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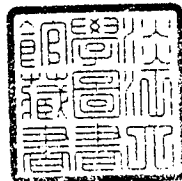
IN THE NEW CENTURY

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CHAPTER SIX

**TAIWAN'S LEGAL STATUS:
BEYOND THE UNIFICATION-
INDEPENDENCE DICHOTOMY**

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TAIWAN'S AMBIGUOUS STATUS IN INTERNATIONAL LAW is a product of a half-century of changing international and cross-strait circumstances. Geopolitics and the PRC's claim to sovereignty over Taiwan also affect the status of Taiwan and bilateral relations across the Taiwan Strait. According to international legal theories and practices, the long nonrecognition by most countries in the world also contributes to Taiwan's dilemma. Nonrecognition is due partly to the political nature of the international law of recognition and partly to misunderstanding the traditional idea of sovereignty in international law.

Here I discuss traditional conditions for statehood with respect to Taiwan. I also propose a new approach and a framework to democratic sovereignty. This new approach to democratic sovereignty, both internal and external, is then applied to the case of Taiwan to determine Taiwan's international legal status and its legal personality and capacity. Finally I discuss the meaning of "one China" and relations between the two political entities across the Taiwan Strait, arguing that, although bilateral political and private law relations remain unique and special circumstances apply, China and Taiwan are two separate states in political and legal reality.

TAIWAN AND TRADITIONAL CONDITIONS FOR STATEHOOD: ANOTHER TAIWAN EXPERIENCE

The government of the Republic of China (ROC) on Taiwan remains in effective control of an area of 14,000 square miles and more than 22 million people, each earning an average of U.S.\$11,500 a year. Taiwan is the world's 14th-largest trading nation and holds the world's third-largest foreign-exchange reserve. The "Taiwan experience" was originally used to refer to Taiwan's rapid economic development. Since the late 1980s, the movement toward political liberalization and democratization in Taiwan has attracted more attention than its economic miracle. The meaning of the Taiwan experience has thus expanded to include Taiwan's stable political democratization.

Taiwan is not recognized diplomatically by most countries of the world; it has not been represented in the United Nations or other major international intergovernmental organizations since China's seat in the UN was awarded to the Beijing government in 1971. Yet, owing to its economic strength and political achievements, Taiwan has maintained substantive or functional relations with most countries in the world and has participated, under different names, in some important international economic organizations. Taiwan's ambiguous international status, diplomatic isolation, and close substantive relations with other states constitute "another Taiwan experience."

A state as a juristic person in international law should possess four qualifications: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.¹ Satisfaction of the first three qualifications is a matter of fact, not law. As far as public international law is concerned, the last qualification, the capacity to engage in formal relations with other states, is most important and controversial.

Before the 1971 UN resolution that accorded China's UN seat to the PRC in Beijing, Taiwan was recognized by almost half of the world's countries. Now Taiwan has diplomatic relations with 28 states. Yet Taiwan also maintains substantive relations, including semiofficial, commercial, trade, and cultural relations, with more

than 140 states in the world.² Taiwan sends diplomats and trade representatives all over the globe to promote such unofficial relations with other countries. The ROC on Taiwan therefore has an unquestioned capacity to engage in foreign relations with other nations. Even scholars who do not regard Taiwan as a sovereign state acknowledge that "Taiwan was under the de facto authority of a government that engaged in foreign relations and entered into international agreements with other governments."³

Facts and legal analysis indicate that Taiwan fulfills all the traditional criteria for statehood. It has a clearly defined territorial base, an island larger in size than 90 states in the world; 22 million people permanently living within its territory; a stable, effective, and popularly elected government; and the capacity and willingness to engage in relations with other states. According to these international legal criteria, the word "state" has a clear meaning and appears entirely applicable to Taiwan.

DEMOCRATIC SOVEREIGNTY: NEW APPROACH

Sovereignty is central to the study of both the nature of the modern state and the theory of international law. It has therefore a dual connotation: within the state and in international law or, respectively, internal and external. The idea of sovereignty began as an indication of the political power enjoyed by a prince within a state. Later it came to describe both internal and external power relations. The external application of sovereignty became a core concept of international law and relations more quickly than it did in the domestic context. Sovereignty cannot be fully understood without reference to its specific context in time and space. Changes in the doctrine of sovereignty reflect changes in political facts, both domestic and international.

Sovereignty remains a constitutive concept although its principles are neither fixed nor constant.⁴ In the domestic application, internal sovereignty denotes constitutional arrangements regulating the balance of power state authority upholds. In the international context, external sovereignty means a state's independence from other states and the exclusive jurisdiction over its subjects within its territory.⁵

FRAMEWORK FOR DEMOCRATIC SOVEREIGNTY

A new concept of democratic sovereignty and a preliminary framework for this new approach as the legal basis of state jurisdiction integrate the domestic and the international applications of the notion of sovereignty.

Although sovereignty in the domestic or constitutional context is closely related to sovereignty in international law, few scholars connect the two concepts. Herein lies the major difference between the new approach to sovereignty and previous approaches. The new approach seeks to synthesize discussions about sovereignty both in political theory and in international law. Unlike other approaches that discuss either the development from absolute to popular sovereignty or the relationship between autonomy and independence, the new approach integrates the dual connotation of sovereignty—within the state and in international law.

Internal Sovereignty

Internal sovereignty, which refers to sovereignty's domestic sense, and internal autonomy, which is the internal aspect of sovereignty in international law, have close theoretical connections. That is, based on possession of the final political and legal power, a sovereign state holds the highest legal authority within its territorial domain. The internal dimension of the idea of democratic sovereignty includes democratic governance, a constitutional legal system, and domestic jurisdiction.

Democratic governance. Democratic sovereignty means not only that sovereignty should reside with the people but also that the legitimacy of democratic governance is recognized. Democratic sovereignty denotes both the substantive and the procedural legitimacy of democratic governance in the internal political structure of a state. The concepts of both absolute and popular sovereignty are defined by the location and distribution of decisionmaking and lawmaking power. Because popular sovereignty merely transfers the absolute rule of the monarch to the absolute rule of the people, it could lead to anarchy or to despotism of the few in the name of the many. Indeed,

the past 200 years have seen many cases of politicians using the people's name while exercising dictatorial rule.

Constitutional legal system. The internal aspect of sovereignty in international law means that a state has the highest legal authority within its territorial boundary. This legal authority is not subject to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or any foreign law other than international law. This aspect of sovereignty is also known as territorial sovereignty, which means the complete and exclusive authority a state exercises over all persons and things found on, under, or above its territory. An autonomous state therefore will have its own legal system that can exercise exclusive jurisdiction over individuals and property within its territory. The requirement of a legal system is the basis for a sovereign state to be independent from another nation's legal control. In other words, the constitutional legal system, which is not subject to another state's control, constitutes a state's internal autonomy.

Domestic jurisdiction. Sovereignty also denotes the basic international legal quality of a state and an attribute of statehood. Therefore sovereignty should be viewed as the legal basis for the competence and restriction of state jurisdiction. As Rebecca Wallance points out, "jurisdiction is an attribute of state sovereignty."⁶ Jurisdiction is primarily exercised on a territorial basis for "the territory of a state furnishes the title for the competence of the state."⁷ Territorial limits on state competence are not absolute; a state may occasionally exercise jurisdiction outside its territory.

External Sovereignty

External sovereignty traditionally refers to its international application. In the past, scholars have not given sufficient weight to the development of the idea of sovereignty in the domestic sense. Instead they tend to apply only the absolute aspect of state authority to the theory of sovereignty in international law. For the new approach to democratic sovereignty described here, external sovereignty is the external application of the idea of sovereignty as a whole. It includes

external independence, extraterritorial jurisdiction, and sovereign rights and immunities.

External independence. The external aspect of democratic sovereignty in international law underlines the independence and equality of states and the fact that they are direct and immediate subjects of international law. According to James Crawford, "it seems preferable to restrict 'independence' to the prerequisite for statehood, and 'sovereignty' to the legal incident."⁸ In other words, independence, like the existence of population, a territory, and a government, is a precondition for the existence of a state, whereas sovereignty is the attribute of statehood once it has been established.

Sovereign rights and immunities. Based on external sovereignty, a state can enjoy, in accordance with international law, certain rights and immunities outside its territorial domain. Sovereign rights, a relatively new concept developed from the law of the sea, refer to the rights of coastal states with regard to exploring, exploiting, conserving, and managing the natural resources of the continental shelf and the Exclusive Economic Zone. The word "sovereign" is used to characterize rights that are exclusive in the sense that if the coastal state does not explore or exploit its resources, no other state can undertake activities to do so without the coastal state's express consent. The rights do not depend on occupation, effective or notional, or on any express proclamation.

Extraterritorial jurisdiction. External sovereignty is the legal basis for a state's extraterritorial jurisdiction, which may be based on the effects principle, passive personality principle, protective principle, or universality principle. Based on the legal competence of external sovereignty, states also enjoy sovereign immunity for their public actions. Moreover certain sovereign rights belong exclusively to states.

TAIWAN: DEMOCRATIC SOVEREIGNTY

Here I consider Taiwan's legal status within the new approach to democratic sovereignty outlined above. The theory provides a framework for examining all the other formal features of an entity and for

deciding whether it constitutes a democratic form of government. Internal sovereignty includes political democratization, a constitutional legal system, a policymaking process, and domestic jurisdiction. External sovereignty includes external independence, diplomatic efforts, and extraterritorial jurisdiction. From them one can determine whether the ROC on Taiwan is a sovereign state by using a more objective and sophisticated method than traditionally used to approach this issue.

Internal Sovereignty of Taiwan

As discussed above, the internal aspect of democratic sovereignty entails three features: democratic governance, the constitutional legal system, and domestic jurisdiction. Examining Taiwan's constitutional development, recent political democratization, policymaking process, and the legal system on which its domestic jurisdiction is based argues for a mature democratic sovereignty in Taiwan's internal political structure. Also, examining Taiwan's constitutional development and its legal system argues that the people and government of the ROC on Taiwan hold the final political and legal power, in other words, the highest political and legal authority within Taiwan's territorial domain.

Political democratization. Taiwan's political democratization took place in a unique social-historical context. Taiwan's successful economic development fostered the emergence and development of a pluralistic society sufficiently strong to exert pressures on the political system to be more responsible. There was a reduction in Taiwan Strait tension in the late 1970s, and there were social and economic developments within Taiwan and abroad.⁹ Therefore the Kuomintang leadership realized that liberalization and democratization had become not only the fervent desire of many people but also an urgent necessity if the country was to meet future development goals.¹⁰ Taiwan today has meaningful and extensive competition for government power through all levels of regular elections. Opposition parties of real significance exist. Considerable civil and political liberties, including freedoms of expression, of the press, to form organizations,

and to demonstrate and strike, are common features of public and political life.¹¹

Policymaking process. After four decades of industrialization and economic growth, Taiwan's social structure has become highly differentiated. Taiwan's policymaking process is open. As in any other democratic country, many channels exist for citizen involvement in policymaking, at least for nonstrategic policies. In most cases, three organizations at different levels formulate policy—the bureaucracy, the Executive Yuan Council, and the Central Standing Committee of the ruling party, the Kuomintang.¹² Thus the preference of the people, the lobbying of interest groups, and the opinions of intellectuals all play important roles.

Constitutional legal system and domestic jurisdiction. Domestic jurisdiction refers to the competence of the state to govern persons and property by its municipal law, both criminal and civil, within its territorial domain and subject to the limits of international law. The competence of state jurisdiction depends on an independent and comprehensive legal system. Taiwan's legal system is close to the civil law system and based largely on German, Swiss, and Japanese models and experiences. Therefore much of the law is codified to provide a framework for legal transactions and relationships. Bills are submitted by the Executive Yuan to the Legislative Yuan; the legislation contains provisions that delegate authority to the various ministries, councils, and commissions of the Executive Yuan to implement statutory provisions through detailed regulations and guidelines.

External Sovereignty of Taiwan

External sovereignty traditionally refers to the international manifestation of the idea of sovereignty. In Taiwan's case, one can examine Taiwan's external independence and its sovereign rights and immunities.

External independence. Independence may be seen as sovereignty's external aspect. The concept entails the state's legal right generally to conduct its own affairs without direction, interference, or control by any other state. The ROC on Taiwan is self-governing under its own constitution and legal system, which are not under the control of any

other state's constitutional arrangement. The ROC has a territory base and support of the population and is recognized by a stable number of countries.

One indicator of an entity's possession of an independent international personality is its independent treaty-making capacity. The ROC on Taiwan has independently entered all kinds of political, military, economic, commercial, cultural, and technical agreements with foreign states. Most agreements involve the exercise of government power. The ROC on Taiwan has also maintained its status as a party to some multilateral treaties.

Sovereign rights and immunities. States can enjoy, based on external sovereignty, in accordance with international law, certain rights and immunities outside their territorial domains. Although neither a negotiating party in the Law of the Sea Conference III nor a contracting party to the Law of the Sea Convention of 1982, Taiwan announced a 12-mile territorial sea and a 200-mile Exclusive Economic Zone on October 8, 1979. On October 2, 1980, the American Institute in Taiwan (AIT) and the Taiwan Coordination Council for North American Affairs (CCNAA)(now known as TECRO, the Taipei Economic and Cultural Representative Office in the United States) signed an agreement on privileges, exemptions, and immunities.¹³ They granted a number of traditional diplomatic privileges and immunities to each other.

PRC AND ROC: SPECIAL STATE-TO-STATE RELATIONS?

Objective observation and analysis indicate that there are indeed two states—the PRC on the mainland and the ROC on Taiwan. As discussed above, the ROC remains in existence and maintains a title on Taiwan and a close relationship with the international community, officially or unofficially. Furthermore, the analysis above demonstrates that the ROC on Taiwan is a democratic sovereign state. Since 1949, the PRC regime in Beijing has been the de facto government of the mainland territory, and the ROC regime in Taipei has been the de

facto government of Taiwan. The existence in reality of two separate states across the Taiwan Strait seems difficult to deny.

As to the relationship between Taiwan and China, Taiwan admits the existence of two Chinese states: Both are de facto and de jure states controlling their own territories, but neither is the legal government representing both mainland China and Taiwan. Taiwan's "one China, two political entities" policy is designed to bypass the argument over sovereignty—over which is the legitimate government for all China. Also in 1993, Taiwan developed the "two Chinas in transition" expression to address cross-strait relations. While upholding the ultimate goal of reunification, the policy implicitly admits the existence of two Chinese states. This "two Chinas in transition" policy was presented at the APEC (Asia-Pacific Economic Cooperation) press meeting in Seattle on November 20, 1993. There, in response to Beijing's public claims of sovereignty over the island, Taipei's economic minister P. K. Chiang announced that "the ROC government is now pursuing a 'transitional' 'two Chinas policy' and that there are now two sovereign nations across the Taiwan Strait."¹⁴ This "two Chinas in transition" policy also summarized the reality—the long existence of two political entities divided as a result of civil war—without changing the ROC's ultimate goal of unifying China.

The latest remark was in July 1999 when President Lee Teng-hui was asked by a *Deutsche Welle* radio interviewer to comment on China's description of Taiwan as a renegade province. Lee pointed out that "Taiwan has an elected, democratic government" and the definition of the cross-strait relationship is "at least a special state-to-state relationship." President Lee also mentioned that "under such special state-to-state relations, there is no longer any need to declare Taiwan independence" and urged China to "proceed with democratic reforms at an early date to create better conditions for democratic reunification with Taiwan."¹⁵ Beijing has once more accused President Lee of embarking on a quest for Taiwan's independence, which could provoke a Chinese military attack. Subsequent statements by President Lee and other Taiwan officials stress that Taiwan had not abandoned unification as its ultimate goal and that the new remark was only a modest and logical extension of a previous position.

One analyst argues that President Lee's remark reflects growing frustration with Beijing's refusal to accord Taiwan a politically equal position in the cross-strait talks.¹⁶ Beijing fails to understand that Taiwan's democratization in recent years has changed its state structure and mainland policy. A libertarian-civic Taiwan society driven by popular support demands more equal treatment in cross-strait relations and more breathing space in the international community.¹⁷ Taipei argues that

Beijing has denigrated the ROC as a local government through its hegemonistic one-China principle. It downgraded the ROC in cross-strait exchanges, and appropriated the "one-China principle" as the premise for all cross-strait negotiations, in order to force us to gradually acquiesce to the "one country, two systems" formula.¹⁸

For Taipei therefore "one China" is something for the future, a *democratic* union with a mainland China that is far different from that of today. For now, Taipei's insistence that the current cross-strait situation is a "special state-to-state relation" is designed to guarantee that cross-strait dialogues and exchanges are conducted on a basis of equality.¹⁹

Taipei has issued a new official terminology to describe its relations with mainland China as "*one nation, two states*." The articulation of the relationship is indeed one step away from the previous policy of "one China, two political entities." The major difference between these two descriptions is the replacement of "one China" by "one nation." Taipei reasons that Beijing uses the term "one China" to promote the PRC as the superior sovereign entity and to isolate Taiwan further.²⁰ In essence, these remarks about "one nation, two states," "two Chinas in transition," or "special state-to-state relations" represent not only policy changes toward cross-strait relations but also strategies to cope with the legal and political dilemma posed by Beijing's "one China" rhetoric.

Legally speaking, when President Lee addressed the cross-strait relationship as a "special state-to-state" relationship, he accurately described current relations between China and Taiwan. On the one

hand, Taiwan is a state, although an isolated democracy. On the other hand, the relationship between Taiwan and China is a special state-to-state relationship—a unique situation, a special relationship that has never arisen before, that is different from the two Germanys and the two Koreas. Taiwan and China share the same cultural heritage and historical ties and could achieve the common goal of integration in the future. The Taiwan government's position on President Lee's remark argues that

[t]his practical and forward-looking view fully voiced the aspirations of the twenty-two million people in Taiwan. It is designed to lay a foundation of parity for the two sides, to elevate the level of dialogue, to build a mechanism for democratic and peaceful cross-strait interactions, and to usher in a new era of cross-strait relations.²¹

CONCLUSION

I have examined Taiwan's legal status and relations with mainland China in light of current political and legal facts and reality. In addition to traditional conditions of statehood, I have proposed a framework for a new approach to democratic sovereignty, internal and external, that determines a political entity's international legal status and its legal personality and capacity.

In addressing relations between China and Taiwan, I have concluded that the PRC and the ROC are, in political and legal reality, two separate states with a unique and special relationship. Many countries fail to understand this important structural change in Taiwan and its relations with China, that is, that Taiwan is now a democracy. Taiwan is a democratic political community with its own constitution and final control of legal jurisdiction. Taiwan is not part of the PRC, nor is it part of the "China" defined by the PRC and other states. Most states disregard the reality that a democratic sovereign state exists on Taiwan, denying Taiwan the rights to liberty, participation, and self-respect of full political participation in the international arena.

Notes

1. According to the general opinion of international lawyers and the Montevideo Convention on Rights and Duties of States, article 1.
2. See Mark S. Zaid, "Taiwan: It Looks Like It, It Acts Like It, But Is It a State? The Ability to Achieve a Dream through Membership in International Organizations," *New England Law Review* 32 (Spring 1998): 805-818.
3. Louis Henkin, Richard C. Pugh, Oscar Schachter, and Hans Smit, *International Law: Cases and Materials*, 2d ed. (St. Paul, Minn.: West Publishing Co., 1987), 278.
4. Constitutive rules can be understood as the basic concepts and relatively unchanging practices that create and define new forms of behavior. See David Dessler, "What's at Stake in the Agent-Structure Debate?" *International Organization* 43 (Summer 1989): 455.
5. See Samuel M. Makinda, "The United Nations and State Sovereignty: Mechanism for Managing International Security," *Australian Journal of Political Science* 33, no. 1 (March 1998): 101-115.
6. Rebecca M. M. Wallace, *International Law* (London: Sweet & Maxwell, 1992), 107.
7. Ingrid Delupis, *International Law and the Independent State* (New York: Crane, Russak Co., 1974), 5.
8. James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 1990), 71.
9. See Lu Ya-li, "Political Developments in the Republic of China," in *Democracy and Development in East Asia: Taiwan, South Korea, and the Philippines*, ed. Thomas W. Robinson (Washington, D.C.: American Enterprise Institute, 1991), 35-48.
10. See Bruce J. Dickson, "China's Democratization and the Taiwan Experience," *Asian Survey* 38, no. 4 (April 1998): 349-364.
11. See Hung-mao Tien and Yun-han Chu, "Building Democratic Institutions in Taiwan," *China Quarterly* 148 (December 1996), 1103-1132.
12. In addition, the Legislative Yuan is responsible for deciding the statutory bills regarding national policies. See Chien-Kuo Pang, *The State and Economic Transformation: The Taiwan Case* (New York: Garland Publishing, 1992), 50-76.
13. The AIT and TECRO are the de facto embassies established by the Taiwan Relations Act after the U.S. government withdrew its recognition of Taipei.

14. The statement was a rebuttal to the PRC president Jiang Jemin's comment that Taiwan was only a province of the PRC. See *China Times*, November 22, 1993, p. 1 (in Chinese).

15. "Taiwan Redefines China Relations," The Associated Press, July 10, 1999, at the Web site of Taiwan Security Research <taiwansecurity.org/AP/AP-990710.htm>.

16. Ralph A. Cossa, "Cross-Straits Relations: Now What?" Pacnet 28, July 16, 1999.

17. For more discussion on Taiwan's democratization and cross-strait relations, see Timothy Ka-ying Wong, "The Impact of State Development in Taiwan on Cross-Strait Relations," *Asian Perspective* 21, no. 1 (Spring-Summer 1997), 171-212.

18. "Parity, Peace and Win-Win: The Republic of China's Position on the 'Special State-to-State Relationship,'" Mainland Affairs Council, Executive Yuan, Republic of China, August 1, 1999.

19. "Taiwan Sees 'One China' as Democratic Ideal," Reuters, July 20, 1999, at the Web site of Taiwan Security Research <taiwansecurity.org/Reu/Reu-990720.htm>.

20. "'One Nation, Two States'—Taiwan Clarifies Chinese Relations," The Associated Press, July 15, 1999, at the Web site of Taiwan Security Research <taiwansecurity.org/AP/AP-990715.htm>.

21. "Parity, Peace and Win-Win: The Republic of China's Position on the 'Special State-to-State Relationship.'"