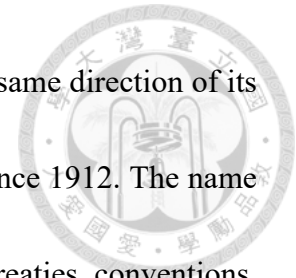
When the General Assembly convened in September 1971, Members who spoke in opposition to the draft resolution presented by the US and other members calling for the seating of both the People's Republic of China and the Republic of China made the point that the precise issue of the restoration of the lawful rights of the People's Republic of China in the United Nations did not imply a question of admission or expulsion. Rather, the issue was one of credentials. The vacating of the seat of China by the Chiang Kai-shek régime was a legal, logical consequence of the restoration of the lawful rights of the People's Republic of China. Moreover, Taiwan had never been a Member State of the United Nations. There was only one Chinese State that was entitled to a seat at the United Nations. If Taiwan wants a seat in the UN, it has to apply for membership under the Charter. ¹¹⁴⁶

In the case of the ROC, although it claims to have maintained its legal order in the form of a continuing constitution, given the losing of a significant part of Chinese territories and people, and that the ROC has not been recognized by any international organization

¹¹⁴⁵ S.C.Res.777,U.N.Doc.S/RES/777, Sept.19, 1992, available at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNMembers%20SRES777.pdf> (last visited Feb.22, 2022).

¹¹⁴⁶ United Nations, Yearbook of the United Nations 131 (1971), available at <https://www.un-ilibrary.org/content/books/9789210601986/read> (last visited Feb.22, 2022).

or major state since 1979, all theories mentioned above point to the same direction of its discontinuity and loss of identity as the state of China established since 1912. The name of ROC almost disappeared in all sources of international law, eg., treaties, conventions, diplomatic documents and accounts since the late 1970s.



With regard to ROC's membership in UN during 1949-1979, since governmental recognition is a highly political affair and the admission by UN as a member state is not a way to create statehood, but a form of group recognition to consolidate statehood.¹¹⁴⁷

Given the political manipulation of UN during the cold war period, there were instances in pre-1963 practice of premature recommendations for admission. For example, the Republic of Vietnam, which, in 1950, was neither formally independent of France nor had a stable and effective government in the territory it claimed to govern, was admitted as a UN member.¹¹⁴⁸ According to Kelsen, “the political act of recognition, since it has no legal effect whatsoever, it is not constitutive for the legal existence of the recognized state or government.”¹¹⁴⁹

Regarding the constitution of Republic of China imposed on Taiwan, it is important to

¹¹⁴⁷ A detailed discussion of ROC's occupation of China's seat in the UN and its legal effect, *see* P.217-33.

¹¹⁴⁸ Crawford, *supra* note 30, at 180.

¹¹⁴⁹ Kelsen, *supra* note 78, at 605.

note that statehood is not solely dictated by the constitutional law of a state. According to



Therefore, the claim that the Republic of China's territory consists of China proper and the island of Taiwan is also without any foundation.

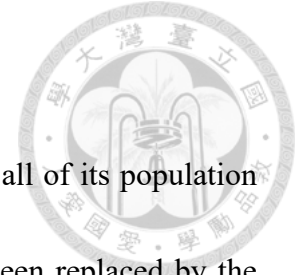
e. Republic of China is without doubt a sovereign independent state since 1912, which has relocated its regime to Taiwan since 1949.

As discussed already, the KMT Government was just a mandatory delegated by the Allied Power of World War II to administrate Taiwan since 1945.¹¹⁵⁰ The crux of the non-sovereign position of the Mandatory or Administering Authority was that it could not unilaterally determine the status of the territory. The fundamental long-term goal of Mandates and Trust territories was the progression to self-government of the people of the territory.¹¹⁵¹

On the other hand, ROC's continuity as the state of China established since 1912 subsisting in Taiwan up until now was also refuted by the reasons given to the previous claim of the KMT government.

¹¹⁵⁰ For a detailed discussion of the nature of KMT's administration during this period, see P.185-200.

¹¹⁵¹ Crawford, *supra* note 30, at 573.



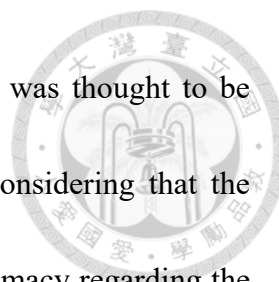
As Chiang's regime lost the substrate of the state of China- almost all of its population and territory, ROC's continuity/identity as the state of China has been replaced by the People's Republic of China since 1949, not to mention China has never got the sovereignty of Taiwan. As aforementioned, the UN membership of ROC from 1949 to 1971 was categorized as group political recognition without legal effect. The ROC government taking exile in Taiwan is incompetent to speak on behalf of China since then.

Thus, the claim of ROC as "ROC on Taiwan" is also groundless.

f. PRC and ROC are divided nations, both of the two Chinas are working toward the same direction of reunification, just like the two Germanys and two Koreas.

The characteristics of a divided nation have already been discussed in Chap. II, which are summarized as follows:

A. Immediately before World War II, the divided nations constitute a single entity. After the war, however, the expanded divisions and conflicts between Soviet Union and the US eventually compelled the establishment of two states on each side of the former country/entity, despite that it violated the original international arrangement.



B. At the time, the democratic government supported by the west was thought to be legitimately formed and had gained worldwide recognition. Yet considering that the formation of state is a matter of fact, the lack of fundamental illegitimacy regarding the formation of the socialist states and their consolidated statehood over a long period of time finally compelled the universal recognition and membership in the United Nation.


C. As the former entity/state was divided into two sections with almost equal areas, neither of the two states are able to claim continuity/identity of the pre-war state/entity. The state extinction/ succession scenario therefore can hardly be applicable to the two cases.

D. Given that statehood takes priority over other kinds of territorial transference, the establishment of the two states in violation of the war-time arrangement or peace treaties eventually gained legitimacy over time.

E. The tenets of the Divided Nation “is not whether two entities are bound to work towards the reunification of the nation and their reabsorption into a single State; but whether they do actually constitute parts of a single State”¹¹⁵² or entity immediately before the war.

In the case of Taiwan, however, first, China and Taiwan did not constitute parts of a

¹¹⁵² Crawford, *supra* note 30, at 451.



single State immediately before World War II, which was a formal colony of Japan until the Peace Treaty with Japan was signed in 1951. Second, the ROC government in exile has lost its identity/continuity as the state of China since 1949 due to a considerable loss of Chinese population and territories. Moreover, the KMT government was just a mandatory delegated by the Allied power to administrate Taiwan provisionally, which could not decide the legal status of Taiwan unilaterally, once Taiwan achieved self-determination and independence, the sovereignty of Taiwan would be transferred to the Taiwanese. Thus, KMT has no residual power to decide the future of Taiwan.¹¹⁵³

Caty excludes the Chinese situation from the rubric “divided State” on the ground that Taiwan is a separate State.¹¹⁵⁴ Crawford argued that no general conception of divided statehood is of value in analyzing the legal status of Taiwan.¹¹⁵⁵

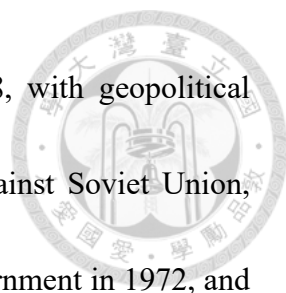
Thus, the relationship between the ROC government in exile and the People’s Republic of China cannot be categorized as divided nation.

4.3 Positions of the US

¹¹⁵³ For a detailed discussion of the nature of KMT’s administration during this period, see P.219-61.

¹¹⁵⁴ G. CATY, *LE STATUT JURIDIQUE DES ÉTATS DIVISÉS* 23–30 (1969), cite in Crawford, *supra* note 30, at 477.

¹¹⁵⁵ Crawford, *id.*



a. After the UN General Assembly adopted Resolution No. 2758, with geopolitical reasons of a cease fire in Vietnam and an alliance with China against Soviet Union, Nixon broke the ice between the US Government and the PRC government in 1972, and softened his attitude toward China. His policy toward China was reflected in the Shanghai Communiqué of 1972 (known simply as the “Shanghai Communiqué”),¹¹⁵⁶ which was a unique joint declaration, each government declared its own view on the same issues. On the Taiwan issue, **the PRC government stated:**

The Chinese side reaffirmed its position: the Government of the People’s Republic of China is the sole legal government of China; Taiwan is a province of China which has long been returned to the motherland; the liberation of Taiwan is China’s internal affair in which no other country has the right to interfere; and all US forces and military installations must be withdrawn from Taiwan. The Chinese Government firmly opposes any activities which aim at the creation of “one China, one Taiwan,” “one China, two governments,” “two Chinas,” an “independent Taiwan” or advocate that the “status of Taiwan remains to be determined.

With regard to “Taiwan ... has long been returned to the motherland”, the PRC

¹¹⁵⁶ Shanghai Communiqué, Feb. 27, 1972), available at <https://digitalarchive.wilsoncenter.org/document/121325> (Last visited May 2, 2022)

government in its 2000 White Paper explained that, “[O]n October 25, 1945, the Chinese government recovered Taiwan and the Penghu Archipelago.”¹¹⁵⁷



In response, The US side declared:

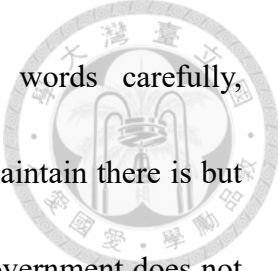
The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves. With this prospect in mind, it affirms the ultimate objective of the withdrawal of all US forces and military installations from Taiwan. In the meantime, it will progressively reduce its forces and military installations on Taiwan as the tension in the area diminishes.¹¹⁵⁸

Reappraisal:

As discussed in Chap III, at the time, the ROC government taking exile on Taiwan was not only authoritarian but also colonial for the Taiwanese people; the ROC government in exile was hardly a representative government of Taiwan, which was not entitled to

¹¹⁵⁷ “White Paper-The One-China Principle and the Taiwan Issue (2000)” issued by the PRC government State Council and the Taiwanese Affairs Office on February 21, 2000, *available at* <http://www.taiwandocuments.org/white.htm> (Last visited May 2, 2022)

¹¹⁵⁸ *id.*



decide the legal status of Taiwan unilaterally. Choosing the words carefully, “acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. [t]he United States Government does not challenge that position”¹¹⁵⁹ simply means that the US Government did not deny the fact that Chinese took the position that Taiwan was part of China. Since mandatory cannot unilaterally decide the legal status of the mandated territory,¹¹⁶⁰ without equal representatives of Taiwanese in the central government, the KMT government’s position that there is but one China and that Taiwan is a part of China was in violation of the principal of self-determination, which did not have any legal effect. Therefore, Nixon’s response was just a diplomatic expedient to appease the PRC.

Furthermore, “a peaceful settlement of the Taiwan question by the Chinese themselves” was also a diplomatic expedient, which did not necessarily mean the sovereignty of Taiwan is an open question to be solved by the Chinese. First, the Taiwan question could mean the civil war between the ROC government in exile and the PRC Government. Second, as aforesaid, the Peace Treaty signed between the Allied Powers and Japan was final, and the Taiwanese people have become the new sovereign of Taiwan since self-determination became preemptory international law.

¹¹⁵⁹ Shanghai Communique, *supra* note 1156.

¹¹⁶⁰ Crawford, *supra* note 30, at 573.



b. On December 15, 1978, the Carter Administration withdrew recognition of the ROC and recognized the PRC as the representative government of China by establishing diplomatic relations with it. The policy statements were made in the Joint Communiqué on Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China announced on January 1, 1979.¹¹⁶¹ The Communiqué was later called "the Second Communiqué." The Carter Administration again, like Nixon's, only acknowledged China's claim over Taiwan. The Second Communiqué states, "The United States of America and the People's Republic of China reaffirm the principles agreed on by the two sides in the Shanghai Communiqué, and emphasize once again that: The government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China."

Reappraisal:

The Second Communiqué dropped the ambiguous sentence that appeared in the Shanghai Communiqué that "The United States Government does not challenge the position of Chinese." Since the PRC had distorted its meaning, the US instead made it

¹¹⁶¹ The Joint Communiqué on Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, Jan. 1, 1979, *available at* <https://www.ait.org.tw/our-relationship/policy-history/key-u-s-foreign-policy-documents-region/u-s-prc-joint-communicue-1979/> (Last visited May 2, 2022)



clearer that: “The government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.” Yet “The United States has not itself agreed to this position.”¹¹⁶²

c. Immediately after withdrawing recognition of the ROC government, the United States enacted Taiwan Relations Act (TRA), which prescribes that “in furtherance of the policy of this Act, the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capabilities”¹¹⁶³ became law on January 1, 1979. The Act establishes the American Institute in Taiwan (AIT) as the US unofficial representative for maintaining relations with Taiwan. Section 2(b) of TRA¹¹⁶⁴ sets forth the main objects of the Act. It states, (3) to make clear that the United States decision to establish diplomatic relations with the People’s Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means; (4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific and are of grave

¹¹⁶² Andrews & Chabot, *supra* note 1022.

¹¹⁶³ Sec. 3 of Taiwan Relations Act. The Act was approved by the Congress on April 10, 1979, but was effective retroactively on January 1, 1979. Available at <https://www.ait.org.tw/our-relationship/policy-history/key-u-s-foreign-policy-documents-region/taiwan-relations-act/> (Last visited May.2, 2022) The Act was approved by the Congress on April 10, 1979, but was effective retroactively on January 1, 1979.

¹¹⁶⁴ *Id.*

concern to the United States;



Reappraisal:

In fact, the Act positively indicates that Taiwan is not China’s territory.¹¹⁶⁵ If the US recognizes Taiwan as part of China, any intervention of US would be prevented by the non-invention principal of UN Charter. This point was later confirmed by Harvey Feldman, who was involved in drafting the Act, Feldman recalled: “Washington’s “one-China policy” says we have diplomatic relations only with Beijing, though we maintain all other relations with Taipei, and we ‘acknowledge’ China’s claim to the island, but we make no statement about Taiwan’s status.”¹¹⁶⁶

d. In October 1981, China’s Foreign Minister Huang Hua met with President Reagan and the US Secretary of State Alexander Haig in Washington, DC. It was widely reported that the two sides discussed the US’ reduction of arms sales to Taiwan and possible sale of arms to China.¹¹⁶⁷

¹¹⁶⁵ Chiang, *supra* note 236, at 245.

¹¹⁶⁶ Harvey Feldman, *United States is Caught Between Two Governments Glaring Across a One-China Policy*, L.A.TIMES, Aug.12, 2003, at <https://www.latimes.com/archives/la-xpm-2003-dec-08-oe-feldman8-story.html> (Last visited May 2, 2022)

¹¹⁶⁷ Chiang, *supra* note 236, at 247.



To alleviate the fear of the Chinese Nationalist officials in Taiwan, President Reagan sent to President Chiang Ching-kuo of a private letter which contained a policy statement on July 14, 1982. The letter, which listed six points that the US Government “would not accede to in any agreement with mainland China,”¹¹⁶⁸ came to be known as the Six Assurances. The Six Assurances offered by the US Government to the ROC government are that, in dealing with the PRC government, the United States will not: (1) set a date for termination of arms sales to Taiwan; (2) consult with China on arms sales to Taiwan; (3) play a mediation role between PRC and Taiwan; (4) revise Taiwan Relations Act; (5) alter its position regarding sovereignty over Taiwan; or (6) exert pressure on Taipei to enter into negotiations with Beijing.¹¹⁶⁹

Reappraisal:

The assurance that “[t]he United States will not alter its position regarding sovereignty over Taiwan”¹¹⁷⁰ means that Reagan, consistent with the US’ position in the TRA, will not change the long held position of the United States on the legal status of the island of

¹¹⁶⁸ Steve Lohr, Taiwan Expresses Regret Over Communique, N. Y. TIMES, Aug.18, 1982, at A13. Available at <https://www.nytimes.com/1982/08/18/world/taiwan-expresses-regret-over-communique.html> (Last visited May 2, 2022)

¹¹⁶⁹ Chiang, *supra* note 236, at 248; President Reagan’s Six Assurances to Taiwan, CONGRESSIONAL RESEARCH, Oct.8, 2020, available at <https://sgp.fas.org/crs/row/IF11665.pdf> (Last visited Sept.8, 2022)

¹¹⁷⁰ The “Six Assurances” to Taiwan, available at <https://www.ait.org.tw/our-relationship/policy-history/key-u-s-foreign-policy-documents-region/six-assurances-1982/> (Last visited May 2, 2022)

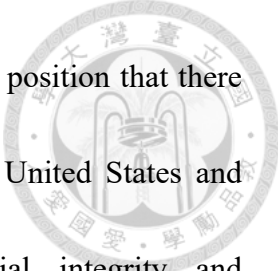
Taiwan—that the United States only acknowledges China’s position but does not recognize Taiwan as China’s territory.



And what was that position specifically? As the State Department wrote in a letter to Senator John East in September of 1982, “The US takes no position on the question of Taiwan’s sovereignty.” This position was explicated in a state Department memorandum to the US Senate in 1970, which said that “As Taiwan and the Pescadores are not covered by any existing international disposition; sovereignty over the area is an unsettled question subject to future international resolution.”¹¹⁷¹

e. On August 17, 1982, with respect to the arm sales to Taiwan, the Reagan Administration and the PRC government issued a third joint communique’ called the Third US-China Joint Communique’ on Arms Sales to Taiwan (known as “the Third Communique’”). The Third Joint Communique’ announced that “arms sale to Taiwan will not exceed, either in quantitative or qualitative terms, the level of those supplied in recent years.” Regarding the legal status of Taiwan, the Third Communique’ confirmed what the Shanghai Communique’ and the Second Communique’ did: the United States simply took notice of what the PRC government claimed. The Third Communique’

¹¹⁷¹ Tkacik, *supra* note 1023, at 191-2.



stated that “the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.” It stated that the United States and China’s “[r]espect for each other’s sovereignty and territorial integrity and noninterference [in] each other’s internal affairs constitute the fundamental principles guiding [US]China relations. ¹¹⁷²

Reappraisal:

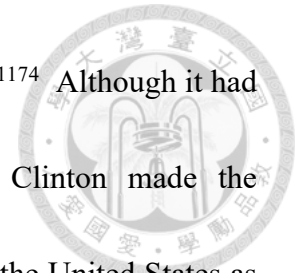
Since the US would continue “its arms sales to Taiwan”, it means that in the eyes of the Reagan Administration, arms sales to Taiwan did not “infring[e] on China’s sovereignty and territorial integrity.” If the US government recognizes Taiwan as part of China, arms sales to Taiwan would infringe on the territory integrity of China, thus, such a statement implies that the US had not recognized Taiwan as China’s territory. ¹¹⁷³

f. In June 1998, Clinton made an official trip to China, and made a policy statement, subsequently called the “Three-nos statement.” The “Three-nos statement” was “no [US] support for an independent Taiwan, no recognition for a separate Taiwan Government,

¹¹⁷² United States-China Joint Communique on United States Arms Sales to Taiwan, August 17, 1982, *available at* <https://www.reaganlibrary.gov/archives/speech/united-states-china-joint-communique-united-states-arms-sales-taiwan> (Last visited Sept.8, 2022)

¹¹⁷³ Chiang, *supra* note 236, at 250.

and no support for Taiwan's entry into international organizations.”¹¹⁷⁴ Although it had not recognized China's sovereignty over Taiwan, as soon as Clinton made the “Three-nos statement,” he was criticized by conservative groups in the United States as selling out Taiwan to the PRC, since the statement was “cited by the PRC government as further justification of its claims of sovereignty [over Taiwan.]”¹¹⁷⁵



In August 2002, in an annual conference of the World Federation of Taiwanese Associations, Chen gave a speech to the group via close circuit TV in Tokyo, proclaiming that “Taiwan and China are two countries, each on one side of the Taiwan Strait and that the (ROC) Institute of Legislation (the Legislature Yuan) should consider passing a referendum law [permitting the people] to protect its sovereignty.”¹¹⁷⁶ The proclamation became known as the “two countries each on one side [of the Taiwan Strait]” statement.¹¹⁷⁷ However, this statement alarmed the Bush Administration just as it was powering up its international campaign to disarm Iraq. In August 2001, Deputy Secretary of State Richard Armitage flew to Beijing, probing for China's position for

¹¹⁷⁴ See Philip Shenon, No Policy Turn, US Assures Taiwan Again, N.Y.TIMES, Jul.7, 1998, at A9, available at <https://www.nytimes.com/1998/07/07/world/no-policy-turn-us-assures-taiwan-again.html> (Last visited May 2, 2022)

¹¹⁷⁵ Larry M. Wortzel, Why the Administration Should Reaffirm the "Six Assurances" to Taiwan, HERITAGE FOUNDATION, Mar.16, 2000, available at <https://www.heritage.org/asia/report/why-the-administration-should-reaffirm-the-six-assurances-totaiwan> (Last visited May 2, 2022)

¹¹⁷⁶ Sandy Huang, *Pan blue camp pans Chen's talk*, TAIPEI TIMES, Aug.5, 2002, P.1, available at <http://www.taipeitimes.com/News/front/print/2002/08/05/0000159038> (Last visited May 2, 2022)

¹¹⁷⁷ Chiang, *supra* note 236, at 165.

Iraq. He reiterated that the US “did not support Taiwan independence”¹¹⁷⁸



In July 2021, in an online discussion hosted by the Asia Society Policy Institute (ASPI), White House coordinator for the Indo-Pacific Kurt Campbell noted that the US supports a strong “unofficial relationship” with Taiwan but that “we do not support Taiwan independence.” He stressed that the Biden administration is fully cognizant of the “sensitivities” involved in cross-strait relations.¹¹⁷⁹

Reappraisal:

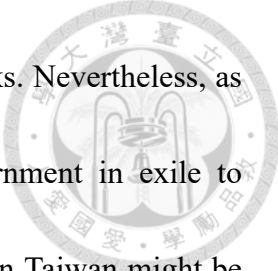
When Henry Kissinger paid a secret trip to China in 1971, on the one hand, he tried to appease the PRC by saying not pursuing a policy of “one China, one Taiwan”, on the other hand, Kissinger also stressed that “some events in Taiwan might be beyond our ability to control.”¹¹⁸⁰

At the time, the ROC government in exile was hardly a representative government of Taiwan, which maintained also the “One China Doctrine” to prevent Taiwan’s

¹¹⁷⁸ James Wang, *Armitage’s clarification is sensible*, TAIPEI TIMES, Sept.9, 2002, available at <https://www.taipeitimes.com/News/editorials/archives/2002/09/09/0000167432> (Last visited Feb. 22, 2022).

¹¹⁷⁹ Keoni Everington, *White House says it does not support Taiwan independence: White House official describes relations with Taiwan as 'dangerous balance'*, TAIPEI TIMES, July 7, 2021, available at <https://www.taiwannews.com.tw/en/news/4242061> (Last visited May.2, 2022)

¹¹⁸⁰ See Henry Kissinger, Memorandum to the President, July 14, 1971, p.13, available at <https://2001-2009.state.gov/documents/organization/72581.pdf> (Last visited May 2, 2022)



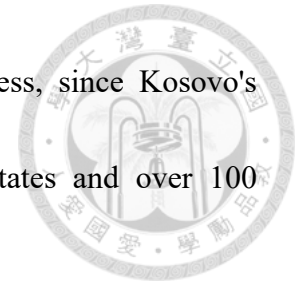
independence. It is comprehensible why Kissinger made such remarks. Nevertheless, as discussed earlier, the US long time policy is for the ROC government in exile to develop into a representative government of Taiwan. “Some events in Taiwan might be beyond our ability to control” probably means that the democratic development and independence of Taiwan would not be in the control of both the ROC government in exile and the US government. That is because the State in the contemplation of international law is a “primary fact”, i.e. a fact that precedes the law, which the law acknowledges only once it has materialized, by attributing certain effects to it, including a certain legal status.¹¹⁸¹ Arthur Hummel, then Assistant Secretary of State and later ambassador to Beijing, once said “Down the road, perhaps the only solution would be an independent Taiwan.”¹¹⁸²

As a matter of fact, the State Department apparently does not construe “no support” as meaning “oppose.” In a different context, State Department spokesman James Foley was asked, “Do you all oppose independence for Kosovo under any circumstances at any time?” Foley replied, “Well, we have made clear that we do not support Kosovo

¹¹⁸¹ Georges abi-saab, *Conclusions, in SECESSION: INTERNATIONAL LAW PERSPECTIVES* 470 (Marcelo G. Kohen ed., 2006).

¹¹⁸² WILLIAM BURR, *KISSINGER TRANSCRIPTS: THE TOP SECRET TALKS WITH BEIJING AND MOSCOW* 464 (1999).

independence. I do not care to elaborate on that.”¹¹⁸³ Nevertheless, since Kosovo's independence in 2008, it has been recognized by the United States and over 100 UN-member countries as an independent sovereign state.



Therefore, whether the US supports the independence of Taiwan or not, it cannot be oblivious to the law and fact.

5. Statehood Attained and Obstacles to a Full-functioning State

5.1 Achieving Self-determination

Since Taiwan has met the four criteria of statehood- a permanent population, a defined territory, effective government and the capacity to enter into relations with other States established by the Montevideo Convention, the key issue here is to decide the critical time of the Taiwanese people's attainment of self-determination, which has become a constitutive element of statehood as discussed earlier. The previous discussions have established Taiwan's legal status as a self-determination unit similar to mandate/trusteeship/non-self-governing territory. The right of self-determination has been vested in the Taiwanese as a measure to finally determine the legal status of

¹¹⁸³ Cited in Tkacik, *supra* note 687, at 99.

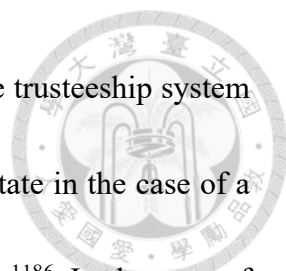
Taiwan. However, without being formally listed as trusteeship/non-self-governing territory, Taiwan had experienced a tortuous development of self-determination and democratization.



After the KMT government took exile in Taiwan, the Taiwanese citizens became increasingly frustrated by their lack of influence on the central government. Chiang Ching-kuo initially responded by calling for the arrests of the democratic activists and the blacklisting of academics who were critical of his regime. In 1979, as the US finally withdrew the political halo by cutting diplomatic relations with the ROC government in exile, Chiang's regime has no excuse to deny democracy request of the Taiwanese people any longer. One year after President Carter's announcement; the Kaohsiung Incident brought the issue to a head. Thousands of supporters gathering outside a political organizing office were met by a brutal crackdown from KMT forces.¹¹⁸⁴ By the late 1980s, inspired by democratization movements spreading from the fall of Berlin Wall, Tiananmen Square Accident, and other demonstrations around the world, Taiwanese citizens demonstrations were boiling over the streets, which sometimes resulted in bloodshed, and the arresting and jailing of organizers and participants.¹¹⁸⁵

¹¹⁸⁴ Chen, *supra* note 835, at 26.

¹¹⁸⁵ JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 5 (2016).



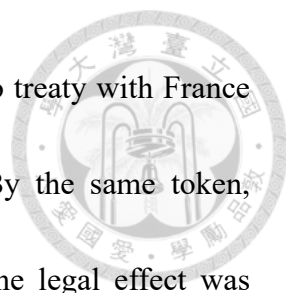
In normal circumstances, UN authorities had the right to wind up the trusteeship system by withdrawing a territory from the authority of the administering State in the case of a fundamental breach of the interest of the people on these territories.¹¹⁸⁶ In the case of Taiwan, however, no UN authority has been put in place to protect the human right of the Taiwanese people, though the supervising role had been played by the leading Allied Power of US from time to time. Throughout the late 1970s and early 1980s, the US Congress held a number of hearings on the human rights situation in Taiwan.¹¹⁸⁷ With the strong support of Taiwanese activists at home and abroad, US policymakers pushed the KMT regime to end its authoritarian abuses and to embark on long sought democratic reforms. Consequently, Chiang allowed the formation of the Democratic Progressive Party (DPP) on September 28, 1986. Less than a year later, on July 14, 1987, Chiang proclaimed the end of the thirty-eight-year martial law in Taiwan.¹¹⁸⁸

Under the mandate system, termination of a Mandate involved compliance with the basic purpose of the Mandate and that effective self-government existed. However, formal termination is not always in place, for example, in the termination of the mandated status of Syria and Lebanon, no formal League action was taken to terminate

¹¹⁸⁶ Crawford, *supra* note 30, at 592.

¹¹⁸⁷ Chen, *supra* note 835, at 26.

¹¹⁸⁸ *Id.* at 27.



the Mandate, which disappeared “with graceless reluctance”.¹¹⁸⁹ No treaty with France formally terminating the French administration was concluded. By the same token, although Taiwan was not put under the UN trusteeship system, the legal effect was similar. These measures taken under the pressure of both US and Taiwanese democratic activists were analogous to the termination of the delegation relationship between the US and the ROC government in exile and the beginning of the process of self-determination.

The internal right to self-determination comprises the right to determine a people’s own destiny, which constitutes a genuine human right.¹¹⁹⁰ Similarly, it could be expressed as the right to govern oneself on the basis of a free and genuine expression of the will of the governed.¹¹⁹¹ On the other hand, the external aspect of the right implies that all peoples “have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation”.¹¹⁹² It implied freedom from any foreign

¹¹⁸⁹ Yoshida, *supra* note 589, at 317.

¹¹⁹⁰ Franck et al, *The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty – Experts Report*. In *SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED* 248 (A.F. Bayefski eds., 2000).

¹¹⁹¹ Lauwers & Smis, *supra* note 123, at 58.

¹¹⁹² CERD, General Recommendation XXI on self-determination, *supra* note 146, at 125, para. 9.

interference that might affect its international status, and freedom from any violation of its independence.¹¹⁹³ Moreover, it is indicated that before the right to external self-determination is recognized by the international community, the internal self-determination regarding the respect of the popular will and human rights and minority rights has to be exercised.¹¹⁹⁴

The self-determination of Taiwanese had been attained in a unique way. In 1984, Chiang Ching-kuo appointed Lee Teng-hui, a Taiwan-born politician as his vice president, who succeeded to the presidency upon Chiang's death in 1988. As a native Taiwanese, Lee's succession was met with an undercurrent of opposition from KMT party cadres.¹¹⁹⁵ Nevertheless, regardless of being condemned as a betrayer of the KMT Party, Lee was determined to respond to the public outcry for political reform after he took the office in 1990.¹¹⁹⁶ He embarked on a series of rigorous political reforms¹¹⁹⁷ to end the colonial and authoritarian ruling of the KMT government.

Measures included the termination of the Period of National Mobilization for

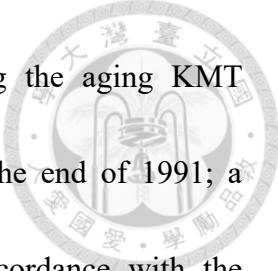
¹¹⁹³ A. Cassese, *The Self-Determination of Peoples*, In THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 95, 100 (L. Henkin eds., 1981).

¹¹⁹⁴ Pazartzis, *supra* note 1047, at 367.

¹¹⁹⁵ Yeh, *supra* note 1185, at 36

¹¹⁹⁶ *Id.* at 37

¹¹⁹⁷ Chiang, *supra* note 236, at 154.



Suppression of the Communist Rebellion in April 1991; forcing the aging KMT legislatures who were elected in China in 1948 to step down at the end of 1991; a legislative election at the end of 1992 that allotted seats in accordance with the Taiwanese population; the first direct presidential election in March 1996 with Lee winning a second term; and the transfer of political power from the KMT to the DPP after the election of Chen Shui-bian as president in May 2000.¹¹⁹⁸ These reforms were facilitated by seven rounds of constitution amendments.

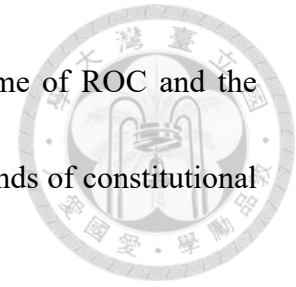
Despite the calling for a brand new constitution tailored for the political reality of Taiwan, with the KMT government remaining in power and no international authorities were in place to supervise the exercising of self-determination of the Taiwanese people, these reforms occurred through a process of negotiations and compromises between the KMT party and a growing civil society of Taiwan.¹¹⁹⁹ The KMT, which had cultivated its systematic advantages¹²⁰⁰ during the authoritarian period, demanded the integrity of the ROC Constitution remain intact to maintain its political legacies and legitimacy of

¹¹⁹⁸ Chen, *supra* note 835, at 27.

¹¹⁹⁹ Yeh, *supra* note 1185, at 37.

¹²⁰⁰ J-r Yeh, *Constitutional Reform and Democratization in Taiwan, 1945 – 2000*, in TAIWAN ' S MODERNIZATION IN GLOBAL PERSPECTIVE 35-36 (PCY Chow ed., 2002) “In the shadow of the KMT government’s power consolidation, economic policies became at best the servant of political mobilization. The state machine intervened extensively by tightly controlling foreign exchange, imports and exports, and market entry, as well as instituting state ownership of several major industries, including transportation, steel, electricity, water, oil, salt, and sugar. As a result of such intrusive regulatory intervention, the state machine penetrated every sector of society, eventually exercising comprehensive controls over universities, the entertainment community, farmers ’ associations, fishermen ’ s associations, labor unions, trade unions, and local financial associations.”

its authoritarian rule in the past four decades. As a result, the name of ROC and the framework of the ROC Constitution remained intact throughout rounds of constitutional revisions.¹²⁰¹



In a separate text annexed to the Constitution, known as the Additional Articles, the rights and obligations and “disposition of other related affairs” between citizens of the Mainland China and those of Taiwan were designated for stipulation by special laws.¹²⁰²

Two geographic regions were created for the purpose of selecting the deputies: “the Free Area” and “the Entire Country.” The term “the Free Area,” by implication, refers to the territory under the actual control of the ROC: the “Province of Taiwan” and China’s two offshore islands, Quemoy and Matsu. The term “the Entire Country,” by implication, refers to both the territory under the control of the ROC and the territory under the control of the PRC.¹²⁰³

This is clearly an “imagined communities” as conceptualized by Benedict Anderson, which has no substantial legal effect in international law. As aforementioned, Taiwan’s legal status as a self-determination unit and the incapability of the delegated KMT

¹²⁰¹ Yeh, *supra* note 1185, at 13.

¹²⁰² *Id.*

¹²⁰³ Additional Articles of the Republic of China, at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000002>. Chiang, *supra* note 236, at 155.

government to universally decide it, have made the legitimacy of these provisions questionable.



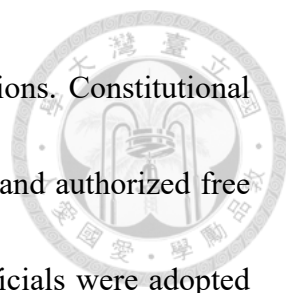
In 2005, the PRC's launching of the Anti-Secession Law¹²⁰⁴, in addition to Gorge W Bush's statement¹²⁰⁵ to discourage the referendum and formal independence of Taiwan in 2004, had spawned the last round of constitution revision in 2005, which took a bold step in locking the ROC Constitution into its current iteration. "The threshold to pass a subsequent constitutional revision was raised an extremely high procedural threshold—so high that many believe any future constitutional revision to be almost impossible."¹²⁰⁶

At any rate, in spite of the problematic constitution name and illegitimate constitutional provisions insisted by the dominating KMT government, the Taiwanese had attained

¹²⁰⁴ Article 8 purports to define certain conditions under which China may use force in relation to Taiwan: (1) attempted separation of Taiwan from China; (2) 'incidents entailing Taiwan's secession from China'; or (3) exhaustion of possibilities for peaceful reunification. In "Anti-Secession Law", *supra* note 864.

¹²⁰⁵ In 2003, Bush for the first time expressed his opposition to Taiwan independence in public. In December of 2003, President Chen Shui-bian proposed that the ROC government, coinciding with the presidential election in March 2004, conduct a referendum in Taiwan pursuant to the ROC's Referendum Law. The Bush Administration condemned the proposal charging that it was a move toward independence. In Chiang, *supra* note 236, at 261 *referencing to* David Sanger, On Eve of Chinese Premier's Visit, White House Warns Taiwan, N.Y. Times, Dec. 8, 2003; Later, when Chinese Premier Wen Jiabao met with President Bush in Washington on December 9, 2003, Bush, standing next to Wen, rebuked Chen for proposing to hold a referendum. After the meeting, Bush said, "(W)e oppose any unilateral decision by either China or Taiwan to change the status quo. And the comments and actions made by the leader of Taiwan indicate that he may be willing to make decisions unilaterally that change the status quo, which we oppose." See Lin Chieh-yu & Charles Snyder, Chen Still Defiant After Bush Rebuke, TAIPEI TIMES, Dec.11, 2003, *available at* <http://www.taipeitimes.com/News/front/archives/2003/12/11/2003079111>. (Last visited May 2, 2022). Cited in Chiang, *supra* note 236, at 261.

¹²⁰⁶ Yeh, *supra* note 1185, at 247.



self-determination through the seven rounds of constitutional revisions. Constitutional amendments adopted in 1991 terminated the Temporary Provisions and authorized free elections in Taiwan. Direct elections for the president and other officials were adopted in 1992. The 2005 amendments disbanded the National Assembly, a remnant of the ROC government in China, and provided for the ratification of constitutional changes by popular referendum held by the 23 million Taiwanese.¹²⁰⁷ By this point, the constitutional independence of Taiwanese people had been achieved through putting the right of constitutional revisions and interpretations into the hands of the Taiwanese people, who would be able to decide their own destiny accordingly thereafter. The fact that the constitution of ROC was originally designed in the mainland China does not derogate from Taiwan’s constitutional independence. As Crawford noted, “the “*principe de validité*” of the new constitution is not its legality under the law of the grantor but the fact of its assumption as the constitution of the new State.”¹²⁰⁸ The similar situations of the previous dominions of UK will be discussed in the next chapter.

As discussed earlier, a territory ceases to be “non-self-governing” when it has achieved self-government¹²⁰⁹, a central element of which is the right of the people of the State to

¹²⁰⁷ Chen, *supra* note 835, at 25.

¹²⁰⁸ Crawford, *supra* note 30, at 332.

¹²⁰⁹ *Id.* at 621.

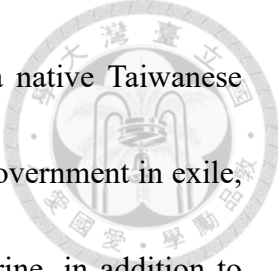
choose for themselves their own form of government. To this end, the objective for the non-self-governing territory of Taiwan to form its full self-government had been fulfilled.



Yet the self-determination of Taiwanese has been attained in an unsatisfactory way without following the guidelines of the UN charter. As the Principles annexed to General Assembly resolution 1541 provide, when the inhabitants of Non-Self-Governing Territories undertake an act of self-determination, they should do so on the basis of full information as to the choices available, and Principle VII states that the voluntary choice of the people should be “expressed through informed and democratic processes.” Besides, the International Court emphasized in the Western Sahara case, that the application of “the right of self-determination...Require[s]...a free and genuine expression of the will of the peoples concerned.”¹²¹⁰ And any use of force to alter the status of such a territory—where self-determination is forcibly denied by the administering Power—is in principle unlawful under the Charter and under general international law.

Nonetheless, in lack of supervision conducted by an international authority, the process

¹²¹⁰ Western Sahara Opinion, *supra* note 134, at 32, 121-2

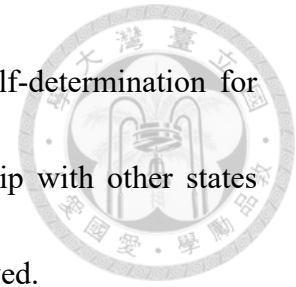


of the self-determination of the Taiwanese people was hosted by a native Taiwanese president who was forced to operate within the system of the ROC government in exile, and under the shadow of decades of education of One China Doctrine, in addition to judicial reviews made in line with the structure of the ROC constitution. With the framework of the ROC constitution designed in the mainland China being intact, numerous imperfections are doomed to exist in the constitution in use in Taiwan today, regardless of several compromised revisions dominated by the KMT government. For example, there are no effective checks and balances between the Legislative Yuan and the President¹²¹¹, which has rendered severe constitutional crisis in almost every presidency.

Furthermore, it is almost impossible for Taiwan under the formal state name of Republic of China to join an international organization or establish diplomatic relations with any other states under the One China Policy that is widely accepted by the international community. With the state name--Republic of China by itself claiming the identity and continuity of China that has already been succeeded by the PRC, other UN members cannot neglect the UN GA. Res. 2758 when considering their relationship with Taiwan, since recognition de jure creates clarity and is not open to unreliable promises by

¹²¹¹ Yeh, *supra* note 1185, at 249.

uncertain governments.¹²¹² In this sense, the external arena of self-determination for Taiwanese to determine freely their political status and relationship with other states cannot be attained until the residues of the ROC in exile were removed.



At any rate, the 2005 constitutional revision has entitled the Taiwanese to decide their own destiny through revising their constitution by themselves. Meanwhile, the human rights of Taiwanese have been protected systematically by the constitutionalism granted by the seven rounds of constitutional revisions. To that extend, it can be concluded that the right of self-determination has been attained by the Taiwanese. Since self-determination is a continuing, and not a once-for-all right,¹²¹³ by the 2005 constitutional revision, the fifth criteria of statehood has been met, Taiwan has become a state, and consequently, the sovereignty of Taiwan revive in the Taiwanese people. Given that independence is the prerequisite of statehood, and sovereignty is the legal incident, Taiwan has achieved the first category of full measure of self-government mentioned in the UN resolution 1541¹²¹⁴-become an independent sovereign state.

¹²¹² Lauterpacht, *supra* note 906, at 42.

¹²¹³ For democracy as a continuing form of self-determination. *See* Crawford, *supra* note 30, at 126.

¹²¹⁴ A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State, such as the relationship between Northern Mariana Islands and Guam with United States; or (c) Integration with an independent State. Cited in the Western Sahara Opinion, *supra* note 134.



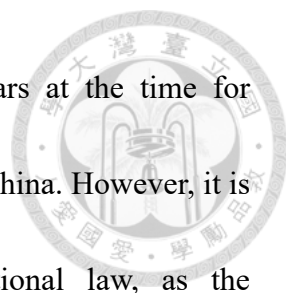
5.2 Problematic International Identity of Taiwan

In late 2005, the double external pressures from both the US and China had caused the DPP government of Taiwan that initially took a stance of establishing the Republic of Taiwan to make a compromised announcement in response to China's Anti-Secession law. It stated that, "based on the Montevideo Convention of 1933 . . . it is undeniable that the Republic of China is a sovereign and independent state." According to the official response, the Chinese law "infringes upon the sovereignty of the Republic of China."¹²¹⁵ A further statement by the Minister of Foreign Affairs of the Republic of China indicated that: "The status quo is that the Republic of China is independent and sovereign. The sovereignty of the Republic of China rests in the hands of the twenty-three million people of Taiwan. Only the twenty-three million people of Taiwan have the right to make the final decision on any change to the nation's status and future. The Republic of China and the People's Republic of China both exist and have no jurisdiction over each other."¹²¹⁶

In these statements, the government of Taiwan was trying to incorporate the connotation of ROC into the island of Taiwan and made the two equal to each other. This assertion

¹²¹⁵ Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession Law, 29 March 2005, available at https://www.mac.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=D1B0D66D5788F2DE (Last visited May 2, 2022)

¹²¹⁶ Crawford, *supra* note 30, at 218 referencing to remarks by HE Dr. Tan Sun Chen, 15 March 2005.



was thought to be a brilliant creation by most Taiwanese scholars at the time for safeguarding the sovereignty of Taiwan without provoking US and China. However, it is not only ambivalent but also illegal in the eyes of international law, as the name-Republic of China itself indicates the continuity of the Chinese state that was established in 1912, which had been replaced and succeeded by PRC. Not to mention Taiwan has a separate legal status from the administrating government of ROC in exile. As has been established earlier, it is illegal for the ROC government in exile to annex Taiwan or unilaterally decide its legal status.

These assertions also met with setbacks in the UN. In August 1999, a Request from 12 UN Members was made for the inclusion of the question of representation of Taiwan on the agenda of UN General Assembly. The Explanatory Memorandum asserted that “each of these two Governments can only speak for and represent the people actually under its jurisdiction on its respective side of the Taiwan Strait” (para 1). It repeatedly qualified “The Republic of China on Taiwan” as a country and a “Member” of the international community. In August 2004, an Explanatory Memorandum attached to a later Request asserted, “The Republic of China (Taiwan) is a sovereign State.”¹²¹⁷ Both of the Requests were not accepted by the Assembly.

¹²¹⁷ Cited in *id.* at 219.



UN's rejections have proved the illegitimacy of the claims of Republic of China on Taiwan and Republic of China (Taiwan). As James Crawford stated in his leading work, "While reiterating the separateness of Taiwan as a self-governing unit...the government in Taiwan continues to characterize itself as the 'Republic of China' and to stress its continuity, while increasingly practicing discontinuity."¹²¹⁸ He went on to comment that "It is still the case that there is no general international recognition of Taiwan as a separate State."

Clearly, it is difficult for a foreigner to comprehend why the democratically elected government in Taiwan made such an ambivalent statement. It is probably due to the huge difference between the Chinese and English pronunciation of "Republic of China" and "People's Republic of China". In Chinese, ROC is pronounced: "Zhong Hua Ming Guo", whereas PRC has a quite different pronunciation: "Zhong Hua Ren Ming Gong He Guo". After years of brainwash of the ROC myth, the Taiwanese people have scarcely realized that the state name of both PRC and ROC is the same--China, while the adjectives in front of them only refer to the organizational way of government. Since it is universally recognized that there is only one China in the world, that is People's

¹²¹⁸ *Id.* at 218.

Republic of China, either the claim of the ROC or ROC on Taiwan is groundless in the eyes of international law.



As aforementioned, recognition de jure is based on self-determination with the constitution name being an element of consideration. Today, considering the government in Taiwan is still operating under the constitution name of Republic of China, while publicly displaying symbols of the former state, such as the state name, the flag, and the emblem, it is not difficult to conclude that recognitions de jure would be withheld until the residues of the ROC in exile are officially removed. After all, “a government is only recognized for what it claims to be.”¹²¹⁹

On the other hand, ambivalent statements made by the government of Taiwan have confused the international community from time to time. For example, in responding to Taiwan government’s application for the membership of WHO, the World Health Assembly, citing the UN resolution 2758 (XXVI) by which it decided to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China having the right to represent China in the World Health Organization. In response, The Ministry of Foreign Affairs

¹²¹⁹ O’Connell, *supra* note 1048, at 415.



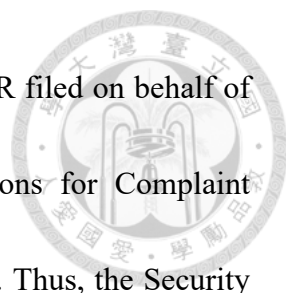
under the name of Republic of China (Taiwan) said:

The Secretariat's citing of U.N. General Assembly Resolution 2758 and World Health Assembly Resolution 25.1 as justifications for Taiwan's exclusion is erroneous, while its claim of having maintained good and extensive interactions with Taiwan also fails to present the full picture. The two resolutions do not refer to Taiwan as part of China, appropriately address the participation of Taiwan's 23 million people in U.N. specialized agencies or authorize China to represent Taiwan in the U.N. system.¹²²⁰

The above statement is partly true on the grounds that the United Nation has never handled the issue of Taiwan. In August 1950, after the US sent the US Navy Seventh Fleet to the Taiwan Strait in order to prevent any attack on Formosa by the Chinese Communists, representative Wu Hsiu-chuan of the Central People's Government of the PRC argued that since June 27, 1950 the Seventh Fleet of the United States had been invading the territorial waters of China around Taiwan so as to prevent the Central People's Government of the People's Republic of China from exercising sovereignty on Taiwan.¹²²¹ In September 1950, the Security Council received a "Complaint of armed

¹²²⁰ Editorial, *MOFA voices discontent with WHO remarks on Taiwan*, TAIWAN TODAY, April 17, 2020, at <https://taiwantoday.tw/news.php?unit=2,6,10,15,18&post=175627> (Last visited May.2, 2022)

¹²²¹ Chiang, *supra* note 236, at 276.



invasion of Taiwan (Formosa)” from the representatives of the USSR filed on behalf of the People’s Republic of China.¹²²² Both the proposed Resolutions for Complaint prepared by the USSR and the PRC were put to a vote and rejected. Thus, the Security Council did not make or adopt any position with respect to the title to the island of Taiwan and certainly did not make any statement, express or implied, indicating that Taiwan was China’s territory.¹²²³

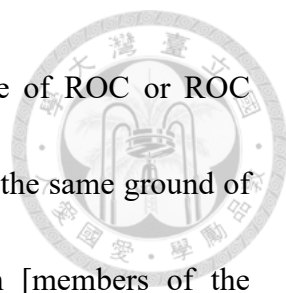
When the Peace Treaty of San Francisco entered into force in 1952, the total members of the UN numbered only 60, with 49 Allies that signing the Peace Treaty of San Francisco being the UN members.¹²²⁴ Pursuant to the principal of estoppel, the UN members that signed the Treaty cannot vote in the General Assembly or the Security Council for a position that contravening what they had agreed to in the Treaty- Japan has renounced its title to Formosa.

However, the logic of the ROC Ministry of Foreign Affairs’ statement was quite schizophrenia in the eyes of international community. Since ROC has been derecognized generally, its capability to represent Taiwan in the international relations

¹²²² Resolution 87 (1950) / (adopted by the Security Council at its 506th meeting), of 29 September 1950, available at <https://digitallibrary.un.org/record/112030> (Last visited May.2, 2022)

¹²²³ Chiang, *supra* note 236, at 278.

¹²²⁴ *Id.* at 280.



was deprived; that is the reason why any submission in the name of ROC or ROC (Taiwan) is doomed to be rejected by international organizations on the same ground of UN resolution 2758. As Peterson observes in 1997, “If enough [members of the international community] [...] do not recognize, then a new regime’s request for participation is likely to be refused.”¹²²⁵

Even the name of Ministry of Foreign Affairs, Republic of China (Taiwan) is problematic in the eyes of international law; not a single legal ground can be found to support the claim of equating ROC to Taiwan. It could be speculated that if Taiwan wants to apply for membership in international organizations, it could only be in the name of Taiwan without any displaying of names or symbols of the former authority that derogate from Taiwan’s international identity. Although international law is sometimes about power play, and political factors are unneglectable in state practice of recognition, it is also true that any political effort would be futile without Taiwan meeting the lowest legal standards of ascertaining its separate international identity from China.

Nevertheless, the ROC constitution imposed on Taiwan and the old China’s flags flying

¹²²⁵ Grant, *supra* note 884, at 123.



everywhere on the island does not amount to the displaying of sovereignty by China.

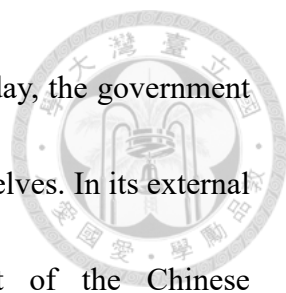
With regard to hollow sovereignty, in the Permanent Court of International Justice in

Lighthouses in Crete and Samos, Judge Hudson has made a classic statement:

It will suffice to say that after 1899 the Ottoman Government exercised no governmental powers in Crete, and that although the Sultan's flag was ceremoniously flown in Crete until February 1913, the government of this island was entirely in the hands of the High Commissioner and the Cretans themselves.... In its external relations, the Cretan Government acted independently of the Ottoman Government also. . . If it can be said that a theoretical sovereignty remained in the Sultan after 1899, it was a Sovereignty shorn of the last vestige of power. A juristic conception must not be stretched to the breaking-point, and a ghost of a hollow sovereignty cannot be permitted to obscure the realities of this situation.¹²²⁶

Except for these and that difference of the two cases, the relationship between China and Taiwan fit squarely into the above description. Similarly, after 1949, China exercised no governmental powers in Taiwan, and that although the old Chinese

¹²²⁶ Lighthouses in Crete and Samos (Fr. v. Greece), 1937 P.C.I.J. (ser. A/B) No. 62 (Oct. 8), para 121, available at http://www.worldcourts.com/pcij/eng/decisions/1937.10.08_lighthouses.htm (last visited Feb.22, 2022).



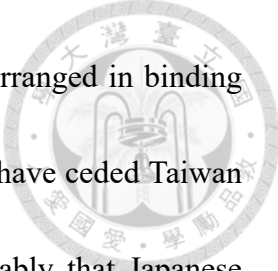
regime-ROC's flags are ceremoniously flown in Taiwan up until today, the government of this island was entirely controlled by the Taiwanese people themselves. In its external relations, the Taiwan Government acted entirely independent of the Chinese Government. If it could be said that a theoretical Chinese sovereignty remained in Taiwan after 1949, it was a Sovereignty shorn of the last vestige of power. A juristic conception must not be stretched to the breaking-point, and a ghost of a hollow sovereignty of China cannot be permitted to obscure the realities of this situation.

5.3 Critical appraisals of James Crawford's viewpoints

Pro. James Crawford concluded in his leading work- "The Creation of States in International Law" that Taiwan is not a state because of its claim as the Republic of China. It is probably because of the overwhelming political propaganda of the pro-Chinese KMT hardliners and the PRC government, in addition to the ambivalent and confusing statements made by the government in Taiwan from time to time. In any case, for purpose of this work, the legal arguments made by Prof. Crawford will be appraised one by one as follows.

Argument 1:

"The cession of territory at the end of a war must await the peace treaty, and this may be



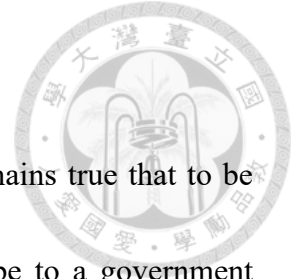
the case even though the terms of the treaty have been in part pre-arranged in binding form between the belligerents. In other words the peace treaty could have ceded Taiwan to no other than the State of China.”¹²²⁷ “The better view is probably that Japanese relinquishment, which took place against a background of a commitment to return Taiwan to ‘China’, and the continued occupation of Taiwan by a recognized government of ‘China’, operated to re-vest sovereignty in China as a State without taking any position as to the government entitled to exercise that sovereignty.”¹²²⁸

Appraisals:

It has already been discussed that the statehood ROC had been lost in retroactive to 1 Oct 1949 due to the retroactivity of recognition, since there could be only one government in a single state at a particular point of time. Furthermore, the previous chapter has already discussed the nature of the Cairo Proclamation and the Potsdam declaration, which has been superseded by the 1952 Peace Treaty with Japan. Even if the two documents had binding effects, there was a census among the Allied Powers that Taiwan could never be put into a communist China. Moreover, change of circumstances and abuse of power invoked to reject the execution of the war time commitment has also been discussed in the previous Chapter.

¹²²⁷ Crawford, *supra* note 30, at 208.

¹²²⁸ *Id.* at 209.



Besides, Prof. Crawford deviated from his own theory that: “It remains true that to be consistent with self-determination any transfer of authority must be to a government which has the support of, and thus can fairly be said to be representative of, the people.”¹²²⁹ “Virtually all the territories qualified as non-self-governing under the twin criteria of geographical separateness and political subordination of the population have been treated as such, at least for a time.”¹²³⁰

However, Prof. Crawford did not explain why Taiwan perfectly meeting the criteria of non-self-governing territory should not be treated as such.

Argument 2:

“Virtually every State in the world has more or less unequivocally recognized the status of Taiwan as Chinese territory. The ROC and the PRC have long both insisted that there is only one Chinese State; and, notwithstanding the more ambiguous position communicated from time to time by officers of the Taiwanese government, that view has been acquiesced in, or even explicitly recognized, by all or almost all other

¹²²⁹ *Id.* at 334.

¹²³⁰ *Id.* at 118.

international actors.”¹²³¹



Appraisals:

As aforementioned, first, the so called ROC government was just a belligerent government delegated by the Allied Power to administrate Taiwan, which had no right to unilaterally decide the legal status of Taiwan. Second, the term Chinese probably does not have any political connotation but was used merely as a generic term stemming from the Chinese ethnic origin of the populace on Taiwan. Since the government of Taiwan has never claimed otherwise, it is not unusual for other states to make such recognitions.

While most countries did recognize the PRC as the one and only legal government of China, they almost uniformly disagree with the PRC’s territorial claim over Taiwan. Individual states have added important qualifiers – they may “take note of,” “acknowledge,” or “understand and respect” the PRC’s position that Taiwan is part of China but they do not share that position. Specifically, US observers have long complained that the PRC, on the other hand, incorrectly interprets the Communiqué to

¹²³¹ *Id.* at 211.

suggest it acknowledged the mainland's right to Taiwan.¹²³²



Argument 3:

“Some of these provisions in the constitutional revisions appear to involve a continuing assertion of legislative authority over mainland affairs.”¹²³³ “The territory of mainland China is not treated as ‘foreign’ territory either in the original Constitution or the Additional Articles. The state of ‘China’ to which the Constitution pertains has a ‘free area’ and a ‘mainland area’. The conflicts rules passed under Article 11 in some respects cover conduct by mainlanders on the mainland which it would be unusual for a completely independent legal system to cover. On the other hand, the current constitutional arrangements are clearly transitional.”¹²³⁴

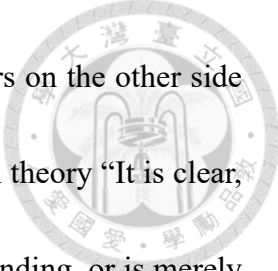
Appraisals:

As a matter of fact, the cross-Strait relations are more strictly regulated than normal international transactions would be. As it is well established that statehood must be based on effectiveness, it is impossible for the government in Taiwan having no control

¹²³² Joseph Bosco, *Trump Had Good Reason to Question the “One-China” Fallacy*, THE HILL, June 28, 2018. Available at <https://thehill.com/opinion/international/394203-trump-had-good-reason-to-question-the-one-china-fallacy/> (Last visited May 2, 2022)

¹²³³ Crawford, *supra* note 30, at 213.

¹²³⁴ *Id.* at 215.



of the Chinese territory or Chinese people to regulate the mainlanders on the other side of the strait. This ground has also contradicted Prof. Crawford's own theory "It is clear, first of all, that whether a territorial unit has separate international standing, or is merely a subordinate constitutional unit of a metropolitan State, is not a matter of domestic jurisdiction of the latter State, nor is it determined conclusively by the municipal law of that State."¹²³⁵ "Any developments in the direction of conditioning the standing or legitimacy of governments by reference to democratic standards have not affected the underlying position of the State as an entity under international law."¹²³⁶ "A State cannot by internal law alone define the scope of its international authority."¹²³⁷

Moreover, the illegitimacy of the provisions that unilaterally decide the legal status of Taiwan has already been discussed.

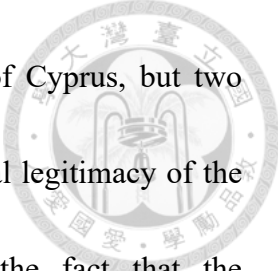
Argument 4:

"The coexistence in fact of two distinct entities with their own constitutional systems and electorates on particular territory does not necessarily entail the existence of two States in international law. The State in international law is not identified with its

¹²³⁵ *Id.* at 353.

¹²³⁶ *Id.* at 152.

¹²³⁷ *Id.* at 363.



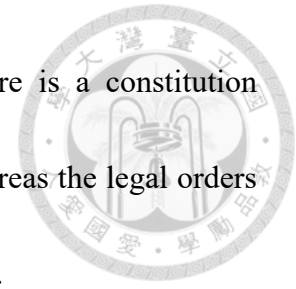
internal constitutional arrangements. Thus there is a single State of Cyprus, but two governments exist on its territory, neither accepting the constitutional legitimacy of the other. There is a single State of Bosnia-Herzegovina despite the fact that the constitutional arrangements for the linkage between the two federal units as provided for in the Dayton Agreement are minimal.... International law appears to exclude the possibility of secession or separation of the conflicting units within Cyprus and Bosnia-Herzegovina. These are special applications of the general principle that the international identity of the State is not the same as its constitutional identity.”¹²³⁸

Appraisals:

Here, Prof. Crawford has made a weak analogy by comparing the two straits relationship to the two constituent states of Cyprus. It is out of context without exploring the independence of state in each case. First, the Republic of Cyprus has de jure sovereignty over the entire island due to general recognition, which is de facto partitioned into two main parts, with the northern part of the island being occupied by Turkish forces. On the contrary, China has never established de jure sovereignty over the island of Taiwan, which had already attained full independence and statehood.

¹²³⁸ *Id.* at 216.

In the case of Bosnia and Herzegovina, on the other hand, there is a constitution embodying a federal arrangement between the two Entities¹²³⁹, whereas the legal orders of Taiwan and PRC have fully independent of each other since 1949.



In Prof. Crawford's own words "The situations under discussion involve conflicting or disputed claims to sovereignty over particular territory: here the conflict is to be settled primarily by the application of the criteria for statehood and only secondarily by the rules relating to territorial disputes between States."¹²⁴⁰

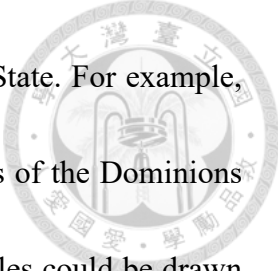
Given that Prof. Crawford himself has admitted that Taiwan had met all criteria for statehood, he did not explain why rules relating to territorial disputes between States should be considered in this case.

Argument 5:

"The coexistence on the territory of 'China' of two rival governments for more than fifty years has been the result. ROC characterizes the relationship as 'a state-to-state relationship or at least a special state-to state relationship'. This is not, however, unequivocal. There are many and diverse examples of 'special' intergovernmental

¹²³⁹ *Id.* at 529.

¹²⁴⁰ Cited in *id.* 664.



relations between entities which were still formally part of a single State. For example, it is clear that the United Kingdom government and the governments of the Dominions had intergovernmental relations throughout this period. Other examples could be drawn from the long history of international protectorates, within a single State, intergovernmental relations can exist based upon degrees of independence and without any necessary or systematic coordination of one entity to another.”¹²⁴¹

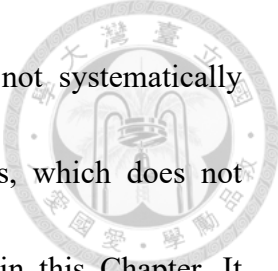
Appraisals:

First, the relationship between UK and the dominions after 1931 was based upon the consent of the latter, which is equal whatever the municipal law of the UK says. In Crawford’s own words, “whether a territorial unit has separate international standing, or is merely a subordinate constitutional unit of a metropolitan State, is not a matter of domestic jurisdiction of the latter State, nor is it determined conclusively by the municipal law of that State. The fact that before the adoption of the Statute of Westminster 1931, Canada was still, in British law, a colony was not decisive as to its international status as an independent sovereign state.”¹²⁴²

Second, the people of international protectorates have little right to decide their military

¹²⁴¹ *Id.* at 216-17.

¹²⁴² *Id.* at 353.



and foreign policies, whereas the Taiwanese people are at least not systematically subordinated to the legal order of other states in those two areas, which does not derogate from the full independence of Taiwan, as stated earlier in this Chapter. It reminds of us the remarks of Pro. Crawford that “the conflict is to be settled primarily by the application of the criteria for statehood and only secondarily by the rules relating to territorial disputes between States.”¹²⁴³

Argument 6:

“The President of Taiwan was not declaring the independence of Taiwan in a newspaper interview with Deutsche Welle. Indeed he said as much: there was ‘no need to declare independence’ because ‘the Republic of China has been a sovereign state since it was founded in 1912’. His statement is predicated upon continuity, and the continuity is that of a constitutional system of China, albeit a constitutional system now occupying only part of the territory of China and no longer entertaining claims to the whole.”¹²⁴⁴ “The government in Taiwan continues to characterize itself as the ‘Republic of China’ and to stress its continuity, while increasingly practicing discontinuity. It is still the case that Taiwan has not unequivocally declared its independence from China. It is still the case

¹²⁴³ Cited in *id.* at 664.

¹²⁴⁴ *Id.* at 217.

that there is no general international recognition of Taiwan as a separate State.”¹²⁴⁵



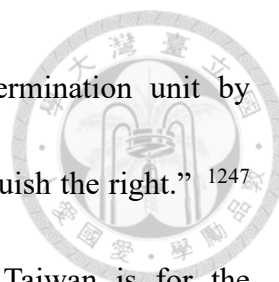
Appraisals:

First, the position that Taiwan is a part of China has already been resolutely rebutted by the discussions in the previous Chapter. The reason why Taiwan has not yet unequivocally declared its independence from China and gets rid of the residues of Republic of China has also been discussed. The lack of international surveillance to formally terminate the delegation agreement as well as the dominating role of KMT in the revisions of the constitution, in addition to decades of brainwash education of the ROC myth has resulted in the confusion of Taiwanese people’s national identity and the absurd situation of Taiwan today.

It is true that the problematic constitution name of Republic of China and symbols of the former colonial government has prevented de jure recognitions from other states, as O’Connell pointed out in 1956, “a government is only recognized for what it claims to be.”¹²⁴⁶ However, it is the political calculus of the powers in the cold war structure to blame, rather than the Taiwanese people.

¹²⁴⁵ *Id.* at 218-19.

¹²⁴⁶ O’Connell, *supra* note 1048, at 415.



In Prof. Crawford's own words, "The annexation of a self-determination unit by external force in violation of self-determination also does not extinguish the right."¹²⁴⁷

Following him, the objective of the self-determination unit of Taiwan is for the Taiwanese people to exercise full scale of self-determination, including the external self-determination to become an independent sovereign state in the name of Taiwan.

Argument 7:

"In announcing the exchange of ambassadors with the PRC the Foreign Secretary of United Kingdom stated the position as follows: 'We think that the Taiwan question is China's internal affair to be settled by the Chinese people themselves...' A further US-China declaration, in 1982, included the statement that 'the question of Taiwan is China's internal affair'. If Taiwan is not part of China then the relation between China and Taiwan is not an internal affair."¹²⁴⁸

Appraisals:

As aforementioned, both the US and UK had iterated their position in the Peace Treaty with Japan, which is final. The US government has noted that it has no position on this matter.

¹²⁴⁷ Crawford, *supra* note 30, at 147.

¹²⁴⁸ *Id.* at 210.



Second, the “question of Taiwan” does not necessarily mean the sovereignty of Taiwan; it could refer to the civil war between the KMT Party and the Community Party in Mainland China, since both of which insisted that they are Chinese Parties. As discussed earlier, Taiwan has a separate legal status from that of the ROC government in exile, and the legal status of Taiwan has been generally treated independently of ROC by the international community.

Argument 8:

“Whether or not there was such a people in 1947, the experience of a half-century of separate self-government has tended to create one.”¹²⁴⁹ “...the status of Taiwan has been determined, not by any illegality by which it has been enabled to survive as a separate entity, but by the insistence of both governments involved that Taiwan remains part of China— a view acquiesced in by all other States.”¹²⁵⁰

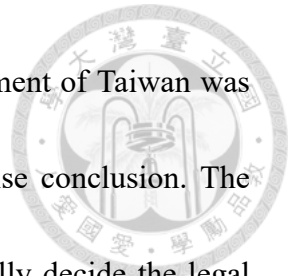
Appraisals:

First, Taiwan has not become a self-governing territory until the 1990s, when the representatives were finally elected by the Taiwanese people with full franchise. It

¹²⁴⁹ *Id.* at 220.

¹²⁵⁰ *Id.* at 133.

might be Pro. Crawford's critical misunderstanding that the government of Taiwan was already a self-governing territory by the 1940s that lead to his false conclusion. The reason why the ROC government in exile had no right to unilaterally decide the legal status of Taiwan, and the fact that other states indeed treat Taiwan and ROC as two different entities has already been discussed earlier in this Chapter.



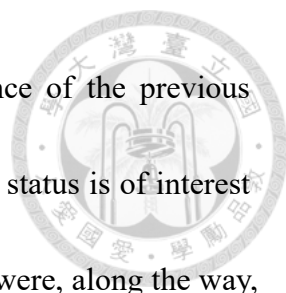
Chapter V: Constitutional Independence



As has discussed in the previous Chapter, the statehood of Taiwan is withheld until the constitutional and governmental structure of Taiwan is brought into line with the principle of self-determination, as the de facto state of Taiwan cannot become a de jure state until full constitutional independence was attained. However, in the constitutional reforms in the 1990s, the pro-Chinese KMT hardliners demanded the framework of ROC constitution be kept intact, moreover, the preamble of the Additional Articles of the constitution stated that: “to meet the requisites of the nation prior to national unification, the following articles of the ROC Constitution are added or amended to the ROC Constitution.”¹²⁵¹ This line has been invoked as an evidence to prove that Taiwan is a part of China, the ultimate constitutional goal of which is to reunify with the mainland China, derogating from the constitutional independence of Taiwan. Notably however, that preamble was insisted by the first-term representatives who were elected in China in 1948, who continued to occupy the National Assembly for more than four decades without any re-election by the Taiwanese people.

There is a legal limbo regarding the constitutional independence of Taiwan, in contrast

¹²⁵¹ Additional Articles of the Constitution of the Republic of China, preamble, *available at* <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000002> (last visited May.2,2022)



to the established theories regarding the constitutional independence of the previous dominions of the United Kingdom. Since “The history of Dominion status is of interest in demonstrating that devolving entities can achieve statehood, as it were, along the way, before the full transfer of responsibility for all purposes from the metropolitan State,”¹²⁵² given the similarities shared by the dominions and Taiwan as self-determination units that were en route to independent sovereign states, the theories of the constitutional independence of the former might shed some light on the discussion the latter. In this light, the first part of this Chapter will focus on the the constitutional independence of the previous three dominions of the UK-Canada, Australia and New Zealand.

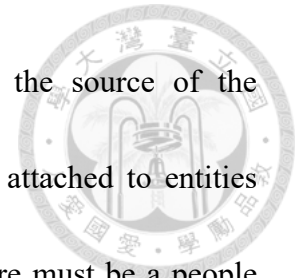
1. Constitutional Independence of the Dominions

“Sovereignty”, in the political sense as developed by Bodin, Hobbes, Bentham and Austin, refers to the power to determine the law, and to have those determinations ultimately obeyed; to have the final word or to hold the trump card.¹²⁵³ It has been held that the abstract concept of sovereignty did not acquire flesh and heat until the right of self-determination appeared as a general principal and thereafter *jus cogens* of

¹²⁵² Crawford, *supra* note 30, at 353.

¹²⁵³ For further discussion of the varied meanings of sovereignty, see Peter C. Oliver, *Sovereignty in the Twenty-First Century*, 14 *KING'S L. J.* 137(2003).

international law, which concerns the idea that the people are the source of the sovereignty of the state.¹²⁵⁴ In international law, “sovereignty” is attached to entities fulfilling the criteria of statehood;¹²⁵⁵ “for sovereignty to exist there must be a people conscious of itself as a people, conscious of its power as a people and collectively ready to believe and act as if sovereignty were vested in the state.”¹²⁵⁶



According to Jackson, the main reason why decolonization took place so rapidly is that there had been a change in norms: from criteria for statehood emphasizing empirical capacity to criteria centered on the principle of self-determination.¹²⁵⁷ In 1918, Woodrow Wilson, President of the United States, while presenting his 14-point agenda before the US Congress, emphasized the collective rights of the people in colony to obtain independence and enjoy sovereign rights.¹²⁵⁸ Wilson’s Fourteen Points, providing the basis of the Covenant of the League of Nations, tentatively endorsed the principle of self-determination by stating that the “world is to be made fit and safe...for every peace-loving nation which, like our own, wishes to live its own life...and...determine its own institutions”.¹²⁵⁹ With its incorporation in the Charter of

¹²⁵⁴ JO-ANNE PEMBERTON, SOVEREIGNTY: INTERPRETATIONS 105 (2009).

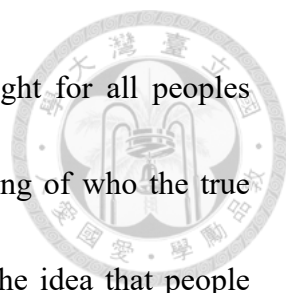
¹²⁵⁵ Crawford, *supra* note 30, at 33.

¹²⁵⁶ Pemberton, *supra* note 1254, at 18.

¹²⁵⁷ JACKSON, R.H., QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD, 15–6 (1990)

¹²⁵⁸ SURENDRA BHANDARI, SELF-DETERMINATION & CONSTITUTION MAKING IN NEPAL 135 (2014).

¹²⁵⁹ Murray supplies the example of the Inter-Allied Labour Conference in London in February 1918 which laid down that: “It is the supreme principle of the Right of Each People to Determine its own



the United Nations (1945), self-determination was defined as a right for all peoples instead of nations, which represented a critical shift in understanding of who the true beneficiaries of international law are generally.¹²⁶⁰ It is based on the idea that people should have recourse against a government that is systematically abusing their human rights and is therefore violating the underpinnings of a social compact between the governing and the governed.¹²⁶¹ The logical corollary of the right of self-determination as a right against colonization implies the establishment of a sovereign state.¹²⁶²

As a main feature of an independent sovereign state, the principle of non-intervention is applied. The ICJ stated that the principle of non-intervention “involves the right of every sovereign State to conduct its affairs without outside interference”.¹²⁶³ In other words, the sovereign entity often has the power to interpret the rules created by its law-making powers with regard to a particular territory or a particular topic or field, within which, its powers are preemptive and final.¹²⁶⁴ The principle of non-intervention cannot be fulfilled until constitutional independence is attained, which refers to a state’s

Destiny that must now decide” the steps to be taken for settlement.” In G. Murray, *Self-Determination of Nationalities*, 1 J. BRIT INSTI INTEL. AFFAIRS 6 (1922).

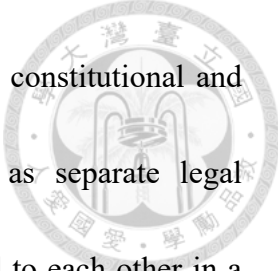
¹²⁶⁰ Amanda Cats-Baril, *Self-determination*, Sept. 2018, available at <https://www.idea.int/sites/default/files/publications/self-determination-constitution-brief.pdf> (Last visited May 2, 2022)

¹²⁶¹ *Id.*

¹²⁶² Bhandari, *supra* note 1258, at 132.

¹²⁶³ *Nicaragua v. United States of America*, *supra* note 5, para 202.

¹²⁶⁴ ANTONIA M. WALTERMANN, *RECONSTRUCTING SOVEREIGNTY* 27-8 (2019).



ability in formal legal terms to determine with finality all the rules, constitutional and other, in their respective legal systems, establishing the states as separate legal systems.¹²⁶⁵ “Legal system” describes all the laws which are related to each other in a particular legal sense, i.e. they regulate their own creation, interpretation and amendment, and, at the most fundamental level, they must be heeded or recognized by lawyers, judges and officials.¹²⁶⁶

The most ideal pattern for a newly established state is for it to enact a brand new constitution tailored-made for its social reality, yet it is observed that new independent legal systems can be created out of old legal systems even when the relevant constitutional rules are followed to the letter.¹²⁶⁷ In law, the connection to the past often carries with it a signal of respect for the rule of law.¹²⁶⁸ In state practices, the experience of the previous dominions of Canada, Australia and New Zealand proved that it was possible to respect the rule of law by maintaining constitutional continuity while achieving constitutional independence, a new beginning and a foundation based on popular acceptance.¹²⁶⁹

¹²⁶⁵ Oliver, *supra* note 48, at 1-2.

¹²⁶⁶ For a detailed discussion of legal system, see J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (2nd ed.1980); J. RAZ, *PRACTICAL REASON AND NORMS* (1975).

¹²⁶⁷ Oliver, *supra* note 48, at 13.

¹²⁶⁸ *Id.* at 13-4.

¹²⁶⁹ *Id.* at 7.



The word of dominion did appear as a term referring to the colonies of the UK until the twentieth century, which means “large self-governing colonies”.¹²⁷⁰ However, this concept was never without ambiguity;¹²⁷¹ the core concept of dominion reflected a “distinctive blend of national status and Imperial identity.”¹²⁷² The status of the dominions mainly relies on convention and bilateral negotiation.

Dicey’s principle of parliamentary sovereignty¹²⁷³ put the Imperial Parliament at the apex of the Imperial legal system.¹²⁷⁴ When the Imperial Parliament at Westminster performed its function of legislating for colonies, its enactments were known as Imperial statutes, based on its claim of sovereignty over the colonial territories. Accordingly, Imperial statutes was amendable by the sovereign body which enacted it—the Westminster Parliament—but was binding on and unamendable by the subordinate legislatures in the dominions. The Imperial Parliament in Westminster acted as a constituent assembly or constitution making body for New Zealand in 1852,

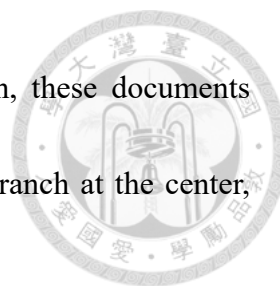
¹²⁷⁰ Cited in T. Baty, *Sovereign colonies*, 34 (8) HARV.L.R. 837, 843 (1921).

¹²⁷¹ Mara Malagodi, Luke McDonagh and Thomas Poole, *The Dominion model of transitional constitutionalism*, 17 INT. J. CONST. LAW 1283, 1288 (2019).

¹²⁷² John Darwin, *A Third British Empire? The Dominion Idea in Imperial Politics*, in THE OXFORD HISTORY OF THE BRITISH EMPIRE: THE TWENTIETH CENTURY 85 (Judith M. Brown and William Roger Louis eds., 1999).

¹²⁷³ See M. LOUGHLIN, PUBLIC LAW AND POLITICAL THEORY 148 (1992) ; M. LOUGHLIN, THE IDEA OF PUBLIC LAW 67(2003) .

¹²⁷⁴ The principle of parliamentary sovereignty means that the Parliament had the right to make or unmake any law under the English constitution, and no one else is recognized by the law of England as having a right to override or set aside the legislation of Parliament. See A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 41 (10th ed. 1959).



Canada in 1867 and Australia in 1900 respectively. While written, these documents were in line with the Westminster model with a strong executive branch at the center, and few robust checks and balances on it.¹²⁷⁵

The four indicia of subordination between the dominions and UK is the doctrine of repugnancy, extraterritoriality, reservation and disallowance. In 1865, the Colonial Laws Validity Act in the form of Imperial statute confirmed that colonial laws were void if they were repugnant to an Imperial statute. As a result, the New Zealand Constitution Act 1852, the Canadian Constitution Act 1867 and the Commonwealth of Australia Constitution Act 1900, as Imperial statutes, took priority over incompatible domestic legislations of these colonies.¹²⁷⁶ As R.O. Mc Gechan has pointed out, one particular case of the doctrine of repugnancy is their inability regarding the amendment of the Constitution.¹²⁷⁷ The second doctrine is, extraterritoriality, according to which legislation would become invalid if it had not sufficient connection to the geographical area of the legislating colony. Because in British law, the “sovereignty” or “supremacy” of the British Parliament implied that its lawmaking power had no territorial limit.¹²⁷⁸

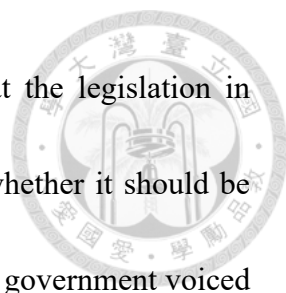
The third and fourth limitations on Dominions were, respectively, reservation and

¹²⁷⁵ Malagodi et al, *supra* note 1272, at 1286.

¹²⁷⁶ Oliver, *supra* note 48, at 38-9.

¹²⁷⁷ R. O. Mc Gechan, *Status and Legislative Inability* in NEW ZEALAND AND THE STATUTE OF WESTMINSTER 65, 98(J. C. Beaglehole eds., 1944).

¹²⁷⁸ Oliver, *supra* note 48, at 44.



disallowance by the Crown under its prerogative. This means that the legislation in question would be referred to the British government to consider whether it should be allowed to become law,¹²⁷⁹ which would be amended if the Imperial government voiced an objection.¹²⁸⁰ In addition, the Queen, or the British government, could “disallow” legislation passed by colonial legislatures, usually within two years of its enactment.¹²⁸¹ Last but not least, the Privy Council was the final court of appeal from all the colonial courts in the nineteenth century, which was constituted by legislation of the Imperial Parliament in 1833 and 1844 to perform this role.

In the World War I, Dominion armies had fought in separate units and Dominion leaders had separately signed the peace treaty at Versailles. Considering their contributions in the War, the Dominions became Members of the League of Nations. Since the League Covenant allowed the admission to membership of any “fully self-governing State, Dominion, or Colony” (Art 1), it is implied that Dominion status was something between that of “Colony” and “State”. Inspired by Wilson’s “self-determination”, there were increasing calls for an end to their ongoing vestiges of subordination to the Mother Country. These Dominions together sought to acquire the full attributes of statehood.

¹²⁷⁹ *Id.* at 45.

¹²⁸⁰ See P. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND 105 (2nd ed.2001).

¹²⁸¹ See Australia, First Report of the Constitutional Commission (1988). Available at <https://nla.gov.au/nla.obj-2490702296> (Last visited May 2, 2022)



In order to deal with this issue, the Imperial Conference held in 1926 agreed on what was to become known as the Balfour Declaration. The Balfour Declaration acknowledged that Great Britain and the Dominions were “autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic and external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations”.¹²⁸³ The understanding was that the former “colonial” legislatures were no longer subordinate to the United Kingdom Parliament but rather coordinate. The dominions therefore became equal with the United Kingdom under the Crown.¹²⁸⁴ The Balfour Declaration had sought to recast the bilateral connection between Britain and the various Dominions as “free association.”¹²⁸⁵ “The old club [would] become a rules-based association”¹²⁸⁶ held together through informal ties of sentiment and self-interest.¹²⁸⁷ The logic of Britain was that “if we treat them strictly as a[n]

¹²⁸² Peter C. Oliver, “*Dominion status*”: *History, framework and context*, 17(4) INT. J. CONST. LAW 1173, 1188(2019).

¹²⁸³ Balfour Declaration 1926, available at https://www.foundingdocs.gov.au/resources/transcripts/cth11_doc_1926.pdf (Last visited May 2, 2022)

¹²⁸⁴ This understanding is similar to the disputes of the Americans with the UK leading up to the American War of Independence. See W.P.M. KENNEDY, SOME ASPECTS OF THE THEORIES AND WORKINGS OF CONSTITUTIONAL LAW 59 (1932).

¹²⁸⁵ PHILIP MURPHY, MONARCHY AND THE END OF EMPIRE: THE HOUSE OF WINDSOR, THE BRITISH GOVERNMENT, AND THE POSTWAR COMMONWEALTH 17 (2013).

¹²⁸⁶ DAVID MCINTYRE, A GUIDE TO THE CONTEMPORARY COMMONWEALTH 69, 77 (2001).

¹²⁸⁷ JOHN DARWIN, THE EMPIRE PROJECT: THE RISE AND FALL OF THE BRITISH WORLD-SYSTEM 407

[independent] dominion, they will behave very like a loyal colony.”¹²⁸⁸



It has been argued that notwithstanding the lacking of formal independence, pursuant to the 1926 Declaration, it became possible, to express inter-Dominion relations with certainty and clarity on the basis of agency and representation. Thus, the Balfour Declaration can properly be taken as the critical date of the actual independence of the Dominions.¹²⁸⁹ The meaning of independence in terms of lawmaking capacity has been substantiated by the incapacity of the British Parliament to legislate for the New Dominions. As discussed earlier, actual independence is the central prerequisite for statehood.

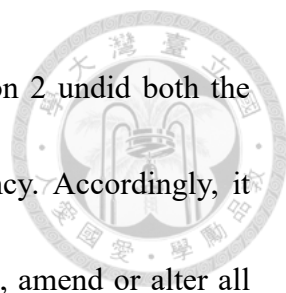
The Statute of Westminster 1931 was passed after the imperial conferences of 1926–1930 to stabilize legal relations between the dominions and the Empire, and then was reiterated in the various Independence Acts.¹²⁹⁰ The preamble to the Statute of Westminster 1931 set out the new relationship between the Dominions and the United

(Reprint, 2011).

¹²⁸⁸ Memo by Patrick Gordon Walker, Parliamentary Under-Secretary of State at the Commonwealth Relations Office, March 1948, quoted in JOHN DARWIN, *THE EMPIRE PROJECT: THE RISE AND FALL OF THE BRITISH WORLD-SYSTEM, 1830–1970* 561 (2009).

¹²⁸⁹ Crawford, *supra* note 30, at 366.

¹²⁹⁰ Statute of Westminster, 1931, available at https://www.legislation.gov.uk/ukpga/1931/4/pdfs/ukpga_19310004_en.pdf (Last visited May 2, 2022); see also *British Coal Corporation v. The King*, (1935) A.C. 500, 520–522, available at <https://www.casemine.com/judgement/uk/5b4dc2692c94e07cccd24492> (Last visited May 2, 2022); *Madzimbamuto v. Lardner-Burke*, (1969) A.C. 645, available at <https://documents.manchester.ac.uk/display.aspx?DocID=45553> (Last visited May 2, 2022)



Kingdom as recognized by the Balfour Declaration in 1926. Section 2 undid both the statutory and the common law bases for the doctrine of repugnancy. Accordingly, it became possible for the Parliament of the former colonies to repeal, amend or alter all Imperial statutes (other than those listed in section 7(1)) in so far as these were part of their municipal law.¹²⁹¹ Section 3 “declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial operation”. The United Kingdom’s ability to legislate for the Dominions was not terminated by the text of the Statute; however, restrictions were put on the United Kingdom Parliament to do so.¹²⁹² Section 4 of the Statute provided that no Act of Parliament of the UK passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof. Section 7(1) provided that Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder. This provision was thought to be in theory left the United Kingdom Parliament at the apex of the legal system of its former colonies. Section 10 of the 1931 Statute ensured that the core provisions (sections 2–6) would not have any effect in

¹²⁹¹ Oliver, *supra* note 48, at 160.

¹²⁹² See G. MARSHALL, CONSTITUTIONAL CONVENTIONS 188 (1984).

dominions until their Parliament decided to adopt the Statute.¹²⁹³



The Statute itself, while it contains a complete renunciation by the Imperial Parliament of any measure of control over, or interference with, Dominion affairs, it is at the same time, as Professor Keith has expressed it, “a singular assertion of the sovereign authority” of the British Parliament, since it is legally unthinkable for the sovereign Parliament to limit itself in this way.¹²⁹⁴ However, the real problems of any Westminster-based scheme would be “political rather than legal”.¹²⁹⁵ The Balfour Declaration 1926 and Statute of Westminster 1931 set out, respectively, the political and legal equality of the United Kingdom and the Dominions, with various sections of the 1931 Statute removing obstacles that had previously stood in the way of Dominion equality: repugnancy, reservation, disallowance and extraterritoriality. The former colonies were therefore en route to full independence, albeit with continued external links to Britain.¹²⁹⁶ Australia, Canada and New Zealand had thereafter acquired their political and international independence: political independence, in the sense of their ability to make their own decisions regardless of former legal rules, and international

¹²⁹³ Oliver, *supra* note 48, at 188.

¹²⁹⁴ W. ANSTEY WYNES, LEGISLATIVE AND EXECUTIVE POWERS IN AUSTRALIA 74 (1st ed.1936).

¹²⁹⁵ Oliver, *supra* note 48, at 155.

¹²⁹⁶ Malagodi et al, *supra* note 1272, at 1286.

independence, in the sense of how other countries viewed them.¹²⁹⁷



In spite of Britain's attempts to retain some form of control, for the local actors of its newly independent former colonies, sovereignty had been undisputedly transferred. For them, the acquisition of independence amounted to a legal revolution disguised beneath the fancy legal dress of independence legislation.¹²⁹⁸ "Freedom once conferred could not be revoked".¹²⁹⁹ As Lord Sankey noted, the Imperial Parliament could, as a matter of abstract law, repeal or disregard of the Statute, but that is theory without relation to realities. In reality, Canada and the other commonwealth countries are in enjoyment of the full scope of self-government.¹³⁰⁰ In international law, their continuing legal relations with the metropolitan state would be reinterpreted in as subsisting by consent, which is not against the statehood they had attained. In the eyes of James Crawford, whether a territorial unit has separate international standing, or is merely a subordinate constitutional unit of a metropolitan State, is not a matter of domestic jurisdiction of the latter State, nor is it determined conclusively by the municipal law of that State. The fact that until the Statute of Westminster 1931, Canada was still, in British law, a

¹²⁹⁷ Oliver, *supra* note 48, at 1.

¹²⁹⁸ H.W.R. Wade, *The basis of legal sovereignty*, 13 CAMBRIDGE. L. J. 172,191 (1955).

¹²⁹⁹ See the South African case, *Ndlwana v Hofmeyr* (1937) AD 229, 237, available at <https://joasa.org.za/articles/HARRIS%20v%20MINISTER%20OF%20THE%20INTERIOR.pdf> (Last visited May 2, 2022)

¹³⁰⁰ Oliver, *supra* note 48, at 72.

“colony” was not decisive as to its international status, since the extent of a particular State is not just a matter of assertion, legislative or otherwise.¹³⁰¹



The newly independent former colonies made use of the transitional New Dominion model to enshrine their new state institutions and structures. In each case, the British hopes were frustrated, as the local intellectuals made use of the constitutional tools offered by the Dominion status to push for independence.¹³⁰² The inevitability and haste of the transition had finally led to what Hanna Lerner calls the incrementalist approach to constitution making.¹³⁰³ In response to the question of why these countries had gone to the trouble of obtaining their constitutional independence by the means of Acts of the United Kingdom Parliament, Wade stated “When sovereignty is relinquished in an atmosphere of harmony, the naked fact of revolution is not so easy to discern beneath its elaborate legal dress”.¹³⁰⁴ The price paid by the UK for peace was its ceding of any residual authority to local actors, which was much faster than the British had intended or predicted.¹³⁰⁵

In the 1949 Conference, The London Declaration stated that “the King is the symbol of

¹³⁰¹ Crawford, *supra* note 30, at 353.

¹³⁰² Malagodi et al, *supra* note 1272, at 1285.

¹³⁰³ See generally HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011).

¹³⁰⁴ Wade, *supra* note 1299, at 191.

¹³⁰⁵ Malagodi et al, *supra* note 1272, at 1296.



the free association of its independent members and as such the Head of the Commonwealth.”¹³⁰⁶ As a result, “the Commonwealth of Nations became a diverse, loose, and largely symbolic association of independent states.”¹³⁰⁷

The following sections will discuss how the constitutional independence of the three countries of Canada, Australia and New Zealand had been achieved in the eyes of their constitutional theorists and courts.

1.1 Canada

In the 1867 Act, constitutional amendments of Canada had to be accomplished by resorting to the same procedure that the Constitution was enacted initially-- the Imperial Parliament. It was clear that most of legislative competence, including the power to modify the 1867 Act, remains in the hands of the Imperial Parliament.¹³⁰⁸

After the passage of the Statute of Westminster 1931, Canadian politicians meeting at successive federal-provincial conferences were unable to agree on a domestic procedure

¹³⁰⁶ London Declaration, April 22-27, 1949, available at <https://thecommonwealth.org/london-declaration-1949> (Last visited May 2, 2022)

¹³⁰⁷ Malagodi et al, *supra* note 1272, at 1300.

¹³⁰⁸ Oliver, *supra* note 48, at 39.

for the amending of the Constitution of Canada.¹³⁰⁹ Despite that in 1931, Canada was acknowledged to have autonomous status internationally; it chose to leave the mechanism for amendment of its Constitution with the Westminster.¹³¹⁰ The enactment of a Canadian Constitution and the repeal of the present British Acts on the subject would therefore operate only as a change of form.¹³¹¹ It would have to be up to the Supreme Court of Canada to declare it so, but that Court was not willing to do so.¹³¹²

The Canadian constitutional theorists argued that the Canadian legal independence would require the development of a distinct Canadian legal understanding, including its own Grundnorm. To use Kelsen's formulation of Grundnorm or basic norm¹³¹³, it was possible that a new Canadian Grundnorm had already existed since 1931. The constitution and other important laws may have originally grown in the United Kingdom, but they had been transplanted into native branches and had subsequently taken root in native soil.¹³¹⁴ The Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is a theory, not reality. In truth, Canada's Legislature was invested with all the necessary powers after the Statute was

¹³⁰⁹ See P. GE'VIN-LAJOIE, CONSTITUTIONAL AMENDMENT IN CANADA CHAP1 (1950).

¹³¹⁰ Oliver, *supra* note 48 at 117.

¹³¹¹ Ge'rin-Lajoie, *supra* note 1310, at 241.

¹³¹² Oliver, *supra* note 48, at 157

¹³¹³ *Id.* at 128.

¹³¹⁴ *Id.* at 106.

adopted in 1939.



Despite the fact that the constitution of Canada had been formally brought into law by the Imperial Parliament and was for a time interpreted by the highest Imperial court, the Judicial Committee of the Privy Council; it is a Constitution with strong roots in Canadian soil. Some Canadian constitutional commentators tentatively suggested that even the Privy Council could only interpret Canada's fundamental law in a manner taking into account a changing Canadian reality.¹³¹⁵ So far the constitution of Canada was still unwritten, but constitutional practices were evolving in accordance with Canadian developments such as independence, federalism and the changing attitudes of the Canadian public. Accordingly, the Constitution was domiciled in Canada and was governed by a distinct Canadian constitutional understanding. The Canadians had clearly chosen to leave the constitutional amendment mechanism in the hands of the Westminster in 1931, but it had since then been governed by the Canadian interpretations of it.¹³¹⁶ It seems safe to assert that, as a matter of mixed law and convention, the Parliament of Canada possesses the unilateral power to change the Constitution, although it has chosen not to exercise that power.¹³¹⁷

¹³¹⁵ *Id.* at 136.

¹³¹⁶ *Id.* at 158.

¹³¹⁷ Canada, Constitutional Conference, Statement of Conclusions (8–9 February 1971). Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of



In 1939, the Parliament of Canada took steps to abolish all Privy Council Appeals. In the Bill introduced, it provided that “The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive.”¹³¹⁸ The Bill was referred to the Supreme Court of Canada for an opinion as to its validity, which ruled that the Parliament of Canada was competent to enact the Bill.¹³¹⁹ The Privy Council in the UK eventually confirmed that view,¹³²⁰ and appropriate legislation was enacted and came into force in 1949. As a result, cases commencing after 1949 could no longer proceed to the Privy Council. “It is important to note that, to the extent that the Constitution of Canada was and continues to be modified by decisions of the highest court, the termination of Privy Council appeals brought a further measure of constitutional control into Canadian hands.”¹³²¹

On the other hand, the effort for a formal domestic procedure for amending the

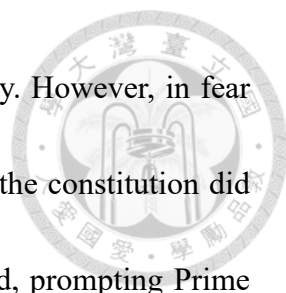
Canada, Final Report, 16 March 1972 (Chairmen: Senator G.L. Molgat, Mr. Mark MacGuigan, MP). Available at <https://primarydocuments.ca/sjc-1970-1972-final-report/> (Last visited May 2, 2022)

¹³¹⁸ Bill 9, An Act to Amend the Supreme Court Act, 4th Session, 18th Parliament, 1939, available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/8487/index.do?q=first+nation> (Last visited May 2, 2022)

¹³¹⁹ *Id.*

¹³²⁰ Attorney-General of Ontario v Attorney-General of Canada (1947) AC 127 (PC), available at https://www.bailii.org/uk/cases/UKPC/1947/1947_1.html (Last visited May 2, 2022)

¹³²¹ Oliver, *supra* note 48, at 162.



Canadian Constitution was ongoing throughout the twentieth century. However, in fear of its insinuation for the independence of Quebec, the patriating of the constitution did not happen until 1982. By 1980, no consensus had yet been reached, prompting Prime Minister Trudeau to attempt to proceed unilaterally by the sole initiative of the federal Parliament.¹³²² The dissenting provinces of Manitoba, Newfoundland and Quebec asked their respective Courts of Appeal to consider the constitutionality of the federal initiative, and the decisions of all three Courts of Appeal were appealed to the Supreme Court of Canada.¹³²³

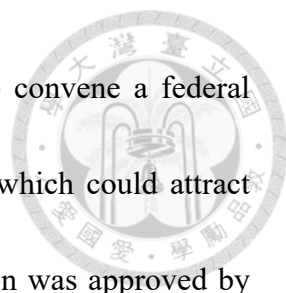
In the Patriation Reference case in 1981, the highest Canadian court was unwilling to define the Westminster Parliament power, regardless of the political circumstances that empowered it to find a way to reject the United Kingdom legislation, and rely principally on the political fact of independence. Constitutional theorists argued that the Patriation Reference was an essentially political decision.¹³²⁴ It was an opportunity for the Supreme Court of Canada to articulate the Canadian rule of recognition, but the majority appeared unwilling to do so.¹³²⁵

¹³²² *Id.*

¹³²³ *Id.* at 162-63

¹³²⁴ J.-Y. MORIN AND J. WOEHLING, *LES CONSTITUTIONS DU CANADA ET DU QUEBEC DU RÈGIME FRANÇAIS À NOS JOURS* 464 (1992). Cited in *id.*

¹³²⁵ Cited in Oliver, *supra* note 48, at 167.



In early November 1981, the Canadian Prime Minister decided to convene a federal provincial meeting, making another attempt at finding a proposal which could attract sufficient provincial support. In early December 1981, the resolution was approved by the Canadian Parliament and transmitted to the United Kingdom. Section 2 of the Canada Act 1982 stated that “No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law”, and the marginal notes underlined this point succinctly “Termination of power to legislate for Canada”.¹³²⁶ On 29 March 1982, Queen Elizabeth II assented to the Canada Act 1982 (UK). On 17 April 1982, at a ceremony on Parliament Hill in Ottawa, Canada, Queen Elizabeth II proclaimed the Constitution Act, 1982 in force. The opening words of the proclamation gave further indication of the importance of the event:

WHEREAS in the past certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada;

AND WHEREAS it is in accord with the status of Canada as an independent state that Canadians be able to amend their Constitution in Canada in all

¹³²⁶ Canada Act 1982, Mar. 29, 1982, available at <https://www.legislation.gov.uk/ukpga/1982/11> (Last visited May 2, 2022)



respects;

AND WHEREAS it is desirable to provide in the Constitution of Canada for the recognition of certain fundamental rights and freedoms and to make other amendments to the Constitution;

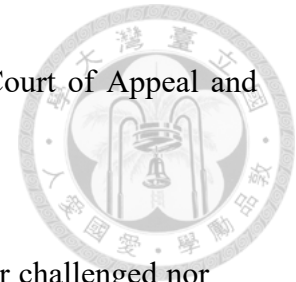
AND WHEREAS the Parliament of the United Kingdom has therefore, at the request and with the consent of Canada, enacted the Canada Act, which provides for the patriation and amendment of the Constitution of Canada;¹³²⁷

By means of the Canada Act 1982, the Westminster Parliament renounced its authority of legislating for Canada and substituted a new domestic code on constitutional amendment.

On 25 November 1981, the government of Quebec presented a reference case to the Quebec Court of Appeal in which it challenged the legitimacy of proceeding to patriation and amendment of the Constitution of Canada over the objection of the province of Quebec. The case moved on to the Supreme Court of Canada. The Supreme Court of Canada confirmed in the Veto Reference that the new code on amendment had

¹³²⁷ Transcription of the Proclamation of the Constitution Act, 1982, available at <https://www.bac-lac.gc.ca/eng/discover/politics-government/proclamation-constitution-act-1982/Pages/proclamation-1982-transcript.aspx> (Last visited May 2, 2022)

entirely replaced the Westminster Parliament. It agreed with the Court of Appeal and made the following declarations in the course of its reasons:

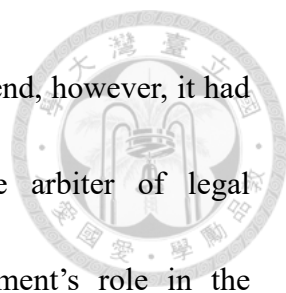


The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution of Canada which entirely replaces the old one in its legal as well as in its conventional aspects. Even assuming therefore that there was a conventional requirement for the consent of Quebec under the old system, it would no longer have any object or force.¹³²⁸

Since the Quebec Veto Reference, the Supreme Court of Canada and most Canadians assumed that the Canada Act 1982 (UK) had successfully terminated the United Kingdom Parliament's power to legislate for Canada. The discussion of the Canadian constitutional independence "began with the question whether the United Kingdom Parliament is still a part of the Canadian legal system and an institution to which the Canadians might recourse in the event of future constitutional paralysis."¹³²⁹ Given the fact or reality of Canadian political independence, the ongoing role of UK up until 1982 was considered as only a formal part of a Canadian process "just formal machinery to

¹³²⁸ Quebec Veto Reference, Re: Objection by Quebec to a Resolution to amend the Constitution, (1982) 2 S.C.R. 793, at 806. Available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5530/index.do> (Last visited May 2, 2022)

¹³²⁹ Oliver, *supra* note 48, at 322.



be used by Canadians to amend their own Constitution”.¹³³⁰ In the end, however, it had been up to the Supreme Court of Canada, as “the ultimate arbiter of legal legitimacy”,¹³³¹ and to determine the nature of the UK Parliament’s role in the Canadian amendment process.¹³³² It might be argued that there is no legal escape from the legal continuity of UK legislation, since no Canadian constitution has ever been made. It is observed that the most significant missed “insight” was “that rules of constitutional law may have their source in constitutional practice.”¹³³³

Both Slattery and Hogg assumed that it was independence instead of section 2 of the Canada Act 1982 that was the key to the Canadian constitutional independence.¹³³⁴ For Slattery, Canada’s constitutional independence was based neither on 1931 nor on 1982 nor on any other decisive legal event, but was “at root a matter of fact”.¹³³⁵ The legal effect of the acquisition of political independence at some point between 1919 and 1931 is that it has ended the colonial rule of subordination and replacing it with one of equality. This meant in effect that a disguised legal revolution based on extralegal

¹³³⁰ B. Schwartz & J.D. Whyte, *The Patriation Reference and the Idea of Canada*, 8 QUEEN’S L.J. 158, 166 (1982–3).

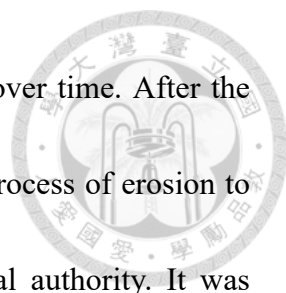
¹³³¹ *Id.* at 169.

¹³³² Oliver, *supra* note 48, at 254.

¹³³³ E. Colvin, *Constitutional Jurisprudence in the Supreme Court of Canada*, 4 SUP. CT. L. REV. 3,7 (1982).

¹³³⁴ P.W. Hogg, *Patriation of the Canadian Constitution: Has It Been Achieved?*, 8(1&2)QUEEN’S L.J. 123,128 (1982–3).

¹³³⁵ Brian Slattery, *The independence of Canada*, 5 SUP. CT. L. REV. 391(1983)



factors took place; its true dimensions would only become visible over time. After the moment of independence, it was only necessary for the inevitable process of erosion to run its course and so eliminate the remaining residues of Imperial authority. It was therefore Canada's political independence instead of the section 2 of the Statute of Westminster that has ended the relationship of subordination between the Canadian and United Kingdom Parliaments,¹³³⁶ and the British Parliament's ability to legislate for Canada.¹³³⁷ Hogg essentially adopted Slattery's view that once Canada had acquired all the tools of its legal autonomy, any future legislation by the United Kingdom Parliament would be treated as a nullity, in the same way that any unwanted legislation from another country would be so treated.¹³³⁸

Ge'rin-Lajoie states that once Canada had acquired the means to amend its own Constitution, Canadians would be masters of their development, and not even the Westminster Parliament would be able to affect that independence.¹³³⁹ Colvin observes that eventually a point is reached where there is no higher rule and analysis must turn from questions of validity to questions of observance.¹³⁴⁰ At the end of the day, the

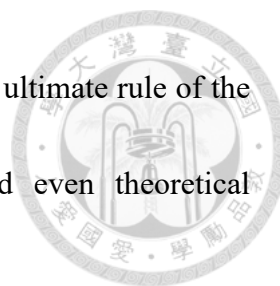
¹³³⁶ *Id.* at 394.

¹³³⁷ *Id.* at 403.

¹³³⁸ Hogg, *supra* note 1335, at 128.

¹³³⁹ See P. Ge'rin-Lajoie, *Du pouvoir d'amendement constitutionnel au Canada* (Constitutional Amending Power in Canada), 29 CAN. BAR. REV. 1136, 1178 (1951).

¹³⁴⁰ Colvin, *supra* note 1334, at 8–9.



Supreme Court of Canada would be fully justified in recognizing an ultimate rule of the Canadian legal system based on Canadian social, political and even theoretical reality.¹³⁴¹

In the end, these authors concluded that given the equal political status, the Court would find a way to reject the United Kingdom legislation, and rely principally on the political fact of independence.¹³⁴²

The self-embracing conceptions of the Canadian constitutional theory in the twentieth-century could be explained and justified in terms of Canada's social, political and historical development, both inside and outside the legal community. The legal understanding of the patriation of the Canadian constitution process therefore should include not only the respecting for the existing constitutional rule of law, but also the factors particularly relevant to Canada and the Canadians.¹³⁴³

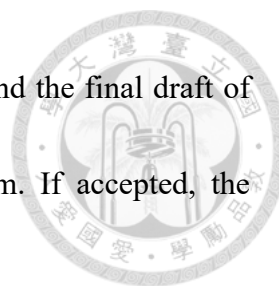
1.2 Australia

Unlike the Canadian and New Zealand Constitutions, the Australian Constitution 1900

¹³⁴¹ *Id.* at 12–3.

¹³⁴² J.-Y. Morin and J. Woehrling, *Les Constitutions du Canada et du Québec du Régime Français à nos Jours* 464 (1992). Cited in Oliver, *supra* note 48, at 260.

¹³⁴³ Oliver, *supra* note 48, at 322.



was drafted by Australians in elected Constitutional Conventions, and the final draft of the Constitution would then be put to the people in a referendum. If accepted, the Constitution would then be submitted to the Crown.¹³⁴⁴

Given the way in which the Constitution was prepared and adopted, there are interpretations that the Constitution is grounded, politically and legally, in the sovereignty of the Australian people.¹³⁴⁵ However, there was a vague feeling of distrust of the Constitution, since the representative body was conservative in composition and indirectly representative of the people, which was entrusted with no definite or detailed mandate by the parliaments which create it.¹³⁴⁶ It was therefore thought to be “not a supreme law purporting to obtain its force from the direct expression of a people’s inherent authority to constitute a government”.¹³⁴⁷

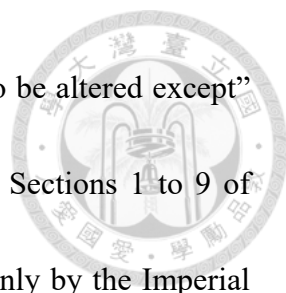
Section 128 of the constitution required approval of the alteration by each House of Parliament (or, in special circumstances, one House) and by the Australian people voting in state referendums (approval of the alteration by a majority of electors voting

¹³⁴⁴ *Id.* at 206.

¹³⁴⁵ *Id.* at 207.

¹³⁴⁶ R. QUICK & R. GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 144 (Reprint of 1901 edition, 1976).

¹³⁴⁷ (1992) 108 A.L.R. 577, available at <http://classic.austlii.edu.au/au/journals/MelbULawRw/1992/27.pdf> (Last visited May 2, 2022)



in a majority of states and by a majority of electors overall). “Not to be altered except” seemed to exclude even the Imperial Parliament.¹³⁴⁸ Nevertheless, Sections 1 to 9 of the Commonwealth of Australia Act 1900 (Imp.) could be altered only by the Imperial Parliament.¹³⁴⁹ It has been acknowledged that the Imperial Parliament was an alternative method of amending the Constitution, especially when the section 128 procedure was blocked for whatever reason.¹³⁵⁰ Therefore, the argument that the Australian people were the sovereign by virtue of their powers in section 128 was vulnerable, “if it can be found that the power to alter the constitution also resides elsewhere, or that there are important matters ... which lie beyond the scope of section 128”.¹³⁵¹ Regarding the recourse to the United Kingdom Parliament, Evans noted that “the Westminster Parliament can, technically speaking, at any time amend” the Australian Constitution.¹³⁵²

In July 1900, the referendum in Western Australia went ahead with positive results.¹³⁵³

The Bill was passed by the Westminster Parliament, coming into effect on 1 January 1901. However, as Irving stated, “If it were amended, they might have to begin all over

¹³⁴⁸ Oliver, *supra* note 48, at 209.

¹³⁴⁹ Quick & Garran, *supra* note 1347, at 989.

¹³⁵⁰ Oliver, *supra* note 48, at 214

¹³⁵¹ G. Lindell, *Why is Australia's Constitution Binding? —the reasons in 1900 and Now and the Effect of Independence*, 16 FED. L.R. 29, 39(1986).

¹³⁵² G. Evans, *Changing the System*, in CHANGING THE RULES: TOWARDS A DEMOCRATIC CONSTITUTION 158 (S. Encel, D. Horne and E. Thompson eds., 1977).

¹³⁵³ Oliver, *supra* note 48, at 207.

again”.¹³⁵⁴ Hence, in strict legal terms, the final version of the Commonwealth of Australia Constitution Act 1900 was the product of the Imperial Parliament, since the highest legislature of Australia can pass no law repugnant to any Act of the British Parliament extending to Australia.¹³⁵⁵

With the enactment of the Statute of Westminster 1931 and its adoption by Australia in 1942, these obstacles standing in the way of using the tools needed to be constitutionally independent were eliminated.¹³⁵⁶ According to the Statute of Westminster, the British Parliament cannot legislate to affect the constitution or anything else in Australia, unless such legislation is requested by and consented to by the parliament and government of the commonwealth of Australia.¹³⁵⁷ It is argued that the new Constitution could then be ratified by the people of Australia, which therefore became a constitution of “We the people” rather than a “Made in Britain” constitution.¹³⁵⁸

A number of constitutional commentators designate 11 December 1931, the time when


¹³⁵⁴ H. IRVING, *TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA’S CONSTITUTION* 14 (1999).

¹³⁵⁵ Quick & Garran, *supra* note 1347, at 994.

¹³⁵⁶ Oliver, *supra* note 48, at 349

¹³⁵⁷ Evans, *supra* note 1353, at 159.

¹³⁵⁸ *Id.* at 160.



Australia acquired the power to adopt the Statute of Westminster, as the moment when Australia achieved its independence.¹³⁵⁹ Dixon recognized that sections 2 and 4 of the Statute represented a clear legislative denial or restriction of the Imperial Parliament's supremacy.¹³⁶⁰ For Zines, the Constitution was law because it was enacted by the British Parliament, but it is now law because it is accepted by the Australian people as their framework of government. In other words, it is the Australian fundamental law which needs no further legal justification. Zines proceeded to take "the people" as a potential new sovereign. The argument seems to be that, by doing away with the authority of [the Westminster] Parliament, the people of Australia was left as the font and origin of the Australian legal system. The United Kingdom Parliament could still legislate for Australia after 1939, as it would do in 1986, but it was no longer hierarchically superior. The Grundnorm or rule of recognition had seemingly shifted.¹³⁶¹ The will of the people, and the political precondition of the legal enactment of the Constitution, have become the ground of its validity.¹³⁶² Popular sovereignty now requires that the Commonwealth and state legislatures must "listen to, and be accountable to, their political, and now constitutional masters",¹³⁶³ a duty none of these

¹³⁵⁹ Oliver, *supra* note 48, at 219-20

¹³⁶⁰ *Id.* at 223-24

¹³⁶¹ See L. Zines, *The Sovereignty of the People*, in *POWER, PARLIAMENT AND THE PEOPLE* (M. Cooper and G. Williams eds., 1997).

¹³⁶² *Id.* at 95.

¹³⁶³ *Id.* at 96.

legislatures owed to the Imperial Parliament.



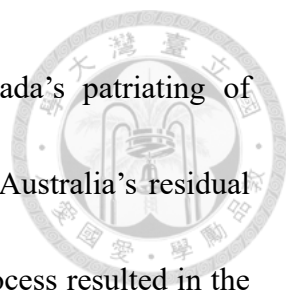
The relationship between Australia and the United Kingdom had changed because “the continued application of existing Imperial laws ... subject now to the power of repeal or amendment by Commonwealth legislation”.¹³⁶⁴ The practical effects of the power to amend the Constitution are that the ultimate authority in this country lies with the Australian people. Moreover, subject to the Constitution, the Australian Parliament possesses the legislative competence to exclude the direct operation of the laws, executive actions and judicial decisions of any other country (including the United Kingdom) from Australia and Australian law.¹³⁶⁵

Nevertheless, a question was raised in 1978 that whether Australian courts would “recognize the enactment by the United Kingdom Parliament of constitutional amendment legislation at the request of the Commonwealth Parliament”.¹³⁶⁶ A growing academic literature took the view that the Commonwealth, at the request of the states, could achieve constitutional independence for Australia by exercising powers given to it

¹³⁶⁴ As confirmed in Section 2 of the Statute of Westminster, 1931. *See* *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 212, *available at* [https://staging.hcourt.gov.au/assets/publications/judgments/1979/052--CHINA_OCEAN_SHIPPING_CO_v_SOUTH_AUSTRALIA--\(1979\)_145_CLR_172.html](https://staging.hcourt.gov.au/assets/publications/judgments/1979/052--CHINA_OCEAN_SHIPPING_CO_v_SOUTH_AUSTRALIA--(1979)_145_CLR_172.html) (Last visited May 2, 2022)

¹³⁶⁵ *Id.* at 442.

¹³⁶⁶ R.D. Lumb, *Fundamental Law and the Processes of Constitutional Change in Australia*, 9 FED. L.R. 148,157(1978).



under section 51(xxxviii). In June 1982, just months after Canada's patriating of constitution, the Premiers Conference decided that action to sever Australia's residual links with the United Kingdom was in order.¹³⁶⁷ Eventually, this process resulted in the enactment of two substantially identical versions of the Commonwealth and Westminster Parliaments. Each state requested both the Australian and United Kingdom versions of the Australia Act.¹³⁶⁸ The Commonwealth in turn communicated its request and consent to Westminster, as expressed in the Australia (Request and Consent) Act 1985 (Cth). According to section 15 of the bill, only the states and Commonwealth which had brought about the Australia Act 1986 could repeal or amend it. In presenting the Australia Bill and Australia (Request and Consent) Bill to Parliament, the Attorney-General, Lionel Bowen, stated that the proposed legislation would "eliminate those laws and procedures which are anachronistic and substitute new arrangements which reflect Australia's status as an independent and sovereign nation".¹³⁶⁹ In the debates that followed, some of the speakers noted that "Britain laid the egg that was to yield the nation, but laid it in someone else's nest", and "this is ... truly a coming of age".¹³⁷⁰ Finally, both the Commonwealth and Westminster Parliaments acceded to these various requests by enacting the Australia Act 1986 (Cth) and the Australia Act

¹³⁶⁷ Oliver, *supra* note 48, at 244.

¹³⁶⁸ *Id.*

¹³⁶⁹ Australia, Parliament, House of Representatives, Debates, 13 November 1985, 2695, cited in Oliver, *supra* note 48, at 246.

¹³⁷⁰ Debates, 25 November 1985, 3590, cited in *id.*

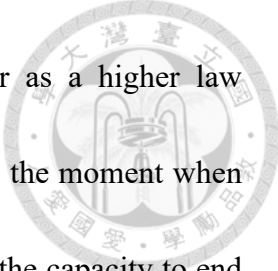
(UK).



In 1999, the case of the *Sue v Hill* called into the question whether a British is a foreigner. It concerned a challenge to the election of a Senator on the basis that the British person elected was a “subject or citizen of a foreign power” within the meaning of section 44(i) of the Australian Constitution. In the words of Gleeson CJ, Gummow and Hayne JJ, it would not be possible to describe the United Kingdom as a “foreign power” under section 44 (i) “if Australian courts are, as a matter of the fundamental law of this country, immediately bound to recognize and give effect to the exercise of legislative, executive and judicial power by the institutions of government of the United Kingdom”.¹³⁷¹ The judges immediately stated that the Commonwealth version of the Australia Act 1986 prevented such a conclusion. In this case, the High Court of Australia suggested that the Australia Act 1986 (Cth) accomplished the task of achieving constitutional independence on its own.

Lindell admitted that the 1986 Act resulted in “the attainment of complete constitutional

¹³⁷¹ *Sue v Hill* (1999) 199 CLR 462, available at [https://www.ato.gov.au/law/view/document?Mode=type&TOC=%2205%3ACases%3AHigh%20Court%3A1999%3ASue%20v.%20Hill%20-%20\(23%20June%201999\)%3A%230105%23Judgment%20by%20Kirby%20J%3B%22&DOCID=%22JUD%2F199CLR462%2F00005%22](https://www.ato.gov.au/law/view/document?Mode=type&TOC=%2205%3ACases%3AHigh%20Court%3A1999%3ASue%20v.%20Hill%20-%20(23%20June%201999)%3A%230105%23Judgment%20by%20Kirby%20J%3B%22&DOCID=%22JUD%2F199CLR462%2F00005%22) (Last visited May 2, 2022)



independence”¹³⁷², since the Constitution now enjoys its character as a higher law because of the will and authority of the people, but he chose 1931 as the moment when Australia achieved its constitutional independence. He distinguished the capacity to end colonial links with the United Kingdom from the exercise of that capacity, dating acquisition of the former at 1931 and the latter at 1986. He deemed acquisition of capacity to be critical in so far as independence was concerned.¹³⁷³ Significantly, he emphasized that freely choosing the legislature (executive and courts) of another country to exercise authority in Australia was not inconsistent with constitutional independence.¹³⁷⁴ Accordingly, “the essential point was not the continued existence or operation of these extra-Australian forms of governmental authority, but rather the ability or capacity of Australian institutions to put an end to them.”¹³⁷⁵ George Winterton also identified 1931 and enactment of the Statute of Westminster as the moment of independence, given that from then on, all the necessary tools for the removal of any vestige of colonialism lay within the Australian hands, either through Commonwealth legislation in the Statute of Westminster Adoption Act 1942, or by joint legislation by Commonwealth and state legislatures in the Australia Act 1986 (Cth)

¹³⁷² Lindell, *supra* note 1352, at 37.

¹³⁷³ G. Lindell, *Further reflections on the date of the acquisition of Australia's independence*, in REFLECTIONS ON THE AUSTRALIAN CONSTITUTION 51, 54-5 (G. Lindell, C. Saunders and R. French eds., 2003).

¹³⁷⁴ *Id.*

¹³⁷⁵ Oliver, *supra* note 48, at 274.

enacted pursuant to section 51(xxxviii) of the Constitution.¹³⁷⁶



1.3 New Zealand

Unlike the Australians, New Zealanders were not directly involved in the making of their constitutional texts.¹³⁷⁷ The New Zealand Constitution Act 1852 (Imp.) was drafted and enacted in London and then made available to the colony for its intended local operation.¹³⁷⁸ It was true that section 68 made it lawful for the General Assembly of New Zealand “to alter from time to time any provisions of this Act” subject to reservation for the signification of royal pleasure.¹³⁷⁹ However, twenty-one sections were excluded from the amending powers of the General Assembly, and it was generally accepted that only the Imperial Parliament could amend these, so long as the 1857 Act remained unaltered.¹³⁸⁰

Furthermore, in the section 53 of the 1852 Act, it provided that “no such laws are repugnant to the law of England”. As Aikman stated, the doctrine of repugnancy was itself an expression of the legislative supremacy of the United Kingdom Parliament.

¹³⁷⁶ G. Winterton, *The Acquisition of Independence*, in REFLECTIONS ON THE AUSTRALIAN CONSTITUTION 31 (G.J. Lindell, C. Saunders and R.S. French eds., 2003).

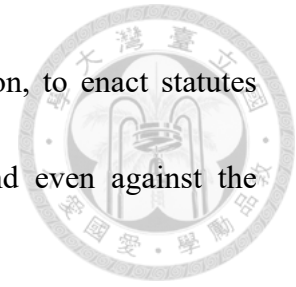
¹³⁷⁷ Oliver, *supra* note 48, at 35.

¹³⁷⁸ *Id.* at 37.

¹³⁷⁹ *Id.* at 185.

¹³⁸⁰ See Joseph, *supra* note 1281, at 107–8; C.C. Aikman, *Parliament in NEW ZEALAND: THE DEVELOPMENT OF ITS LAWS AND ITS CONSTITUTION* 40, 55 (J.L. Robson eds., 2nd ed. 1967).

Still the UK Parliament had the power, limited only by convention, to enact statutes applying to New Zealand without consulting its Government and even against the wishes of the New Zealand Government or Parliament.¹³⁸¹



When the Balfour Declaration 1926 and Statute of Westminster 1931 came into force, The New Zealand Parliament showed its preference for the status quo, and the Statute was not adopted until 1947.¹³⁸² By section 4 of the Statute of Westminster, the United Kingdom Parliament “surrendered” its “power ... to enact legislation extending to New Zealand without consulting the New Zealand Government or Parliament”.¹³⁸³ Given that nothing less than true request and consent of the New Zealanders would enact legislation; it is argued that perhaps the United Kingdom Parliament was now legally subordinated to the New Zealand Parliament.¹³⁸⁴ McHugh accepted the “supposition ... that once New Zealand adopted the Statute of Westminster in 1947 its legislative organs obtained supreme sovereign power.”¹³⁸⁵ Hence, New Zealand was considered to obtain “full legislative capacity” through adoption of the Statute of Westminster and true “legislative autonomy”.¹³⁸⁶ As long as New Zealand was capable of developing

¹³⁸¹ Aikman, *id.* at 59–60.


¹³⁸² Oliver, *supra* note 48, at 191.

¹³⁸³ Aikman, *supra* note 1381, at 60.

¹³⁸⁴ Oliver, *supra* note 48, at 195.

¹³⁸⁵ P.G. MCHUGH, *THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI* 59 (1991).

¹³⁸⁶ New Zealand, House of Representatives, *The Statute of Westminster: Notes on the Purpose and Effect of the Adoption by New Zealand Parliament of Sections 2, 3, 4, 5 and 6 of the Statute of*



constitutional understandings corresponding more closely to its own developments, then it was not bound to interpret the Statute in the same manner as the British courts might have done. Section 3 of the Statute of Westminster Adoption Act 1947 (NZ) gave this argument exceptional strength in the New Zealand context by stating that the request and consent provided for under section 4 of the 1931 Statute “shall be made and given by the Parliament of New Zealand, and not otherwise.” However, most New Zealanders “showed no awareness” of what had been achieved in 1947.¹³⁸⁷

Meanwhile, the New Zealand Constitution (Amendment) Act 1947 (UK) was enacted in UK at the request and consent by New Zealand, Section 1 of which made it “lawful for the Parliament of New Zealand ... to alter, suspend or repeal, at any time, all or any of the provisions of the New Zealand Constitution Act 1852.”¹³⁸⁸

Prompted by the turbulent transfer of power in the final days of the Muldoon government (1975–84), as part of a larger package of constitutional reform, the new Labour government sought to terminate any residual power of the United Kingdom

Westminster and the New Zealand Constitution Amendment (Consent and Request) Bill in New Zealand, House of Representatives, Journals, 1st Session, 28th Parliament, 1948, App., Vol. 1 5-6 (1947). Cited in Oliver, *supra* note 48, at 192.

¹³⁸⁷ J.F. Northey, *The New Zealand Constitution*, in *The A.G. DAVIS ESSAYS IN LAW* 179 (J.F. Northey eds., 1965).

¹³⁸⁸ Oliver, *supra* note 48, at 192.



Parliament to legislate for New Zealand. The work of preparing the necessary legislation was given to the Officials Committee on Constitutional Reform. The Committee readily acknowledged that before 1947, the New Zealand Parliament had been “clearly subordinate” to the Parliament of the United Kingdom,¹³⁸⁹ but after 1947 the relationship had changed due to the combined effect of section 4 of the 1931 Statute and section 3 of the (Adoption) Act 1947.¹³⁹⁰ From 1947 on, even the United Kingdom Parliament’s residual constituent powers had been subordinate to the will of the New Zealand Parliament. By 1986, in the Committee’s view, “the continued power of the United Kingdom Parliament to legislate for New Zealand, even residually and as agent for the New Zealand Parliament, [was] incompatible with New Zealand’s present status”.¹³⁹¹ It concluded that it was up to the New Zealand Parliament, as the supreme constituent authority in the New Zealand legal system, to declare that the United Kingdom Parliament’s powers were terminated.

In the constitution Act 1986, United Kingdom Parliament’s residual constituent powers were removed.¹³⁹² Section 26(1) repealed the (Amendment) Act 1947 (UK) and transfer the full constituent powers to the New Zealand Parliament. Section 15(1) made sure that

¹³⁸⁹ New Zealand, Department of Justice, Reports of an Officials Committee on Constitutional Reform: Second Report 28 (1986). Cited in Oliver, *supra* note 48, at 199.

¹³⁹⁰ New Zealand, *id.*

¹³⁹¹ *Id.*

¹³⁹² Oliver, *supra* note 48, at 199.

these “full powers” were perpetuated; “The Parliament of New Zealand continues to have full power to make laws.”



When the proposed Bill came before Parliament, members may have been satisfied with the Minister of Justice’s assurances that the Bill was mostly a restatement and updating of the law.¹³⁹³ If the Amendment Act 1947 (UK) had transferred constituent or amending powers to the New Zealand Parliament, leaving the United Kingdom Parliament as an alternative but subordinate constituent or amending body alongside the New Zealand Parliament after 1947, then the Constitution Act 1986 (NZ) terminated even this residual role of the United Kingdom Parliament.¹³⁹⁴

Westminster Parliament’s powers were limited in terms of New Zealand laws of 1947, and from that point on they were subject to termination at the discretion of the New Zealand Parliament, which was occurred in 1986.¹³⁹⁵

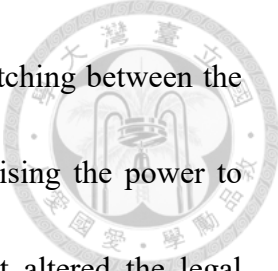
1.4 Sub Conclusion

MacCormick pointed out that “a necessary condition for coherence in a workable

¹³⁹³ *Id.*

¹³⁹⁴ *Id.* at 198.

¹³⁹⁵ *Id.* at 290.



constitution for a law-state” was that there had to be “reciprocal matching between the criteria for recognizing valid law, and the criteria for validly exercising the power to enact law”.¹³⁹⁶ Although the Statute of Westminster 1931 had not altered the legal authority of the United Kingdom Parliament with respect to the amendment of the dominions’ constitution, in reality the dominions have become fully independent since then. It has therefore been held that at the highest level of constitutional analysis “the reality is the law”.¹³⁹⁷ Former colonies become legally independent in the eyes of their own courts which accept the fact that there has been a change in the fundamental legal order.¹³⁹⁸

The debate of the constitutional theorists and courts of the three countries demonstrated how they are now constitutionally independent, which took place without any breach in legal continuity. The old Grundnorm could be said to have been replaced by the new;¹³⁹⁹ the old ultimate rule of recognition has been transformed into a version more attuned to their needs.¹⁴⁰⁰ On Joseph’s account, the process was evolutionary but the effect revolutionary,¹⁴⁰¹ since they would be free of the authority of the Imperial

¹³⁹⁶ See N.MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND PRACTICAL REASON 85(1999); G. TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 19-24 (A. Bankowska and R. Adler trans, Z. Bankowski eds., 1993).

¹³⁹⁷ Schwartz & Whyte, *supra* note 1330, at 165.

¹³⁹⁸ *Id.*

¹³⁹⁹ P.A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND 398 (1993).

¹⁴⁰⁰ *Id.* at 121, 398.

¹⁴⁰¹ *Id.* 122.

sovereign.¹⁴⁰²



Then how could it be said that the Australian, Canadian and New Zealand legal systems were separate and distinct from the British legal system?

Kelsen states that a legal system includes all rules which are connected to the Grundnorm by an unbroken chain of legal rule-following.¹⁴⁰³ Accordingly, the Grundnorm was probably the continuing Westminster sovereignty from which there could be no legal escape. Nevertheless, while Kelsen's simple model may be enough to identify valid law and explain its normativity in basic terms; other factors must be brought into consideration in order to bring the constitution to life.¹⁴⁰⁴ Hart underlined the importance of habitual and factual use by calling his substitute for the Grundnorm the "rule of recognition".¹⁴⁰⁵ For him, validity was a question of fact, specifically "the actual practice of the courts and officials of the system."¹⁴⁰⁶ When identifying the law which they are to apply, "Hart's analysis did not require a historically first constitution; validity could be determined by reference to the observable facts of the present."¹⁴⁰⁷ In

¹⁴⁰² Oliver, *supra* note 48, at 291-92.

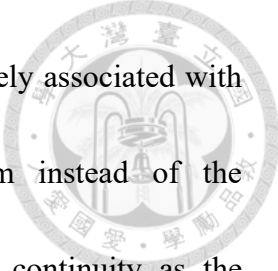
¹⁴⁰³ *Id.* at 343.

¹⁴⁰⁴ H.L.A. HART, *THE CONCEPT OF LAW* 245 (2nd ed, 1994).

¹⁴⁰⁵ *See id.* ch. 6.

¹⁴⁰⁶ *Id.* at 245.

¹⁴⁰⁷ Oliver, *supra* note 48, at 293.



the eyes of Raz, the continuity and identity of a legal system is closely associated with the continuity and identity of the social and political system instead of the grundnorm.¹⁴⁰⁸ Raz considers that Kelsen's use of constitutional continuity as the criterion for the identity of a legal system does not fit the facts, since "A country may be granted independence by a law of another country authorizing its laws; nevertheless, its laws form a separate legal system."¹⁴⁰⁹ Therefore, in consideration of whether the ultimate rules of the Australian, Canadian and New Zealand legal systems have evolved, it is crucial to recognize that all three systems are now judicially independent.¹⁴¹⁰ "When the Supreme Court of Canada had taken over the leading role in constitutional interpretation, it was natural that the Canadian court would occasionally take different views from the British or other Commonwealth courts on various legal and theoretical questions."¹⁴¹¹

In Wade's view, however respectful of law the process may have appeared to be, it was because of the "atmosphere of harmony" that "the naked fact of revolution was not so easy to discern beneath its elaborate legal dress."¹⁴¹² Since the legal basis of the United Kingdom Constitution had been altered by a procedure not contemplated in the previous


¹⁴⁰⁸ Raz (1980), *supra* note 1267, at 88.

¹⁴⁰⁹ *Id.* at 188.

¹⁴¹⁰ Oliver, *supra* note 48, at 313.

¹⁴¹¹ *Id.* at 318

¹⁴¹² Wade, *supra* note 1298, at 191.



rule, a legal revolution must have occurred. Wade characterizes this revolutionary change as a change in the United Kingdom’s “ultimate rule of recognition”.¹⁴¹³ The moment when the Westminster Parliament relinquishes its supreme constitution-making powers to Australia, Canada and New Zealand is “a disguised revolution” even if that Parliament’s powers are irrevocably continuing in nature.¹⁴¹⁴

Different legal systems might take different views on where sovereignty lies or simply accept that the matter is uncertain. In order to understand and interpret the evolution of a legal system, it is important to know which legislature can influence the telling of that story and which courts can influence its interpretation. It is also necessary to take into account the culture, politics, history and law of the society in question. This is also the case in understanding and interpreting sovereignty.¹⁴¹⁵ In the years following the enactment and adoption of the Statute of Westminster 1931, even if the United Kingdom were to persist in assuming that its Parliament can legislate for Australia, Canada and New Zealand, those countries, through their courts, certainly assume the contrary. “Given their political, international and judicial independence, Australia, Canada and New Zealand are entitled to adopt distinct interpretations of the Westminster

¹⁴¹³ See H.W.R. Wade, *Sovereignty—Revolution or Evolution?* 112 LAW Q. REV. 568, 574. (1996).

¹⁴¹⁴ Oliver, *supra* note 48, at 314.

¹⁴¹⁵ *Id.* at 344.



Parliament's powers in so far as that institution affects their own legal systems."¹⁴¹⁶ In all three countries, any ongoing role of the Westminster Parliament in these countries was terminated through legislation or the court.¹⁴¹⁷

In the view of a self-embracing legal change, constitutional independence of these countries is granted by United Kingdom legislation while the United Kingdom Parliament is permanently and fully prohibited from interfering in their legal affairs, constitutional or other.¹⁴¹⁸ United Kingdom Parliament is no longer an active component of the previous dominions' legal system with the people of these countries being the new sovereign now.¹⁴¹⁹ According to the local constitutional theorists, the Australian Constitution is rooted in the sovereignty of the people, the Canadian Constitution is dependent on the acceptance by the international community of Canada's independent status, and the New Zealand Constitution is based on popular acceptance of the local communities.

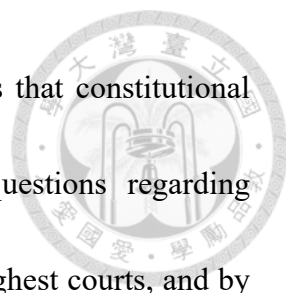
The Imperial link was important in demonstrating the respect for the rule of law, but those constitutions also derive their meaning and force from social, political and

¹⁴¹⁶ *Id.* at 311.

¹⁴¹⁷ *Id.* at 347.

¹⁴¹⁸ *Id.* at 332.

¹⁴¹⁹ *Id.* at 336.



historical factors particular to those countries.¹⁴²⁰ The crux here is that constitutional questions in Australia, Canada and New Zealand, including questions regarding constitutional independence, are now decided by those countries' highest courts, and by them alone.¹⁴²¹ Since the constitutional amendment process is usually the master key to the Constitution, when the United Kingdom Parliament handed over that master key and removed itself from dominions' constitutional amendment, the fully constitutional independence of those countries has become beyond doubt.

2. Constitutional Development of Taiwan

Every state is in a certain “constitution”, and where no constitution could be identified, no state existed. While the older concept of constitution was an empirical concept, according to the modern constitutionalism set by the American and French Revolutions, it is in the constitution that a society determines the form and content of its political unity.¹⁴²² In so doing, a society exercises its right of self-determination vis-à-vis the ruling order, thereby demonstrating that it is sovereign and the sole source of public authority.¹⁴²³ Therefore, the only possible legitimization of political power is the

¹⁴²⁰ *Id.* at 328.

¹⁴²¹ *Id.* at 53.

¹⁴²² DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE 44 (2016).

¹⁴²³ *Id.* at 156.

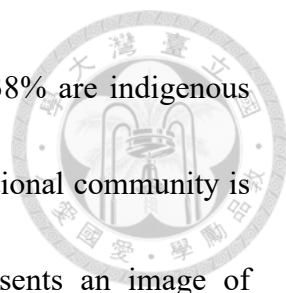
consent of the governed, and the source of the validity of the order could only be found in the people.¹⁴²⁴



In Taiwan's over 400 hundred years of civilized history, its legal system had been imposed by several external conquerors. From the arrival of the Dutch in 1624 to the death of Chiang Ching-kuo in 1987, Taiwan had been ruled by a sequence of six foreign regimes: (i) Dutch (1624-62); (ii) Spain (1626-42) in the north; (iii) Cheng regime (1662-83); (iv) Qing Dynasty (1683-1895); (v) Japan (1895-1945); (vi) China (1945-1949); (vii) The Republic of China government in exile (1949-1988). While colonialism occurs when people from one country settle in a territory for the purpose of exploiting its people and natural resources, settler colonizers "come to stay" and permanently occupy and assert sovereignty over indigenous lands. In this sense, all the former regimes were traditional colonizers, except for the last regime of ROC government in exile, which fits into the category of settler colonizers. At any rate, all of these regimes came to impose their rule on the indigenous people without their consent, which was illegitimate in the modern sense of constitutionalism.

It is true that most of the inhabitants in Taiwan today came from China. The population

¹⁴²⁴ *Id.* at 200-01.



of Taiwan today is largely composed of Han Chinese and only 2.38% are indigenous Austronesian, yet one must differentiate a nation from a People. National community is an image of community over time, the people, in contrast, presents an image of community over space.¹⁴²⁵ A people portray all individuals within the given boundaries of a state as members of a community from which the state derives its legitimate authority. A people is the whole body of a territory's inhabitants imagined as the final judge of how the state's authority should be constructed, which exists by right rather than by custom or consciousness raising.¹⁴²⁶ A people exist as long as one believes in a particular theory of political legitimacy. A nation needs time and effort to establish a legacy of memories and symbols salient enough to link one generation to another. A people, in contrast, need no nurturing. It is available as soon as the individuals on a territory accept the principles of legitimacy that assert its existence.¹⁴²⁷

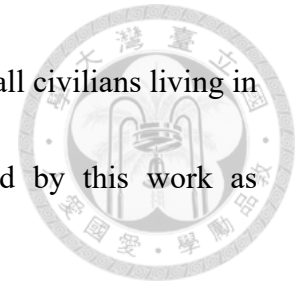
Therefore, the Taiwanese Han Chinese people as a community from which the modern state of Taiwan derives its legitimate authority shall not be confused with the genetic and cultural concept of Chinese. Under the constitution of Nepal, all ethnic, linguistic, cultural, and religious groups or communities living in Nepal since the formation of the

¹⁴²⁵ Bernard Yack, *Popular Sovereignty and Nationalism*, 29 *POLIT. THEORY* 517, 520 (2001).

¹⁴²⁶ See ROGER SCRUTON, *THE PHILOSOPHER ON DOVER BEACH* 301 (1990).

¹⁴²⁷ Yack, *supra* note 1426, at 521.

Nepalese statehood are indigenous peoples.¹⁴²⁸ By the same token, all civilians living in Taiwan on the event of its attainment of statehood are deemed by this work as Taiwanese people.



Considering that the national identity formed by a people within a particular territory has only developed as late as 18th century,¹⁴²⁹ just about the same time as the origins of modern constitutionalism, this section will focus on the discussion of the Japanese and Chinese constitutions imposed on Taiwan after the 18th century. Regardless of their original democratic structure, both of them were only applicable to Taiwan wherever it worked to the advantages of the colonial government. As instruments for building Japanese and Chinese identity rather than constraining governmental abuse of power, they were nothing but nominal constitutions for the Taiwanese people, given that partial ineffectiveness are capable of discrediting the constitution as a whole.¹⁴³⁰ On Waltermann's account, while anyone can write a document labelled as constitution, unless the norms contained in it are recognized and efficacious, this "constitution" will only be a number of words on a piece of paper.¹⁴³¹

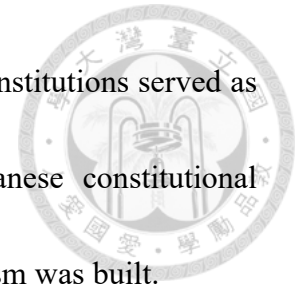
¹⁴²⁸ Bhandari, *supra* note 1258, at 141.

¹⁴²⁹ Breuilly, John (2016) Benedict Anderson's imagined communities: a symposium. *Nations and Nationalism*. ISSN 1354-5078, at 17.

¹⁴³⁰ Grimm, *supra* note 1422, at 138.

¹⁴³¹ Waltermann, *supra* note 1264, at 40.

Nevertheless, from an historical point of view, the two incoming constitutions served as the primary foundations upon which the process of the Taiwanese constitutional indigenization took hold and Taiwan's contemporary constitutionalism was built.



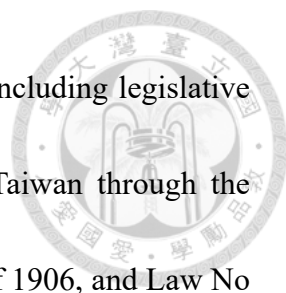
2.1 Under Japan (1895-1945)

2.1.1 Governmental system

After Taiwan was ceded to Japan by the Shimonoseki Treaty in 1895, Japan's Meiji Constitution was only partially applicable to Taiwan.¹⁴³² The government structure of Taiwan was built in accordance with the Meiji Constitution, whereby sovereignty resided in the Emperor through various bodies of the state instead of the people. All the executive acts of the Emperor requires the counter-signature of the minister of state in the Cabinet; the Emperor's command over the Army and Navy was issued upon the advice of the General Staff Headquarters, and his legislative power requires the consent of the Imperial Diet; the judicial power of the state was exercised by the courts in the name of the Emperor.¹⁴³³

¹⁴³² TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE (1895 – 1945): THE RECEPTION OF WESTERN LAW 39 (2000).

¹⁴³³ See generally JAPANESE LEGISLATION IN THE MEIJI ERA 383-86, 401-03 (Ryosuke Ishii ed., William J. Chambliss trans., 1958); Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *Law in JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 6, 13 (Arthur von Mehren ed., 1963).



In the colony of Taiwan, most of the Japanese Emperor's powers, including legislative and executive ones, were delegated to the Governor-General of Taiwan through the enactment of special laws such as Law No 63 of 1896, Law No 31 of 1906, and Law No 3 of 1921. Accordingly, legislative powers were concentrated in the Governor's hands, contravening the provisions of the Meiji Constitution.¹⁴³⁴ Under the supervision of the Minister of the state and the General Staff Headquarters, the Governor-General was entrusted with the executive and military authority.¹⁴³⁵ The Japanese Constitution was applied to Taiwan only when they felt it would not constrain its powers.¹⁴³⁶

In the late 1910s, in order to eliminate the influence of the Wilsonian principle of self-determination, the Japanese Empire decided push for the assimilation of the Taiwanese people.¹⁴³⁷ After 1919, the military authority of the Governor-General was transferred to the post of commander-in-chief. From January 1, 1923, under the policy of “extension of the homeland”, a large part of Japanese law was directly implemented in Taiwan.¹⁴³⁸ The Governor-General possessed the power to legislate with regard to the people of Taiwan through issuing special ordinances with the approval of the

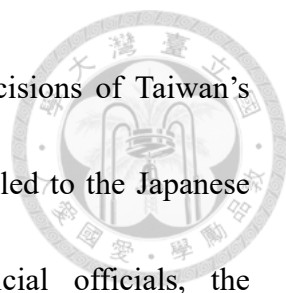
¹⁴³⁴ Jau-Yuan Huang , Fort Fu-Te Liao , and Wen-Chen Chang, *Development of Constitution Law and Human Rights in Taiwan Facing the New Century* 4 (2003), available at <https://www.ide.go.jp/library/English/Publish/Reports/Als/pdf/24.pdf> (Last visited May 2, 2022)

¹⁴³⁵ Wang, *supra* note 604, at 540.

¹⁴³⁶ See Edward -te Chen, *Japanese Colonialism in Korea and Formosa: A Comparison of the Systems of Political Control*, 30 HARV.J.ASIATIC STUD 132,137 (1970).

¹⁴³⁷ Wang, *supra* note 604, at 534.

¹⁴³⁸ *Id.* at 535.



Cabinet (in the name of the Emperor). On the other hand, the decisions of Taiwan's courts, which had the sole power to adjudicate, could not be appealed to the Japanese Supreme Court in Tokyo. Through the appointment of judicial officials, the Governor-General could control the administration of these courts. All of his powers were supervised by the central government in Tokyo.¹⁴³⁹

However, after a long period of civilian bureaucrats holding the post since 1919, in 1936, Japan appointed active duty or retired military men as Taiwan Governors again, due to the gravity of the international situation.¹⁴⁴⁰

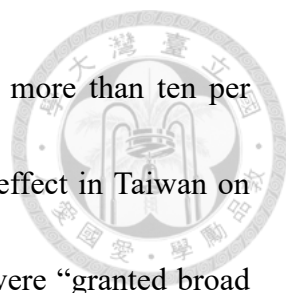
2.1.2 Human Rights

In Taiwan, rights and liberties were rigidly constrained and suppressed by the colonial military and state police.¹⁴⁴¹ During the first two decades of Japanese rule, very harsh criminal sanctions were imposed on Taiwanese political criminals. After the policy of “extension of the homeland” was adopted in the 1920s, however, most of the punishment of flogging was abandoned and replaced by fines. Meanwhile, more than one half of all sentences of penal servitude were for less than six months terms, and “the

¹⁴³⁹ *Id.*

¹⁴⁴⁰ Wang, *surpa* note 1433, at 129-30.

¹⁴⁴¹ Huang et al, *surpa* note 1435.



number of defendants sentenced to life in prison or death was no more than ten per year”.¹⁴⁴² The Japanese Code of Criminal Procedure of 1922 took effect in Taiwan on January 1, 1924.¹⁴⁴³ Yet the prosecutors and the police in Taiwan were “granted broad powers to summon, interrogate, search, or detain persons not in flagrante delicto; powers that in metropolitan Japan belonged only to the preliminary judge.”¹⁴⁴⁴ Nevertheless, it is worth noting that under the new code, counsels are permitted to assist the accused in the preliminary investigation.¹⁴⁴⁵ Learning the concept of due process during this period of time, the Taiwanese people increasingly resorted to court to solve disputes.¹⁴⁴⁶

On the other hand, under the Taiwan Vagrant Discipline Regulation of 1906, vagrants without fixed residences or jobs could be sent to work in a vagrant camp for one to three years, which was equivalent to a criminal penalty. The decision was made by the police, with the approval of the governor-general, and the vagrant had no right to judicial appeal. However, it has to be noted that at the end of the wartime period, almost no one was imprisoned in vagrant camps.¹⁴⁴⁷

¹⁴⁴² Wang, *supra* note 604, at 549.

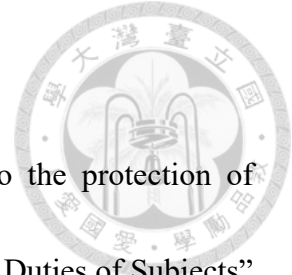
¹⁴⁴³ *Id.* at 551.

¹⁴⁴⁴ The procurator had power to detain the suspect for twenty days (1905-1923) or ten days (1924-1945). The police had no such a power to detain. In Wang, *supra* note 1432, at 129-30.

¹⁴⁴⁵ See Takayanagi, *supra* note 1434, at 20-2.

¹⁴⁴⁶ See Wang, *supra* note 1433, at 80-84, 86-88, 100-02, 130-31.

¹⁴⁴⁷ Wang, *supra* note 604, at 552.



The Meiji Constitution was relatively conservative with regard to the protection of human rights. Chapter II of the Meiji Constitution titled “Rights and Duties of Subjects” stipulates for the fundamental rights and liberties of Japanese subjects. In the 1920s, many Taiwanese intellectuals inspired by Wilson’s self-determination were engaged in political and cultural movements, asserting their fundamental rights and liberties provided by the Meiji Constitution to publish periodicals and newspapers, rally assemblies, petition the Diet; several political associations had been established, including opposition parties, in the 1920s and early 1930s.¹⁴⁴⁸ However, everything changed when the war came in 1937.¹⁴⁴⁹

As Taiwan entered the wartime period in 1937, “Japanization and wartime mobilization became the main concerns of the law in colonial Taiwan”.¹⁴⁵⁰ With Japan’s accelerating war-effort, its colonies were pressed into service as sources of men and material, the kominka campaign were implemented by the colonial bureaucracies, so as to rapidly turn the people of its colonies into loyal and thoroughly Japanese subjects of the

¹⁴⁴⁸ For the Taiwanese people’s political activities in the relatively free period under the Japanese colonial government, *see* Chapter III, P.137-43.

¹⁴⁴⁹ *See* Lamley, *supra* note 635, at 231-4, 244. ; Rigger, *supra* note 598, at 34-8.

¹⁴⁵⁰ Wang, *supra* note 604, at 535.

Emperor.¹⁴⁵¹



2.1.3 Autonomy

After the World War I and the conclusion of the Versailles Treaty, with the global trend of the recognition of human rights and critics of the colonial governments, during 1910s and 1920s, a legal variant of *isshi-doujin* which means “impartiality and equal favor [for all subjects of the Emperor]” began to be voiced by Legislators, newsmen, and other opinion leaders within the Japanese society, who began to question the correctness of limiting the Meiji Constitution’s application to the colonies and advocate for full Constitutional applicability in Taiwan and Korea.¹⁴⁵²

In tandem with the reformist efforts made by the Japanese intellectuals, there emerged a number of groups proposing equivalent rights with the Japanese subjects within the island of Taiwan. Despite the many Grievances the Taiwanese people harbored against the Japanese in the earlier colonial period, the younger Taiwanese generation has become more and more receptive with the assimilation policy. With the encouragement of the colonial authorities, the Taiwanese intellectuals called for the abolition of the old

¹⁴⁵¹ Chou, Wan-yao, *The Kominka Movement in Taiwan and Korea: Comparisons and Interpretations*, in *THE JAPANESE WARTIME EMPIRE, 1931-1945* 40-2 (Peter Duus, Ramon H. Myers, and Mark R. Peattie ed., 1996).

¹⁴⁵² Takekoshi, *supra* note 545, at 23-4.

“ills” inherent in the local Chinese society, including widespread use of opium, the practice of foot-binding among Hokkien womenfolk, the wearing of queues by adult males, and the popularity of superstitions which had an adverse effect on the population.

Many inhabitants were happy to embrace the modernization their new mother country had brought to the island.¹⁴⁵³

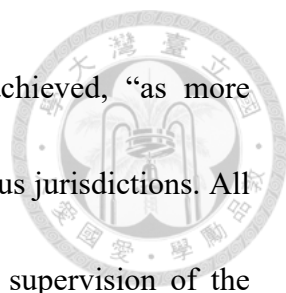
Nevertheless, while the Taiwanese people were encouraged to speak Japanese, to imitate the Japanese customs and lifestyle, they were denied political representation. The Meiji Constitution was only applied in a limited fashion to the advantage of the Japanese, and the Japanese authorities did not honor Western constitutionalism in Taiwan.¹⁴⁵⁴ Nevertheless, the Taiwanese people advocated on the basis of that very Constitution, for their autonomy and equal status with respect to the Japanese.¹⁴⁵⁵

In 1920, the Japanese authority introduced a system of local government with some semblance of autonomy to Taiwan. Under a three-tier system of local government (province and sub-province, mid-level municipality and county, and lowest-level

¹⁴⁵³ Harry J. Lamley, *Assimilation efforts in colonial Taiwan: the fate of the 1914 movement*, 29 *MONUM. SERICA* 496, 501-3 (1970). Available at <https://p303.zlibcdn.com/dtoken/a164eb9e4f4a40f2e1f3659fa31b0d6a/40725934.pdf> (Last visited Sep.6, 2022)

¹⁴⁵⁴ Wang, *supra* note 604, at 559.

¹⁴⁵⁵ Yeh, *supra* note 1185, at 27.



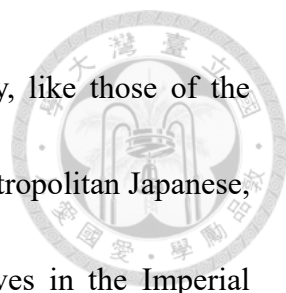
township and village), a certain level of decentralization was achieved, “as more authority was delegated to the ranking officials responsible for various jurisdictions. All heads of local governments, however, functioned under the direct supervision of the governor-general.”¹⁴⁵⁶ In 1921, local elites, grounding their claims on the Meiji Constitution itself, sought greater political freedoms from the Japanese colonial government. In petition for the creation of a Taiwanese council, the local elites viewed themselves as Japanese nationals, and campaigned that “the people” represented a self-governing entity.¹⁴⁵⁷ However, the petition was met with skepticism by the Japanese settlers on the island who at this time believed that encouraging such a movement would mean the Government’s tacit approval of faster assimilationist methods, which would lead to violent native resistance. Some Japanese argued that before equal rights could be granted, the colonial subjects should share more responsibilities.¹⁴⁵⁸

Regardless of the disapproval of the Japanese, the Taiwanese activists submitted petitions to the Diet annually requesting a parliament and a Taiwanese representative in the national legislature for 15 years. Eventually, things move forward in 1935.

¹⁴⁵⁶ Wang, *supra* note 604, at 545-6.

¹⁴⁵⁷ Wang, *supra* note 1433, at 149 – 50.

¹⁴⁵⁸ Mark R. Peattie, *Japanese Attitudes Toward Colonialism, 1895-1945*, in THE JAPANESE COLONIAL EMPIRE, 1895-1945 102, 109-114 (Ramon H. Myers and Mark R. Peattie ed.,1984).



Nevertheless, the suffrage rights granted by the Japanese authority, like those of the metropolitan Japanese, were limited to males only, but unlike the metropolitan Japanese, the Taiwanese were excluded from the right to elect representatives in the Imperial Diet.¹⁴⁵⁹ After 1935, the provincial and municipal councils were, to a certain degree, granted decision-making powers; half of their members were elected either by the lower councils within their jurisdictions at the provincial level or by qualified voters at the municipality level. Although qualified voters elected half of their representatives, the local councils in the townships and villages remained only advisory organs.¹⁴⁶⁰

However, with Japan's increased involvement in China, wartime demands accelerated, the discussions over the proper management of colonial peoples from the World War I to the end of the 1920s was made moot. Particularly from late 1936 until the end of World War II in August 1945, "it became readily apparent to colonial governments that the time needed for long-term assimilation to come to fruition could not be assured."¹⁴⁶¹

In 1945, as the World War II waned, the Japanese government devised a plan to grant the Taiwanese the right of participation in the Imperial Diet as a way to strengthen their

¹⁴⁵⁹ See Lamley, *supra* note 635, at 231-34, 244.

¹⁴⁶⁰ *Id.* at 225-57.

¹⁴⁶¹ Gunnar Abramson, Comparative Colonialisms: Variations in Japanese Colonial Policy in Taiwan and Korea, 1895 - 1945, 1(1) PSU MCNAIR SCHOLARS ONLINE JOURNAL 11, 22 (2004).

allegiance to Japan. But as Japan surrendered in that August, it was never carried out.¹⁴⁶²



Looking forward to the prospectus of Taiwan after the war, there were two trends of thought then. According to those who were contemplating the possibility for an independent state of Taiwan after the war, the political autonomy could only be based on the assertion of the independence of a “Taiwanese people”. Their arguments were that because of Taiwan’s colonial past, it had reached a particular level of sociological and economic development which enabled it to build a unique Taiwanese consciousness fundamentally different from that of Mainland China.¹⁴⁶³ Several Taiwanese intellectuals approached the Japanese authority about their possible support for an independent Taiwan, but they met with the stern opposition of the last Japanese governor of Taiwan, Ando Likichi.¹⁴⁶⁴ On the other hand, the pro-Chinese movement tended to create a link between Taiwan’s liberalist movement and Sun Yat Sen’s Chinese Nationalist Party and opinions, while the Marxist trend was focusing more on its own relation to the Chinese Communist Party.¹⁴⁶⁵ However, not until the arrival of the Chinese nationalist government soon after the war, did the pro-Chinese idealists

¹⁴⁶² Yeh, *supra* note 1185, at 27.

¹⁴⁶³ Renaud, *supra* note 637.

¹⁴⁶⁴ Han Cheung, *Taiwan in Time: The last governor-general*, TAIPEI TIMES, Dec. 31, 2017, at <http://www.taipeitimes.com/News/feat/archives/2017/12/31/2003684929> (Last visited May 2, 2022)

¹⁴⁶⁵ Renaud, *supra* note 637.

recognize the huge gap between them and the Chinese on the other side of the strait.



2.2 Under China (1945-1949)

2.2.1 Governmental System

After the World War II, the Chinese government was delegated by the Allied Power to administrate Taiwan pending the peace treaty with Japan. Chen Yi was appointed as the first ROC Governor-General of Taiwan Province and garrison commander of Taiwan, and on October 24, 1945 he arrived to take charge.¹⁴⁶⁶ The next day, Chen conducted a ceremony with Toshikichi Ando, the nineteenth Taiwanese Governor- General, declaring that “from today, Taiwan is a part of Chinese territory again and all the land and people are under the sovereignty of the government of the Republic of China.”¹⁴⁶⁷

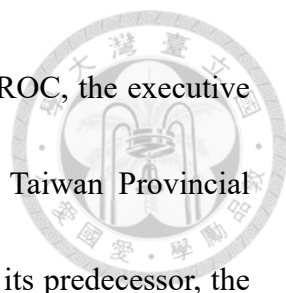
This announcement was null and void, because the peace treaty with Japan was still pending. Since political rule was deemed illegitimate when it was not based on a contract between the governor and the governed,¹⁴⁶⁸ yielding the densely populated and strategically important Taiwan in this way without consulting the will of the islanders, was an act of imprudence, as was described by George F. Kennan.¹⁴⁶⁹

¹⁴⁶⁶ Yoshida, *supra* note 583, at 64.

¹⁴⁶⁷ *Id.*

¹⁴⁶⁸ *Id.* at 42.

¹⁴⁶⁹ *Id.* at 64.



Under the legal framework of the 1931 Provisional Constitution of ROC, the executive power on Taiwan was delegated to the Governor-General of the Taiwan Provincial Administration Executive Office by the Executive Yuan.¹⁴⁷⁰ Just as its predecessor, the ROC's government in Taiwan possessed relatively autonomous authority in the executive and military affairs of Taiwan. Although under this provisional constitution, sovereignty resided in the people, the KMT claimed to exercise sovereign political power on behalf of the people who were not “mature enough” to elect representatives during “the period of political tutelage.”¹⁴⁷¹

A number of national legal systems attribute sovereignty to the people of that state in their constitutions.¹⁴⁷² Popular sovereignty requires that all exercise of state power be traced back to the will of the people.¹⁴⁷³ A regime based on popular sovereignty cannot be oppressive. By giving this form of consent, the subject conveys their respect for the state, their loyalty to it, their identification with it, and their trust in it.¹⁴⁷⁴ Yet many Chinese nationalists believed that political conditions in China were not hospitable to the constitution's full-blown adoption. Some considering the Chinese people as “too

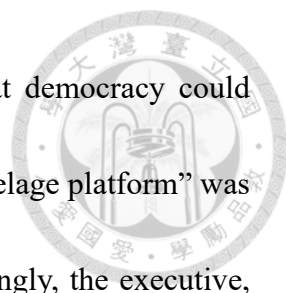
¹⁴⁷⁰ Lai et al, *supra* note 612, at 57.

¹⁴⁷¹ Wang, *supra* note 604, at 540.

¹⁴⁷² Examples can be found in the Portuguese Constitution (article 3), that of Thailand (section 3), of Russia (art. 3), Greece (art. 1(2)), Brazil (art.1) and of Germany (art. 20(2)).

¹⁴⁷³ Waltermann, *supra* note 1264, at 31.

¹⁴⁷⁴ *Id.* at 41.



politically immature” to enjoy complete democracy concerned that democracy could hinder the administration of the state.¹⁴⁷⁵ The so called “political tutelage platform” was in effect a justification for KMT’s despotic one-party rule. Accordingly, the executive, legislative, and judicial authority of the state was entrusted to separate departments of the National Government that was controlled by the Central Standing Committee of the KMT.¹⁴⁷⁶ The KMT excluded the democratic political elements that could give it a claim to popular sovereignty, instead allowing no checks and balances to limit its power.¹⁴⁷⁷

In Mainland China, the political and economic orders governed by the KMT were far from stable; indeed, the Communists had instigated a rebellion. The US and the Soviet Union put joint pressure on the KMT and Communist Party to avoid civil war. As a result, the middle factions opposing civil war were supported widely amongst the people, which had a chance to enact a constitution with a good democratic framework.¹⁴⁷⁸ In late 1946, the Constituent National Assembly convened its members elected in 1936 and 1937. Amid political instability and alleged electoral scandals, Taiwan sent 17 delegates to the convention, along with thousands of those from the

¹⁴⁷⁵ Pemberton, *supra* note 1254, at 98.

¹⁴⁷⁶ See Herbert H. Ma, *Adoption of the ROC Constitution of 1946*, in THE TAIWAN EXPERIENCE, 1950-1980: CONTEMPORARY REPUBLIC OF CHINA 298-301 (James C. Hsiung et. al. eds., 1981).

¹⁴⁷⁷ Yoshida, *supra* note 589, at 64

¹⁴⁷⁸ *Id.* at 32.

mainland.¹⁴⁷⁹ On December 25, 1946, the ROC Constitution was passed by the National Assembly. It was promulgated on January 1, 1947 and was scheduled to come into effect on December 15, 1947. On January 10, 1947, however, the Governor General of Taiwan, Chen Yi made the following announcement:

The constitution shall not be applied to Taiwan. Since the people of the mainland are more advanced, they can enjoy privileges of the constitution. However, the people of Taiwan lived under Japanese colonial rule for a long time. Their political conscience has degenerated and they lack intelligence; they cannot exercise autonomous politics. There needs to be a couple of years of political tutelage by the KMT before the Taiwanese can become full-fledged citizens.¹⁴⁸⁰

The Taiwanese people were outraged by the insulting nature of the statement. Their secondary citizen status made them felt that Taiwan was transferred from a Japanese colony to a Chinese colony. For the Taiwanese elites, the government seized by minority foreign rulers was against a movement demanding autonomy whose social authority was based on the people's will.¹⁴⁸¹

¹⁴⁷⁹ Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3 N.T.U.L. REV.111, 121 – 3 (2009).

¹⁴⁸⁰ Iharag, Kichinosuke, *Taiwan no seijikaikaku nenpyo oboegaki 1943-1987* (Taiwan's chronology of political reform and a memorandum from 1943 to 1987), TEZUKAYAMA DAIGAKU KYOYOGAKUBU KIYO (Tezukayama University bulletin of liberal arts) 46 (1992). Cited in Yoshida, *supra* note 589, at 68.

¹⁴⁸¹ *Id.* at 69.



On the other hand, the KMT regime intentionally maintained the political structure left by the Japanese colonialists and axed the bureaucratic organizations by sacking almost 40,000 Taiwanese civil servants.¹⁴⁸² In their place, unqualified Chinese civil servants were brought in. With the system's governing powers being centralized in the Governor-General's office, Taiwan remained without the benefit of any democratic forms of governance.¹⁴⁸³ Furthermore, the economy became destabilized by black-marketers and unscrupulous Chinese traders who arrived in junks. All Japanese property, which was 17% of the GDP at the time, was confiscated and most of it shipped out to the mainland.¹⁴⁸⁴ In a short period of time, modern Taiwan, built up assiduously over a long period, had been demolished by a corrupt and insolent robbery. The Taiwanese felt a growing anger at the corruption and arrogance of the new KMT rulers. For a year and a half after the end of the war, people lived through a series of shocking experiences.

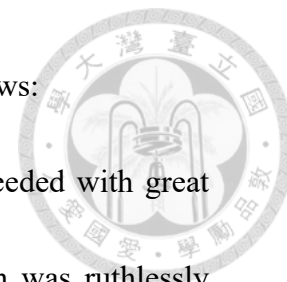
The anger of the Taiwanese people toward the re-imposition of colonial rule by the KMT was finally unleashed in what became known as the 228 incident. The China

¹⁴⁸² *Id.* at 70.

¹⁴⁸³ Yeh, *supra* note 1185, at 28.

¹⁴⁸⁴ *Id.*

White Paper captures the mood of the Taiwanese at the time as follows:



The new governor arrived with an imposing retinue who proceeded with great efficiency to exploit Formosa. In addition the local population was ruthlessly excluded from any important role in public life and was made to feel that it was again under the rule of a conqueror... The people anticipated sincerely and enthusiastically deliverance from the Japanese yoke. However, Chen Yi and his henchmen ruthlessly, corruptly and avariciously imposed their regime upon a happy and amenable population. The Army conducted themselves as conquerors. Secret police operated freely to intimidate and to facilitate exploitation by Central government officials...They fear that the Central government contemplates bleeding their island to support the tottering and corrupt Nanking machines and I think their fears well founded.¹⁴⁸⁵

After the 228 incident, the local leaders founded the “228 Incident Settlement Committee”, and submitted a list of 32 Demands for reforms of the island’s administration to Governor-General Chen Yi on March 7, 1947.¹⁴⁸⁶ It demanded that the KMT government should transform political tutelage into constitutional politics as soon as possible. They insisted that the Taiwanese were not to become second-class

¹⁴⁸⁵ VAN SLYKE & LYMAN P, THE CHINA WHITE PAPER: AUGUST 1949 308-9 (1967).

¹⁴⁸⁶ Yoshida, *supra* note 589, at 71.

citizens of China, but should be entitled to the freedoms and human rights assured by the constitution on an equal basis with the citizens in mainland China, and that the government should exercise its power appropriately according to the constitution.¹⁴⁸⁷

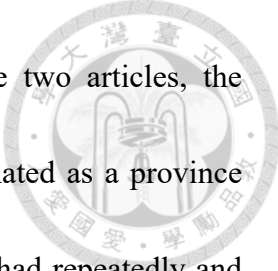
Nonetheless, the KMT government regarded these events as a rebellion and dispatched the Chinese Army, equipped with modern armaments, from the mainland. The reinforcements landing on March 8, 1947 systematically shot about 10000-30,000 leading members of Taiwanese society: lawyers, prosecutors, business people, journalist, teachers and students.¹⁴⁸⁸ The corruption and brutality of the KMT government in Taiwan led Secretary of State Dean Acheson to report on April 11, 1947, in a letter to Senator Joseph H. Ball(R-MN), that the transfer of sovereignty over Formosa to China “has not yet been formalized.”¹⁴⁸⁹

Facing the pressure from the US, the KMT government impeached Chen Yi, discharging him on April 22, 1947, and the Governor General’s Office was reorganized into the Taiwan Provincial Government. The constitution stipulated that a province may convene a provincial assembly to enact regulations (Article 112) and that its regulations shall be

¹⁴⁸⁷ *Id.* at 72.

¹⁴⁸⁸ *Id.* at 71.

¹⁴⁸⁹ JOHN J. Tkacik, jr, *Understanding and Misunderstanding China Policy: A Primer*, in RETHINKING “ONE CHINA” 76, 182 (John Tkacik ed., 2004) with reference to the Memorandum of the Department of State titled “the legal status of Taiwan” on Jul.13, 1971 from the Office of the Legal Advisor to the Director of Republic of China Affairs under the US Department of State.



enforced by the provincial government (Article 113). Given these two articles, the Constitution was therefore applied to Taiwan,¹⁴⁹⁰ which was designated as a province of China, regardless of the fact that since March 1947, Washington had repeatedly and explicitly not recognized ROC sovereignty over Taiwan.¹⁴⁹¹ Nevertheless, there was hope in the Taiwanese again that the freedom and democracy were to be granted according to the constitution.¹⁴⁹²

Nevertheless, the conflict between the KMT and Communists deepened and the situation became critical for the KMT. In July 1947, the KMT government denounced the Communist Party as treasonous and ordered a national mobilization. The possibility of peace became distant and the crisis of a total civil war became imminent. The KMT's problem was described as a combination of utter corruption, defeatism and psychological reliance on the aid from the US.¹⁴⁹³ To consolidate power during the war, the first ROC President, Chiang Kai-shek finding that the President only enjoyed limited power under the young Constitution, sought to revise it.¹⁴⁹⁴ On April 18, 1948, less than five months after the Constitution was implemented,¹⁴⁹⁵ Chiang Kai-shek

¹⁴⁹⁰ Yoshida, *supra* note 589, at 74.

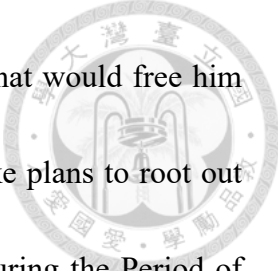
¹⁴⁹¹ Tkacik, *supra* note 687, at 76.

¹⁴⁹² Yoshida, *supra* note 589, at 74.

¹⁴⁹³ CARSUN CHANG, *THE THIRD FORCE IN CHINA* 236 (1952).

¹⁴⁹⁴ Yeh, *supra* note 1185, at 31.

¹⁴⁹⁵ Yoshida, *supra* note 589, at 75 with reference to KOSHO YOKOYAMA, *CYUKAMINKOKUHSI: SENSEI TO MINSYU NO SOUKOKU*(HISTORY OF THE REPUBLIC OF CHINA: CONFLICT BETWEEN DICTATORSHIP AND DEMOCRACY) 211 (1996).



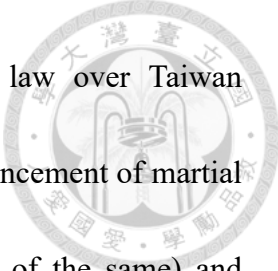
demanded the first National Assembly to give him the prerogative that would free him from the restrictions placed on him by the Constitution so as to make plans to root out and kill communist rebels. The “Temporary Provisions Effective During the Period of the National Mobilization for Suppressions of the Communist Rebellion (Temporary Provisions)”¹⁴⁹⁶ were therefore added onto the constitution. In doing so, the constitutional system was fundamentally changed. In addition, Chiang created an enigmatic organization called the “National Mobilization for Suppression of the Communist Rebellion Organization”; accordingly, personnel and finance of the state were all put under the personal jurisdiction of the president. As a result, Chiang had gained unlimited and indefinite despotic power that was unrestricted by the Legislative Yuan or the constitution. He therefore created an extreme version of personal rule instead of the rule of law.¹⁴⁹⁷

On May 19, 1949, Chen Cheng, the Provincial Chair and the Taiwan Garrison Commander, promulgated martial law effective from the next day, and executive and judicial authority on Taiwan were merged into the military office.¹⁴⁹⁸ It is true that the Legislative Yuan promulgated martial law on December 28, 1949, but this was also

¹⁴⁹⁶ *Id.*

¹⁴⁹⁷ *Id.* at 76.

¹⁴⁹⁸ See Lai et al, *supra* note 612, at 57.



unconstitutional, as the Legislative Yuan cannot declare martial law over Taiwan according to Articles 39 and 43 of the constitution. Finally, the announcement of martial law (Article 39 of the constitution), emergency orders (Article 43 of the same) and emergency measures (clause 1 of the Temporary Provisions), are all the prerogatives of the president.¹⁴⁹⁹

Even if there was some sort of Taiwanese representativeness in the making of the ROC constitution as the KMT government has claimed, the Temporary Provisions and martial law superseding the ROC constitution had never been with the consent of the Taiwanese people. As Kalyvas points out,

should a person or group appropriate the power to constitute a legal order at the exclusion of all those who will be its addressees, the ensuing constitutional document should be regarded as invalid, unauthorized, the result of an arbitrary act of usurpation that violates the normative prescription of the constituent act.

Such an act would not only amount to an incorrect use of the term to constitute, but it would also violate the normative content of its semantic meaning.¹⁵⁰⁰

¹⁴⁹⁹ Yoshida, *supra* note 589, at 78.

¹⁵⁰⁰ Andreas Kalyvas, *Popular sovereignty, democracy, and the constituent power*, 12(2) CONSTELLATIONS 223, 237(2005).

2.2.2 Human Rights



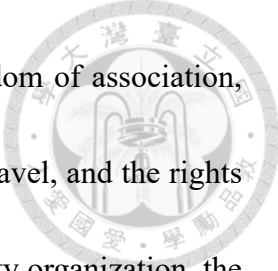
In 1947, the dissatisfied Taiwanese people strongly protested against the discrimination and misrule imposed by the incoming KMT government. The response of the KMT government, like that of Japanese colonialists fifty years earlier, was a ruthless military repression, in what became known as the “228 Incident.”¹⁵⁰¹ When the armed reinforcements landed on the north of Taiwan around March 8, 1947, launching their cleansing operation, one of their objectives was to kill the leaders of the Settlement Committee.¹⁵⁰² The government gagged the people with terror and made the society completely quiescent. Bodies of the victims were displayed in won squares for several days as an example.¹⁵⁰³

The martial law declared on May 19, 1949 transfers executive and judicial power to the military commander. It supersedes the laws of peacetime, and makes serious infringements on the rights of the people. For example, Article 8 and 11 of the martial law gave a military court the authority to exercise jurisdiction over ten kinds of crimes, including offences against internal and external state security. Article 11 also gave the military authorities the power to suspend all rights laid out in the Republic of China

¹⁵⁰¹ See Lai et al., *supra* note 605, at 26.

¹⁵⁰² Yoshida, *supra* note 589, at 73.

¹⁵⁰³ *Id.* at 71.



Constitution such as freedom of speech, freedom of assembly, freedom of association, freedom to demonstrate and petition, freedom to strike, freedom to travel, and the rights of the press. In August 1949, Chiang Kai-shek set up the secret security organization, the Political Action Committee, also known as the Revolutionary Action Committee. From the late 1940s to 1950s, the activities of Taiwanese indigenous society went into limbo. The Taiwanese leaders were strictly controlled and could not engage in public speaking and political activities. In addition, the language was shifted from Japanese to Chinese, and the culture and philosophy that had been developed during the Japanese colonial era was under threat of oblivion.¹⁵⁰⁴ The despotic objective of the KMT was to destroy the essence of freedom and democracy momentum in the society that had led to the petition campaign for the establishment of a Taiwan Assembly.

Mastery means that there is no recognition of the legal order, as well as any governing convention between the mastered and government. “The more individuals are subject to mastery, the more likely it is that the regime is illegitimate.”¹⁵⁰⁵ Therefore, notwithstanding the sovereign power the KMT government exercised over Taiwan since 1945, the mastery situation in Taiwan had evidenced its illegitimacy in the years that followed.

¹⁵⁰⁴ *Id.* at 79.

¹⁵⁰⁵ Waltermann, *supra* note 1264, at 66, 69.



2.2.3 Autonomy

As soon as Japan lost the war and before the arrival of the ROC government, the Taiwanese people initiated voluntary activities to maintain order all over the island and, for a brief period between August 15 and October 25, 1945, there was a form of self-rule.¹⁵⁰⁶ In the last few months of 1945, the Taiwanese activists worked quietly to lay the groundwork for substantial political organizations in a series of bottom-up initiatives. Activists of the Taiwan Cultural Association, the Taiwan People's Party and the Taiwan Local Autonomy Association were at the center of fast-moving discussions that resulted, in January 1946, in the creation of the Taiwanese' People's Council. In April 1946, the council was reorganized into the Taiwan Political Reconstruction Association. In the short period before it was banned by the Taiwan Garrison Command in March 1947, the Association established more than 24 branches all over the island and recruited more than 10,000 members. There was no doubt that the Taiwan Political Reconstruction Association represented the majority of the Taiwanese society.¹⁵⁰⁷

From the spring of 1946, the Taiwan Political Reconstruction Association actively

¹⁵⁰⁶ Yoshida, *supra* note 589 at 63.

¹⁵⁰⁷ *Id.* at 66.

prepared for elections of township, county, city and provincial representatives.¹⁵⁰⁸

However, the democratic shortcomings of the Chinese system were even worse than in the Japanese colonial era, as the victorious candidates found that they were only part of a consultative organization that lacked power and autonomy.¹⁵⁰⁹ The result was that, regardless the democracy promised by the KMT government, the degree of autonomy in Taiwan regressed to the pre-1935 Japanese colonial period. Though during this period, the Council of Taiwan Province was indirectly elected by Taiwanese people, it neither effectively checked the power of the Governor-General nor was able to freely enact Taiwan's own laws.¹⁵¹⁰

Furthermore, unlike Japan, the rule of law had never been established in China. The KMT was a semi-Leninist revolutionary party, the diehard members of which were brutal and treacherous characters who would go to any lengths to secure their ends.¹⁵¹¹

In August 1946, there was an election for the national political participation members for the Constituent National Assembly that would soon meet to enact the ROC Constitution. The governor general's office and the KMT Taiwan provincial branch manipulated this election so that those at the top of the poll were half-mountain

¹⁵⁰⁸ *Id.*

¹⁵⁰⁹ *Id.* at 67.

¹⁵¹⁰ Wang, *supra* note 604, at 543.

¹⁵¹¹ Yoshida, *supra* note 589, at 73.

people¹⁵¹²-Taiwanese who had returned from the mainland and entered into corrupt dealings with the KMT. The Taiwanese people were exasperated at this unexpected result and urgently requested the introduction of direct elections.¹⁵¹³



It is fair to say that the deteriorated degree of autonomy and human rights violation, in addition to the unprecedented corruption that had never been seen by the Taiwanese finally led to the 228 strategy.

2.3 Under the ROC Government in Exile (1949-1987)

2.3.1 Governmental System

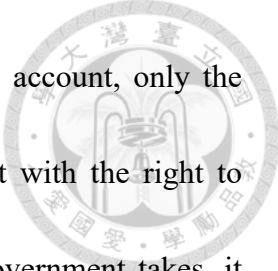
Unexpectedly, the KMT governments lost the Chinese civil war to the communists and took exile in Taiwan in December 1949. Accompanying the KMT regime were a large number of Chinese refugees, who accounted for about 13 percent of Taiwan's entire population at the time.¹⁵¹⁴

The authority of the state was thought to be derivative of popular consent, especially in the social-contract tradition and earlier in the medieval legal doctrine of the *quod omnes*

¹⁵¹² *Id.* at 67.

¹⁵¹³ *Id.*

¹⁵¹⁴ Wang, *supra* note 604, at 537.



tangit [“What touches all ought to be decided by all”].¹⁵¹⁵ On this account, only the people can constitute its public institutions and legally empower it with the right to exercise legitimate authority in their society. Whatever form the government takes, it derives its authority from a territory’s inhabitants, imagined as a collective body.¹⁵¹⁶ However, to legitimize its rule in Taiwan, the KMT government maintained its sovereignty claim over Mainland China by claiming that the mainland-elected national representatives coming to Taiwan still represented all of China, therefore, all the people in Taiwan and mainland China were governed by the ROC constitution.¹⁵¹⁷ The extralegal accident brought about by the ROC government in exile caught the Taiwanese off guard, who had already formed a people at that time.

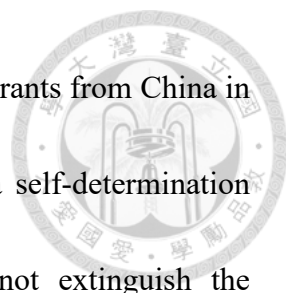
In an article published in 1978, Lederman stated that constitutional law is intimately related to the people whose affairs it governs “For me, constitutional law arises out of our whole history and tradition as a people, and one must constantly relate these rules and principles of law and government to the organic life of our national community, from which they derive their validity.”¹⁵¹⁸ Notwithstanding the dilution of the

¹⁵¹⁵ On the Quod omnes tangit, see the classic study of Gaines Post, *A Romano-Canonical Maxim*, “quod omnes tangit,” in *Bracton*, 4 TRADITIO 197–251 (1946).

¹⁵¹⁶ Yack, *supra* note 1426, at 524.

¹⁵¹⁷ Yeh, *supra* note 1185, at 32.

¹⁵¹⁸ Oliver, *supra* note 48, at 152 with reference to W. R. Lederman, *Constitutional Amendment and Canadian Unity* in SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 92 (1978).



Taiwanese inhabitants as a people by the extralegal enormous immigrants from China in the late 1940s, as James Crawford observed, “the annexation of a self-determination unit by external force in violation of self-determination does not extinguish the right.”¹⁵¹⁹ It is important to note that self-determination is not a one-off consent to the form of government but involves its continuous affirmation, which entails genuine involvement in the activities of the government.¹⁵²⁰

“It is the community from which political authority arises and to which it reverts when that authority no longer serves its proper function.”¹⁵²¹ When the KMT government stopped to govern mainland China, not to mention the groundlessness of its claim in the eyes of international law, following Hart’s theory of social rules, Shapiro argues that “a rule exists within such a group if, but only if, it is accepted and practiced by most of its members.”¹⁵²² In the case of a once-established system, no rule is to count as a rule of the system if it has ceased to be the legal system of the group.¹⁵²³ Accordingly, the ROC government in exile stopped to be the government of China since 1949, regardless of the political manipulation of the UN during the cold war period that helped to retain

¹⁵¹⁹ Crawford, *supra* note 30, at 147.

¹⁵²⁰ See HANNUM, H. AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 30 (1990).

¹⁵²¹ Yack, *supra* note 1426, at 524.

¹⁵²² Shapiro, *infra* note 1632, at 2.

¹⁵²³ Hart, *supra* note 1405, 103.

ROC's seat. Whatever the ROC government in exile claims to be after 1949, Taiwan has a legal system entirely separate from China since then.



Through the power derived from his chairmanship of the KMT, Chiang Kai-shek became a lifetime dictator of the Party-state. His authoritarian power was even bigger than that of the Governor-General in Taiwan during the Japanese colonial period. Since its creation, the abiding aim of the constitution is the limitation of power, yet the ROC constitution was imposed on the Taiwanese people only as a tool to create the Chinese identity instead of suppressing governmental power.

In contrast to authoritarian regimes, democracies embody legal or customary restraints on the exercise of authority,¹⁵²⁴ the establishment of the grand justice system is one of the most important mechanisms to perform those functions. Established in Mainland China in 1947, the Council of Grand Justices met in Taiwan after the ROC government took exile on this island in 1949. As the ROC government in exile continued to claim as the only legitimate Chinese government in the world governing the “Free China”, the grand jury system was taken as a token to add legitimacy to its claim. Under ROC Constitution, the Council of Grand Justices was a component of the Judicial Yuan which

¹⁵²⁴ Jerry McBeath, *Democratization and Taiwan's Constitutional Court*, 11 AME.J.CHI.STUD. 51 (2004).

is vested with the exclusive power of judicial review, interpreting the Constitution, as well as unifying the interpretations of laws and ordinances.¹⁵²⁵ Nonetheless, the Council of Grand Justices' ability to interpret and apply constitutional articles protecting fundamental rights was severely constrained by the Temporary Provisions and the martial law. Instead, the Council operated to legitimize, rather than constrain, the excesses of the KMT's rule.

Article 2 of the ROC Constitution reads, "The sovereignty of the Republic of China shall reside in the whole body of the citizenry"; Article 62 further provides that "the Legislative Yuan shall be composed of members elected by the people and shall exercise legislative power". When the first-term legislative representatives' tenure expired in 1954, as no election could be held on the Mainland, the judiciary was called upon to add legitimacy to KMT's political claim. As a result, in the quickly rendered JY Interpretation No. 31, the Court sought to extend the representatives' terms, ruling that "the nation was under crisis and the country could not hold the election of the second term legally".¹⁵²⁶ The Constitutional Court did not provide sufficient rationale for the ruling and not a single dissenting opinion was filed, which merely rubber-stamped the

¹⁵²⁵ Ma, *supra* note 1477, at 300.

¹⁵²⁶ JY Interpretation No 31 (1954), available at https://www2.judicial.gov.tw/FYDownload/en/p03_01.asp?expno=31 (Last visited May 2, 2022)



functions for the KMT government.¹⁵²⁷ Consequently, those first-term representatives continued to serve for the next four decades, resulting in severe representative distortions.

For the most part, the Court served as a legal advisor, whose chief role was to make uniform interpretations of statutes and ordinances in the context of the temporary provisions and the imposition of martial law and resolve quarrels between agencies.¹⁵²⁸ The Constitutional Court's first three terms produced only one interpretation with an unconstitutional declaration. The fourth term had only four such findings of unconstitutionality.¹⁵²⁹ In addition, the Council was administered by the Ministry of Justice, a department of the executive, which compromised the separation of powers principle and the independence of the constitutional court.¹⁵³⁰ In 1960, the Constitutional Court issued the JY Interpretation No. 86 and ruled that high and district courts should be administered by the Judicial Yuan. However, while it ordered that "all relevant acts and regulations shall respectively be amended" to reflect the Judicial Yuan's status as the highest judicial institution of the nation,¹⁵³¹ it did not declare

¹⁵²⁷ Yeh, *supra* note 1185, at 33-4.

¹⁵²⁸ Yueh-sheng Weng, *Interpretations of the Constitutional Court and the Developments of Rule of Law and Democratic Constitutionalism in Taiwan*, IN CONSTITUTIONALISM AND GOOD GOVERNANCE 321 – 360 (Kittisak Prokati, Henning Glaser and Kittisak Prokati ed., 2014)

¹⁵²⁹ Yeh, *supra* note 1185, at 170.

¹⁵³⁰ Judicial Yuan, Volume II (2001), 425, cited in McBeath, *supra* note 1525, at 54.

¹⁵³¹ Judicial Yuan, Volume I (2000), 343, cited in *id.*, at 57.

legislation on court organization unconstitutional.¹⁵³² Unsurprisingly, the KMT government ignored this interpretation for roughly two decades.¹⁵³³



The Council interpretations during these early years reflected a pronounced bias toward support for the state against the individual, and the executive against the other branches of the state. In this respect, the Council of Grand Justices behaved no differently than other departments of government operating under the Temporary Provisions and martial law. For example, when it faced disputes arising over controversial issues such as land reform and redistributive measures, the Court only tend to lend legitimacy to the disputed policy.¹⁵³⁴ “If the very essence of constitutionalism is the submission of politics to law, the very essence of constitutional adjudication is to enforce constitutional law vis-à-vis government”;¹⁵³⁵ any political interference with the judicial process would undermine the whole system of constitutional democracy.¹⁵³⁶ In this sense, the Grand Justice’s role was nothing but a vase functioning to the political advantage of the government during the authoritarian period.


¹⁵³² F. Fraser Mendel, *Judicial Power and Illusion: The Republic of China's Council of Grand Justices and Constitutional Interpretation*, 2 PAC RIM. L.& POL’Y J.172 (1993).

¹⁵³³ Yeh, *supra* note 1185, at 178.

¹⁵³⁴ *Eg.*, JY Interpretation Nos 78, 124 and 125.cited in *id.* at 172-73.

¹⁵³⁵ Grimm, *supra* note 1422, at 201.

¹⁵³⁶ *Id.* at 202.



Moreover, with regard to the vertical separation of power, the central government's legal capacity was expanded to control resources. The KMT Government imported this unique design from Mainland China to Taiwan in an effort to assert tight control over local politics. The allocation of resources from the Central Government had enabled them to reap more benefits and resources.¹⁵³⁷

The unconstitutionality of the governmental power could further be proved by the illegitimate succession to the presidency. After the death of Chiang Kai-shek in 1975, his son, Chiang Ching-kuo illegally named himself as president through the “Temporary Provisions”, he gained a power which was above the constitution and mixed it with the power he had as a party leader, which was fundamentally unlawful.¹⁵³⁸

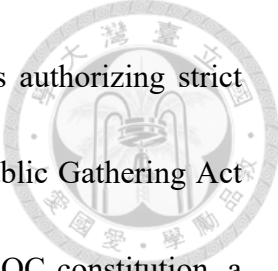
All in all, the ROC constitution was at most a nominal constitution during this period if not totally invalid.

2.3.2 Human Rights

Under the martial law, the authoritarian KMT government severely curtailed the

¹⁵³⁷ Yeh, *supra* note 1185, at 146.

¹⁵³⁸ Chiang Ching-kuo was trained in Soviet Union from 1925 to 1937, whose followers had been taught to have animal-like loyalty by special training, and also were promised a comfortable and privileged life. They were frightened of the dictator who relied on violence to secure complete loyalty from the members of his private party. *See* Yoshida, *supra* note 589, at 90.



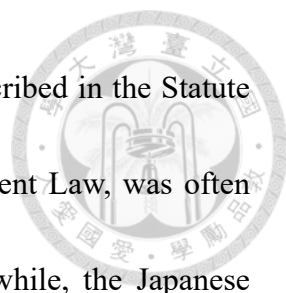
Constitution's human rights protections by enforcing special laws authorizing strict social control: the Publication Act, the Civil Association Act, the Public Gathering Act and so forth. Regardless of the democratic structure embodied in ROC constitution, a sizable gap existed between the Constitution's text and realities.¹⁵³⁹ The human rights situation in postwar Taiwan under the KMT regime was to a large extent an extension of the Japanese wartime rule.¹⁵⁴⁰ Like the Japanese colonial government, the KMT government invested much effort in forced assimilation in order to emphasize the country's Chinese identity. These efforts included requiring indigenous peoples to adopt Chinese names and to learn Mandarin. The KMT party state followed its nation father, Sun Yat-sen's "revolutionary human right" (*geming minquan*), which argues that human rights are not heaven-given, but only granted to nationals who were loyal to the nation. This is similar to the philosophy embedded in the Meiji Constitution that fundamental rights are granted by the Emperor to loyal subjects.¹⁵⁴¹

The incoming KMT regime had deprived the Taiwanese people of the same political participation and fundamental rights that were withheld during the Japanese colonial period. "The suppression of political dissent was even harsher under the KMT than it

¹⁵³⁹ Yeh, *supra* note 1185, at 194.

¹⁵⁴⁰ Wang, *supra* note 604, at 548.

¹⁵⁴¹ See Ishii., *supra* note 1434, at 398.



had been under the Japanese after the 1920s”.¹⁵⁴² The penalty prescribed in the Statute for Punishments on Rebellion, like that in Japan’s Bandit Punishment Law, was often the death penalty, which was not abolished until 1991.¹⁵⁴³ Meanwhile, the Japanese vagrant camp system was continued under the KMT regime, which was implemented on a larger scale. Under the direction of the Taiwan Garrison Command, the police could decide whether to send a person to a vagrant camp or not.¹⁵⁴⁴ Although the Council held that the law was not in compliance with requirements of Article 8 of the Constitution, it did not mandate immediate change to the legislation.¹⁵⁴⁵ This situation did not change until the 1980s.

On the other hand, unlike the Japanese era, the KMT martial court was also involved in the criminal justice of general public. Civilians were tried by martial court for ordinary offences.¹⁵⁴⁶ Douglas Mendel found that between 1949 and 1955, more than half of the 90,000 political prisoners were executed.¹⁵⁴⁷ According to Christian Schafferer, “the number of people executed during the martial law period for violating the laws of the KMT is uncertain. Estimates go far beyond tens of thousands.”¹⁵⁴⁸ During this period,

¹⁵⁴² Wang, *supra* note 604, at 559.

¹⁵⁴³ *Id.* at 550.

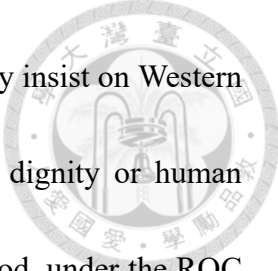
¹⁵⁴⁴ *Id.* at 552-53.

¹⁵⁴⁵ McBeath, *supra* note 1525, at 58.

¹⁵⁴⁶ Yeh, *supra* note 1185, at 36.

¹⁵⁴⁷ Mendel, *supra* note 1533, at 120.

¹⁵⁴⁸ Schafferer, *supra* note 721, at 5.



the courts were dominated by the Mainlanders who did not necessarily insist on Western ideas of due process,¹⁵⁴⁹ and usually paid limited attention to the dignity or human rights of the accused.¹⁵⁵⁰ In addition, in contrast to the Japanese period, under the ROC Code of Criminal Procedure, counsel was not allowed to assist the suspect during the investigation until 1982.¹⁵⁵¹ In lack of the rule of law, the general public even trusted the courts less than in the Japanese period.

However, the idea of democracy and freedom was utilized as political expediency whenever the KMT government felt necessary. In November, 1949, as the KMT ruling of Taiwan was still unstable and Chiang was eager to secure support from the US, the Chinese libertarians followed Chiang to Taiwan. Launched a magazine called “Free China”, calling for free speech and democracy. The magazine’s existence had been tolerated as a tool to add legitimacy to Chiang’s claim as “free China” for around ten years. However, Chiang was increasingly infuriated by the magazine’s calling for freedom and democracy. In an editorial in Feb 1960, “Free China” recommends that Chiang should not stand for election for the third time. As a result, its editor, Lei Chen was arrested and accused of sedition and collaborating with communists. He was

¹⁵⁴⁹ See Takayanagi, *supra* note 1434, at 31.

¹⁵⁵⁰ Wang, *supra* note 604, at 554.

¹⁵⁵¹ *Id.* at 552.

sentenced to ten years in prison and “Free China” was abolished.¹⁵⁵²



It is generally accepted that “the source of sovereignty lay in communal willing”.¹⁵⁵³

According to T.H. Green, “Will, not force, is the basis of the state”.¹⁵⁵⁴ Hampton stated that, “in situations where there is a relationship of mastery, rather than political authority between governing and governed, the only reason the governed act in accordance with the norms created by the governing institutions would be fear of the enforcement cadre.”¹⁵⁵⁵ “Situations of mastery, characterized by coercion and widespread human rights violations against the mastered people, has implications for both international and even national sovereignty: in 1984, for example, the Security Council declared null and void the newly-introduced racist constitution of South Africa”,¹⁵⁵⁶ on the ground that “constitution is not a valid legal instrument due to the situation of mastery it derived from and would perpetuate.”¹⁵⁵⁷ By the same token, even though the international community paid little attention to the mastery situation in Taiwan during the cold war period, the illegitimacy of the ROC government in exile

¹⁵⁵² Yoshida, *supra* note 589, at 79

¹⁵⁵³ Pemberton, *supra* note 1254, at 20

¹⁵⁵⁴ THOMAS HILL GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 84 (1999). Available at <https://socialsciences.mcmaster.ca/~econ/ugcm/3ll3/green/obligation.pdf> (Last visited May 2, 2022)

¹⁵⁵⁵ Waltermann, *supra* note 1264, at 87 with reference to J. Hampton, Political philosophy 97(1997).

¹⁵⁵⁶ Waltermann, *supra* note 1264, at 89-90; UN Security Council, *Security Council resolution 554 (1984) (South Africa)*, 17 August 1984, S/RES/554 (1984), available at: <https://www.refworld.org/docid/3b00f16430.html> (Last visited May 2, 2022)

¹⁵⁵⁷ However, such an international declaration of invalidity does not automatically bear legal consequences within the national system. Cited in *id.*, at 90.

was without any doubt.



2.3.3 Autonomy


During this period, elections for central government positions were suspended in an effort to preserve the legitimacy inherited from the Mainland China period.¹⁵⁵⁸ Due to the Temporary Provisions granting the President unlimited tenure, the native Taiwanese people who constituted a supra-majority of the population in Taiwan, could not decide the national affairs through a representative parliament, a situation not unlike their experience under the Japanese colonial government.¹⁵⁵⁹

As a matter of fact, the Republic of China's 1947 Constitution provides a good democratic framework by assigning powers and responsibilities to different government departments, meanwhile limiting the power of the government over the people.¹⁵⁶⁰ Notwithstanding the constitution being severely distorted by Chiang's despotic party-state system, the Taiwanese people steadfastly clung to the essence of democracy contained in the constitution. They knew clearly that if Chiang wanted to prolong his regime in Taiwan, it was essential for him to make some show of democracy by holding

¹⁵⁵⁸ Yeh, *supra* note 1185, at 137.

¹⁵⁵⁹ Wang, *supra* note 604, at 544.

¹⁵⁶⁰ McBeath, *supra* note 1525, at 69.



local elections as a “Free China” model, so as to gain support from the US during the cold War. As a result of the political calculation of the KMT, specific elections were held at the local level for the purpose of political propaganda to show democracy in contrast to the Mainland China under Communist rule.¹⁵⁶¹ The elections on local levels were held under an administrative order, which was subject to cancellation or change at any time by the Executive Yuan that also appointed the chairman of the provincial government.¹⁵⁶²

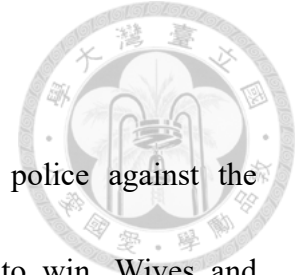
Nevertheless, no matter how small the space was given to the democratic principle, the Taiwanese people fully utilized it and fought elections at province, city and township council levels, systematically turning local elections campaigns into a social movement. They utilized democratic principles embedded in the constitution to demand fair citizenship, just as in the Japanese colonial period.¹⁵⁶³ Out of these local elections, dissenting voices and slogans gradually arose, “Abolish the Temporary Provisions”, “Go back to the system of the constitution”, “Have an election for the National Assembly” and “Change the constitution”.¹⁵⁶⁴

¹⁵⁶¹ For Fatung, see Jiunn-rong Yeh, *The Cult of Fatung, Representative Manipulation and Reconstruction in Taiwan* in *THE PEOPLE REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION* 23-37 (Graham Hassall and Cheryl Saunders eds., 1997).

¹⁵⁶² Wang, *supra* note 604, at 546.

¹⁵⁶³ Yoshida, *supra* note 589, at 93.

¹⁵⁶⁴ *Id.* at 83.



In the local elections, the KMT used the military and secret police against the opposition and ample election money to buy the votes needed to win. Wives and brothers of the political prisoners were harassed and under constant surveillance by the authorities. Inspired by Foucault's Panopticism, Mitchell makes the argument that "the panoptic, the model institution, whose geometric order and generalized surveillance serve as the motif for this kind of power, was a colonial invention".¹⁵⁶⁵ Nonetheless, anger of the people turned to votes in the ballot box, and the electoral victories paved the path for them to become influential outside party politicians.¹⁵⁶⁶

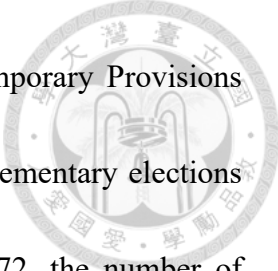
After the ROC government was expelled from the UN in 1971, with the general de-recognition of ROC that followed, the ROC government in exile was forced to indigenize so as to maintain its legitimacy over Taiwan. Since legitimate power arose from the consensus of those subject to it, while the latter had innate and inalienable rights, the securing of this consent was the legitimizing aim of political rule.¹⁵⁶⁷ By giving this form of consent, the subjects convey their respect for the state, their loyalty to it, their identification with it, and their trust in it.¹⁵⁶⁸ With more and more

¹⁵⁶⁵ Mitchell, *supra* note 764, at 35.

¹⁵⁶⁶ Yoshida, *supra* note 589, at 92.

¹⁵⁶⁷ Grimm, *supra* note 1422, at 319

¹⁵⁶⁸ Waltermann, *supra* note 1264, at 87.



representatives from mainland China getting old and died, the Temporary Provisions and relevant statutes were revised to fill vacancies by holding supplementary elections or adding more seats to elect representatives locally.¹⁵⁶⁹ Since 1972, the number of local seats increased steadily, but it remained comparatively much less than that of “tenured” representatives.¹⁵⁷⁰

Meanwhile, many of the native Taiwanese elites continued to support the democratic movement that eventually led to the formation of the Democratic Progressive Party (“DPP”) in 1986. With the erosion of the legitimacy of the ROC on the international level, the Mainlander-led KMT regime had no alternative but to loosen the grip of its authoritarian rule.¹⁵⁷¹

2.4 Indigenization of KMT

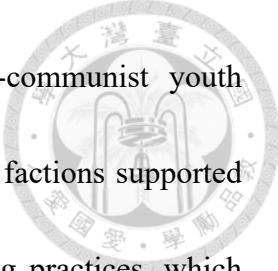
In addition to creating lifetime members of the National Assembly, the KMT had introduced a policy aiming at the penetration, segmentation and rule of Taiwanese society.¹⁵⁷² The KMT bribed influential Taiwan-born figures and tried to penetrate

¹⁵⁶⁹ Yeh, *supra* note 1185, at 171-2.

¹⁵⁷⁰ See Hung Chiu & Jyh-pin Fa, *Law and Justice Since 1966*, in *THE TAIWAN EXPERIENCE, 1950-1980: CONTEMPORARY REPUBLIC OF CHINA* 315-6 (James C Hsiung and James Chieh Hsiung eds., 1998).

¹⁵⁷¹ See Ramon H. Myers, *A New Chinese Civilization: The Evolution of the Republic of China on Taiwan*, 148 *CHI. Q.* 1072, 1078-79 (1996); Rigger, *supra* note 598, at 106-28.

¹⁵⁷² Yoshida, *supra* note 589, at 83.



Taiwanese society through affiliated organizations such as anti-communist youth organizations, and women's organizations.¹⁵⁷³ As a result, the local factions supported by KMT money gained more wealth through corrupt town planning practices, which could invested in land speculation by borrowing money from the national business bank at a low interest rate. Through this manipulation, the KMT made certain of its influence in local politics, and scattered enough money to buy all the votes it needed through local factions, gaining prefectural and city councilor seats.¹⁵⁷⁴

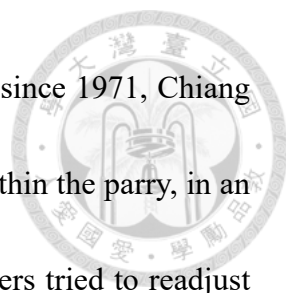
On the other hand, “the state machine intervened extensively by tightly controlling foreign exchange, imports and exports, and market entry, as well as instituting state ownership of several major industries, including transportation, steel, electricity, water, oil, salt, and sugar”.¹⁵⁷⁵ The KMT led party-state penetrated into every sector of the society, eventually exercising comprehensive controls over universities, the entertainment community, farmers' associations, fishermen's associations, labor unions, trade unions, and local financial associations. ¹⁵⁷⁶

¹⁵⁷³ *Id.* at 83.

¹⁵⁷⁴ *Id.* at 84.

¹⁵⁷⁵ Yeh, *supra* note 1185, at 35 referencing to J-r Yeh, *Constitutional Reform and Democratization in Taiwan, 1945 – 2000*, in *TAIWAN ' S MODERNIZATION IN GLOBAL PERSPECTIVE* 35 (PCY Chow ed.,2002).

¹⁵⁷⁶ *Id.* at 36.



Nevertheless, with the international general recognition of the PRC since 1971, Chiang Kai-shek's party-state system began to collapse from the bottom. Within the party, in an effort to extend the life of the KMT government, some party members tried to readjust the party-state to the social reality of Taiwan by calling for reform.¹⁵⁷⁷ After Chiang Kai-shek's death in 1975, his son, Chiang Ching-kuo became president in 1978. As a measure to gain support from the US to prevent military attacks from China, Chiang was taking steps to guarantee that he would be succeeded by a Taiwanese leader who could carry on a pro-Taiwan KMT legacy, instead of mainlanders with more loyalty to the long-lost mainland China than to the KMT's Taiwan base.¹⁵⁷⁸ By integrating more Taiwanese-born KMT members into the party, he tried to waken the impression of the KMT as a foreign power and expand the social base of the government, regardless of the fundamentally authoritarian regime he inherited from his father. The appointment of the technocrat Lee Teng-hui as vice-president in 1984 was a symbolic event of his "Taiwanization" policy. In addition to appointing young, technocratic elites to the executive during his presidency, Chiang Ching-kuo also appointed a number of western trained lawyers to the judiciary, including the Council of Grand Justices. The new blood enlivened Taiwan's constitutional court, whose exposure to both American and

¹⁵⁷⁷ Yoshida, *supra* note 589, at 87.

¹⁵⁷⁸ Morris, *supra* note 369, at 27.

European legal norms regarding civil rights and liberties had a significant impact on their behavior in Taiwan's courts.¹⁵⁷⁹



In 1988, the population of Taiwan was 20 million, with KMT party members numbering 2,050,000, the majority of which joined because of the vested interests at a local level.

¹⁵⁸⁰ Most of the reformists of the KMT, mainly comprised of Taiwanese, had a weak base amongst core party members, except Lee Teng-hui, who finally led to the power shift in favor of the KMT reformists that was pushing forward the democratization of Taiwan.¹⁵⁸¹

Moreover, as tens of thousands of soldiers that followed the KMT to Taiwan eventually realized that going back to mainland China became an unforeseeable hope, they got married with the indigenous women to take root in Taiwan, which further accelerated the irreversible indigenization of the KMT party.

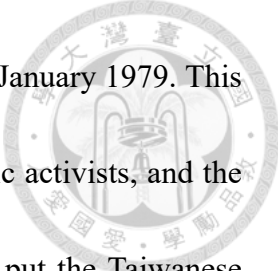
2.4 The Collapse of the Authoritarian Regime

On December 15, 1978, the US announced that it would formally granted diplomatic

¹⁵⁷⁹ Judicial Yuan, Volume II (2001), 429. Cited in McBeath, *supra* note 1524, at 59.

¹⁵⁸⁰ Yoshida, *supra* note 589, at 93.

¹⁵⁸¹ *Id.* at 94.

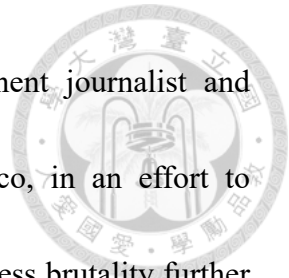


recognition to the PRC and broke its official ties with the ROC from January 1979. This accident had a serious impact upon both the KMT and the democratic activists, and the relationship between them became tense. On December 16, Chiang put the Taiwanese armed forces on alert and cancelled the supplemental elections for the Legislature and National Assembly scheduled for December 23. On January 21, 1979, the Taiwan Garrison Command arrested a senior figure of the outside party and his son for the alleged crime of rebellion. The next day, leaders of the outside party came to Kaohsiung from all over Taiwan to join the demonstration against the arrest. In August 1979, a political review magazine called “Formosa” was launched to propagate democratic politics, which finally led to the bloodshed in the “Kaohsiung Incident” in December 1979. Demonstrators were charged with rebellion, tried in a military court, and sentenced to imprisonment from 12 years to life.¹⁵⁸²

Thereafter, the KMT organized a series of terror attacks against outside party members and their families to ensure that the anger of the Taiwanese was repressed. One of those imprisoned as a ringleader was Lin I-hsiung. In February 1980, his mother and twin daughters were murdered. In July 1981, Chen Wen-cheng, a democratic activist and assistant professor of Carnegie-Mellon University, was also murdered during a

¹⁵⁸² *Id.* at 89-91.

temporary home visit in Taiwan. In 1984, Henry Liu, a prominent journalist and biographer of Chiang Ching-Kuo, was murdered in San Francisco, in an effort to suppress the disclosure of Chiang's family scandal.¹⁵⁸³ KMT's ruthless brutality further accelerated the demise of the authoritarian regime.

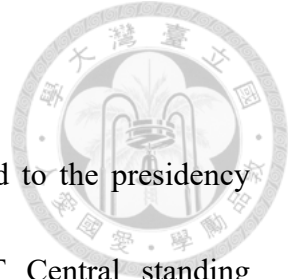


Meanwhile, with the rising of a civil society, a contamination of rice oil in 1979 led to the creation of the first voluntary consumer group in 1980. Following this, the Awakening Foundation, a group of women lawyers, was formed in 1982. The Taiwan Association for Human Rights, composed of human rights lawyers, was subsequently founded in 1984. Eventually, in 1986, the first opposition political party, the DPP, was established.¹⁵⁸⁴

As the KMT regime was growingly losing hearts and minds of the people, in addition to the deterioration of the health of Chiang junior that was falling short of his ambitions, Chiang finally ordered the lifting of the Martial Law Decree in July 1987, only months before his death in January 1988.

¹⁵⁸³ *Id.*

¹⁵⁸⁴ W-C Chang, *Public-Interest Litigation in Taiwan : Strategy for Law and Policy Reforms in Course of Democratization* in PUBLIC INTEREST LITIGATION IN ASIA 136, 138-9 (P.J.Yap and H. Lau eds, 2011).



2.5 Disguised Revolution (1987-2005)

After the native Taiwanese Vice President Lee Teng-hui succeeded to the presidency upon Chiang's death in 1988, the indigenization of the KMT Central standing Committee, cabinet members was undertaken very rapidly.¹⁵⁸⁵ Moreover, the rapid appreciation of the yen due to the Plaza Accord of 1985 resulted in a stream of Japanese investment into Southeast Asian countries including Taiwan that triggered rapid economic growth.¹⁵⁸⁶ A strong middle class and an emergent civil society were gradually formed, calling for subsequent social and political reforms.

By the late 1980s, Taiwanese citizens became increasingly frustrated by their lack of influence on the central government. Inspired by movements spurring Inspired by global democratic movements, the Fall Berlin Wall, Tiananmen Square Incident, and demonstrations elsewhere around the world, the demonstrations of Taiwanese citizens were boiling over the street, demanding human rights protection and democracy.¹⁵⁸⁷ On March 16, 1990, students forming the largest student movement in Taiwan's history gathered in front of the Chiang Kai-shek monument to chant for political reform. "The students requested a reform agenda with four goals: (1) dissolving the National

¹⁵⁸⁵ Yoshida, *supra* note 589, at 102

¹⁵⁸⁶ *Id.* at 103.

¹⁵⁸⁷ Yeh, *supra* note 1185, at 5.

Assembly; (2) abolishing the Temporary Provisions; (3) calling for a national affairs conference; and (4) providing a timeline for political and economic reform.”¹⁵⁸⁸

Confronting increased outcries for reform, President Lee invited the student leaders to the presidential office for discussions. Many of the students’ requests were received positively by Lee, who promised to reform.

The evolving trend of democratic developments in Taiwan's polity and society was followed by the Council of Grand Justices,¹⁵⁸⁹ which issued the JY Interpretation No 261 on June 21, 1990. The Constitutional Court ordered “those first-term national representatives who have not been re-elected on a periodical basis to cease the exercise of their powers no later than December 31, 1991”.¹⁵⁹⁰ This decision opened the way to regular elections for all national-level legislative representatives and constitutional amendments in 1992 which provided for direct election of the president and vice-president.¹⁵⁹¹

On June 28, 1990, a National Affairs Conference, convened by President Lee and

¹⁵⁸⁸ *Id.* at 38.

¹⁵⁸⁹ McBeath, *supra* note 1524, at 68.

¹⁵⁹⁰ JY Interpretation No 261 (1990), available at <https://cons.judicial.gov.tw/uploads/docAtt/4656564e-2f96-4343-b1e5-26d06b90770b.pdf> (Last visited May 2, 2022)

¹⁵⁹¹ McBeath, *supra* note 1524, at 61.

attended by 141 representatives chosen from all societal corners, was held and entrusted with developing a political and constitutional reform agenda. A major consensus was reached, and eventually paved the way for a series of incremental constitutional reforms. They agreed on the total demolition of the Temporary Provisions, bringing a final end to the Martial Law era.¹⁵⁹²

In the rounds of constitutional revision that followed, civic groups and human rights organizations actively pushed for an agenda of reform on human rights institutions, which were welcomed by the courts, and judicial decisions have become increasingly receptive to social consensus and keen to be in dialogue with civil society.¹⁵⁹³ It is the democratization process in Taiwan that explains the new activity of the Council of Grand Justices.¹⁵⁹⁴ The significant drivers of this process included the context of democratization, the burgeoning of civil society and a barrage of media criticism.¹⁵⁹⁵ Increasingly, the Council was carving out an important role for the judiciary by revealing the disconnection between residual authoritarian statutes and regulations and

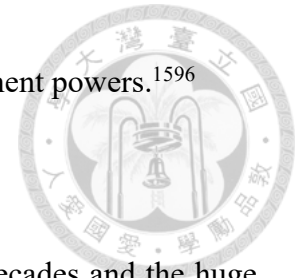
¹⁵⁹² Yeh, *supra* note 1185, at 38.

¹⁵⁹³ *Id.* at 245.

¹⁵⁹⁴ McBeath, *supra* note 1524, at 59

¹⁵⁹⁵ J-r Yeh and W-C Chang, *A Decade of Changing Constitutionalism in Taiwan : Transitional and Transnational Perspectives* in CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY 141,150 – 52 (AHY Chen ed., 2014) ; J-r Yeh and W-C Chang, *The Changing Landscape of Modern Constitutionalism : Transitional Perspective*, 4 NATIONAL TAIWAN UNIVERSITY LAW REVIEW 145, 156 – 57 (2009).

the Constitution's promise of democracy and limitations on government powers.¹⁵⁹⁶



In light of the legitimacy of its authoritarian rule in the past four decades and the huge vested interests in the party-state system, the KMT was reluctant to accept the urged calling for the making of a brand new constitution, and demanded the framework of the ROC Constitution remain intact. As the KMT has always had the legislative majority, the pro-Taiwan reformists were forced to accept such a baseline for constitutional reform.¹⁵⁹⁷ As most Taiwanese citizens were excited by the economic boom and hoped not to damage it by drastic measures, the constitutional revision took the form of additional articles, with relevant contradicting provisions in the original constitution being suspended.

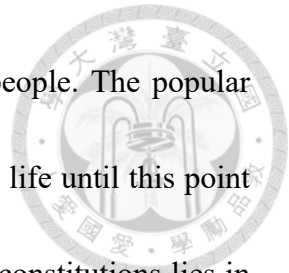
The constitution states at its outset that, “The Republic of China, founded on the Three principles of the People, shall be a democratic republic.” It did not make clear who was specified by “the people” identified in the first half of Article 1 in the constitution. It also left open the question of who is part of the “whole nation” referred to in Article 2, “The sovereignty of the Republic of China shall reside in the whole body of citizens.”

The latter half of Article 1, however, is explicitly democratic in stipulating a democratic

¹⁵⁹⁶ McBeath, *supra* note 1524, at 69-70.

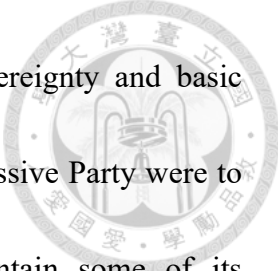
¹⁵⁹⁷ Yeh, *supra* note 1185, at 13.

republic of the people, to be governed by the people and for the people. The popular sovereignty doctrine embedded in the constitution did not come into life until this point of time. Accordingly, the “only democratically legitimate source of constitutions lies in the constituent power of the people, both at the moment of the foundation of a polity as well as during its constitutional existence”.¹⁵⁹⁸ A number of national Constitutions indicate that the sovereignty of the state belongs to the people or to those who are citizens of the territorial State.¹⁵⁹⁹ It has held that “the self-determination of peoples is



¹⁵⁹⁸ Andreas Braune, *Authoritative Constitution-Making in the Name of Democracy?* In RICHARD ALBERT & YANIV ROZNAI, *CONSTITUTIONALISM UNDER EXTREME CONDITIONS LAW, EMERGENCY, EXCEPTION: LAW, EMERGENCY, EXCEPTION* 323, 324 (2020).

¹⁵⁹⁹ See *E.g.*, ALB. CONST. (1998 Draft) art. 2 (“Sovereignty in the Republic of Albania belongs to the people”); Aus. CONST. art. 1 (“(L)aw emanates from the people”); BRAZ. CONST. art. 1 (“All power emanates from the people, who exercise it by means of elected representatives”); CROAT. CONST. art. 1 (“Power in the Republic of Croatia is derived from the people and belongs to the people as a community of free and equal citizens.”); FIN. CONST. § 2 (“Sovereign power in Finland shall belong to the people”); IR. CONST. art. 6 (“All powers of government..., derive, under God, from the people, whose right it is to designate the rulers of the State, and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.”); ITALY CONST. art. 1(2) (“Sovereignty belongs to the people who exercise it in the manner and within the limits laid down by this Constitution”); JAPAN CONST. pmb. (“Government is a sacred trust of the people, authority for which is derived from the people”); NEPAL CONST. pmb. (“We are convinced that the source of sovereign authority of the independent and sovereign Nepal is inherent in the people”); art. 3 (“The sovereignty of Nepal is vested in the Nepalese people and shall be exercised in accordance with the provisions of this Constitution.”); POL. CONST. art. 4 (“Supreme power in the Republic of Poland shall be vested in the Nation”); pmb. (defining “Nation” as “the Polish Nation—all citizens of the Republic”); PORT. CONST. art. 3 (“Sovereignty, single and indivisible, rests with the people.”); Russ. CONST. art. 3(1) (“The multinational people of the Russian Federation shall be the vehicle of sovereignty and the only source of power in the Russian Federation.”); SPAIN CONST. art. 1(2) (“National sovereignty belongs to the Spanish people from whom emanate the powers of the state.”); SWED. CONST. art. 1 (1) (“All public power in Sweden proceeds from the people.”); TAIWAN CONST., art. 2 (“The sovereignty of the Republic of China shall reside in the whole body of citizens.”); US CONST. pmb. (“We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution”); ZAMB. CONST. pmb. (“We, the people of Zambia ... shall govern ourselves as a united and indivisible Sovereign State”). Of course, some of the Constitutional representations about the sovereignty of “the people” should not be accepted without some skepticism. An illustration may help: in a lengthy Preamble, the Chinese Constitution states that, “the Chinese people took state power into their own hands and became masters of the country.” P.R.C. CoNsT. pmb. In addition, Article 2(1) declares that, “All power in the People’s Republic of China belongs to the people.” P.R.C. CONST. art. 2(1). Article 2(2) quickly adds that, “The organs through which the people exercise state power are the National People’s Congress and the local people’s congresses at different levels.” P.R.C. CONST. art. 2(2). Cited in Father Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 *FORDHAM INT’L L.J.* 1477, 1491 (2000).



the link that brings together in an inextricable bond popular sovereignty and basic human rights”.¹⁶⁰⁰ The tactics of the pro-Taiwan Democratic Progressive Party were to stress the democratic elements of the constitution, and to maintain some of its vagueness, so that the changes they sought could be said to be justified by the existing constitutional framework.¹⁶⁰¹ The KMT reformists leading by President Lee Teng-hui, on the other hand, utilized the pressure by the DPP as a political reserve power to win the intra-party struggle with the KMT hardliners who were trapped by their Chinese consciousness.¹⁶⁰²

Insisted by National Assembly Members that were elected in Mainland China in 1948, in the Additional Articles, the rights and obligations between citizens of the Mainland and those of Taiwan were designated for stipulation by special laws.¹⁶⁰³ Two geographic regions were created for the purpose of selecting the representatives: “the Free Region” and “the Entire Country.” The term “the Free Region” refers to the territory under the actual control of the ROC government, including the “Province of Taiwan” and China’s two offshore islands, Quemoy and Matzu. The term “the Entire Country,” by implication, refers to both the territory under the control of the ROC

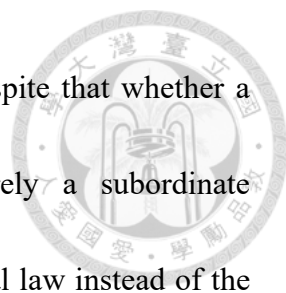
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¹⁶⁰⁰ *Id.* at 1492.

¹⁶⁰¹ Yoshida, *supra* note 589, at 97.

¹⁶⁰² *Id.* at 98.

¹⁶⁰³ *Id.*



government and the territory under the control of the PRC,¹⁶⁰⁴ despite that whether a territorial unit has separate international standing, or is merely a subordinate constitutional unit of a metropolitan State is dictated by international law instead of the municipal law of the State.¹⁶⁰⁵ Taiwan's separate legal status from both ROC and PRC has already been discussed in the previous chapters. The validity of these articles was clearly questionable from the perspective of either international law or constitutional law.

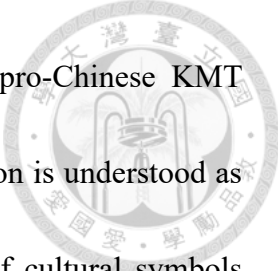
Even though the constitution imposed on the Taiwanese people was named after Republic of China, the collection of the people as the holder of sovereignty “refers to all individuals to whom the legal system that is being constituted or maintained applies by virtue of its territorial/material scope... the people, in constituting the legal system, constitutes also itself... a group of individuals may declare its governance upon a larger group of individuals and if this governance is both efficacious and sufficiently accepted, the legal system is constituted and with it the collection of people”.¹⁶⁰⁶ The popular sovereignty doctrine stipulated in Art.2 of the constitution is considered as a guiding normative principle of self-determination based on the right of free peoples.¹⁶⁰⁷ As a

¹⁶⁰⁴ Chiang, *supra* note 236, at 155.

¹⁶⁰⁵ Crawford, *supra* note 30, at 353.

¹⁶⁰⁶ Waltermann, *supra* note 1264, at 60-1.

¹⁶⁰⁷ Lee, *supra* note 43, at 264.



matter of fact, the ideology that has been trapping the hardline pro-Chinese KMT members had confused the concept of a nation with a people. A nation is understood as “an intergenerational community bound by an imagined heritage of cultural symbols and memories associated with a particular territory or territories.”¹⁶⁰⁸ Indeed, a nation’s strongest sentiments often center on territories that it neither dwells in nor controls: the homelands that earlier generations left behind. However, the popular sovereignty doctrines insist that it is the people, the collective body of a territory’s inhabitants, rather than a national community, that should exercise their mastery over given territories.¹⁶⁰⁹ It is precisely which “people” should be associated with which territory that is at issue. The constituent power of the state remains with the people, understood as the whole body of a territory’s legal inhabitants. It exists as long as one believes in a particular theory of political legitimacy.¹⁶¹⁰ A nation needs time and effort to establish a legacy of memories and symbols salient enough to link one generation to another. The people, in contrast, need no nurturing. It is available as soon as individuals accept the principles of legitimacy that assert its existence.¹⁶¹¹ If the people are “the communities to which the states are accountable, then the boundaries between one people and another will be the boundaries that distinguish the reach of one state’s coercive authority from

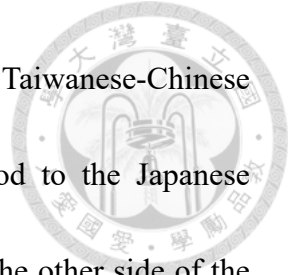
¹⁶⁰⁸ Yack, *supra* note 1426, at 526-27.

¹⁶⁰⁹ *Id.* at 528.

¹⁶¹⁰ Bernard Yack, *Nationalism, popular sovereignty and the liberal democratic state*, in *The Nation-State in Question* 37 (S T. V. Paul, G. John Ikenberry and John A. Hall eds., 2003),

¹⁶¹¹ Yack, *supra* note 1426, at 521.

another's".¹⁶¹² This confused mindset is just the reason why, many Taiwanese-Chinese decedents' fantasy toward Mainland China, from the Dutch period to the Japanese period, had all dashed until the arrival of the Chinese regime from the other side of the strait. The missing understanding of these people with Chinese ethnic origin is that in immigrant societies, the foundation of a state is rather a people than a nation.



In any event, in both law and fact, the people mentioned in the constitution that is in use in Taiwan today could be no one else but the inhabitants of Taiwan. Hence, the articles insisted by KMT to derogate Taiwan's legal status as a separate entity from China was unconstitutional pursuant to the popular sovereignty doctrine embedded in that same constitution.

On the other hand, the reformist alliance between KMT and DPP managed to remove the KMT's legal privileges by stressing the popular sovereignty doctrine embodied in the constitution, making the KMT withdraw and detach itself from all areas of the state, and become one political party amongst others in a civil society. The reforms also promoted gradually increasing civilian control of the Army. These changes went a long

¹⁶¹² *Id.* at 522.

way towards expunging the party-state system.¹⁶¹³



Based on the popular sovereignty doctrine, the 1991 constitutional revision ended the term of tenured Chinese representatives and provided for representative elections by the people of Taiwan. In the following year, a second round of constitutional revision was launched to invest presidential elections with greater democratic legitimacy. The constitution's original design for governmental form was a cabinet system, yet President Lee Teng-hui introduced the direct election of the president by referring to the need to respect the will of the electors.¹⁶¹⁴ The third revision in 1994 introduced the direct presidential election allowing for unprecedented nationwide political mobilization in Taiwan, with the authorization of which, the first directly elected President, Lee Teng-hui, was inaugurated in 1996.¹⁶¹⁵ The constitutional reform was promoted by people's will and energy, forces that had been procured in passionate election campaigns.¹⁶¹⁶

With the KMT government's insistence on designating Taiwan as a province of China, the overlapping of the Taiwanese and central governmental constituencies had resulted

¹⁶¹³ Yoshida, *supra* note 589, at 100.

¹⁶¹⁴ *Id.* at 101.

¹⁶¹⁵ Yeh, *supra* note 1185, at 42.

¹⁶¹⁶ Yoshida, *supra* note 589, at 100.

in an overabundance of administrative red tape and inefficient regulation. In 1997, against the backdrop of Hong Kong's handover to China, the fourth round of constitutional revision authorized the visualizing of the Taiwan Provincial Government and increasing the President's power to manifest Taiwanese sovereignty in the international community.¹⁶¹⁷

Under ROC Constitution, the National Assembly was designed as the supreme organ and was bestowed with the highest sovereignty, which had the power to elect the President and Vice-President and to revise the Constitution. However, once universal suffrage was provided for presidential elections through constitutional mechanisms, the National Assembly became superfluous.¹⁶¹⁸ Against this backdrop, the fifth and sixth revision revolved around reforming and indigenizing the National Assembly. Finally in the seventh round of constitutional revision in 2005, the National Assembly was abolished, and its powers were relinquished to the Legislative Yuan and the people. Accordingly, a three-quarters legislative majority is required to pass a constitutional amendment proposal. In addition, a new proposal has to be publicized and subject to citizen deliberation for at least six months before a public referendum is held. In other words, without majority approval of the Taiwanese people, no further constitutional

¹⁶¹⁷ Yeh, *supra* note 1185, at 42.

¹⁶¹⁸ *Id.* at 139.

change can be made. For the first time in history, the sovereignty of Taiwan truly resides in the Taiwanese people.¹⁶¹⁹



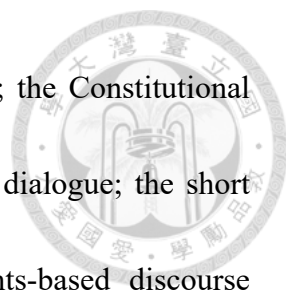
Given that the constitutional amendment procedure is usually the master key to a Constitution, it has been argued that if everything that is amendable in the Constitution is amendable using a procedure involving the substantial participation of the people, then the term “popular sovereignty” is fairly apt.¹⁶²⁰ Winterton observes that, while the Australian constitution does not claim explicitly to be based upon popular sovereignty, it has a more justifiable claim to popular sovereignty than other constitutions that do make an explicit claim to popular sovereignty because the Australian people are involved in the constitutional amendment procedure.¹⁶²¹

Although the framework of the 1946 ROC constitution was kept intact, the Taiwanese people had borrowed whatever they thought would contribute to their happiness to change the ROC constitution as much as possible. Consequently, “the institutional system shifted from a cabinet system to a semi-presidential system; three parliaments was reduced to one; three levels of government was streamlined to two; the manipulated

¹⁶¹⁹ *Id.* at 48.

¹⁶²⁰ Oliver, *supra* note 48, at 330-1.

¹⁶²¹ G. Winterton, *Popular sovereignty and constitutional continuity*, 26 FED L. REV 1-14 (1998).



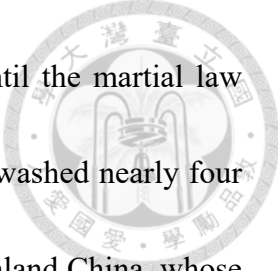
central – local relations was transferred to a functional federalism; the Constitutional Court that merely rubber-stamped is now responsive and supports dialogue; the short list of constitutional rights was enhanced to a burgeoning rights-based discourse engaged by civil society.”¹⁶²² After seven rounds of revision, the ROC constitution had been changed into a completely different document based upon the popular sovereignty of the Taiwanese people.

3. Precarious Sovereignty of Taiwan

Despite all the achievements fulfilled in the seven rounds of constitutional revisions, the systematic advantages of the KMT party cultivated during the authoritarian period had forced the pro-Taiwan reformists to accept some constitutional provisions that put the sovereignty of Taiwan at a precarious situation.

For example, the Additional Articles of the Constitution was taken as a transitional arrangement by stating “... responding to necessity before national reunification”, calling into question whether the ultimate national development direction of Taiwan was pro-reunification with the PRC. It is important to note that the people on the two sides

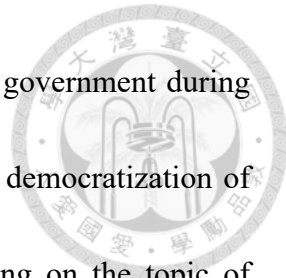
¹⁶²² Yeh, *supra* note 1185, at 242.



of the strait had not communicated from each other since 1949, until the martial law was lifted in 1987, despite that the people of Taiwan had been brainwashed nearly four decades that they are Chinese not different from the Chinese on Mainland China, whose ultimate aim is to seek reunification with each other. After the open-up of communication, this uncertainty was deliberately taken advantage by the PRC to divide the Taiwan society¹⁶²³, which has become the theme of almost every election campaign, deviating from the original intention of a democratic institution to solve the underlying problems of a society. It is true that Taiwan is a state constituting of immigrants, lacking a natural basis for integration. Yet the success of a constitution depends on whether or not the document fulfills the expectations placed in it on the symbolic level. This is what the American constitution has managed to do in a country of immigrants, and the Basic Law in a divided Germany. In both countries, the Constitutions are playing the role of filling the gap, whereas the constitution in use in Taiwan today is playing the

¹⁶²³ Beijing has been adopting a two-handed policy of “hardening the hard, softening the soft”. It has been cooperating with some Taiwanese politicians and merchants to deter Taiwanese from ascertaining its own national identity by discarding the rhetoric of “Republic of China”, while at the same time it reiterated that the “Republic of China” has already been replaced and succeeded by the People’s Republic of China since 1949. China capitalizes on the fiction of “Republic of China” embedded in the mind of Taiwanese that was created by the KMT government. Considering the chronology used in Taiwan today is still the ROC chronology dating from its establishment in 1912 (Year 2021 is recorded as ROC year 110), most of Taiwanese do not even realize the absurdity and illegitimacy of China’s claim to reunify them. At any rate, the movement of “Taiwan Independence” has already been suppressed for over 40 years before the democratization of Taiwan. On the other hand, China is fully aware of the insinuation that the government of Taiwan today still honored Sun Yat-sen as its nation father; every president even has to swear allegiance to his portrait at his/her inauguration. China has long took Sun Yat-sen as a “tool” to “reunify” with Taiwan, see Editorial, *Chuangxin Tongzhan, Zhuanjia Xuezheng Qiju Huangpu “Dasinan” Jiequ Kaizhan Yantao* (Creative united front work: experts convened to discuss at the Huangpu district), CHINAQW, Aug. 25, 2022, available at <https://www.chinaqw.com/qwxs/2022/08-25/338917.shtml> (Last visited Aug.29, 2022)

opposite function. The “One China Doctrine” held on by the KMT government during the authoritarian period was taken over smoothly by PRC after the democratization of Taiwan to penetrate and divide the Taiwanese society.¹⁶²⁴ Centering on the topic of integrating with China or pro-independence, emotional politics has dominated almost every election, ignoring the underlying problems of the society. This tells most of the story why the income and infrastructure development of Taiwan has been stagnant for 30 years.¹⁶²⁵



¹⁶²⁴ During the authoritarian period, the KMT’s intelligence agencies had conducted widespread purges to root out all the movements advocating for a separate identity of Taiwan from the ROC at home and abroad, creating a “Chilling Effect” in the society already. Taking a strategy of “divide and rule”, the KMT saw instrumental value in elections at the local level because it could play off the local Taiwanese factions against each other. After the democratization of Taiwan, however, the fractions and conflicts among different ethnic groups of Taiwan were utilized by PRC smoothly.

¹⁶²⁵ Of course, the biggest beneficiary of a divided Taiwan is China, which is united in its single-minded pursuit of unification while Taipei is divided in how to respond. In Bush & Hass, *supra* note 792; The merchants from Taiwan became the first bunch of foreign investors in China after its “reform and opening up policy” in the 1980s. It is fair to say that, the 40 years of rapid development of China was largely attributed to the bridge role played by the people on Taiwan who were trapped by their Chinese ideology to bring in fund and western advanced technology to develop China. This has enabled Beijing to significantly increase pressure on Taiwan as the politics of the latter have been largely consumed by its debates around “reunification” or “Independence”. The primary goal of the United Front of China is the promotion of the “motherland unification” and blocking of “secession.” A 2007 handbook for United Front workers in Beijing instructs cadres to “unite neutral forces in order to divide and attack enemies.” It also directs them to “make friends extensively and deeply with representatives from all sectors” in Taiwan and abroad to “form a mighty troop of patriots.” As early as 2014, some Taiwanese people in Shanghai and Zhejiang became the target of the Mainland’s new united front work. Taiwan’s economy has become increasingly intertwined with China’s. Over half of Taiwan’s exports are to China and some key sectors like technology have much of their manufacturing on the other side of the strait. The legion of Taiwanese businessmen working in China is a beachhead. United Front documents reviewed by a Reuters report revealed the extent to which the agency is engaged in a concerted campaign to thwart any move toward greater independence by Taiwan and ultimately swallow up the self-ruled island of 23 million. Through the United Front, Beijing has also tried to influence politics on the island, in part by helping mobilize Taiwanese businessmen on the mainland. For a detailed discussion of China’s overseas united front, see generally Lo et al, *infra* note 1841; “The goal is simple – peaceful unification,” said a person with ties to the Chinese leadership in Beijing. Soft power, not armed force, is the strategy. “To attack the heart is the best. To attack a (walled) city is the worst,” the source said, quoting Sun Tzu’s “Art of War.” The Taiwanese people are vulnerable to the PRC’s penetration. With the symbols of the old Chinese regime still displaying in almost every government agency of Taiwan, the Taiwanese people have long been confused about their national identity. The KMT’s decades of brainwashing education of planting the ideology of “One China” in the minds of Taiwanese people has paid off. The punishment of any movement advocating for the establishment of the Republic of Taiwan has scared away most of the people, which chose to accept the status quo. See Yimou Lee and Faith Hung, *Special Report: How China’s Shadowy Agency is working to absorb Taiwan*, REUTERS, November 27, 2014, available at

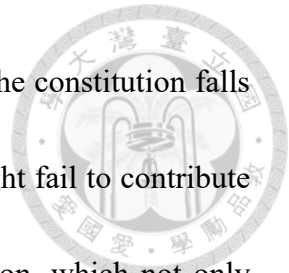


Second, the Article 6 of the constitution provided: “The national flag of the Republic of China shall be of red ground with a blue sky and a white sun in the upper left corner.” It has to be mentioned that this article is a symbol of party-state, since the “blue sky and a white sun” image was also the party emblem of the KMT and the national emblem of ROC before its government took exile on Taiwan. The “blue sky and a white sun” flag is a symbol of unfair distribution of resources, suppressing of Taiwanese identity and the KMT dominated party-state. Ironically, only after the erosion of the legitimacy of the ROC on the international stage did the Taiwanese people begin to increase their voice in the government. Given the national cohesion effect of the flag and emblem, the flag symbolizing the KMT party-state is humiliating to other parties of democratic Taiwan and the pro-Taiwan idealists. Moreover, the images of the old Chinese regime has aggravated China’s impression that Taiwan is its last “unrecovered” and “unliberated” territory, putting Taiwan’s sovereignty in danger. As a matter of fact, the PRC’s intimidation and aggression toward Taiwan are largely based upon the KMT’s claim over Taiwan.¹⁶²⁶ Since the constitution is regarded as a guarantee of the

<https://www.reuters.com/article/ustaiwan-china-special-report/special-report-how-chinas-shadowy-agency-is-working-to-absorb-taiwan-idUSKCN0JB01T20141127> (Last visited May 2, 2022)

¹⁶²⁶ The islanders’ allegiance to Taiwan is a real problem indeed. The ideology of ROC and its tenet of “One China” have confused the Taiwanese people for a long time. Considering that the military sector of Taiwan, which has been long controlled by KMT is still pledging its allegiance to the old Chinese regime’s emblem, flag and the Chinese nation father-Sun Wen, the confused ideology could make the Taiwanese military officers susceptible to the penetration of China. Serving and retired military officers were found exchanging intelligence information with China from time to time. As lately as July 2021, the

fundamental consensus that is necessary for social cohesion,¹⁶²⁷ if the constitution falls short of its anticipated emotive benefits and integrative value, it might fail to contribute to social integration.¹⁶²⁸ A prime example is the Weimar constitution, which not only failed to integrate, but even drove Germans apart during the transformations following the World War I. On the other hand, one cannot deny the considerable integrative power of American constitution, which is seen by many as the veritable embodiment of the American myth.¹⁶²⁹



Furthermore, the 1992 revision added that a political party would be considered unconstitutional if its goals or activities endangered the ROC's existence or the nation's free and democratic constitutional order.¹⁶³⁰ The revision also assigned the Constitutional Court the task of dissolving unconstitutional political parties.¹⁶³¹ This provision was apparently a compromise between the hardline pro-Chinese KMT party members and the democratic reformists. However, as discussed in the previous chapters,

former deputy defense minister General Chang Che-Ping, who is also the head of the National Defense University, was the most senior of officers being investigated for contacts with a representative of the Hong Kong-based China's Central Military Commission, which had travelled to Taiwan where he dined with Chang several times. See Yimou Lee, Taiwan ex-deputy defence minister investigated over "China spy" contacts, REUTERS, July 28, 2021, available at <https://www.reuters.com/world/asia-pacific/taiwan-ex-deputy-defence-minister-investigated-over-china-spy-contacts-2021-07-28/> (Last visited May 2, 2022)

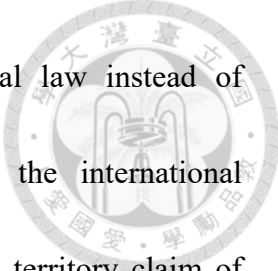
¹⁶²⁷ Grimm, *supra* note 1422, at 144.

¹⁶²⁸ *Id.* at 147-48,

¹⁶²⁹ William Y. Elliott, *The constitution as the American aocial myth*, IN, THE CONSTITUTION RECONSIDERED 209 (Conyers Read ed., 1938); HANS KOHN, AMERICAN NATIONALISM 8 (1957); SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 30 (1981).

¹⁶³⁰ art 13(3), Additional Articles of the Constitution of the Republic of China, available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000002> (Last visited May 2, 2022)

¹⁶³¹ *Id.* at art 13(2).



the statehood or existence of ROC was dictated by international law instead of municipal law. Given the general de-recognition of ROC by the international community, in addition to the unacceptable state name including a territory claim of whole China, Taiwan was excluded from any international organization that required statehood, which has been detrimental to the well-being of the Taiwanese people.

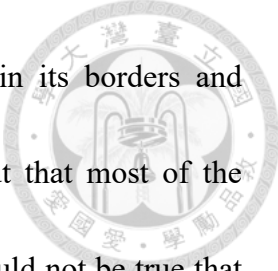
From the perspective of international law, the name of ROC imposed on Taiwan is invalid. A rule is valid “because it passes the test of some other existing rule, and not because it is accepted by its audience from the internal point of view”.¹⁶³² “it is possible that the rule of recognition will be determined by social facts other than agreement on its existence or content”.¹⁶³³ Considering that the name of ROC had almost disappeared in all international documents since its general de-recognition, the rule of recognition regarding the statehood and international personality of Taiwan and ROC had probably already transferred without the notice of the Taiwanese people.

Hart effectively showed that sovereignty is created by rules, not habits of obedience.

Following Hart, Shapiro observes “the secondary rules can be used to explain two

¹⁶³² Shapiro, Scott J., What is the Rule of Recognition (and Does it Exist)?, THE RULE OF RECOGNITION AND THE US CONSTITUTION, Matthew Adler, Kenneth Himma, eds., Oxford University Press, 2009, Yale Law School, Public Law Working Paper No. 184, at 10-11, Available at SSRN: <https://ssrn.com/abstract=1304645> (Last visited May 2, 2022)

¹⁶³³ *Id.* at 26.

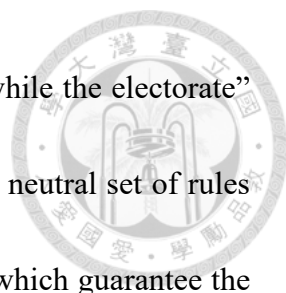


properties shared by modern state legal systems: supremacy within its borders and independence from other systems”.¹⁶³⁴ “Thus, even if it turned out that most of the citizens of Rhode Island obey most of the rules of Roman law, it would not be true that Roman law still exists today, given that the Rhode Island State officials would not be following the secondary rules of the (extinct) Roman legal system.”¹⁶³⁵ By the same token, even if the constitution in use in Taiwan today borrowed texts from 1946 ROC constitution, and some of the laws enacted in old China are still applicable in Taiwan, it could not prove the existence of the Republic of China, given that the state officials of Taiwan today would not be following the secondary rules of the extinct ROC legal system that confer power to create sovereignty. With the master key of the amendment of the constitution being transferred into the hands of Taiwanese people, the Taiwanese people are now the sovereign of their state.

As a matter of fact, the role of the privileged KMT members playing in the reconstructing of the constitution of Taiwan was questionable. In the parlance of the theory of constitutions as rational pre-commitments, “constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal

¹⁶³⁴ *Id.* at 9.

¹⁶³⁵ *Id.* at 11.



hand in the day of their frenzy.”¹⁶³⁶ “A constitution is Peter sober while the electorate”
sometimes “is Peter drunk.” ¹⁶³⁷ “Constitutional Law is seen as the neutral set of rules
which regulate social and political interaction within the polity and which guarantee the
free and equal status of its citizens. These fundamental laws are neutral, apolitical and at
best not dependent on shifting political majorities. If (groups of) citizens are entitled to
make these laws, they can impose their particular interests on others which is
destructive of political equality.”¹⁶³⁸ “Political factions could mold institutional design
to their advantage...he who holds command over men ought not to have command over
the laws, he who has command over the laws ought not any more to have it over men;
or else his laws would be the ministers of his passions and would often merely serve to
perpetuate his injustices.”¹⁶³⁹ Therefore, the power to design a constitution must not be
misused for particular political interests, or in a politicized fashion.¹⁶⁴⁰ “Ideally,
constitution-making follows the principle of public reasoning and is not a form of
political bargaining or of finding some political compromise.”¹⁶⁴¹

¹⁶³⁶ JON ELSTER, *ULYSSES UNBOUND* 89 (2000).

¹⁶³⁷ STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 235 (1995).

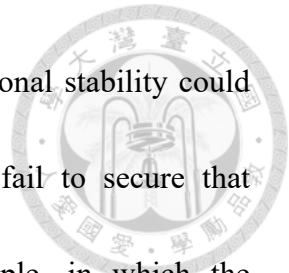
¹⁶³⁸ Braune, *supra* note 1598, at 327.

¹⁶³⁹ *Id.* at 328.

¹⁶⁴⁰ See A. Vermeule, *Veil of ignorance rules in constitutional law*, 111 *YALE L.J.* 399–433 (2001).

¹⁶⁴¹ Braune, *supra* note 1598, at 331 referencing to M. PATBERG, *CONSTITUENT POWER: A DISCOURSE-THEORETICAL SOLUTION TO THE CONFLICT BETWEEN OPENNESS AND CONTAINMENT* (2016); See also J. Habermas, *Constitutional democracy: a paradoxical union of contradictory principles?* 29 *POLIT THEORY* 766–81(2001).

In a state with a well-designed constitution, political and constitutional stability could be expected.¹⁶⁴² Conversely, a badly design constitution would fail to secure that stability, the Weimar constitution was such a prominent example, in which the insecurity and ambivalence undercut the prospect of collective action.¹⁶⁴³ In the case of Taiwan, given the predominance of the KMT and its penetration into other parties and all segments of the society¹⁶⁴⁴, not until constitutional clarity regarding sovereignty and identity is achieved- either through comprehensive constitutional re-engineering or strong judicial intervention, could the constitutional stability be attained.¹⁶⁴⁵



4. Conclusion

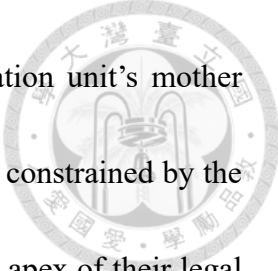
The theories regarding the constitutional independence of Canada, Australia and New Zealand demonstrated that constitutional independence could be attained without

¹⁶⁴² See B.R. Weingast, *Designing constitutional stability*, In DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY. ANALYSIS AND EVIDENCE 343-66 (R.D. Congleton and B Swedenborg eds., 2006).

¹⁶⁴³ Ivan Ermakoff , *Frail democracy*, in MILITANT DEMOCRACY – POLITICAL SCIENCE, LAW AND PHILOSOPHY 51(Afshin Ellian and Bastiaan Rijpkema eds., 2018)

¹⁶⁴⁴ In DPP’s platform, it committed to draft a new constitution and establish the Republic of Taiwan, but after the DPP came into office in 2016, it has not even mentioned this mission. It has been disclosed that the supposed pro-independence DPP has already been widely infiltrated by the pro-Chinese KMT party, which had dominated the political life of Taiwan for over five decades. See Editorial, *Taiwan Zhengzhi Xianmin Fengbo Ji Yichu Jiang Jieshi Tongxiang Zhengyi: Zhuanxin Zhengyi Ruhe Miandui Gengduo Tiaozhan*(Taiwan’s “political informant” scandal and the removal of Chiang Kai-shek’s bronze statue controversy: How “transition justice” faces more challenges), BBC CHINESE NEWS (Nov.22,2021), at <https://www.bbc.com/zhongwen/trad/chinese-news-59339027>(last visited Feb.22, 2022); see also Editorial, *Mingjindang Qiang Jiangjingguo Pai? Zhiqingzhe Bao Muliao Qianglie Fandui,Caiyingwen Jianchi Yaoqu*,(DPP Praises Chiang Chingguo? Insider Exposed Tsai’s insistence disregarding the Party’s backlash) STORM MEDIA (Jan.14, 2022), at <https://www.storm.mg/article/4166521?kw=%E8%94%A3%E7%B6%93%E5%9C%8B&pi=4> (last visited Feb.23, 2022)

¹⁶⁴⁵ Yeh, *supra* note 1185, at 232.



abrogating the original constitution conferred by the self-determination unit's mother country. In the earlier 1900s, the previous dominions of the UK were constrained by the principal of repugnance, putting the imperial parliament of UK at the apex of their legal systems. With the passage of the Bafarmore Declaration and the Westminster Statue during 1926-1931, however, those obstacles that prevent the previous dominions to act as independent sovereign states were removed. The incapacity of the British Parliament to legislate for the New Dominions substantiated the meaning of independence in terms of lawmaking capacity. Australia, Canada and New Zealand had thereafter acquired their political independence, in the sense of their ability to make their own decisions regardless of theoretic legal links with the UK, and international independence, in the sense of how other countries viewed them.

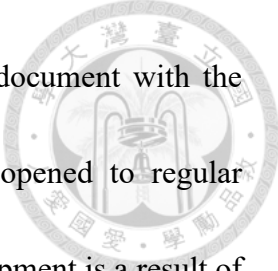
In spite of their outside imperial link with the UK, it is the actual independence that is the central prerequisite for statehood. Britain attempted to retain some form of control afterwards; given that the orthodox imperial theory put the Imperial Parliament at the apex of the legal system of the devolved colonies, but it soon recognize that it was just an abstract theory with no relation to reality. In reality, these countries have been fully independent since then, and at the highest level of constitutional analysis “the reality is

the law”¹⁶⁴⁶ The legal status of the devolved units have become irrevocable by virtue of the fact that it qualified as a State protected by territorial integrity, since the principle of non-intervention involves every sovereign State’s right to conduct its affairs without outside interference.



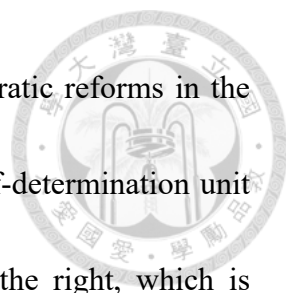
In international law, the Commonwealth countries’ continuing legal relations with the metropolitan state would be reinterpreted as subsisting by consent, which was not against the statehood they had attained. Eventually, national pride and a desire for clarity and certainty dictate that when they acquire independence they eventually wanted that independence to be constitutionally beyond doubt. In the discussion of sovereignty as well as constitutional independence, it is important to know which legislatures can influence the telling of that story and which courts can influence its interpretation. In all three countries, any ongoing role of the Westminster Parliament in these countries was terminated through legislation or the court. The constitutional independence of Australia, Canada and New Zealand was attained because constitutional questions are now decided by those countries’ highest courts, and by them alone.

¹⁶⁴⁶ Schwartz & Whyte, *supra* note 1330, at 165.



The constitution of Taiwan, on the other hand, did not become a document with the consent of the governed until 1991, when the way was finally opened to regular elections for all national-level legislative representatives. This development is a result of the Taiwanese people's over seven decades of fighting for freedom and democracy. Since political rule was deemed illegitimate when it was not based on a contract between the governor and the governed, the previous constitutions used by Japan and China as instruments for building Japanese and Chinese identity rather than constraining governmental abuse of power were illegitimate and at most nominal constitutions in the modern sense of constitutionalism.

The political independence that made the legal system of Taiwan separate from China happened in 1949, when the ROC government took exile in Taiwan, catching the Taiwanese off guard. Taiwan has become a de facto settler colony of the ROC government in exile since then, regardless of the latter's claim to represent the whole China and keeping on designating Taiwan as a province of China. When the "emperor's new cloth" was finally taken off by the general de-recognition of ROC in the late 1970s, this illegitimacy has been more and more exposed by its severe abusing of governmental power and human rights violations in Taiwan.



Taiwan's legal status as a self-determination unit before the democratic reforms in the 1990s was without any doubt. Given that the annexation of the self-determination unit of Taiwan in violation of self-determination does not extinguish the right, which is based on the idea that people should have recourse against a government that is systematically abusing their human rights and that is therefore violating the underpinnings of a social compact between the governing and the governed. After seven rounds of constitutional revisions, constitutionalism had been established in Taiwan, not satisfactorily though. Since the logical corollary of the Right of self-determination as a right against colonization implies the establishment of a sovereign state, when the master key to the amendment of constitution was finally put into the hands of the Taiwanese people in the 2005 constitutional revision, the process have become irrevocable by virtue of the fact that Taiwan has been qualified as an independent sovereign state. Just like the legal relationship between the previous dominions and Britain, the National Assembly members elected in China are now permanently and fully prohibited from interfering in Taiwanese legal affairs, constitutional or other. If the constitutional practice of Taiwan today obtained its life in the seed bed at Japan and China¹⁶⁴⁷, and was transplanted to Taiwan, it had struck root in the Taiwanese soil, and


¹⁶⁴⁷ The current constitution's interlinkage with the constitution of Japan is that the tone of "respecting for the law" and "peaceful and regular participation in politics" set by the Japanese period had laid the foundation for the current constitutional practices of Taiwan.

it owed its life now to Taiwan rather than Japan or China.



Nevertheless, there were still some obstacles left in the constitution that derogate from Taiwan's formal independence, such as the constitution name and flag, both of which were vestiges of the old Chinese regime. Just as the Canadian Patriation Reference case in 1981, whereby the highest Canadian court showed itself unwilling to make the question beyond doubt based solely on the political fact of independence, all the court decisions in Taiwan that interpreted Taiwan and PRC as free area and mainland area of China were also essentially political decisions. Like the supreme court of Canada, it is an opportunity for the constitutional court of Taiwan to articulate the Taiwanese rule of recognition. The decision of the supreme court of Canada, however, had forced the executive and legislative branch to take action, which in turn brought about the case of Veto Quebec Veto Reference that put the constitutional independence of Canada beyond all doubt.

For the sake of integrating national identity and removing uncertainty that put the sovereign of Taiwan at a precarious status, this work advocates that all the vestiges of ROC and constitutional revisions derogating Taiwan's independent sovereignty and identity enacted as a result of KMT's privileged power are unconstitutional, including



the constitutional name, the “white sun, blue sky” flag, the transitional arrangements, and anything that legalize the “ROC on Taiwan”, pursuant to the popular sovereignty doctrine embedded in the that same constitution. Here, the role of the KMT as a Chinese party coming to Taiwan dictated by international law has to be emphasized; it held no residue power to decide the legal status of Taiwan but to transfer all sovereign powers to the Taiwanese people, and ensure that unflawed sovereignty is enjoyed by the Taiwanese people. After all, by Article 2(b) of the Treaty with Japan, Japan has renounced all right, title and claim to Formosa and the Pescadores. Given that self-determination has already become a jus cogens, which is about inhabitants deciding the fate of the territory instead of the other way around, the beneficiary of the sovereignty of Formosa and the Pescadores could be no one else but the people of Formosa and the Pescadores. The legal status of KMT as a Chinese Party in exile or a representative Party of Taiwan must be clarified, and the relationship between the Chinese Nationalist Party (KMT) and the CCP on Mainland China or any official contacts between them must be detached from any future developments of Taiwan, as the sovereignty of which belongs to the Taiwanese people as a whole in both international law and constitutional law.

Chapter VI: Prospectus of the legal status of Taiwan



1. Taiwan's relationship with China

1.1 China's attitude toward international law

Probably due to China's history of unequal treaties with the West, China had embraced the Western system centered on state sovereignty, and "carry the logic of state sovereignty to an untenable extreme."¹⁶⁴⁸ The doctrine of non-intervention is main focus of the Chinese conception of state sovereignty.¹⁶⁴⁹ For instance, in the Kosovo case, China's representatives to the Security Council called on UNSMIS to "fully respect Syria's sovereignty and dignity"¹⁶⁵⁰ and states to respect "the sovereignty, independence and territorial integrity of Libya"¹⁶⁵¹ and the "sovereignty and territorial integrity of Serbia".¹⁶⁵² Yet there are also examples in which China did not insist on the principle non-interference, provided that the interference was authorized by the UN Security Council and/or requested by the state itself.¹⁶⁵¹ At any case, China took territorial integrity, the principle of non-intervention and independence as the three key components of state sovereignty.¹⁶⁵²

¹⁶⁴⁸ S. S. Kim, *People's Republic of China and the Charter-based international legal order*, 72 AME. J. INT. L. 317, 347 (1978).

¹⁶⁴⁹ Waltermann, *supra* note 1264, at 157.

¹⁶⁵⁰ W. Muller, *China's sovereignty in international law: from historical grievance to pragmatic Tool*, 1(3-4) CHINA-EU LAW J. 35-59(2013).

¹⁶⁵¹ *Id.* at 51.

¹⁶⁵² *Id.* at 46.



However, the Hong Kong issue underlines the conflicts between the different views of China and the western countries toward international law. Although China views international agreements as important sources of international law,¹⁶⁵³ whether a particular agreement is considered binding on China depends upon its substantive terms.¹⁶⁵⁴ The Chinese government had claimed for years that Hong Kong is a part of Chinese territory, and that the three treaties under which the British claim sovereignty over Hong Kong are not binding on China, because they are unequal, and that the treaties have never been accepted by the Chinese people.¹⁶⁵⁵ Therefore, China vowed to recover the entire region of Hong Kong when the appropriate situation materialized.¹⁶⁵⁶ The British government has, until the 1980s, continuously contended that these treaties were valid under international law.¹⁶⁵⁷ As aforementioned, the principal of intertemporal law established by the *Palmas Arbitration* case requires that “a juridical fact must be appreciated in the light of the law contemporary with it”.¹⁶⁵⁸ Moreover, the ICJ had observed in *The Temple of Preah Vihear Case* in 1962 that “the special rule of

¹⁶⁵³ David. M. Corwin, *China's Choices: The 1984 Sino-British Joint Declaration and Its Aftermath*, 19(1) *LAW & POL'Y INT'L BUS.* 505, 510 (1987).

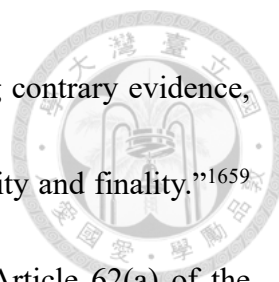
¹⁶⁵⁴ *Id.* at 511.

¹⁶⁵⁵ Wesley-Smith, *Settlement of the Question of Hong Kong*, 17(1) *CAL. W. INT'L L.J.* 116, 117 (1987).

¹⁶⁵⁶ Joint Declaration on the question of Hong Kong (with annexes). Signed at Beijing on 19 December 1984, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201399/v1399.pdf> (Last visited Aug.31, 2022)

¹⁶⁵⁷ Smith, *supra* note 1655, at 165-6.

¹⁶⁵⁸ *Islands of Palmas Arbitration*, *supra* note 31.



interpretation of treaties regarding boundaries is that it must, failing contrary evidence, be supposed to have been concluded in order to ensure peace, stability and finality.”¹⁶⁵⁹

The characteristic of finality of a territorial treaty is reflected in Article 62(a) of the Vienna Convention, which stipulates that the *rebus sic stantibus* rule¹⁶⁶⁰ would not be invoked “if the treaty establishes a boundary”. From the International Law Commission’s Commentary, it is clear that such treaties should constitute an exception to the general rule permitting termination or suspension in case of fundamental change of circumstances, since otherwise the rule might become a source of dangerous frictions.¹⁶⁶¹ Hence, the territory treaties between China and Britain are legitimate in the eyes of international law. Regarding China’s claim of reversion, on the other hand, as the ILC after some debate deleted the notion of reversion from its draft Article 7 (“Date of Transfer of public property”) of its Draft Articles on State Succession in Respect of Matters other than Treaties,¹⁶⁶² “it must be concluded that, whatever the validity or usefulness of reversion as a political claim, there is little authority and even less utility for its existence as a legal claim.”¹⁶⁶³

¹⁶⁵⁹ Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 1.5 June 1962: I.C. J. Reports 1962, p. 6, available at <https://www.icj-cij.org/public/files/case-related/45/045-19620615-JUD-01-00-EN.pdf> (Last visited May 2, 2022)

¹⁶⁶⁰ The concept of *rebus sic stantibus* (Latin: “things standing thus”) stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminate the treaty in question.

¹⁶⁶¹ United Nations, Yearbook of the International Law Commission, 259 (1966), available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (last visited Feb.18, 2022).

¹⁶⁶² Crawford, *supra* note 30, at 698.

¹⁶⁶³ *Id.* at 699.



Yet China has been inconsistent in applying its principle that unequal treaties violate international law.¹⁶⁶⁴ It has been held that, without indicating clear criteria, China takes both the substance of treaty and the negotiating position of the parties as decisive for its “unequal” status in a treaty.¹⁶⁶⁵ On the one hand, China insisted that the 1898 Convention with Britain was unequal and infringed upon China’s sovereign rights, but on the other hand, China’s willingness to conclude the Joint Declaration with Britain is considered as a de facto recognition of British rights under the 1898 Convention. China’s inconsistent application of the principles of unequal treaties and violation of sovereignty warrants led Corwin to argue that “the PRC’s interpretation of treaties depends more on political expediency than on strict notions of international law.”¹⁶⁶⁶

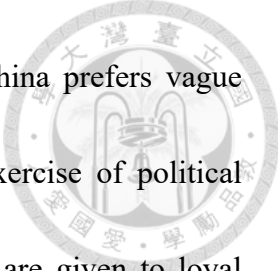
In fact, China has a very different approach to law. While in Western understanding, law carries normative value in itself, the Chinese understanding of law pays more attention to family ethics, compassion and context sensitivity.¹⁶⁶⁷ The Chinese approach to law depends on not only concrete contexts, but also cost-benefit calculations, “when legal

¹⁶⁶⁴ Corwin, *supra* note 1653, at 514-15; Smith, *supra* note 1656, at 186.

¹⁶⁶⁵ See Corwin, *id.*, at 513-15.

¹⁶⁶⁶ *Id.*, at 514-5.

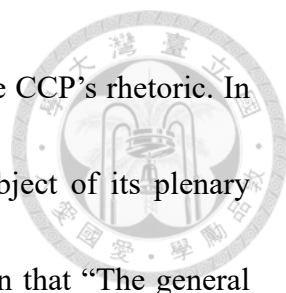
¹⁶⁶⁷ Tim Rühlig, *How China approaches international law: Implications for Europe*, EU-ASIA AT A GLANCE, May, 2018, available at https://www.eias.org/wp-content/uploads/2016/03/EU_Asia_at_a_Glance_Ruhlig_2018_China_International_Law.pdf (Last visited May 2, 2022)



certainty is beneficial for China, it is improved. In other cases, China prefers vague legal norms that are open to interpretation not constraining the exercise of political power.”¹⁶⁶⁸ According to the China’s understanding of law, rights are given to loyal citizen by the state. In the Common Law context, on the contrary, both the state powers and individual rights are assumed to be limited by the legislature through the law. Western legal ideas such as the intrinsic value of the law, the independence of the judiciary and the central role of the individuals are alien to the Chinese legal system. Referring to a functionalist understanding of law, the PRC would go to any lengths to secure the economic status of Hong Kong while protecting the country’s international reputation. China invents a “creative reinterpretation” of the Sino-British Joint Declaration by stating that it has already expired. In effect, this argument serves the Chinese goal of maximizing its control over Hong Kong by negating that China is bound by international law. This way of understanding might be rooted in the Chinese tradition that does not know laws deriving from a divine order; moreover, the communists are atheists. Hence, the Chinese leaders intend to govern the country by means of the “rule by law” or “in accordance with law”, which should not be confused with the Western understanding of the rule of law.¹⁶⁶⁹

¹⁶⁶⁸ *Id.*

¹⁶⁶⁹ *Id.*

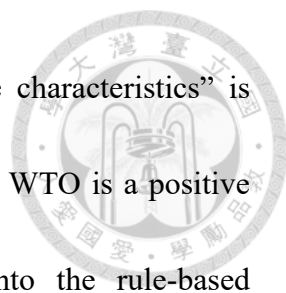


Nevertheless, the wording of “rule of law” plays a crucial role in the CCP’s rhetoric. In 2014, the CCP Central Committee made the “rule of law” the subject of its plenary session for the first time in history.¹⁶⁷⁰ It was stressed at the session that “The general objectives to comprehensively move ruling the country according to the law forward are constructing a Socialist rule of law system with Chinese characteristics and constructing a Socialist rule of law country. That is to say, under the leadership of the Chinese Communist Party, persisting in the system of Socialism with Chinese characteristics, implementing the theory of Socialist rule of law with Chinese characteristics”¹⁶⁷¹ This emphasis is largely due to China’s economic programs abroad accompanying its efforts to gain international discursive power over legal issues. The “Belt and Road Legal Cooperation Research and Training Program” launched in autumn 2019 serves to disseminate China’s international law practice, legal concept and its particular theory of “Socialist rule of law with Chinese characteristics”. Intending to establish an international dispute resolution mechanism, China is striving to create a rule-based order in which the guidelines and processes were set by China itself, with moderate success so far though.¹⁶⁷²

¹⁶⁷⁰ CCP Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law, policy paper, Oct.28, 2014, available at <https://www.chinalawtranslate.com/en/fourth-plenum-decision/> (Last visited Sept.6, 2022)

¹⁶⁷¹ *Id.*

¹⁶⁷² Rühlig, *supra* note 1667.

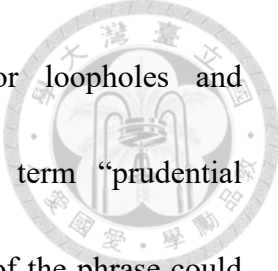


Although China's idea of the "socialist rule of law with Chinese characteristics" is largely at odds with the Western legal tradition, China's practice in WTO is a positive example of how China can also be successfully integrated into the rule-based international order if the scope for interpretation was kept as narrow as possible. Upon its accession to the World Trade Organization (WTO) in 2001, the PRC has decided to comply with its WTO obligations by and large, considering that China's economy is benefiting from legal certainty provided by the WTO system. As a matter of fact, China has a very good compliance record with Dispute Settlement Body (DSB) rulings against it. China has a compliance record of 85.7% out of the 33 concluded cases. The reason for this extraordinary high compliance rate is that the DSB rulings are comparatively clear in identifying violations of the WTO law and pretty precise by outlining what the countries have to do to bring their policies into conformity with the WTO law. Hence, concerning for its international reputation, "if China wants to avoid being clearly named as a violator of WTO law, it has hardly any choice but compliance."¹⁶⁷³

However, the devil is in the details. In order to uphold its "state-permeated capitalism" and its non-market economy,¹⁶⁷⁴ China has aimed to avoid bluntly violating the WTO

¹⁶⁷³ *Id.* at 1638.

¹⁶⁷⁴ T. Ten Brink, *Institutional Change in Market-Liberal State Capitalism: An Integrative Perspective on the Development of the Private Business Sector in China, 2011*, available at <https://www.econstor.eu/bitstream/10419/45622/1/656739584.pdf> (Last visited Sept. 2, 2022)



law, rather, it has studied its legal obligations carefully for loopholes and ambiguities.¹⁶⁷⁵ For example, China has carefully studied the term “prudential regulations” and noticed that no internationally accepted definition of the phrase could be found. The PRC then adopted a very broad definition of the term that enabled it to effectively retain full control over its financial sector. As a result, the letter of China’s WTO obligations is complied, but the spirit of it is violated. In its invented “‘creative compliance’, China has effectively made use of the legal loopholes inherent in WTO law”.¹⁶⁷⁶ Just like that in the case of Hong Kong, China prefers vague laws that provide room for its interpretation and “creative compliance”.

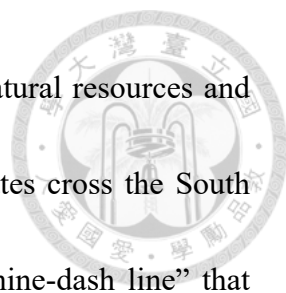
All in all, China rather adopts a pragmatic approach to law. Sometimes, it tends to play by the rules widely accepted by the international community, as long as it is crucial and necessary to assure international partners that China will remain a reliable partner and a responsible great power.¹⁶⁷⁷

In the international security area, on the other hand, China aims to utilize ambiguity to

¹⁶⁷⁵ See Y. Kobayashi, “Creative Compliance?” *China’s Compliance with the WTO - a Case Study of Telecommunications Services*, In CHINA AND GLOBAL TRADE GOVERNANCE (K. Zeng and L. Wei eds.,2013); T. Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 (3) MICH.J. INT’L L 525 (2014); Seung-Youn Oh, Convenient Compliance. China’s Industrial Policy Staying One Step Ahead of WTO Enforcement, 2015. Available at <https://www.files.ethz.ch/isn/191745/13.05.2015.pdf> (Last visited May 2, 2022)

¹⁶⁷⁶ Rühlig, *supra* note 1668.

¹⁶⁷⁷ *Id.*



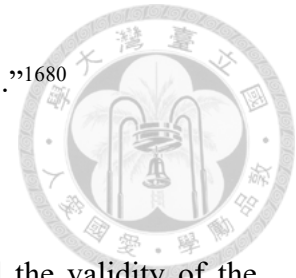
its own negotiation advantage. For instance, considering the rich natural resources and fish stock, and the most important international maritime trade routes cross the South China Sea, China has taken out maps that include the so-called “nine-dash line” that accompanied the claims of China in the region. China emphasizes its historical rights there, namely the discovery, longstanding historical use and administrative control of the area under dispute dating back to the Han Dynasty by referencing to old maps and archeological findings. The argument of historical right “lies outside the justifications under UNCLOS which rather highlights proximity and continuous and effective administration...It is this vagueness that plays into China’s negotiation position”.¹⁶⁷⁸

In July 2016, an arbitration tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) ruled against the PRC’s maritime claims in *Philippines v. China*.¹⁶⁷⁹ It noted that the UNCLOS comprehensively governs the parties’ respective rights to maritime areas in the South China Sea. China’s nine-dash line is a claim of “historic rights” to the waters of the South China Sea, which is invalid. “Whatever historic rights China may have had were extinguished when UNCLOS was

¹⁶⁷⁸ *Id.*; Ian Storey, *China’s Bilateral and Multilateral Diplomacy in the South China Sea*, 8(3) ASIA SECURITY 287 (2012).

¹⁶⁷⁹ PCA Case No 2013-19 ,ICGJ 495 (PCA 2016) (OUP reference), available at <https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf> (Last visited May 2, 2022)

adopted, to the extent those rights were incompatible with UNCLOS.”¹⁶⁸⁰



In response to the decision, the PRC on the one hand questioned the validity of the tribunal’s jurisdiction, but at the same time, it wants to protect its international reputation by showing willingness to negotiate a code of conduct with the countries around the South China Sea in dispute. Since late 2016, consultations between China and ASEAN on a potential COC have gained new momentum.¹⁶⁸¹ It demonstrates that China’s position has been weakened by the legalization of the issue.¹⁶⁸² It appears that the reputation costs inherent in international law remain significant in the eyes of the Chinese leaders, it could be concluded that economic gains and reputation play a crucial role in China’s calculus, and the Chinese pragmatic approach to law goes along with a preference for vague legal norms that leaves room for very different interpretation and do not constrain political decision-making too much.¹⁶⁸³

Therefore, it should be well aware that the leverage vis-à-vis China is very important.

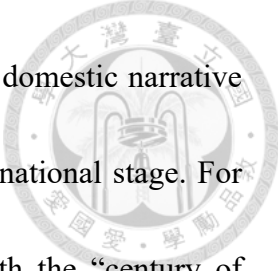
The PRC is indeed very concerned with its international image and reputation, so as to

¹⁶⁸⁰ *Id.*

¹⁶⁸¹ South China Sea expert working group, A blueprint for a South China Sea code of conduct, Oct.11, 2018, available at <https://amti.csis.org/blueprint-for-south-china-sea-code-of-conduct/> (Last visited May 2, 2022)

¹⁶⁸² Storey, *supra* note 1678.

¹⁶⁸³ Rühlig, *supra* note 1667.

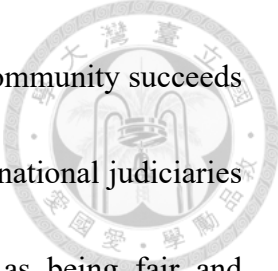


not only promote China's international influence but also serve as a domestic narrative emphasizing that China is a well-respected great power on the international stage. For the PRC, it is important to contrast the country under its rule with the “century of humiliation” before the CCP took over the power from the KMT in 1949.¹⁶⁸⁴ China's concern for its international reputation and record of compliance with international law provides the international community with significant leverage.

To deal with China, first, the international community should clearly distinguish between legal and political decisions. This transparency helps to commit China to international legal norms where necessary. Second, since China is eager not to violate international law flagrantly but to exploit legal vagueness and loopholes, the international community should insist on international legal rules that are as precise as possible. Because precise definition of rights and obligations would “makes it more difficult for China to shirk from its international legal obligations by means of interpreting legal norms as broadly as to violate the spirit of it”.¹⁶⁸⁵ Last but not least, “since clarity and precision are not always a viable option for international law, the international community should promote prescribed and inclusive procedures of law

¹⁶⁸⁴ *Id.*

¹⁶⁸⁵ *Id.*



interpretation and implementation.”¹⁶⁸⁶ In sum, if the international community succeeds in increasing “legal precision, institutionalized and independent international judiciaries and inclusive procedures of law interpretation that are accepted as being fair and procedurally just, the costs for Chinese non-compliance with international law will be enormous”.¹⁶⁸⁷

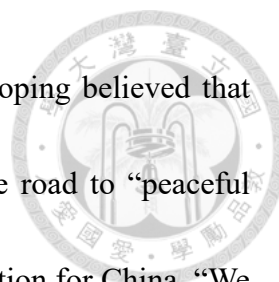
1.2 Legitimacy of China’s Claim of “Reunification” with Taiwan

Hong Kong is seen as a harbinger of the aggressive PRC action against Taiwan, because in the eyes of the Chinese Communist Party (CCP), Taiwan is the last large piece of unrecovered territory in making China great again. In January 2019, Chinese leader Xi Jin-ping suggested that the time had come to “explore a Taiwan plan for “one country, two systems.” Xi has also signaled that the Taiwan question cannot be delayed indefinitely, and increasingly use military forces to intimidate Taiwan.

As a matter of fact, as soon as the Sino-British Joint Declaration was signed in September 1984, the then Chinese leader Deng Xiaoping expressed his willingness to adopt the Hong Kong model of “one country, two systems” to resolve the Taiwan

¹⁶⁸⁶ *Id.*

¹⁶⁸⁷ *Id.*



issue.¹⁶⁸⁸ Viewed Taiwan as a natural economic partner, Deng Xiaoping believed that deepening the cross-strait economic ties would eventually pave the road to “peaceful reunification”. He also made clear that the use of force was a live option for China, “We are pursuing a policy of ‘one country, two systems.’ . . . If the problem cannot be solved by peaceful means, then it must be solved by force.”¹⁶⁸⁹

In the 2002 white paper titled “China’s National Defense”, China declared its political resolve and military capacity to suppress separatist movements to preserve its sovereignty and territorial integrity.¹⁶⁹⁰ It included taking actions against any independence forces of Taiwan or military assistance by other countries to aid it.¹⁶⁹¹ In particular, an Anti-secession Law adopted by China on 14 March 2005 reaffirms that “Taiwan is a part of China” (Art 2) and that the “Taiwan question” is an “internal affair” of China (Art 3). Article 8 purports to define certain conditions under which China may use force in relation to Taiwan: (1) attempted separation of Taiwan from China; (2)

¹⁶⁸⁸ Guo-Cang Huan, *Taiwan, A View from Beijing*, 63 FOREIGN AFF. 1064, 1066 (1985), available at <https://www.foreignaffairs.com/articles/asia/1985-06-01/taiwan-view-beijing> (Last visited May 2, 2022)

¹⁶⁸⁹ Editorial, *Deng Xiaoping on “One Country, Two Systems”*, CHINA DAILY, June 23, 1984, available at https://www.chinadaily.com.cn/english/doc/2004-02/19/content_307590.htm (Last visited May 2, 2022)

¹⁶⁹⁰ The Taiwan Affairs Office and The Information Office of the State Council, The Taiwan Affairs Office and The Information Office of the State Council, May 17, 2004, at <https://www.fmprc.gov.cn/ce/ceno/eng/ztxw/twwt/t110655.htm> (Last visited May 2, 2022)

¹⁶⁹¹ Tie Wee Tan, *Consolidating Separation: The LeeTeng-hui Administration and the Political Status of Taiwan*, available at <https://docplayer.net/24800258-Consolidating-separation-the-lee-teng-hui-administration-and-the-political-status-of-taiwan.html>; J. I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 AME.J.INT’L.L453(2000); J. Shen, *Sovereignty, Statehood, Self-Determination and the Issue of Taiwan*, 15 AME.UNI.INT’L R. 1101 (2000).

incidents entailing Taiwan's secession from China; or (3) exhaustion of possibilities for peaceful reunification.¹⁶⁹²



The wording of the “Anti-secession Law” has to be studied very carefully. By saying that “Taiwan question” is an “internal affair” of China, China referred to the principle of “Non-intervention”, which is stipulated in Article 2(7) of the UN Charter. Putting aside the international border separating China and Taiwan into two independent legal systems since 1949, there is a widespread agreement that the principle of “Non-intervention” is inapplicable as far as the principle of self-determination applies,¹⁶⁹³ which has acquired the status of jus cogens and customary international law.¹⁶⁹⁴ Since Taiwan's legal status as a self-determination unit has been firmly established¹⁶⁹⁵, the Art 2 of China's “Anti- secession law is invalid in the eyes of international law.

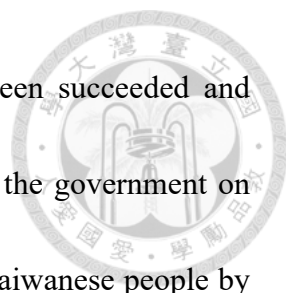
By enacting a law preventing Taiwan's secession and separation from China, the PRC seems to implicate that the ROC government in exile is a representative government of

¹⁶⁹² Anti-Secession Law, *supra* note 864.

¹⁶⁹³ Cassese, *supra* note 127, at 174.


¹⁶⁹⁴ Barcelona Traction, Light and Power Co. Case, ICJ Reports 1970, p. 3, at p. 32, para. 33, *available at* <https://www.refworld.org/cases,ICJ,4040aec74.html> (Last visited May 2, 2022); United States Diplomatic and Consular Staff in Tehran Case, ICJ Reports 1980, p. 42, para. 91, *available at* http://www.worldcourts.com/icj/eng/decisions/1980.05.24_consular_staff.htm (Last visited May 2, 2022)

¹⁶⁹⁵ For a detailed analysis of the legal status of Taiwan, *see* Chapter IV.



China; despite that it has long held the position that ROC has been succeeded and replaced by PRC since 1949. Not to mention the law and fact that the government on Taiwan has already turned into a representative government of the Taiwanese people by their effective exercising of self-determination, even before the democratic reforms of Taiwan in the 1990s, this argument of China is also problematic. The contradictory argument of China may find its source in the previous Chinese premier Zhou En-lai's discussion with the then US Secretary of State Henry Kissinger. Zhou claimed that, "Taiwan has belonged to China for more than 1000 years. . . . Taiwan is a Chinese province, is already restored to China, and is an inalienable part of Chinese territory."¹⁶⁹⁶ Here again, China elaborately tapped into the ambiguities regarding the legal status of Pescadores and Taiwan. As aforementioned, the Pescadores were not treated as affiliated islands of Taiwan until 1895, when they were ceded to Japan permanently by the Shimonoseki Treaty as a whole. As discussed before, the Chinese Tsing Dynasty had only loosely controlled nearly one third of the whole territory of Taiwan for around 200 years in Taiwan's thousands of years' history. Given the geographic location of Pescadores, China could hardly claim it as a colonial enclave of China based on historical title. Indeed, modern China has only administrated Taiwan as well as Pescadores for four years, from 1945-1949. As discussed earlier, the concept of


¹⁶⁹⁶ US Department of State, Foreign Relations of the United States, Document 139, 368, July 9, 1971, available at <http://history.state.gov/historicaldocuments/frus1969-76v17/d139> (Last visited May 2, 2022)



reversion is hardly applicable in international law, and territory transference must be stipulated in a peace treaty between the winning parties and the losing party, yet Taiwan and the Pescadores have not been covered by any existing international disposition except the Peace Treaty with Japan in 1952, whereby Japan has renounced its titles to Formosa and Pescadores. More importantly, Taiwan has already evolved into an independent sovereign state that is to be protected by the principle of territorial integrity.¹⁶⁹⁷ Thus, no legal foundation can be found to legitimize China's so called "Anti-Secession law", which only constituted China's intention to invade Taiwan.

The reason why China wants to annex Taiwan so badly is nothing but its ambition in the Asia-pacific region. "From China's perspective, Taiwan is one of the critical links in the so-called 'first island chain' that includes Japan, the Ryukyus, the Philippines, Malaysia, Indonesia, and Australia. Beijing sees the navigational "choke points" between those islands as constraining the People's Liberation Army's naval access to the "second island chain" (Guam, the Marianas, the Palau island group and other small islands in the central Pacific) and from there into the open ocean far from China's shores. China's coastline in the East China Sea lacks the deep-water ports needed to service its naval bases located there. Its submarines must operate on the surface until they are able to

¹⁶⁹⁷ For the discussion of the statehood attained by Taiwan from both international and constitutional perspective, see Chapter IV and Chapter V.



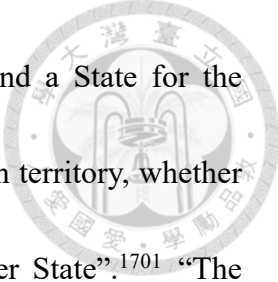
submerge and dive deep when they reach the area of the Ryukus archipelagoes. If China controlled Taiwan, its submarines would have a far easier exit from Taiwan's deep-water ports into the Pacific”¹⁶⁹⁸, providing China an enhanced ability to project power into the Pacific. From naval and military perspective, control of the island of Taiwan would constitute a huge strategic asset for China. From an economic perspective, China's control of Taiwan would facilitate its operations in the South China Sea, putting it in an advantageous position to make the South China Sea the “Chinese lake”, which China claims that it has a historical title. The Chinese control of Taiwan's high technology industry, and the entrance to the South China Sea would have major economic, diplomatic, and political implications¹⁶⁹⁹ that will led to geopolitical power shift in the Indo-Pacific Region.

That being said, Taiwan is not a property existing to serve the interest of China, it is an island with 23 million inhabitants. The abstract concept of sovereignty did not acquire flesh and heat until the right of self-determination appeared as a general principal and thereafter jus cogens of international law, which concerns the idea of the people as the source of the sovereignty of the state.¹⁷⁰⁰ “International law prohibits the settlement of

¹⁶⁹⁸ Bosco, *infra* note 1770.

¹⁶⁹⁹ *Id.*

¹⁷⁰⁰ Pemberton, *supra* note 1254, at 105.



territorial disputes between States by the threat or use of force, and a State for the purpose of this rule means any entity established as a State in a given territory, whether or not that territory formerly belonged to, or is claimed by, another State”.¹⁷⁰¹ “The independence of an existing State is protected by international law against unlawful invasion and annexation”.¹⁷⁰² Moreover, the UN Charter (Article 2 (4)) prohibits the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations. The exception is the right of self-defense against armed attack under Article 51.

In the Article 2 paragraph 4 of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations approved by resolution 2625 (XXV), it provides that:

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence... In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and

¹⁷⁰¹ Crawford, *supra* note 30, at 49

¹⁷⁰² *Id.* at 63.

principles of the Charter.¹⁷⁰³




This is the rationale behind the western countries' repeatedly assertion that the Taiwan question must be resolved peacefully, and they are entitled to assist Taiwan to defense itself.

It is an incontrovertible fact that the international community treats Taiwan economically, militarily, diplomatically, commercially, and in every other way separately from China. "There is no country on Earth that treats Taiwan as though it were a part of China. Not even China treats Taiwan as if it were part of China--for the obvious reason that there is no People's Republic of China governmental, military, economic, or commercial presence in Taiwan and never has been".¹⁷⁰⁴ Most of the countries have adopted a "One China Policy" only to mollify China,¹⁷⁰⁵ which positively deny the existence of the ROC by recognizing that the PRC is the one and

¹⁷⁰³ Friendly Relations Declaration, *supra* note 34; Art 7 of the Definition of Aggression, adopted without vote by GA res 3314 (XXIX), 14 December 1974: "Nothing in this definition...could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived in that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations...particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration." Available at <https://legal.un.org/avl/ha/da/da.html> (Last visited May 2, 2022); see also GA res 3103 (XXVIII), Basic Principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes, 12 Dec.12, 1973, available at <https://digitallibrary.un.org/record/191382> (Last visited May 2, 2022)

¹⁷⁰⁴ Andrews & Chabot, *supra* note 1022.

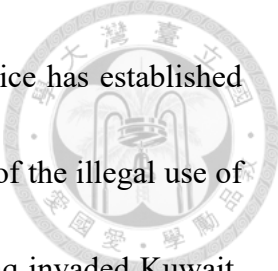
¹⁷⁰⁵ *Id.*



only Chinese government in the world, while uniformly rejecting to recognize Taiwan as part of China. Just because Taiwan's official name "the Republic of China" appears to suggest that Taiwan is part of China, this ambiguity plays into China's hands. As a matter of fact, China is threatening a war over the Taiwanese activists' endeavor to break the myth of "ROC representing China", which has all along been rebutted by the PRC itself. This is the area where the CCP and KMT could collaborate closely, in an effort to both suppress the Taiwanese independent identity and protected the KMT's huge vested interest, pushing the real democracy of Taiwan to a dead end.¹⁷⁰⁶ By claiming that Taiwan is China's existential threat, China is trying to deter other countries from coming to the defense of Taiwan. As a matter of fact, however, the US military base in South Korea poses nothing less threat than Taiwan.¹⁷⁰⁷ Clearly, China's claim over Taiwan is, on a large level, dependent on the fiction created by the KMT out of reality, which has become convenient in respective of the political propaganda by the PRC.

¹⁷⁰⁶ For how the KMT create a "Chilling Effect" in respect of the advocating for an independent Taiwanese identity, *see* note 1625; For why the CCP is reluctant to rectify this issue, and how the CCP has been broadly impacted by the KMT, *see* note 1644.

¹⁷⁰⁷ *See* Mellissa J. Brown, *Author's Response: Social Experience, Authenticity, and Theory*, In MURRAY A. RUBINSTEIN ET AL, BOOK REVIEW ROUNDTABLE: MELISSA J. BROWN'S IS TAIWAN CHINESE?--THE IMPACT OF CULTURE, POWER, AND MIGRATION ON CHANGING IDENTITIES? 506 (2004): "Concern that the support Taiwan receives from the United States is a potential security threat to China could also apply to South Korea, yet the PRC is not claiming sovereignty there, despite the fact that the Korean peninsula was once subject to China's dynastic control. Thus, control over territory and resources is indeed linked to identity in the case of Taiwan." Available at <https://www.ios.sinica.edu.tw/people/personal/fcwang/fcwang2004-2.pdf> (Last visited May 2, 2022)



Nevertheless, it is important to note that since the 1930s, state practice has established the “proposition that annexation of the territory of a State as a result of the illegal use of force does not bring about the extinction of the State”.¹⁷⁰⁸ When Iraq invaded Kuwait, on August 9, 1990, the UN Resolution 662 called upon “all States, international organizations and specialized agencies not to recognize [the Iraqi] annexation [of Kuwait], and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation.”¹⁷⁰⁹ Without declaring formal independence so far, Taiwan’s legal status as a self-determination unit is without question. It has been held that invasion and “annexation of territory is unlawful, and the separate status of a territory for the purposes of self-determination, if anything, aggravates the illegality”.¹⁷¹⁰

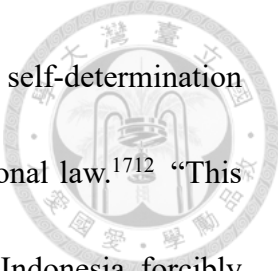
The International Court emphasized in the Western Sahara case, that the application of “the right of self-determination...Require[s]...a free and genuine expression of the will of the peoples concerned.”¹⁷¹¹ Accordingly, unless self-determination is forcibly denied

¹⁷⁰⁸ Crawford, *supra* note 30, at 689.

¹⁷⁰⁹ SC res 662, 9 August 1990, para 2, available at <https://digitallibrary.un.org/record/94573> (Last visited May 2, 2022); The Council subsequently characterizing the annexation of Kuwait as ‘null and void’: SC res 664, 18 August 1990, para 3, available at <https://digitallibrary.un.org/record/95133> (Last visited May 2, 2022)

¹⁷¹⁰ Crawford, *supra* note 30, at 137.

¹⁷¹¹ ICJ Rep 1975 p 12, 32, 121-2, available at <https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-00-EN.pdf> (last visited Feb.22, 2022).



by the administering Power, any use of force to alter the status of a self-determination unit is in principle unlawful under the Charter and general international law.¹⁷¹² “This principle was strongly reflected in United Nations practice after Indonesia forcibly annexed East Timor, a Non-Self-Governing Territory under the administration of Portugal.”¹⁷¹³ Following Portugal’s withdrawal and the subsequent Indonesian invasion in 1975, Indonesia claimed to have coordinated an act of self-determination on the part of the East Timorese people.¹⁷¹⁴ “But that claim was rejected by East Timorese representatives and by many States, and although the Indonesian claim to sovereignty was formally recognized by at least one State (Australia) and informally tolerated by others, its administration was never legitimized.”¹⁷¹⁵ “Following the internal changes in Indonesia, a plebiscite was held under United Nations auspices. When the East Timorese people overwhelmingly (78.5 percent) rejected a regime of ‘special autonomy’ within Indonesia, Indonesia withdrew, and there followed a period of United Nations administration (1999–2002), leading to the independence of East Timor, and its admission to the United Nations, on 27 September 2002.”¹⁷¹⁶

¹⁷¹² Crawford, *supra* note 30, at 616-17.

¹⁷¹³ *Id.*

¹⁷¹⁴ See HEIKE KRIEGER & DIETRICH RAUSCHNING, EAST TIMOR AND THE INTERNATIONAL COMMUNITY 44–52 (1997); see also Situation in east Timor, E/CN.4/1996/56 (1996), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G96/107/63/PDF/G9610763.pdf?OpenElement> (Last visited May 2, 2022)

¹⁷¹⁵ Crawford, *supra* note 30, at 617.

¹⁷¹⁶ *Id.* referencing to Security Council recommendation on admission of the Democratic Republic of Timor-Leste, GA res 55/3, 27 Sept 2002, A/57/258, available at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNMembers%20ARES573.pdf> (Last visited May 2, 2022)



Furthermore, the threatening of using force to solve territorial conflicts constitute a situation “likely to endanger the maintenance of international peace and security” under Article 33 of the Charter.¹⁷¹⁷ There is considerable consistency in state practice that the legal validity of acts done or situations achieved by illegal use of force will not be accepted.¹⁷¹⁸ Even the forcible annexation of a colonial enclave by the surrounding (“enclaving”) State is unlawful. In January 1961, when India invaded and annexed Goa, it claimed that Goa was historically and legally a Indian Territory¹⁷¹⁹, yet a majority of the Security Council took the view “that Article 2 paragraph 4 applies to any established de facto political boundary, and that, even in the rather special situation of a colonial enclave, the international interest in peaceful settlement of disputes takes priority over any specific claim of the Enclaving State”.¹⁷²⁰

Indeed, the prohibition of the use of force to change the legal status of a territory has become a peremptory norm of general international law.¹⁷²¹ An act in breach of peremptory norms is illegal and is therefore null and void, which is applied to the


¹⁷¹⁷ *Id.* at 220.

¹⁷¹⁸ Shaw (1997), *supra* note 28, at 500.

¹⁷¹⁹ Crawford, *supra* note 30, at 138.

¹⁷²⁰ *Id.* On Goa, *see* In Brownlie, *supra* note 29, at 349, 379–83; Higgins, *supra* note 275, at 187–8; Q. Wright, *The Goa Incident*, 56 AME.J.INT’L.L.617(1962).

¹⁷²¹ Crawford, *supra* note 30, at 146.

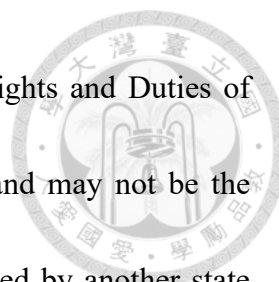


acquisition of territory. One example of such a practice is the Iraqi invasion of Kuwait in 1990; the annexation was declared as invalid by the resolution 662 (1990) of 9 August 1990. As reaffirmed by the International Law Commission in Draft Articles on the States for Internationally Wrongful Acts of 2001, “all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created”¹⁷²²

Whether or not Taiwan is qualified as an independent sovereign state yet, there is no doubt that the Taiwan Strait is an international strait opening for free navigation, the international border between China and Taiwan has been well established by international practices. “When borders become international, they are automatically protected by the rule of inviolability...this introduces into conflicts the duty to respect the prohibitions against the use of force, against interference with other States’ internal affairs, etc.”¹⁷²³ The principle of non-recognition of territorial acquisitions brought about by force or aggression has been included in many regional conventions. For

¹⁷²² Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (Last visited May 2, 2022)

¹⁷²³ Tancredi, *supra* note 77, at 193 referencing to Security Council Resolutions on Bosnia: 752 (1992), 757 (1992), 770 (1992), 787 (1992), 819 (1993), 820 (1993), 824 (1993), 836 (1993), 838 (1993), 847 (1993), 859 (1993), 871 (1993), 913 (1994), 941 (1994), 959 (1994).



example, Article 11 of the 1933 Montevideo Convention on the Rights and Duties of States¹⁷²⁴, which stated that “the territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily”, and Article 17 of the Bogot’a Charter founding the Organization of American States,¹⁷²⁵ “The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.” It has also been included in declarations of principles by the UN General Assembly (in particular GA Res. 2625 (XXV)¹⁷²⁶ and GA Res.3314 (XXIX) on the definition of aggression).¹⁷²⁷ Particularly, the inviolability of international borders and the inadmissibility of the use of force for the acquisition of territory have also be reaffirmed by the Security Council Resolutions 822 (1993); 853 (1993); 874 (1993) and 884 (1993).¹⁷²⁸

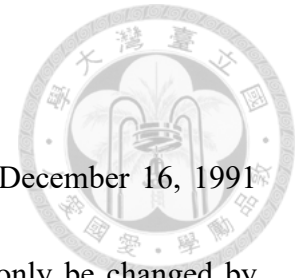
¹⁷²⁴ Montevideo Convention, *supra* note 55.

¹⁷²⁵ Charter of the Organization of American States, art 17(No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized), Bogota, on 30 April 1948, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20119/volume-119-I-1609-English.pdf> (Last visited May 2, 2022)

¹⁷²⁶ Friendly Relations Declaration, *supra* note 34.

¹⁷²⁷ GA Res 3314 (XXIX), Definition of aggression, Dec.14, 1974.According to Article 5(3): “No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful”. Available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement> (Last visited May 2, 2022)

¹⁷²⁸ Cited in Shaw, *supra* note 28, at 111.



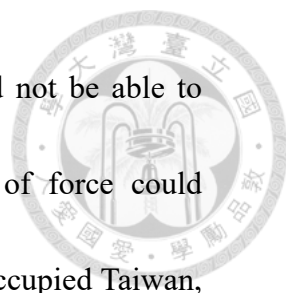
Specifically, the European Guidelines on Recognition adopted on December 16, 1991 called for “respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement”¹⁷²⁹. Article 52 of the Vienna Convention on the Law of Treaties 1969 provides that where the conclusion of a treaty has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, such a treaty is void.¹⁷³⁰ This also explains why most of states emphasize the peaceful resolution of the Taiwan question, which falls under the umbrella of the principle of the stability of boundaries.

In fact, conflict in the Taiwan Strait would be ruinous for the whole international community. As the International Crisis Group in Brussels has assessed the situation:

An invasion of Taiwan by China cannot be rationally related to two of Beijing’s most important objectives: reunification and sustained national economic development. If China did launch such an invasion it might well, whatever its ballistic missile capability, crack the military capability to succeed, particularly

¹⁷²⁹ Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union” (16 December 1991), *available at* <https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/> (Last visited May 2, 2022)

¹⁷³⁰ See generally LORD MCNAIR, THE LAW OF TREATIES 206-11 (1961); IN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 177 (2nd ed. 1984).



if the US intervened, and even in its best-case scenario, would not be able to subjugate Taiwan without large-scale loss of life. Such use of force could certainly be expected to lead to recognition of Taiwan, even an occupied Taiwan, as an independent sovereign country by major powers such as the US and the EU. The subsequent domestic repression in Taiwan over a protracted period under a China-installed regime would ensure a total breach between China and the developed world. Such a breach would bring a near total end to China's substantial exports to the developed world and produce massive unemployment in its coastal cities at a time when domestic political stability is under severe strains.¹⁷³¹

Even before the UN Charter came into force, state practices had already established that the invasion of one state in a disputed territory might render de jure recognition of the latter. For instance, the Yugoslav invasion of Albania forced some collective action. On November 7, 1921, Great Britain extended de jure recognition, and on November 9, the Conference of Ambassadors issued a Declaration regarding the Integrity of the Frontiers of Albania, recognizing that the independence of Albania, as well as the integrity and

¹⁷³¹ Editorial, Taiwan Strait II: The Risk of War, Asia Report, No.54, INTERNATIONAL CRISIS GROUP, Jun. 6, 2003, *available at* <https://www.crisisgroup.org/asia/north-east-asia/taiwan-strait/taiwan-strait-ii-risk-war> (Last visited May 2, 2022)

the inalienability of its borders, such as were fixed by their decision dated November 9, 1921, is a question of international importance and providing for protection of Albania's territorial integrity by the Council of the League.¹⁷³² Albania was recognized de jure by the United States in 1922.¹⁷³³

In light of the foreseeable international backlash following the military attack on Taiwan that would derail China's progress toward modernization, China alternatively took on some sub conflict operations, known as "gray zone aggression", including the People's Liberation Army fighter aircrafts' frequent incursion crossing the centerline of the Taiwan strait, the Chinese warships' showing forces around Taiwan, as well as cyberattacks and disinformation campaigns designed to demoralize the Taiwanese society and undermine its people's confidence in a pro-independence government . These operations are also illegitimate. In the case of *Nicaragua vs. United States*,¹⁷³⁴ the ICJ held that the principles of non-use of force and of non-intervention had crystallized as customary international law. Moreover, according to the proclamation of the Declaration on Friendly Relations among States in 1970, intervention comprises not only "armed intervention" but also "all other forms of interference or attempted threats

¹⁷³² Crawford, *supra* note 30, at 512.

¹⁷³³ G.H. HACKWORTH, 1 DIGEST OF INTERNATIONAL LAW 196–8. (1940–4).

¹⁷³⁴ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), *supra* note 5, at 14, para 98–109.

against the personality of the State or against its political, economic and cultural elements”.¹⁷³⁵



At any rate, China’s “Anti-secession Law” serving to legitimize its threatening actions toward Taiwan, has no legal effect in the western understanding of the intrinsic value of the law, but only clearly constitutes its intention of invasion and intervention, which is in violation of the international law.

2. Fatal Defects of the Constitution of Taiwan

2.1 Unsustainable Democracy

Though the Taiwanese public generally refers democracy to autocracy as a political system, they do not necessarily approve the performance of their own democracy. Support for democracy in Taiwan to a large extent depends on how the questions are asked. In a survey conducted by Asian Barometer, only a modest majority of respondents believed that their democracy has performed well and that Taiwan is a true democracy. Most startlingly, there was a strong opposition to the idea that democracy was more important than economic development and reducing income inequality.

¹⁷³⁵ Friendly Relations Declaration, *supra* note 34.

Furthermore, only about half of the respondents believed that democracy was “always preferable” to other forms of government.¹⁷³⁶



Democratic institutions’ ability to resolve the central issues that the public is most concerned about is essential to the evaluation of the quality of a democracy. However, in the Quality-of-Life Indicators such as job creation, affordable housing, and income distribution, Taiwan’s political system has failed to meet the expectations of its voters. The economic and income growth have been stagnant, and new graduates entering the job market do not necessarily possess the skills that the society needs. In addition, social and economic inequality has increased due to unfair distribution of resources, which is rooted in the party-state system established during the KMT dominated period. The share of retirees in the population is remarkably growing and the birth rate has declined to a historical low level. The Taiwanese population shrank by 0.2 percent in 2020. As China has sought to penetrate the Taiwan political system to its advantage, the political energy of Taiwan has been largely consumed by long-standing debate over the topic of “reunification” and “independence”.¹⁷³⁷ Political leaders are unable (or unwilling) to clarify the relationship among PRC, the old Chinese regime of ROC and Taiwan in front of the international community, let alone to articulate a blueprint for the long-range

¹⁷³⁶ Bush & Hass, *supra* note 792.

¹⁷³⁷ *Id.*

development of Taiwan to the public. The young people of Taiwan are facing an unforeseeable future with no prospects.



Given the huge vested interest accumulated by the party-state system shared by the major parties of Taiwan¹⁷³⁸, the political leaders choose to “maintain the status quo,” which have neither rectified the unjustifiable identity imposed by the incoming regime seven decades ago, nor taken reforms that would narrow the wealth gap.

2.2 Deadlock of the Constitution

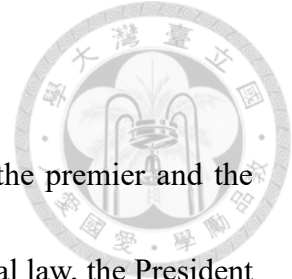
To explore the deep reasons behind the inaction of the two major political parties of Taiwan, the unsatisfactory constitutional reforms have to be mentioned.

It has been observed that a well-functioning democracy requires a clearly defined institutional structure that will empower the government to deliver public goods and constrain it from abusing power, thus allowing the private sphere to flourish.¹⁷³⁹

However, as has discussed in the previous chapters, in lack of the supervising of an international organism, the self-determination process of the Taiwanese people has been incremental, negotiated and compromised.

¹⁷³⁸ For how the CCP has been broadly infiltrated by the KMT, *see* P. 455-61; note 1644.

¹⁷³⁹ Yeh, *supra* note 1185, at 247.



ROC constitution had originally left most of the actual powers to the premier and the executive branch. However, with the subsequent imposition of martial law, the President was vested with comprehensive and substantial power over the military as well as over civil administrative matters, paving the way for the expansion of presidential power ever since.¹⁷⁴⁰ During the democratic reformation in the 1990s, the prospect of reforming the system of government is caught between two competing claims. In light of its systematic advantages cultivated during the authoritarian period, the KMT pushed for a parliamentary system. In contrary, the TPP sought a presidential system, which was supposed to be favored by the universal mobilization of the presidential election. As a result, compromise has been made between the two parties. The requirement of legislative consent to the President's appointment of the premier was removed. Consequently, although the premier remains answerable to the Legislative Yuan, he/she is now effectively subject to the President's control.¹⁷⁴¹ Therefore, there are no effective checks and balances between the Legislative Yuan and the President. What's worse, the president is always the majority party leader in the Legislative Yuan. This ill-designed institutional arrangement has destabilized Taiwanese politics since 2000.¹⁷⁴²

¹⁷⁴⁰ *Id.* at 59.

¹⁷⁴¹ *Id.* at 69.

¹⁷⁴² *Id.* at 249.



Furthermore, the National Security Council (NSC) established by Chiang Kai shek to expand presidential powers was incorporated in the Additional Articles that were appended to the Constitution in 1994.¹⁷⁴³ It is conceivable that during the fierce political struggle between the pro-China and pro-Taiwan factions, President Lee's resolve to conduct the constitutional reform had to be backed by a powerful presidential institution. Nevertheless, a loose definition of national security could result in the NSC's ability to claim dominion over nearly every government function. "Once a policy is categorized as a matter of national security, the legislature no longer has any control over the matter, since it is the premier's decisions, not the President's, that are subject to the Legislative Yuan's review."¹⁷⁴⁴ This scenario led to many serious constitutional disputes regarding presidential accountability and the separation of powers.¹⁷⁴⁵

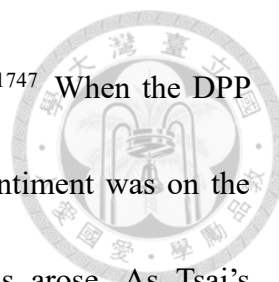
For instance, during Ma Ying-jeou's presidency, he pushed Taiwan in the direction of substantial social and economic integration with Mainland China. The lack of public consultation and support for Ma's aggressive efforts have precipitated the Sunflower movement in 2014¹⁷⁴⁶—a student led protest that succeeded in halting the Ma

¹⁷⁴³ *Id.* at 63.

¹⁷⁴⁴ *Id.* at 65.

¹⁷⁴⁵ *Id.* at 66.

¹⁷⁴⁶ On the evening of March 18, 2014, a group of Taiwanese students stormed the national legislature to



administration’s efforts to implement a trade agreement with PRC.¹⁷⁴⁷ When the DPP candidate Tsai Ing-wen came into office in 2016, anti-mainland sentiment was on the rise in Taiwan. However, another unexpected constitutional crisis arose. As Tsai’s government always confuses dissent with disloyalty, the two party politics in Taiwan became a choice of dictatorship or surrendering to China. Featuring this extraordinary phenomenon, an article published by the “Yazhou Zhoukan” (the Chinese version of Asia Weekly) titled “The origin of Taiwan Electoral Dictatorship, the phenomenon of DPP New Authoritarianism”¹⁷⁴⁸ was granted with the 2021 Honorable Mention Award by the Society of Publishers in Asia (SOPA).¹⁷⁴⁹

It has been held that insecurity and ambivalence could undercut the prospect of collective action.¹⁷⁵⁰ In a “renunciation” scenario, the group might acquiesce to the

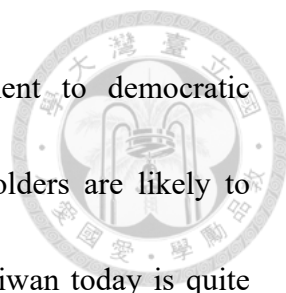
resist a free trade deal with China, evolving into a twenty-four-day confrontation, which won widespread public sympathy in Taiwan. The Sunflower Movement represented the culmination of protests and activism that had gathered momentum since the return of the pro-Chinese KMT in 2008. See Ian Rowen, *Inside Taiwan’s Sunflower Movement: Twenty-Four Days in a Student-Occupied Parliament, and the Future of the Region*, 74(1) J. ASIAN STUD. 5-21(2015).

¹⁷⁴⁷ Bush & Hass, *supra* note 792, at 9.

¹⁷⁴⁸ Tong Qing-feng, *Taiwan Minxuan Ducai Muhou, Lvyng Xin Wenquanzhuyi Xianxiang* (The origin of Taiwan Electoral Dictatorship, the phenomenon of DPP New Authoritarianism), YAZHOUSHOUKAN (Asian Weekly), No.1, 2001, available at <https://sopawards.com/wp-content/uploads/2021/05/%E5%8F%B0%E7%81%A3%E6%B0%91%E9%81%B8%E7%8D%A8%E8%A3%81%E5%B9%95%E5%BE%8C-%E7%B6%A0%E7%87%9F%E6%96%B0%E5%A8%81%E6%AC%8A%E4%B8%BB%E7%BE%A9%E7%8F%BE%E8%B1%A1-The-origin-of-Taiwan-Electoral-Dictatorship-the-phenomenon-of-DPP-New-Authoritarianism.pdf> (Last visited May 2, 2022)

¹⁷⁴⁹ The Society of Publishers in Asia (SPOA), 2021 Award Finalists, available at <https://sopawards.com/the-sopa-awards/awards-finalists/> (Last visited May 2, 2022)

¹⁷⁵⁰ GIOVANNI CAPOCCIA, DEFENDING DEMOCRACY: REACTIONS TO EXTREMISM IN INTERWAR EUROPE 180(2005); Barry Weingast, *The political foundations of democracy and the rule of law*, 91 AME POL. SCI. R. 245, 249(1997).



authoritarian bid and, in so doing, compromises its commitment to democratic institutions.¹⁷⁵¹ In situations of collective indeterminacy, office holders are likely to waver or take refuge in ambiguous stances.¹⁷⁵² The scenario of Taiwan today is quite similar to that of Germany in 1933. Facing with the threat of China and the US “no support for Taiwan Independence”, the interest in coordinating the representatives’ beliefs, actions and justifications gives way to acute uncertainty as the stance of them appears to be indeterminate or open to question.¹⁷⁵³ The indeterminacy of representatives reflects, and intensifies, the indeterminacy of all. In lack of presidential accountability and separation of powers, judicial independence and free speech can hardly be guaranteed. Yet little check and balance mechanism can be found in the constitution to right the wrong.

On the other hand, as the KMT required the constitutional structure to be kept intact, the five-power ROC constitution resulting from the old Chinese imperial systems has made the government extremely inefficient. Unlike more traditional separation-of-powers arrangements in which the executive branch exerts complete power over the bureaucratic system, ROC Constitution delegates such powers to the Examination Yuan,

¹⁷⁵¹ IVAN ERMAKOFF, *RULING ONESELF OUT. A THEORY OF COLLECTIVE ABDICATIONS* CHAP. 6 (2008).

¹⁷⁵² Ermakoff, *supra* note 1643, at 57.

¹⁷⁵³ For the similar scenario of Germany in the 1930s, *see Id.* at 50.

the structure of which nearly parallels that of the Executive Yuan.¹⁷⁵⁴ This rigid and disintegrated civil service system stands as a barrier to the state's competitiveness.¹⁷⁵⁵

Furthermore, the power struggle between the Control Yuan and the Legislative Yuan, and especially their competing claims for oversight of the administration, is unresolved up until today.¹⁷⁵⁶ In practice, the five-power government is susceptible to corruption and manipulation,¹⁷⁵⁷ which largely undercuts the government's efficiency and transparency.

However, in light of the vested interests of political parties as well as the high threshold for constitutional revision after the 2005 round of amendment, a sweeping overhaul of the government's structure through constitutional reform seems very unlikely.¹⁷⁵⁸

2.3 Fundamental Incompatibility of the Two Constitutions

Since the eighteenth century, the western constitution theorists take the popularization of sovereignty and the division of power as the central tenet of constitutionalism, which is understood as involving limitations on government powers in the interest of individual rights. In contrast, it has been observed that the PRC Constitution has failed

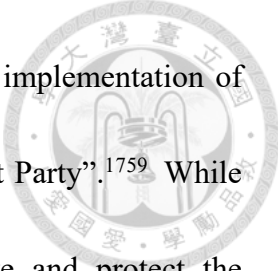
¹⁷⁵⁴ Yeh, *supra* note 1185, at 88.

¹⁷⁵⁵ *Id.* at 89.

¹⁷⁵⁶ *Id.* at 248.

¹⁷⁵⁷ *Id.* at 55.

¹⁷⁵⁸ *Id.* at 51.



to “establish constitutionalism”, and instead sought to facilitate the implementation of “government policy under the absolute leadership of the Communist Party”.¹⁷⁵⁹ While the western understanding state sovereignty is served to promote and protect the freedom of citizens, the Chinese understanding of sovereignty aims to maintain the national sovereignty itself, so that the rights of individuals are subordinated to state power.¹⁷⁶⁰ Chinese leaders have frequently emphasized that China “will not practise western-style democracy and shunned the idea of the separation of power among the Communist Party, government and the legislature”;¹⁷⁶¹ the Chinese people remain in many ways, “subjects under the state’s supreme sovereignty”.¹⁷⁶² Louis Henkin has noted that the PRC Constitution does not claim to be a social contract of the people to establish the state, but is rather a manifesto by the leaders to the people. Though in the constitution’s preamble, it is asserted to be the “fundamental law” of the state, “the unfortunate fact is that there are no independent institutions to determine its meaning and ‘enforce it against high political authority.’”¹⁷⁶³

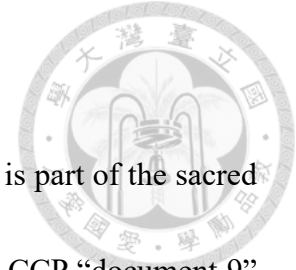
¹⁷⁵⁹ Wu, Xiaohui, Human Rights: China’s Historical Perspectives in Context (October 1, 2002). Journal of the History of International Law, Vol. 4, pp. 335–373, 2002, Available at SSRN: <https://ssrn.com/abstract=1716779> (Last visited May 2, 2022)

¹⁷⁶⁰ S. P. Ogden, Chinese Concepts of the Nation, State, and Sovereignty 221 (1975) (PhD dissertation, Xerox University Microfilms).

¹⁷⁶¹ C. Choi, *Party Hints European Socialism will not Influence Reform Agenda*, SOUTH CHINA MORNING POST, Sep.26, 2007, A6, at <https://www.scmp.com/article/609305/party-hints-european-socialism-will-not-influence-reform-agenda> (Last visited May 2, 2022)

¹⁷⁶² G. Wu, *Identity, sovereignty, and economic penetration: Beijing’s responses to off shore Chinese democracies*, 16 (51) J. CONTEMP. CHINA. 195, 298(2007).

¹⁷⁶³ L. Henkin, *The Human Rights Idea in China*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 26-7 (R.R. Edwards, L. Henkin and A.J. Nathan eds., 1986).

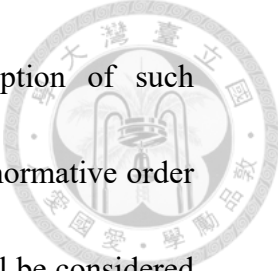


In the words of the PRC Constitution of 1993, it states that “Taiwan is part of the sacred territory of the People’s Republic of China.” According to a leaked CCP “document 9” in 2014, the “Western constitutionalist democracy”, including the tripartite separation of powers, the multi-Party system, universal suffrage, judicial independence, nationalization of the military and other such matters associated with the Western approaches to the rule of law are all at odds with the CCP dominated political system of “Socialism with Chinese characteristics”, and therefore are banned from public discourse and is a forbidden research subject for social scientists in the PRC. The rationale is that judicial independence and separation of powers embedded in “constitutionalism” is not subject to the control of the CCP, which is in violation of the PRC constitution that put the CCP at the apex of the Chinese legal system.¹⁷⁶⁴

In stark contrast, in the constitutional practice of Taiwan, in 2000, the Constitutional Court of Taiwan issued JY Interpretation No.499 and ruled that:

Some constitutional provisions are integral to the essential nature of the Constitution and underpin the constitutional normative order. If such provisions

¹⁷⁶⁴ Communiqué on the Current State of the Ideological Sphere (Document No. 9), *Report concerning the Present Situation in the Ideological Area*, CHINA COPYRIGHT & MEDIA, Apr.22, 2013, available at <https://chinacopyrightandmedia.wordpress.com/2013/04/22/communique-on-the-current-state-of-the-ideological-sphere-document-no-9/> (Last visited May 2, 2022)



are open to change through constitutional amendment, adoption of such constitutional amendments would bring down the constitutional normative order in its entirety. Therefore, any such constitutional amendment shall be considered illegitimate, in and of itself. Among various constitutional provisions, Article 1 (the principle of a democratic republic), Article 2 (the principle of popular sovereignty), Chapter II (the protection of constitutional rights), and those providing for the separation of powers and the principle of checks and balances are integral to the essential nature of the Constitution and constitute the foundational principles of the entire constitutional order. All the constitutionally-established organs must adhere to the constitutional order of liberal democracy, as emanating from the said constitutional provisions, on which the current Constitution is founded.¹⁷⁶⁵

The JY Interpretation No.499 has developed a prototype of defensive democracy in Taiwan. According to the defensive democracy theory, “The right of the plebiscite to judge the constitution is an unwritten law, a silent and self-evident component of any

¹⁷⁶⁵ Council of Grand Justices, Unconstitutional Constitutional Amendments Case, J.Y. Interpretation No. 499, March 24, 2000, available at <https://cons.judicial.gov.tw/uploads/docAtt/3803a303-7e51-4f6c-9535-f89dc19294eb.pdf> (Last visited May 2, 2022).

constitution.”¹⁷⁶⁶ In other words, the people remain sovereign. Radbruch considers that democracy is capable of anything, except definitively renouncing itself,¹⁷⁶⁷ since “relativism is the general tolerance— except the tolerance of the intolerant.”¹⁷⁶⁸ “Under democracy, people invest governments with the power to rule because they can remove them”.¹⁷⁶⁹

In contrast to China, the concept of natural law is deeply embedded in the legal system of Taiwan, which was deeply affected by multiple western legal systems, thanks to its complex colonial history. The objective consequences of natural law are human rights, the rule of law, the separation of powers, and the popular sovereignty. As has discussed in chapter V, popular sovereignty is all about whom holding the right to decide the rule imposed on the people on a particular territory, which has already been indisputably put into the hands of the Taiwanese people. In this sense, Taiwan is the sacred territory of the Taiwanese people instead of the PRC. The constitutionalism adopted in Taiwan is incompatible with the PRC constitution that put CCP at the apex of its legal system. Thus, the two constitutions are fundamentally incompatible with each other.

¹⁷⁶⁶ Ermakoff, *supra* note 1643, at 102-03 referencing to G. RADBRUCH, DER MENSCHIM RECHT (THE HUMAN RIGHT) 86 (1957).

¹⁷⁶⁷ *Id.*

¹⁷⁶⁸ *Id.*

¹⁷⁶⁹ Bernard Manin, Adam Przeworski and Susan C. Stokes, *Introduction*, In DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 13 (Adam Przeworski, Susan C. Stokes, Paris, Bernard Manin eds., 1999).



As a matter of fact, the PRC's infiltration policy cloaked as "peaceful reunification" is not only about winning the minds and hearts of the Taiwanese people, but also a strategy aiming at overturning the constitutional order of Taiwan, so as to "win without fighting" or at least "fight at a very low military cost". The constitution of Taiwan, however, due to its severely defected design regarding separation of powers, can hardly deal with such a grave challenge.

3. Taiwan's Relationship with the Free World

3.1 Importance of a Democratic Taiwan in Asia

One article of "the Diplomat" once describes Taiwan's importance as follows:

Situated at the edge of the South China Sea's shipping lanes, Taiwan is positioned 100 miles east of China. To the south it is 200 miles from the Philippines, 700 miles from China's Hainan Island, and 900 miles from Vietnam and the Spratly Islands. It is linked to the north with the Ryukyu Islands, and lies 700 miles from Japan's home islands. Historically, Taiwan's pivotal location off the China coast and between Northeast and Southeast Asia has served a variety of strategic purposes for regional powers, both offensive and defensive.

Throughout the war, Taiwan served as the staging area and major supply base that sustained Japan's armies in Southeast Asia and as the control point for all shipping through the Taiwan Strait. In the contemporary era, Taiwan remains geographically at the intersection of most of East Asia's danger points. The US State Department at the time stated that strategically no location in the Far East, with the exception of Singapore, occupied such a controlling position.¹⁷⁷⁰



Truman's statement explained the dramatic shift in US policy on Taiwan in the context of the Cold War:

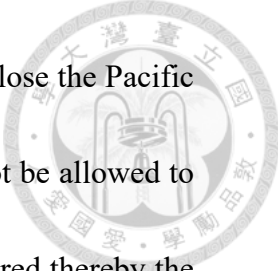
...the occupation of Formosa by Communist forces would be a direct threat to the security of the Pacific area and to the United States forces performing their lawful and necessary functions in that area.¹⁷⁷¹

General Douglas MacArthur, who was responsible for the postwar transitional administration of Japan, expressed the US position in stark terms:

I believe if you lose Formosa, you lose the key to our littoral line of defense . . . the Philippines and Japan both would be untenable from our

¹⁷⁷⁰ Joseph A. Bosco, *Taiwan and Strategic Security: the US declarative policy on Taiwan of "strategic ambiguity" needs to change sooner rather than later*, THE DIPLOMAT, May 15, 2015, <https://thediplomat.com/2015/05/taiwan-and-strategic-security/> (Last visited May 2, 2022)

¹⁷⁷¹ US department of State, Statement Issued by the President, June 27, 1950, available at <https://history.state.gov/historicaldocuments/frus1950v07/d119> (Last visited May 2, 2022)



military point of view.,,[F]rom our standpoint we practically lose the Pacific Ocean if we give up or lose Formosa. . . Formosa should not be allowed to fall into red hands.... If the enemy secured Formosa and secured thereby the Pacific Ocean, that would immeasurably increase the dangers of that ocean being used as an avenue of advance by any potential enemy.¹⁷⁷²

MacArthur later called Taiwan “an unsinkable aircraft carrier.” President Dwight D. Eisenhower described the reason for the Taiwan defense treaty as follows:

In unfriendly hands, Formosa and the Pescadores would seriously dislocate the existing, even if unstable, balance of moral, economic, and military forces upon which the peace of the Pacific depends. It would create a breach in the island chain of the Western Pacific that constitutes for the United States and other free nations; the geographical backbone of their security structure in that ocean. In addition, this breach would interrupt north-south communications between other important elements of that barrier, and damage the economic life of countries friendly to us.¹⁷⁷³

¹⁷⁷² Cited in Bosco, *supra* note 1770.

¹⁷⁷³ US Department of State, message From the President to the Congress, Washington, January 24, 1955, available at <https://history.state.gov/historicaldocuments/frus1955-57v02/d34> (Last visited May 2, 2022)



It is clear that both Republican and Democratic administrations saw Taiwan's strategic value in the same light. The Joint Chiefs of Staff at the time put it this way:

The geographic location of Formosa is such that in the hands of a power unfriendly to the United States it constitutes an enemy salient in the very center of our defensive perimeter, 100 to 150 miles closer to the adjacent friendly segments—Okinawa and the Philippines—than any point in continental Asia.¹⁷⁷⁴

Not only the island of Taiwan, but also the Taiwan Strait is of critical strategic importance. Any conflict across the Strait would have a major global impact on both naval and commercial passage. “When President Barack Obama announced what he called the US ‘pivot to Asia’ before the Australian parliament in 2011, he linked America’s strategic interests to the success of democracy in the region and pledged ‘every element of American power’ to achieving ‘security, prosperity, and dignity for all.’ That places Taiwan and its democratic future at the strategic epicenter of America’s moral and political commitment to the region. US credibility is now tied inextricably to Taiwan’s fate”,¹⁷⁷⁵ since other countries in the region “see the US as the necessary balancer to China’s military buildup and expansionist policies and Taiwan is the number

¹⁷⁷⁴ US Department of State, the Secretary of State to Certain Diplomatic Offices, Secret Washington, August 26, 1950, available at <https://history.state.gov/historicaldocuments/frus1950v06/d266> (Last visited May 2, 2022)

¹⁷⁷⁵ Bosco, *supra* note 1770.

one test case of US will.”¹⁷⁷⁶



3.2 US Role in Shaping the Democracy of Taiwan

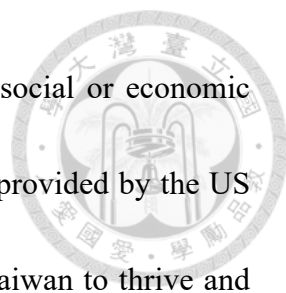
In 1971, ROC was replaced by the PRC in the UN, seriously undercutting the KMT regime’s all-China rationale for the denial of fair representatives and democracy in Taiwan. The United States’ decision to switch recognition from the ROC to the PRC in 1978 debilitated the KMT regime on Taiwan even further. “Stimulated in part by opponents of authoritarian rule in the U.S. Congress, Chiang saw the need for a new, values based relationship with the United States, now that diplomatic relations and the mutual defense treaty of 1954 were gone”.¹⁷⁷⁷ Pushed by both internal and external pressures, Chiang Ching-kuo began the indigenization of his regime and loosening the authoritarian rule. “He likely understood that the KMT’s performance in promoting economic development and running elections would help keep it in power”.¹⁷⁷⁸

Indeed, the United States has been playing a crucial role in deterring China from using force against Taiwan. The TRA enacted in 1979, among other things, states that “it is US policy to maintain the capacity of the United States to resist any resort to force or

¹⁷⁷⁶ *Id.*

¹⁷⁷⁷ Bush & Hass, *supra* note 792, at 4.

¹⁷⁷⁸ *Id.*



other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan”.¹⁷⁷⁹ The substantial financial aid provided by the US as well as the Cross-strait stability guaranteed by it have allowed Taiwan to thrive and build a democratic, pluralistic, and economically vibrant society. However, the deadlock of the constitution of Taiwan endangering Taiwan’s democracy and sovereignty today is also, to a large extent, the very result of the US policy of “strategic ambiguity”.

The US Policy of “strategic ambiguity” was developed by the Clinton Administration after President Lee’s private visit to his Alma mater, Cornell University, in June 1995. Over the following years, the Clinton Administration on the one hand cautioned Taipei that it could not necessarily count on the US to defend it if China were to take military action against it, and on the other hand told Beijing that it could not rule out the possibility that the US would intervene to protect Taiwan if it use forces against Taiwan.¹⁷⁸⁰ This studied indecisiveness was called “strategic ambiguity” by journalists.

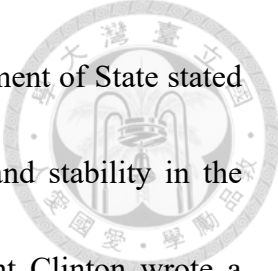
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In July 1995, China lashed out in reaction to President Lee’s campaign to forge closer

¹⁷⁷⁹ 22 USC §3303 (b).

¹⁷⁸⁰ Senator Richard Lugar, *Timely Exit for Ambiguity*, WASHINGTON TIMES, May 17, 2001, A16, available at <http://www.taiwandc.org/washt2001-07.htm> (Last visited May 2, 2022)

¹⁷⁸¹ Tkacik, *supra* note 687, at 98.



ties with the US. Concerning about angering Beijing, the US Department of State stated that it believed China's missile tests "do not contribute to peace and stability in the region."¹⁷⁸² After China's missile "Tests" toward Taiwan, President Clinton wrote a secret letter to the Chinese President Jiang Zemin, in which he articulated for the first time, the "Three No's" policy of his Administration.¹⁷⁸³ That is, "no two Chinas, no Taiwan independence, no Taiwan membership in the UN."¹⁷⁸⁴ "The Chinese press characterized President Clinton's position in the letter as 'opposing' Taiwan's separate status from China. Although President Clinton's letter was publicized in both the Chinese and Taiwan press, it was not printed in the U.S. media".¹⁷⁸⁵

Emboldened by the US hardhearted reaction to the missile tests, on August 10, China announced a second round of missile tests in the Taiwan Strait. From August to December 1995, China's continued large-scale military exercises were widely seen as a threat against the Taiwanese people before the island's first-ever presidential election to

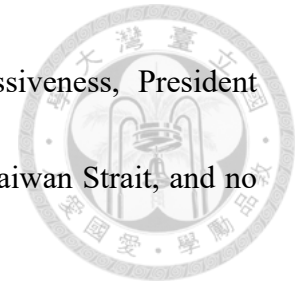
¹⁷⁸² *Id.* at 92.

¹⁷⁸³ In Ta Kung Pao(Hong Kong), August 3, 1995, quoted in JOHN W. GARVER, FACE OFF; CHINA, THE UNITED STATES AND TAIWAN'S DEMOCRATIZATION 79 (1997).

¹⁷⁸⁴ These principles were first raised in 1971 by Zhou Enlai in his secret meetings with Kissinger. At the time, Kissinger said that "we did not advocate a 'two Chinas' or a 'one China, one Taiwan' solution, but would accept any political evolution agreed to by the parties, we hoped that this evolution would be peaceful, and Chou said the PRC would try to keep it so." However, Kissinger also stressed that "some events in Taiwan might be beyond our ability to control." Henry Kissinger, *Memorandum to the President*, July 14, 1971, p.13, available at <https://2001-2009.state.gov/documents/organization/72581.pdf> (Last visited May 2, 2022)

¹⁷⁸⁵ Tkacik, *supra* note 687, at 99.

be held on March 19, 1996.¹⁷⁸⁶ In response to China's aggressiveness, President Clinton ordered two US Navy aircraft-carrier battle groups to the Taiwan Strait, and no further Chinese missile tests were seen any longer.¹⁷⁸⁷



After that, the Clinton Administration insisted that it did not support Taiwan's separate identity, but it has never said that it opposed an independent Taiwan either.¹⁷⁸⁸

Nevertheless, China made the "Three Nos" a touchstone of the US-China relationship and "insisted that President Clinton publicly declare them on his visit to China in June 1998. The president obliged".¹⁷⁸⁹

The then Taiwanese President Lee Teng-hui and many other Taiwanese people were stunned by President Clinton's "Three Nos" public statement in 1998. Lee ordered a comprehensive reappraisal of Taiwan's legal status and its relationship with China, taking a year to complete. On July 9, 1999, in an interview with Deutsche Welle, Lee

¹⁷⁸⁶ *Id.*

¹⁷⁸⁷ Art Pine, US Faces Choice on Sending Ships to Taiwan, L.A. TIMES, Mar. 20, 1996, p.A1, available at <https://www.latimes.com/archives/la-xpm-1996-03-20-mn-49233-story.html> (Last visited May 2, 2022) ; See also Steven Mufson, China Blasts US for Dispatching Warship Groups, WASH. POST, Mar. 20, 1996, p. A1, available at <https://www.washingtonpost.com/archive/politics/1996/03/20/china-blasts-us-for-dispatching-warship-groups/58e7ea42-380f-4c50-9614-36123ab876cc/> (Last visited May 2, 2022)

¹⁷⁸⁸ The State Department apparently does not construe "no support" as meaning "oppose." In a different context, State Department spokesman James Foley was asked, "Do you all oppose independence for Kosovo under any circumstances at any time?" Foley replied, "well, we have made clear that we do not support Kosovo independence. I do not care to elaborate on that." In Tkacik, *supra* note 687, at 99. with reference to the Daily Press Briefing of the US Department of State on Feb. 11, 1999.

¹⁷⁸⁹ *Id.*

articulated what would be known as a “two China” or “Two states” doctrine. According to Lee:



There was “no need to declare independence” because “the Republic of China has been a sovereign state since it was founded in 1912”....since our [Taiwan’s] constitutional reform in 1991, we have designated cross-strait ties as nation-to-nation, or at least as special state-to-state ties, rather than internal ties within “One China” between a legitimate government and rebellion group, or between central and local government.¹⁷⁹⁰

The international community was confused by the above statement. James Crawford, the world renowned scholar in international law commented that:

His statement is predicated upon continuity, and the continuity is that of a constitutional system of China.....the government in Taiwan continues to characterize itself as the “Republic of China” and to stress its continuity, while increasingly practicing discontinuity.¹⁷⁹¹

Given that Taiwan still has not unequivocally asserted its separation from China, while

¹⁷⁹⁰ Interview with the Taiwan President Lee Teng-hui, Deutsche Welle (July.9, 1999), transcript available at <https://www.taiwandc.org/nws-9926.htm> (Last visited Feb.22,2022).

¹⁷⁹¹ Crawford, *supra* note 30, at 218-9.



none of the States Parties to the international Agreement attended by Taiwan recognizes the Republic of China, “Taiwan may end up having many different personas: it may be a meteorological entity, an aviation entity, an investment entity as well as a fishing entity.

It is surprising it does not suffer from schizophrenia,”¹⁷⁹² said James Crawford.

As a matter of fact, in President Lee’s 1996 inaugural speech, he disappointed many of his supporters when he called for a “peaceful reunification of China.”¹⁷⁹³ Following Chiang Kai-shek’s lines of one-China dogma (Taiwan is part of Republic of China), he proclaimed that “there is only one China; there is no so-called “Taiwan independence.”¹⁷⁹⁴ Clearly, Lee’s position as the chairman of KMT had prevented him from claiming otherwise. The term “reunification of China” implied that Taiwan was part of China.¹⁷⁹⁵ While Lee had been perceived by many people in Taiwan as a pro-Taiwan leader, they were confused by Lee’s statement, creating a society in a “schizophrenic environment.” as described by a New York Times reporter.¹⁷⁹⁶ Now,

¹⁷⁹² *Id.* at 220.

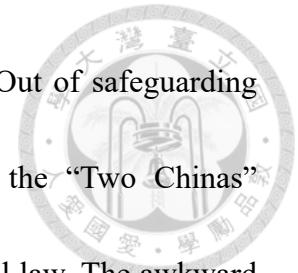
¹⁷⁹³ In the inaugural speech, President Lee stated that both sides of the Taiwan Strait should seek unification of the country. When Lee advocated reunification of the state, he restated his conviction of the one-China dogma. “Mr. Lee added ‘China is a country divided and under separate rule’ implying that there was only one China.” F.J. Khergamvala, Taiwan’s Lee to Be Sworn in Today, HINDU, 05/20/1996, at 2, cited in Chiang, *supra* note 236, at 157.

¹⁷⁹⁴ Lee’s inaugural speech, available at https://newcongress.yam.org.tw/taiwan_sino/leespeech.html (Last visited May 2, 2022)

¹⁷⁹⁵ Chiang, *supra* note 236, at 157.

¹⁷⁹⁶ Patrick E. Tyler, *The world: The China and Taiwan Problem; How Politics Torpedoed Asian Calm*, N. Y. TIMES, Feb.11, 1996, section 4, at 1, available at <https://www.nytimes.com/1996/02/11/weekinreview/the-world-the-china-and-taiwan-problem-how-politics-torpedoed-asian-calm.html> (Last visited May 2, 2022).

President Clinton's "Three Nos" aggravated the "Schizophrenia". Out of safeguarding the sovereignty of Taiwan, President Lee was forced to make the "Two Chinas" statement against the will of his supporters and defying international law. The awkward predicament created by the "Two Chinas" theory is still haunting over the head of the Taiwanese people up until today.



On April 21, 2004, in the House International Relations Committee, the Assistant Secretary of State for East Asian and Pacific Affairs, James A. Kelly, was asked by Rep. Grace Napolitano (D-CA) whether the US government's commitment to Taiwan's democracy conflicted with the so-called One-China Policy.¹⁷⁹⁷ He replied that:

In my testimony, I made the point "our One China", and I didn't really define it, and I'm not sure I very easily could define it. I can tell you what it is not. It is not the One-China policy or the One-China principle that Beijing suggests, and it may not be the definition that some would have in Taiwan. But it does convey a meaning of solidarity of a kind among the people on both sides of the straits that has been our policy for a very long time.¹⁷⁹⁸

¹⁷⁹⁷ John Tkacik, *Secretary Powell Must Not Change US Policy on Taiwan*, HERITAGE FOUNDATION, Oct. 27, 2014, *available at* <https://www.heritage.org/asia/report/secretary-powell-must-not-change-us-policy-taiwan> (Last visited May 2, 2022)

¹⁷⁹⁸ David and Goliath: Strengthening Taiwan's Deterrence and Resiliency, GLOBAL TAIWAN INSTITUTE, Nov. 2020, *available at* <https://globaltaiwan.org/wp-content/uploads/2020/11/GTI-David-and-Goliath-Strengthening-Taiwan-Deterrence-and-Resiliency-Nov-2020-final.pdf> (Last visited May 2, 2022)



The truth is that Washington has never acknowledged the Republic of China government in exile as the sovereign ruler of Taiwan. The brutality of Chiang's army of occupation in Taiwan¹⁷⁹⁹ led Secretary of State Dean Acheson to report on April 11, 1947, in a letter to Senator Joseph H. Ball (R-MN), that the transfer of sovereignty over Formosa to China" has not yet been formalized."¹⁸⁰⁰ Since March 1947, after the "228 Atrocity", Washington has repeatedly and explicitly not recognized the ROC's sovereignty over Taiwan, which has for a long time less repeatedly and not so explicitly commented on Beijing's claims to Taiwan-except to acknowledge that Beijing has such claims.¹⁸⁰¹ The Chiang's regime was annihilated by the Communists in 1949 and for all practical purposes (except the UN representation before 1971) was replaced by the PRC. In May 1950, the US was prepared to abandon the ROC in Taipei and accept the PRC in Beijing, backing the UN trusteeship move and would ready the fleet to prevent any armed attack on Formosa while the move for trusteeship was pending.¹⁸⁰² It was the Korea War and the cold war that followed changed the mind of the US to grant purely political recognition to ROC for thirty years.

¹⁷⁹⁹ The excesses of the occupation were front-page news in Washington within six months of the Nationalist takeover. See "Chinese Exploit Formosa Worse than Japs Did," Washington Daily News, March 21, 1946, at 1,3, Cited in Tkacik, *supra* note 687, at 74.

¹⁸⁰⁰ US Department of State, *supra* note 1490.

¹⁸⁰¹ Tkacik, *supra* note 687, at 76.

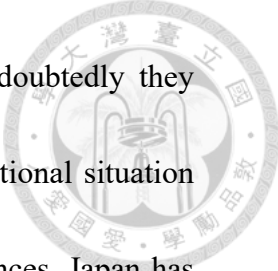
¹⁸⁰² US State Department, Foreign Relations of the United States, Volume VI, East Asia and the Pacific, May 31, 1950, available at <https://history.state.gov/historicaldocuments/frus1950v06/d182> (Last visited May 2, 2022)



Phantom limb pain refers to the pain that is localized in the region of the removed body part; a perception that an individual experiences relating to a limb or an organ that is not physically part of the body. When ROC was defeated by the Communists in 1949 and for all practical purposes replaced by the PRC, the US, out of political calculus, managed to retain its seats in the UN until 1971 and then suddenly cut off diplomatic relations with the ROC government taking exile on Taiwan in 1979. It is the US which planted the Phantom limb pain in the minds of the Taiwanese people, so that when President Lee Teng-Hui made the “Two Chinas” statement, most of them did not even recognize its illegitimacy and absurdity, and easily accepted it.

In fact, even the Chiang Kai-shek administration admitted that the right of the disposition of Taiwan resided in the hands of the Allied Power instead of any arrangement between the ROC government and Japan. In July 1952, ROC Foreign Minister, George Yeh told the Legislative Yuan in Taipei that under the San Francisco Peace Treaty, “no provision was made for the return [of these islands] to China.” He continued:

Formosa and the Pescadores were formerly Chinese territories. As Japan has renounced her claim to Formosa and the Pescadores, only China has the right to



take them over. In fact, we are controlling them now, and undoubtedly they constitute a part of our territories. However, the delicate international situation makes it that they do not belong to us. Under present circumstances, Japan has no right to transfer Formosa and the Pescadores to us; nor can we accept such a transfer from Japan even if she so wishes...¹⁸⁰³


In any event, the legal effects are unchanged, Taiwan's legal status as a self-determination unit en route to an independent sovereign state must be respected. The constitutional independence of Taiwan attained by the 2005 constitutional revision has made the process irreversible, since "freedom once conferred could not be revoked."¹⁸⁰⁴

On the other hand, whenever Beijing is irritated by Washington's contacts with Taipei, it alleges that the US has violated its "commitments" in "the three communiqués" – separate bilateral pronouncements made between 1972 and 1982 that establish the boundaries for US policy toward China.¹⁸⁰⁵ However, The Normalization Communiqué simply "acknowledges the Chinese position that there is but one China and Taiwan is

¹⁸⁰³ US Department of State, *supra* note 1489.

¹⁸⁰⁴ *Ndlwana v Hofmeyr* (1937) AD 229, 237, *supra* note 1299.

¹⁸⁰⁵ *Tkacik*, *supra* note 687, at 80.



part of China.”¹⁸⁰⁶ When questioned on this point during the hearings on the Taiwan Relations Act of 1979, the Carter Administration agreed that it had acknowledged the “Chinese position” that Taiwan is part of China but emphasized that “The United States has not itself agreed to this position.”¹⁸⁰⁷ In 1982, President Ronald Reagan gave the so-called Six Assurances to Taiwan. The Fifth Assurance of which was that “the US has not changed its long-standing position on the matter of sovereignty over Taiwan.” And what was that “long-standing” position? In September 1982, the State Department wrote in a letter to Senator John East that “The US takes no position on the question of Taiwan’s sovereignty.” This position was explicated in a state Department memorandum to the US Senate in 1970, which said that “As Taiwan and the Pescadores are not covered by any existing international disposition, sovereignty over the area is an unsettled question subject to future international resolution.”¹⁸⁰⁸ It is clear that while US did recognize one China, that one China indeed does not include Taiwan.¹⁸⁰⁹ The sovereignty over Taiwan has already been settled, it is now residing in the Taiwanese people.

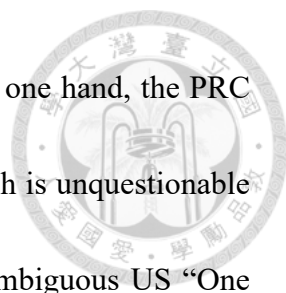
Still, the ambiguity created by Clinton’s “Three Nos” and Lee’s “Two Chinas” lent

¹⁸⁰⁶ Normalization Communique, *supra* note 1021.

¹⁸⁰⁷ Andrews & Chabot, *supra* note 1022.

¹⁸⁰⁸ Tkacik, *supra* note 1023, at 191-2; US Department of State, *supra* note 1490.

¹⁸⁰⁹ Andrews & Chabot, *supra* note 1022.



colors to PRC's intimidation and aggression toward Taiwan. On the one hand, the PRC claims that it has replaced and succeeded the ROC since 1949, which is unquestionable in the eyes of international law. On the other hand, however, the ambiguous US "One China Policy" encourages Beijing to believe that the US will not defend a Taiwan that seeks an identity separate from China.¹⁸¹⁰ As a result, from August 1999, China began to send advanced jet fighters near the Taiwan Strait "Center line."¹⁸¹¹

In March 2000, the second general election was held in Taiwan, which was won by Chen Shui-bian of the DPP. It was the first time the KMT lost the executive power of the government, though it still retained a majority in the legislature. Bush, like Clinton, was keen to keep restraint on both Beijing and Taipei. On April 25, 2001, in an interview with ABC News, President Bush was asked, "if Taiwan were attacked by China, do we have an obligation to defend the Taiwanese?" He responded, "Yes, we do...and the Chinese must understand that," and that the US would do "whatever it takes to help Taiwan defend herself."¹⁸¹² Nevertheless, in his CNN interview, Mr. Bush also said, "I certainly hope Taiwan adheres to the 'one China' policy, and a declaration

¹⁸¹⁰ Steve Chabot, *Confronting reality: There are Two Chinas*, in RETHINKING "ONE CHINA" 11(John Tkacik ed., 2004).

¹⁸¹¹ ZOU JINGWEN, LI DENGHUI ZHIZHENG GAOBAO SHILU (A True Account of Lee Teng-hui's Rule) 234 (2001).

¹⁸¹² Steven Mufson, President Pledges Defense of Taiwan, WASH. POST, Apr.26, 2001, available at <https://www.washingtonpost.com/archive/politics/2001/04/26/president-pledges-defense-of-taiwan/5811b12f-c1c1-4ca6-b77a-0f4a1117a7ce/> (Last visited May 2, 2022)

of independence is not the ‘one China’ policy.”¹⁸¹³



It could be inferred that the US position is that neither the ROC nor the PRC had ever got the sovereignty of Taiwan, and that the ROC had already been replaced and succeeded by PRC. Then the question has to be answered: if there is a problem of independence regarding the legal status of Taiwan, Taiwan has to seek independence of what?

In August 2002, in an annual conference of the World Federation of Taiwanese Associations, President Chen gave a speech to the group via close circuit TV in Tokyo, Japan, proclaiming that “Taiwan and China are two countries, each on one side of the Taiwan Strait and that the (ROC) Institute of Legislation (the Legislature Yuan) should consider passing a referendum law [permitting the people] to protect its sovereignty.”¹⁸¹⁴ The proclamation became known as the “two countries each on one side [of the Taiwan Strait]” statement.¹⁸¹⁵ However, this statement had alarmed the Bush Administration just as it was powering up its international campaign to disarm Iraq. In August 2001, Deputy Secretary of State, Richard Armitage flew to Beijing,

¹⁸¹³ *Id.*

¹⁸¹⁴ Huang, *supra* note 1176.

¹⁸¹⁵ *Id.*

probing for China's position for Iraq.¹⁸¹⁶ He disappointed the Taiwanese people by reiterating that the US “did not support Taiwan independence”¹⁸¹⁷ On September 6, 2003, “150,000 people marched in the streets of Taipei—the largest demonstration Taipei has ever seen- to demand that government agencies, companies, and private institutions which use ‘China’ in their names replace it with ‘Taiwan’”.¹⁸¹⁸

However, during President Bush's October 19, 2003 meeting with the new Chinese President Hu Jintao at the APEC Summit in Bangkok, Thailand, President Bush was reported by Chinese media that he repeated his “opposition” to Taiwan Independence.¹⁸¹⁹ On November 13, 2003, the chairman of the American Institute in Taiwan, Teresa Shaheen, told a Voice of America interviewer that she had been briefed by participants in the Bush-Hu meeting in Bangkok and had been told that Bush had not said the US opposed Taiwan independence.¹⁸²⁰ No matter what Bush said in private, the expression “no support for Taiwan independence” is still used in official US statement.¹⁸²¹ It is observed that the State Department apparently does not construe “no

¹⁸¹⁶ Tkacik, *supra* note 687, at 105.

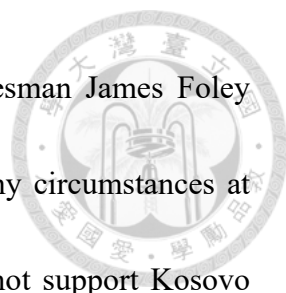
¹⁸¹⁷ James Wang, *Armitage's clarification is sensible*, *TAIPEI TIMES* (Sept.9, 2002), available at <https://www.taipeitimes.com/News/editorials/archives/2002/09/09/0000167432> (Last visited Feb.22, 2022).

¹⁸¹⁸ Andrews & Chabot, *supra* note 1022.

¹⁸¹⁹ Editorial, *US stands firm on one-China policy*, *CHINA DAILY* (Oct 20, 2003), at https://www.chinadaily.com.cn/en/doc/2003-10/20/content_273454.htm(Last visited Feb.22,2022).

¹⁸²⁰ Tkacik, *supra* note 687, at 107.

¹⁸²¹ *Id.* at 110.



support” as meaning “oppose.” When the State Department spokesman James Foley was asked, “Do you all oppose independence for Kosovo under any circumstances at any time?” Foley replied, “Well, we have made clear that we do not support Kosovo independence. I do not care to elaborate on that.”¹⁸²² Nevertheless, Since Kosovo’s independence in 2008, the United States and over 100 UN Member states have recognized Kosovo as an independent sovereign state. However, the Taiwanese people were confused. The results of the referendum for independence were voided on the basis of inadequate turnout.

In March 2004, Chen Shui-bian was reelected for the second term of the presidency. Earlier in February 2004, in an interview with a reporter, he said that “The ROC is a sovereignty [sic] independent country,” but also said that “Taiwan is a sovereignty [sic] independent country.”¹⁸²³ So, after he was reelected, he announced that he would not pursue a referendum to enact a new Constitution, just amend it.¹⁸²⁴ In April 2004, his new foreign minister, Mark Tang-shan Chen, admitted that the international pressure was becoming unbearable. The ROC has always been sovereign and independent, he

¹⁸²² US Department of State, Daily Press Briefing, February 11, 1999, Cited in *Id.* at 99.

¹⁸²³ In an exclusive interview, Former President Chen Shui-bian rejects the mainland’s “one-China” doctrine. See Editorial, *Strait Talking*, TIME (Feb. 16, 2004), at <http://content.time.com/time/subscriber/article/0,33009,591348,00.html> (last visited Feb.22, 2022).

¹⁸²⁴ Joseph Kahn & Chris Buckley, *Taiwan’s President Tones Down His Pro-Independence Oratory*, N.Y. TIMES, May.21, 2004, available at <https://www.nytimes.com/2004/05/21/world/taiwan-s-president-tones-down-his-pro-independence-oratory.html> (Last visited May 2, 2022)

said: “the ROC is on Taiwan, and I am the foreign minister of ROC.”¹⁸²⁵ This stance has been held by the DPP up until today.

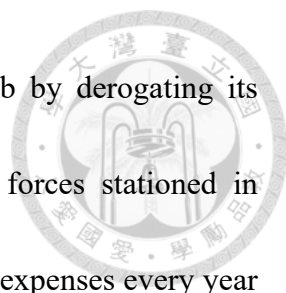


Emboldened by Bush’s statement of opposing Taiwan to change the status quo, in March 2005, China passed the “Anti-Secession Law”, which stated that China could use “non-peaceful means” if Taiwan sought independence or if it deemed that possibilities of peaceful reunification were “completely exhausted.” Facing the double pressure from China and the US, in June 2005, the seventh round of constitution revision was made in Taiwan. Accordingly, the National Assembly (old executive branch of ROC) was abolished, and its powers were relinquished to the Legislative Yuan and the Taiwanese people. In addition, it took a bold step in locking the ROC Constitution into its current iteration (so as to keep the status quo). The threshold to pass a subsequent constitutional revision was raised an extremely high procedural threshold— so high that many believe any future constitutional revision to be almost impossible.¹⁸²⁶

Since Clinton and Bush had dissuaded Taipei from claiming a separate identity from China, there were rumors that the US does not want Taiwan to become a normal state, as

¹⁸²⁵ Wang Pingyu, *Chen Tangshan: Yibian Yiguo Lunshu Ke Tiaozheng Bu Ke Tuifan* (Mark Chen Says One Country on Either Side Formula Can Be Adjusted Can Not Be Overturned), EPOCH TIMES, April 30, 2004, at <https://www.epochtimes.com/b5/4/4/30/n525039.htm> (last visited Feb.22, 2022).

¹⁸²⁶ Yeh, *supra* note 1185, at 247.



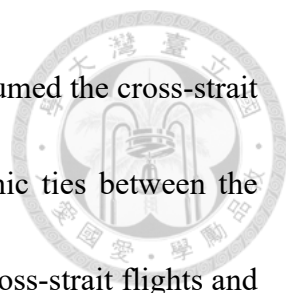
it is in the best interest of the US to put Taiwan under its thumb by derogating its sovereignty. Considering that there were no large scale military forces stationed in Taiwan, and the Taiwanese have to afford a huge amount of military expenses every year in exchange for “obsolete weapons” of the US¹⁸²⁷, it was argued that this might be the reason for the downturn of the Taiwanese economy.¹⁸²⁸ As the KMT has claimed that economic cooperation with PRC would benefit Taiwan’s economy, there was a consensus then that it was time to approach China. On April 26, 2005, KMT chairman Lien Chan traveled to mainland China to meet with the leaders of the CCP, opening the gate of cooperation between the Taiwan politicians and PRC government both economically and politically in the following years.

Frustrated by the US’ derogating Taiwan’s sovereignty, the Taiwanese people put the pro-Chinese President Ma Ying-jeou into office in 2008. Winning a landslide victory in the presidential election, Ma took an unprecedented overwhelmingly pro-China policy to integrate Taiwan with China. During his term, the Taiwanese forces have ended conscription and transitioned to an all-volunteer force¹⁸²⁹, laying the groundwork for

¹⁸²⁷ For the discussion of the KMT dominated military “deep state” in Taiwan, see Eric Setzekorn, *Military reform in Taiwan: the Lafayette scandal, National Defense Law and All-Volunteer Force*, 21(1) AME. J. OF CHI. STUD.7-19 (2014).

¹⁸²⁸ Li Ao, the Taiwanese historian born in China who followed the KMT to Taiwan in 1949, was one of those commentators.

¹⁸²⁹ Throughout the 1990’s, the KMT dominated party state and military section continued to guide defense policy of Taiwan without full civilian control. A major blow to this military “deep state” was the Lafayette scandal, which exposed the military to allegations of corruption, political cronyism, and even



Taiwan's ultimately “peaceful reunification” with China. Beijing resumed the cross-strait exchanges with Taipei, cooperating with Ma to strengthen economic ties between the two and advancing a number of agreements that had increased the cross-strait flights and boosted the flow of mainland tourists to Taiwan, and lowered regulations and tariffs on cross-strait trade. In spite of the rising anti-Chinese sentiment in Taiwan, the PRC United front¹⁸³⁰ expanded its presence in Taiwan in width and depth during the eight years of Ma's administration.

Over the years, America's One China policy has given both Chinese leaders and leading American politicians the impression that the US considers democratic Taiwan to be a part of China. As such, it only legitimizes China's threats to use force against Taiwan and encourages China to believe that the United States will not defend Taiwan's democracy.¹⁸³¹ Being aware of the dangerousness of the ambiguous “One China” policy, during the Trump administration, in a telephone interview with a radio program in November 2020, the US Secretary of State Mike Pompeo said it was important to “get the language right.” Taiwan has not been a part of China, and that was recognized with

murder. Before Ma took office in 2008, Taiwan's civilian leaders are trying to achieve greater control over the military and enact constitutional changes strengthening the authority of civilian officials. However, as conscription was ended by Ma's defense reform program, this process is suffering significant setbacks due to a lack of political and public interest. In Setzekorn, *supra* note 1827.

¹⁸³⁰ For China's overseas united front, *see generally* Lo et al, *infra* note 1841.

¹⁸³¹ John J. Tkacik, jr. *Humoring Chinese irridentism: invitation to disaster?*, in RETHINKING “ONE CHINA” 37, 47(John Tkacik ed., 2004).

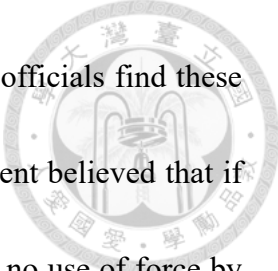
the work that the [former US president Ronald] Reagan administration did to lay out the policies that the United States has adhered to now for three-and-a-half decades, and done so under both administrations” he said.¹⁸³² The Trump administration raised US support for Taiwan higher than at any time since 1971. On January 9, 2021, Secretary of State Pompeo removed all restrictions governing interaction between the US and Taiwan governments.

During the Biden administration, in March 2021, on the official website of US Department of Defense, it states that “Chinese leaders’ talk of unifying Taiwan under Chinese rule, but Taiwan was never part of China.”¹⁸³³ Nevertheless, in July 2021, in an online discussion hosted by the Asia Society Policy Institute (ASPI), White House coordinator for the Indo-Pacific Kurt Campbell noted that the US supports a strong “unofficial relationship” with Taiwan but that “we do not support Taiwan independence.” He stressed that the Biden administration is fully cognizant of the “sensitivities” involved in cross-strait relations.¹⁸³⁴

¹⁸³² Lin Chia-nan, *Taiwan not part of China, Pompeo says*, TAIPEI TIMES, Nov.14, 2020, at <https://www.taipeitimes.com/News/front/archives/2020/11/14/2003746883>

¹⁸³³ Jim Garamone, *DOD Officials Describe Conditions in Indo-Pacific*, US Department of Defense, Mar.15, 2021, available at <https://www.defense.gov/Explore/News/Article/Article/2536889/dod-officials-describe-conditions-in-indo-pacific/> (Last visited May 2, 2022)

¹⁸³⁴ Keoni Everington, *White House says it does not support Taiwan independence*, TAIWAN NEWS, Jul.7, 2021, <https://www.taiwannews.com.tw/en/news/4242061> (Last visited May 2, 2022)

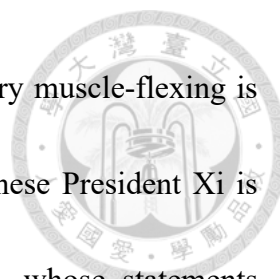


Ordinary people are understandably confused and even professional officials find these diplomatic nuances difficult to follow.¹⁸³⁵ It seems that US government believed that if there was no declaration of independence by Taiwan, there would be no use of force by China, yet the reality might be otherwise. “History is replete with instances of large and powerful tyrannies intimidating their neighbors, and history is replete with instances where the principled nations of the world stood by and did nothing until it was too late.”¹⁸³⁶ In 1938, Britain and France virtually had a “One-Germany” policy which recognized Hitler’s claims over the Sudetenland, the appeasement policy of which had led to Hitler’s occupation of Czechoslovakia and ultimately to World War II in Europe. “In 1990, the US seemed to follow a ‘one-Arab’ policy. The American ambassador in Baghdad told Saddam Hussein, ‘We take no position in territorial disputes between Arabs, like your border disagreement with Kuwait; our only interest is that they be resolved peacefully.’ As you all know, the “border disagreement with Kuwait” was that Saddam Hussein claimed Kuwait as Iraq’s 19th province. The American ambassador’s assurance that the US did not take any position on the issue only encouraged Saddam to believe that America would not intervene in Iraq’s armed invasion of Kuwait.”¹⁸³⁷

¹⁸³⁵ Arthur Waldron, *American diplomacy, and the origins of cross-strait tensions*, in in RETHINKING “ONE CHINA” 23(John Tkacik ed., 2004).

¹⁸³⁶ Chabot, *supra* note 1810, at 14.

¹⁸³⁷ Andrews & Chabot, *supra* note 1022.



While the Chinese Global Times commented that “continued military muscle-flexing is the only answer to cross-strait stability,”¹⁸³⁸ at the same time, Chinese President Xi is reluctant to articulate a specific deadline for the “reunification”, whose statements indicate a desire to make progress, but not necessarily to rush the issue.¹⁸³⁹ At any rate, China will calculate its national interests carefully if it decides to use military force against Taiwan. A PRC attack on Taiwan would disrupt the Chinese plans for its domestic economic development, weaken China’s international reputation and image and likely lead to substantial international sanctions, and provoke a global anti-China coalition, not to mention an all-out war with the United States. Furthermore, China might not win quickly, or at all.¹⁸⁴⁰ Alternatively, it rather chose to push for the so called “peaceful reunification” to infiltrate Taiwan as extensively as possible, aiming at “winning without fighting” or “fighting at a very low cost”.

It is true that the Taiwanese people will not surrender without fighting, yet from

¹⁸³⁸ Gerry Shih, *China Threatens Invasion of Taiwan In New Video Showing Military Might*, THE WASH. POST, Oct. 12, 2020, available at https://www.washingtonpost.com/world/asia_pacific/china-taiwan-invasion-military-exercise/2020/10/12/291f5d86-0c58-11eb-b404-8d1e675ec701_story.html (Last visited May 2, 2022)

¹⁸³⁹ Bonnie Glaser & Matthew P. Funaiolo, *China’s provocations around Taiwan aren’t a Crisis*, FOREIGN POLICY, May 15, 2020, available at <https://foreignpolicy.com/2020/05/15/chinas-provocations-around-taiwan-arent-a-crisis/> (Last visited May 2, 2022); see also John Feng, *Bullish China Vows Continued Push for Taiwan ‘Unification’ in 2021*, NEWSWEEK, Dec. 30, 2021, available at <https://www.newsweek.com/bullish-china-vows-continued-push-taiwan-unification-2021-1557994> (Last visited May 2, 2022)

¹⁸⁴⁰ Robert D. Blackwill & Philip Zelikow, *The United States, China, and Taiwan: A Strategy to Prevent War*, Council on Foreign Relations Special Report No. 90, at 29, available at https://cdn.cfr.org/sites/default/files/report_pdf/the-united-states-china-and-taiwan-a-strategy-to-prevent-war.pdf (Last visited Aug.29, 2022)

Beijing's perspective, the more interactions with the Taiwanese politicians, the more vulnerable the Taiwanese is to its united front work.¹⁸⁴¹ At any rate, there is no formal military defense treaty between Taiwan and others to deter China's attack in the first place. Putting aside the possibility of a war, it comes down to considering the implications of the "unification" of China with Taiwan for the democratic world.

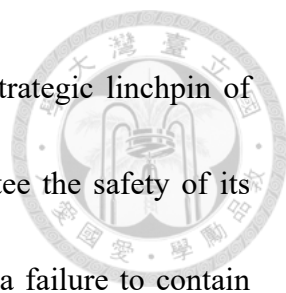
It appears that whenever there is a presidential election in Taiwan, the PRC becomes anxious and want to ensure that the result is acceptable. Considering the fatal defects of the constitution of Taiwan, China probably would decide how Taiwan's leaders are chosen and would not allow certain leaders to be selected through grey tools.¹⁸⁴² In any case, the economic linkages with and dependencies on the PRC have a value that can influence and compel behaviors among US allies; Philippine is a case in point.¹⁸⁴³

Taiwan is of both economic and strategic importance not only to the US, but also to Japan, Korea, the Philippines, Australia, and many other Pacific nations, which, whatever they may say in public, are deeply worried by China's current military buildup

¹⁸⁴¹ SONNY SHIU-HING LO ET AL, CHINA'S NEW UNITED FRONT WORK IN HONG KONG: PENETRATIVE POLITICS AND ITS IMPLICATIONS 357 (1st ed. 2019).

¹⁸⁴² About how the Chinese government extends its influence to manipulate extra-jurisdictional media, see Huang Jaw-Nian, *The China Factor in Taiwan's Media: Outsourcing Chinese Censorship Abroad*, 2017 (3) CHINA PERSPECTIVES 27-36 (2017).

¹⁸⁴³ Blackwill & Zelikow, *supra* note 1840, at 11.



and extensive irredentist territorial claims. Indeed, Taiwan is the strategic linchpin of East Asia and the most potent symbol of the US ability to guarantee the safety of its allies even in the face of a Communist colossus.¹⁸⁴⁴ It is true that a failure to contain Chinese ambitions over Taiwan Strait will make the “empire of liberty” much smaller and shorter.¹⁸⁴⁵ However, the free world has not done enough to ensure the security of Taiwan. China cannot respect Taiwan’s democracy and the reality that it has become a separate, self-governing territory, and the other democratic countries are already facing the same choices as Taiwan in the sense of protecting their democracy and free choice. This is why the clarity and resolve of other democratic countries are so important.

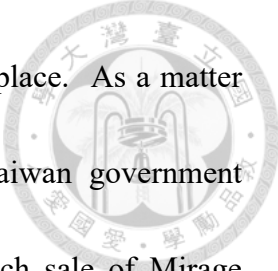
On January 23, 2021, in response to China’s aggressive moves, the new Joe Biden administration issued a prepared statement entitled “PRC Military Pressure Against Taiwan Threatens Regional Peace and Stability.”¹⁸⁴⁶ The statement urged Beijing to “cease its military, diplomatic, and economic pressure against Taiwan and instead engage in meaningful dialogue with Taiwan’s democratically elected representatives.”¹⁸⁴⁷ However, it is the Chinese side that is unbending in its demand

¹⁸⁴⁴ Thomas Donnelly, *Cognitive dissonance: China and the Bush Doctrine*, in in RETHINKING “ONE CHINA” 49, 57 (John Tkacik ed., 2004).

¹⁸⁴⁵ *Id.* at 59.

¹⁸⁴⁶ US Department of State, PRC Military Pressure Against Taiwan Threatens Regional Peace and Stability, Jan. 23, 2021, *available at* <https://www.state.gov/prc-military-pressure-against-taiwan-threatens-regional-peace-and-stability/> (Last visited May 2, 2022)

¹⁸⁴⁷ *Id.*

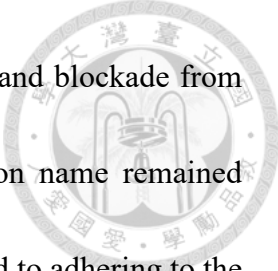


that Taiwan submit as a part of China before any dialogue can take place. As a matter of fact, the first semi-official dialogue between the PRC and Taiwan government happened in 1992, when the US sold F-16 to Taiwan and a French sale of Mirage 2000-5 fighter jets to Taiwan shortly thereafter. Beijing opened a semiofficial political dialogue with Taipei in October and November 1992. The next year, in April 1993 in Singapore, the personal representatives met openly for the first time.¹⁸⁴⁸ Since the collapse of the Soviet Union, China has pursued a course of military modernization focused primarily on Taiwan, justifying vast expenditures on advanced weaponry in an effort to deter American involvement in a Taiwan Strait crisis.¹⁸⁴⁹ It seems that China's military ambition over Taiwan cannot be expected to be contained unless the unbalance of force can be maintained. The question is not about whether the United States should defend Taiwan in the war but about how to deter China's war threat in the first place.

Since the pro-Taiwan DPP took office in 2016, China has coerced foreign businesses to label Taiwan as part of China, prevented Taiwan from participating in international organization as the World Health Organization (WHO) and the UN International Civil Aviation Organization (ICAO), and its military intimidation against Taiwan was significantly increased. Unless Taiwan explicitly accepts Beijing's interpretation of the

¹⁸⁴⁸ Tkacik, *supra* note 687, at 90.

¹⁸⁴⁹ Tkacik, *supra* note 1832, at 41.



“1992 Consensus”, that is Taiwan is part of China, the intimidation and blockade from China will continue. On the other hand, as long as the constitution name remained “Republic of China”, the world organizations will certainly be obliged to adhering to the “One China” principal established by the UN Resolution 2758 repeatedly, which means that the rights and obligations of the ROC has already been replaced by the PRC. Yet the truth is that the less Taiwan is accepted into the international community as a full-functioned member, the more isolated Taiwan would be on the international stage, and the more likely the communist China is to subjugate the democratic Taiwan.

Arthur Hummel, then Assistant Secretary of State and later ambassador to Beijing, once said “Down the road, perhaps the only solution would be an independent Taiwan.”¹⁸⁵⁰

As has discussed already, to achieve independence, two main requirements must be met, first, it must be a separate entity upon the exercise of substantial governmental authority with respect to some territory and people within reasonably coherent frontiers; and it is not being “subject to the authority of any other State or group of States”, which is to say that it has over it “no other authority than that of international law”.¹⁸⁵¹ Clearly, no practice of Taiwan proves otherwise. No diplomatic expediency could obscure this fact, and it is time to fully recognize the reality. If the democratic world is ambiguous about

¹⁸⁵⁰ Burr, *supra* note 1182, at 464.

¹⁸⁵¹ Crawford, *supra* note 30, at 67.

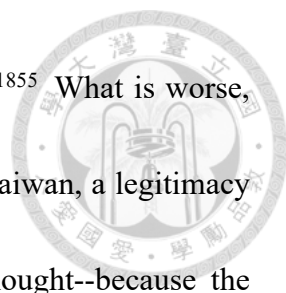
Taiwan's status without dispelling ambiguity, then it is ambiguous about Taiwan's moral standing, sabotaging its own strategic goals. The democratic world is already confronting the same choice as Taiwan: in the face of an authoritarian government, whether to respond by compromising principles or by adhering to them.¹⁸⁵² The rise of a democratic Taiwan is just like the existence of lively West Berlin, sitting in the middle of the communist German Democratic Republic and the Soviet bloc. Were China to subjugate Taiwan, it "would implicate issues about the world's future that go beyond Taiwan and its tens of millions of inhabitants".¹⁸⁵³

When then President-Elect Trump spoke on the phone with Taiwanese President Tsai Ing-wen in December 2016, Obama said that the incoming Trump administration was within its rights to review the One China policy, but stressed that the "status quo, although not completely satisfactory to any of the parties involved, has kept the peace and allowed the Taiwanese to be a pretty successful . . . economy and a people who have a high degree of self-determination."¹⁸⁵⁴ This is anything but true. Despite that the US "One China Policy" purposely left the US neutral about the outcome, when the US government urged Taiwan to keep the status quo without rectifying its identity; it is

¹⁸⁵² Andrews & Chabot, *supra* note 1022.

¹⁸⁵³ Blackwill & Zelikow, *supra* note 1841, at 5.

¹⁸⁵⁴ Roberta Rampton & Jeff Mason, *Obama says China would not take change in US policy on Taiwan lightly*, REUTERS, Dec. 17, 2016, available at <https://www.reuters.com/article/us-usa-obama-china-idUSKBN1452PL> (Last visited May 2, 2022)



actually denying the Taiwanese sovereignty and self-determination.¹⁸⁵⁵ What is worse, Beijing is “convinced of the legitimacy of the use of force against Taiwan, a legitimacy that was based on their sovereignty over the island. And they thought--because the United States had a one-China policy--that we agreed with their argument”.¹⁸⁵⁶ Under the TRA, the US treats Taiwan as an independent state, diplomatically, however, Taiwan’s constitution still mandates that the country’s official name is ROC, and so long as that is the case, the United States cannot grant formal recognition to Taiwan.¹⁸⁵⁷ The US “One China policy” meant merely that the government of the US recognized only one government of China at a time.¹⁸⁵⁸ Republic of China is a fiction, but Taiwan is not. In 1933, the US signed the Montevideo Convention on Rights and Duties of States, which defines independent states in the following way:

Article 1: The state as a person of international law should possess the following qualification: a) a permanent population; b) a defined territory; c) government; d) capacity to enter into relations with the other states....

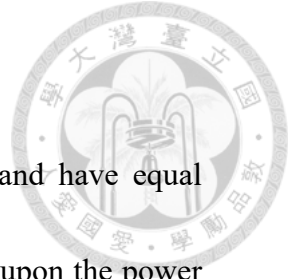
Article 3: The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity

¹⁸⁵⁵ Willian Kristol, *The Taiwan Relations Act: the next 25 years*, in RETHINKING “ONE CHINA” 15, 16 (John Tkacik ed., 2004).

¹⁸⁵⁶ Andrews & Chabot, *supra* note 1022.

¹⁸⁵⁷ John J. Tkacik, Jr., *Introduction: Rethinking “One China”*, in *in* RETHINKING “ONE CHINA” 5,6 (John Tkacik ed., 2004)

¹⁸⁵⁸ Tkacik, *supra* note 1833, at 40.



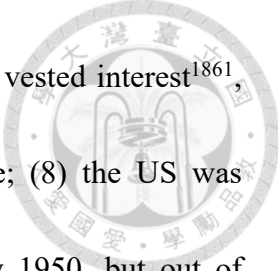
and independence...

Article 4: States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.¹⁸⁵⁹

Given that (1) Taiwan is already an independent sovereign state with an illegitimate state name/identity imposed on it. It is implicated in the Montevideo Convention that “actual independence” is the key criterion for statehood; where such a fact existed, recognition is a legal obligation on the part of existing states;¹⁸⁶⁰ (2) Taiwan’s government today is seen by the Taiwanese people as the legitimate and sovereign government of Taiwan; (3) the US has never accepted China’s claims to sovereignty over Taiwan; (4) Taiwan meets all the qualifications of an independent state under international law; (5) it is impossible for the US and the international community to grant de jure recognition to Taiwan as long as its official name is still ROC; (6) China is very much care about its reputation in abiding by the international law; (7) the US is partly responsible for locking the constitution of Taiwan at the status quo that is

¹⁸⁵⁹ Montevideo Convention, *supra* note 55.

¹⁸⁶⁰ O. Österud, *The narrow gate: entry to the club of sovereign states*, 23 REV. INTL’L STUD. 167, 175 (1997).



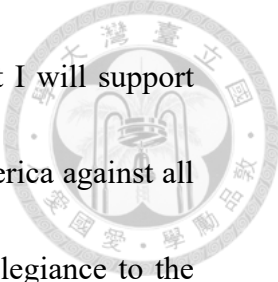
endangering Taiwan's democracy and sovereignty today, and due to vested interest¹⁸⁶¹, the current government of Taiwan is reluctant to rectify the issue; (8) the US was already prepared to put Taiwan under the UN trusteeship in early 1950, but out of political calculus in the cold war, it instead put Taiwan put the legal status of Taiwan at an awkward predicament; justice delayed is all the better than justice denied; (9) the General Assembly has never forfeited a state's title to administer a Non-Self-Governing territory, but to call upon States to terminate such status by granting independence, this work recommends the US government to act in the name of the leader of the Allied Power to officially end all the links between the ROC and Taiwan, to articulate Taiwan's legal status as an independent sovereign State, and to with the enactment of a new constitution of Taiwan.

4. Consolidating the Sovereignty of Taiwan

The "Naturalization Oath of Allegiance to the United States of America" is written as follows:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of

¹⁸⁶¹ For why the CCP is reluctant to rectify this issue, *see* P. 455-61; note 1644.

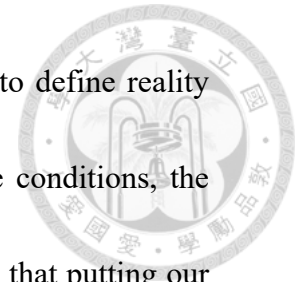


whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

Imagine that the “Oath of Allegiance” in Taiwan today is still alleged to the old Chinese regime- “the Republic of China”, which has already been replaced and succeeded by People’s Republic of China in all practices. This is exactly the allegiance problem of the current constitution of Taiwan, and this is exactly what the PRC is capitalizing on. In a Heritage Foundation Symposium held on February 26, 2004, the Democratic Representative, Peter Deutsch reminds us that:

If we call Taiwan “China”, it does not make it China, if we call night day, it does not make it day. Throughout world history and American history, we’ve seen that recognizing facts as they are is the correct way of dealing with international conflicts and international crisis, whenever we make the ignoring

facts or wishing them away, there are tragic results. We need to define reality and then come to terms with the reality of the experience, the conditions, the economy, and the military situation in Taiwan, and to recognize that putting our head in the sand does not change that reality.¹⁸⁶²



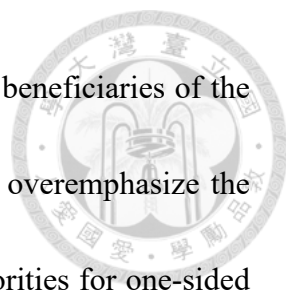
In normal circumstances, the constitution-making should a process or forum for public negotiations in order to prevent conflict and division.¹⁸⁶³ From educating citizens about democratic values, to reconciliation through social dialogue, it sought to create a consensus with respect to a new vision for the country's future.¹⁸⁶⁴ Therefore, the constitution-making process could provide an opportunity for the discussion of how different groups could continue to live together in harmony, and create a prospect for future generations.¹⁸⁶⁵ In some states, however, the constitution making process increased the conflicts between different groups rather than solving it. There is some evidence for the contention that in the situation involving a diaspora and multiple constituent peoples, especially those with serious ethnic, religious or national cleavage,

¹⁸⁶² Heritage Foundation, *Rethinking "One China": a fiction more dangerous than useful?*, in *n* RETHINKING "ONE CHINA" 115,117 (John Tkacik ed., 2004).

¹⁸⁶³ Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 (2) CHI.J.INT'L L 663, 667–8 (2006).

¹⁸⁶⁴ Manar Mahmoud, *Constitution-Making, Political Transition and Reconciliation in Tunisia and Egypt: A Comparative Perspective*, in RICHARD ALBERT & YANIV ROZNAI, *CONSTITUTIONALISM UNDER EXTREME CONDITIONS LAW, EMERGENCY, EXCEPTION: LAW, EMERGENCY, EXCEPTION* 379, 383 (2020).

¹⁸⁶⁵ Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45DUKE L.J.364–96 (1995).




the quality of the resulting constitution could be hampered.¹⁸⁶⁶ The beneficiaries of the old order could stand against the proponents of change, tending to overemphasize the majority rule, to underestimate constitutionalism and to misuse majorities for one-sided constitutional policies. This is exactly the case of the constitutional reforms in Taiwan in the 1990s and early 2000s. As a matter of fact, the polarized political factions that hindered further constitution reform in Taiwan today are somewhat intentionally created by the ROC government in exile during the authoritarian period, making Taiwan easier to rule.

It has been observed that “producing a new constitution (or constitutional settlement) is commonly viewed as one way of reconciling different peoples within the state and forging a common identity.”¹⁸⁶⁷ Given the polarized politics of Taiwan, the recourse to democratic means of constitution-making might bear the risks of failure. Nevertheless, a new Constitution could not necessarily derive its legal validity solely from the sovereign people in a referendum.¹⁸⁶⁸ The participation of the sovereign people is supposed to be pursued only if it would not lead to greater conflict in the process of

¹⁸⁶⁶ See O. Ojielo, *Justice versus reconciliation: the dilemmas of transitional justice in Kenya*, in CONFLICT AND PEACEBUILDING IN THE AFRICAN GREAT LAKES REGION 111(K. Omeje K and T. Redeker Hepner eds., 2013).

¹⁸⁶⁷ Tom Gerald Daly, Introduction: constitution-making and constitutional change, in RICHARD ALBERT & YANIV ROZNAI, *CONSTITUTIONALISM UNDER EXTREME CONDITIONS LAW, EMERGENCY, EXCEPTION: LAW, EMERGENCY, EXCEPTION* 315, 318 (2020)

¹⁸⁶⁸ See Oliver, *supra* note 48, at 156.



constitutional reengineering or threaten the whole project.¹⁸⁶⁹ It is viable that some help or pressure from abroad would facilitate the drafting and implementation of a brand new democratic constitution. “A council of experts may be nominated less democratically than through a national election for a constituent convention... If trust into such a council is high and if its product is accepted and democratically implemented, a constitution can gain sufficient output legitimacy even though its input legitimacy is deficient from a democratic point of view.”¹⁸⁷⁰ “For instance, the Parlamentarische Rat in Germany was established by the victorious allies and not by some articulation of the political will of the German people...The constitution is then not actually made by some external authority, but framed by it,”¹⁸⁷¹ which proved to be more successful than those with the participation of the public in the long run.¹⁸⁷²

In the parlance of the theory of constitutions as rational pre-commitments, “constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy.”¹⁸⁷³ “A constitution is Peter sober while the electorate” – sometimes – “is Peter drunk.”¹⁸⁷⁴ The idea of

¹⁸⁶⁹ Daly, *supra* note 1867, at 319.

¹⁸⁷⁰ Braune, *supra* note 1598, at 338.

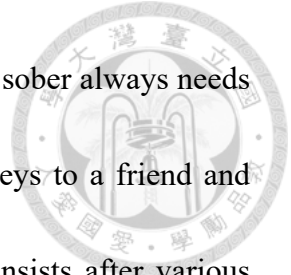
¹⁸⁷¹ *Id.* at 340.

¹⁸⁷² *Id.* at 338.

¹⁸⁷³ Elster, *supra* note 1865, at 89; Critical: Waldron J, *Precommitment and disagreement*, In CONSTITUTIONALISM. PHILOSOPHICAL FOUNDATIONS 271–299(L. Alexander ed.,1998).

¹⁸⁷⁴ Holmes, *supra* note 1637a, at 235.

“commissioning” is crucial in a pre-commitment perspective. “Peter sober always needs some third party for his auto paternalism: He hands over his car keys to a friend and tells him not to give them back to him, no matter how much he insists after various drinks.”¹⁸⁷⁵



Therefore, this work suggests Taiwan to set up a constitutional committee comprising of internal constitutional experts and external experts from countries with an established constitutional democracy, and design a brand new constitution tailored for the Taiwan society, so as to consolidate the security, democracy, and sovereignty of Taiwan.

Before the starting of the constitutional process, reconciliation has to be achieved through a Truth and Reconciliation Commissions, and national dialogues are expected to be conducted based upon principles of mutual respect, inclusivity, deliberation, and dealing with past wrongs.¹⁸⁷⁶

¹⁸⁷⁵ Braune, *supra* note 1598, at 339.

¹⁸⁷⁶ Mahmoud, *supra* note 1864, at 386.

Chapter VII: Conclusion



Having been ruled by a sequence of six incoming regimes in its over 400 hundred years of civilized history; Taiwan has a legal system entirely independent of China since 1949. Nevertheless, it did not become a self-governing territory until the democratic reforms conducted in the 1990s, when the representatives were finally elected by the Taiwanese people with full franchise. This uniqueness of development and the state image and identity of the Republic of China has confused a lot of people about Taiwan's statehood and constitutional independence. Nevertheless, it is crucial to bear in mind that law must be based on facts-insofar as such facts are not in themselves contrary to law.

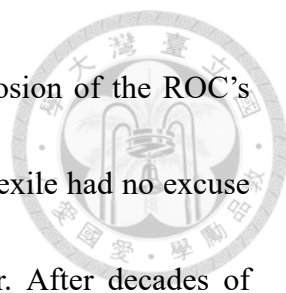
Not until the right of self-determination developed into a general principal and jus cogens of international law, concerning people as the source of the sovereignty of the state, did the abstract and disputable concept of sovereignty acquire substantiality. Accordingly, it is the people who decide the fate of the territory, instead of the other way round. Meanwhile, the popular sovereignty doctrine embedded in modern constitutionalism is based on the idea that the power of the sovereign derives from the people who constitute the states. Centering on the concept of human subjectivity, the self-determination of peoples serves as the link that brings together the popular

sovereignty and basic human rights in constitutional law. This work has found that the statehood evolvement of Taiwan cannot be well explained without looking into these interfaces between international laws and constitutions.



Inspired by Wilson’s “self-determination” in 1918, the Taiwanese people have submitted fifteen official petitions to the Japanese colonial Authority between 1921 and 1934, calling for formal self-governance on the island. Limited suffrage rights were conferred since 1935, which was short-lived with the beginning of war in the late 1930s. Nevertheless, the elections introduced the Taiwanese people to regular, peaceful political participation, laying the foundation for the island’s future democracy.

After Japan lost the war, the ROC government came to take over the administration of Taiwan on behalf of the Allied Powers. The broad mixture of civilian and military powers enjoyed by the incoming dictators was shockingly reminiscent of the Japanese colonial government. Since 1949, the ROC government in exile had taken its claim to represent the whole China as an excuse to deny equal suffrage rights of the Taiwanese People, and elections were only granted by an executive order on the local level. In the cold war structure, the ROC government in exile was able to retain China’s UN seat until 1971, when it was restored to the PRC. Ironically, the Taiwanese people’s



incremental attainment of self-determination was a result of the erosion of the ROC's legitimacy on the international stage, since the ROC government in exile had no excuse to deny equal representatives of the Taiwanese people any longer. After decades of endeavor, the Taiwanese people finally forced the aging KMT legislatures who were elected in China in 1947 to step down at the end of 1991, and conducted a series of democratic reforms, which were facilitated by seven rounds of constitutional revisions. When the master key of constitutional amendment was eventually handed over to the Taiwanese people, and the representatives elected in China are permanently and fully prohibited from interfering in Taiwanese legal affairs; the fate of Taiwan will be decided by the Taiwanese people, and by them alone. The constitutional independence of Taiwan has therefore become beyond doubt.

The practice of Taiwan demonstrates that international law and constitutions are more closely interlinked than one would think. As a main feature of independent sovereign state, the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference, which cannot be fulfilled until the internal constitutional independence- a people's ability to determine with finality all the rules in its legal systems, is attained. This process is the very manifestation of the Taiwanese people's effective exercising of self-determination.



Given that the achievement of self-determination and self-government by territories under Mandate, Trusteeship or non-self-governing territories was treated as finally resolving the question of status and associated issues of sovereignty over the territory as a whole, and that statehood is able to override any other forms of territory transference, the democratic and self-governing Taiwan today is entitled to be protected by sovereignty independence and territorial integrity, and no diplomatic talks could be oblivious to this law and fact. Nevertheless, the confusing identity of Taiwan dictated by ROC constitution has prevented it from acting as a full-functioning state on the international stage. After all, the generally accepted “One China Policy” that denies the continuity/existence of the ROC is in conformity with international law. Since recognition had a consolidating effect to bolster the effectiveness of a state’s government by lending international legitimacy, and a government could not be recognized more than what it claims to be, the executive, judicial and legislative branches of the Taiwanese government are called upon to rectify the problem in line with both international law and constitutional law.

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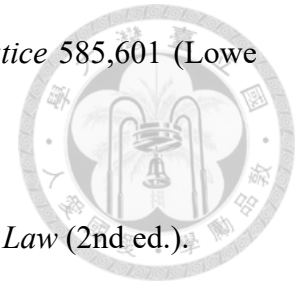
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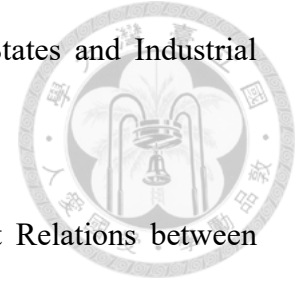
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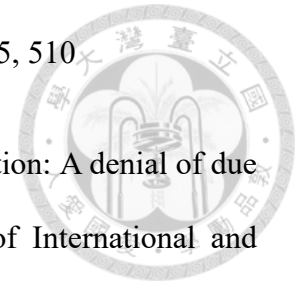
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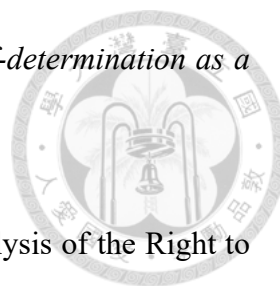
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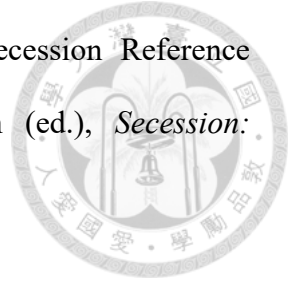
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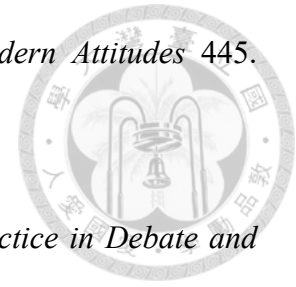
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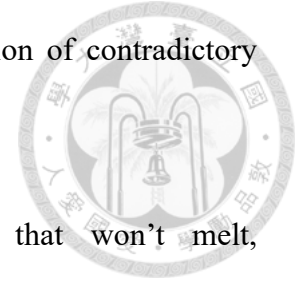
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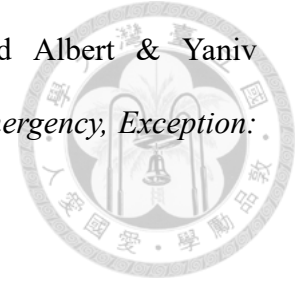
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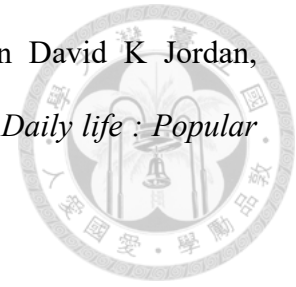
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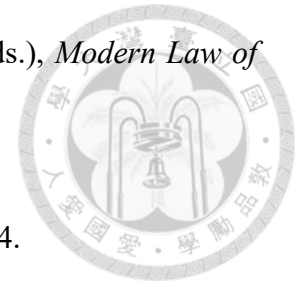
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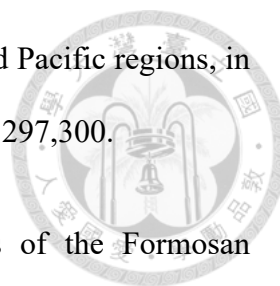
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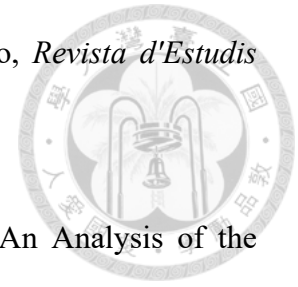
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