

Name Rectification and a New Constitution without Immediate Independence

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Introduction

Since the Democratic Progressive Party came to power in 2000, there has been a continuous stream of articles in the local Taiwanese press saying that Taiwan is already an independent sovereign nation, or asserting that the independence and sovereignty of Taiwan should be fully recognized. Of course, the point of making all of these arguments is to stress that Taiwan should be acknowledged as a normal country by the world community, and its diplomatic isolation should be ended. Are these valid arguments valid?

Numerous writers have listed the four criteria for statehood as specified in the Montevideo Convention of 1934. Taiwan appears to meet all of these criteria, but in fact it doesn't. As a simple example, let's look at "a defined territory." In 1944, the Pentagon held many meetings to discuss the future planned military occupation of Taiwan. That military occupation began on October 25, 1945, but there was no transfer of the "sovereignty" of Formosa and the Pescadores to the Republic of China (ROC) on that date. Moreover, there was no transfer of the sovereignty of these areas in the post-war peace treaty. Hence today, what is the role of the ROC in Formosa and the Pescadores? The answer is "squatters."

Unfortunately, many editors, reporters, and free-lance contributors to the Taiwanese media consistently ignore these facts. For the few who don't, however, they then go on to say that whatever the post-war legal reality might have been, the situation of today (in the early 21st century) is different. Their misconceptions may be briefly categorized as below.

Misconceptions

(1) ROC now has title to Taiwan based on "prescription," i.e. long and continuous ownership. This represents a total misunderstanding of the force of prescription vs. territorial cession. Certain countries with a long history have obtained title to their lands based on prescription. However, Taiwan was a territorial cession in Article 2b of the San Francisco Peace Treaty (SFPT), and there must be a clear transfer of

territorial title in order to be recognized as valid. The doctrine of “prescription” cannot be invoked under such circumstances. This is again fully affirmed when we recognize that October 25, 1945, was the beginning of the military occupation of Taiwan, and “military occupation does not transfer sovereignty.”

(2) ROC now has title to Taiwan based on “popular sovereignty.” This represents a total misunderstanding of the force of popular sovereignty vs. territorial sovereignty. “Popular sovereignty” is the right for the people to hold elections, to institute impeachment proceedings, and the like. However, popular sovereignty is not what former Secretary of State Powell was speaking of when he said: “Taiwan does not enjoy sovereignty as a nation.” Clearly, he was speaking of “territorial sovereignty.” As mentioned above, there has been no transfer of territorial title to the ROC, hence the ROC in Taiwan is equivalent to “squatters.”

(3) ROC now has title to Taiwan based on “full control over the Taiwan area, secondary to no one.” This represents a total misunderstanding of the force of “effective territorial control” vs. “territorial sovereignty.” For those without a good background in military occupation studies, the two appear to be identical, but in fact they are not. “Territorial sovereignty” is held by a government. Taiwan is a territorial cession under the SFPT, and there would have to be a clear transfer of title to the territory of Formosa and the Pescadores to the ROC in order for it to be accepted as valid.

Pro-Localization

The pro-localization newspapers in Taiwan continually stress numerous goals. Among the most important of these are (1) get rid of the ROC nomenclature, (2) accomplish name rectification for Taiwan, and (3) draft a new constitution.

We might ask the following question: Will a stress on the logic of “We are already independent,” or “Our independence should be recognized” help the Taiwanese people to accomplish these goals? One need only re-read the three categories of misconceptions outlined above to ascertain that the answer is negative.

Hence, in regard to the “territorial sovereignty” of Formosa and the Pescadores, we are in a real quandary. Many people stress that the PRC does not own it, because there is no record of such a transfer. From the above analysis, it is clear that the

ROC does own it. Our conclusion must be that Taiwan is **not** part of the PRC, **not** part of the ROC, and **not** independent. This is rather puzzling. How can we determine the true facts of the matter?

To discuss this, we need to look at the international treaty law concept of “escheat,” which is defined as “reversion of property to the state in the absence of legal heirs or claimants.” How does this apply to occupied territory over which the sovereignty has been renounced in the peace treaty, without the specification of a receiving country? The answer is that the title to the territory is held by “the conquerer,” which in the post-Napoleonic period will be “the (principal) occupying power.” This is not ownership, but more of a “quasi-trusteeship.”

WWII History

During the WWII period, all military attacks against Japanese installations in Taiwan were conducted by United States military forces. The historical record shows that bombing raids against targets in Taiwan began in earnest on October 12, 1944. At no time did the military forces of the Republic of China participate in attacks against Taiwan.

After the dropping of two atomic bombs on Japan, the Japanese Emperor agreed to an unconditional surrender on August 15, 1945. On September 2, General Douglas MacArthur issued General Order No. 1, which described procedures for the surrender ceremonies and military occupation of over twenty areas. After a thorough reading of General Order No. 1, we need to answer an important question: "Who is the occupying power?"

The only possible answer is: "It is the United States." (This assertion is also fully confirmed by Article 23 of the post-war SFPT -- the United States is "the principal occupying power.") The Hague Conventions of 1907 state that "Territory is considered occupied when it is actually placed under the authority of the hostile army."

Taiwan's international status

Beginning from the 1898 Spanish American War period, the three fundamental criteria

for the recognition of a type of US insular area are -- conquest by US military forces, the US as "the (principal) occupying power," and territorial cession in the peace treaty. This is the categorization for the initial four insular areas of Philippines, Guam, Cuba, and Puerto Rico. Taiwan also fits these criteria exactly.

With a full clarification of Taiwan's international legal position, the Taiwanese people can demand that the United States government issue the order for the ROC to disband, because the ROC is blocking the Taiwanese people from enjoying fundamental rights under the US Constitution. With the ROC out of the way, Taiwan can enjoy name rectification, and make preparations to call a constitutional convention to draft a new constitution.

Approached in this way, a full implementation of the three goals mentioned above would not be a unilateral change in the status quo, but just a full clarification of the status quo. Could the US President object to such a procedure? If so, he could be impeached. For the benefit of Taiwan's future, the authors would suggest that pro-Taiwan advocacy groups in the USA consider promoting this rationale among members of the US Congress.

Escheat and Sovereignty

A more detailed treatment of escheat and related sovereignty issues is given below. In particular, a full explanation of where the sovereignty of Taiwan is at the present time, and the correct determination of the citizenship of the local Taiwanese populace is offered.

After studying a wide number of situations of military occupation in the post-Napoleonic era, and working through many scenarios for final disposition of the territory, it is the authors' conclusion that the general rule may be stated as follows: "The sovereignty of an area under military occupation is held in trust by the principal occupying power, and this is an interim status condition."

This rule may be easily derived by considering a few scenarios.

Let us base these scenarios on a slightly embellished version of the situation in Cuba after the Spanish – American War. According to the historical record, all military attacks against Spanish installations and fortifications in Cuba were conducted by United States military forces. The United States is the principal occupying power.

However, let us add the stipulation that the military occupation of the western third of the island has been delegated to Venezuelan military troops. Again, following the historical record, in the post war peace treaty, which came into effect on April 11, 1899, (Treaty of Paris, 30 Stat. 1754; TS 343), Spain renounced the sovereignty of Cuba, but no “receiving country” was specified for the cession.

Three Hypothetical Scenarios for the determination of Cuba’s Final Political Status

Scenario 1: Tribal Governments: Unfortunately, after the close of the Spanish American War, Cuba has descended into a rather chaotic situation, and different areas of the island are now effectively organized into loose forms of tribal governments, which have little or no contact between one another. There appears to be no “government of Cuba” which is coalescing.

Scenario 2: Dual Governments: Surprisingly, after the close of the Spanish American War, two different political groups have emerged and are now engaged in nation building, including the writing of a Constitution, the formation of a Congress, the recruiting of congress members, the designing of a flag, the choice of a President, etc.

Scenario 3: Subordinate Occupying Power Influence: The Venezuelan authorities have repeatedly stressed to the United States President that the situation in Cuba is unstable, and have urged that Venezuela be allowed to annex the island, in order to promote long-term peace throughout the Caribbean region.

Overview: Before entering the Spanish American War, the United States renounced any intention to annex the island.⁰¹ Considering any one of the above scenarios, who will decide the future “final status” of Cuba after the period of military occupation? The only possible answer is that the U.S. President, in consultation with his Cabinet members and other experts, will decide. This is because the U.S. President has plenary powers over foreign affairs. After the coming into effect of the peace treaty, and when Cuba is still in a “transitory period” (interim status) under military occupation, Cuba’s status is that of a sub-sovereign entity, and it is “foreign territory under the dominion of the United States.”⁰² Hence, the possible outcomes for the above three scenarios can be condensed as follows:

In Scenario 1, the U.S. President can choose for official U.S. policy to be to nurture one of the local groups to develop into the “government of Cuba” and then unfetter the sovereignty of the island to them. Or he can choose to look into one of the other two Scenarios.

In Scenario 2, the U.S. President can choose which of the local governments appears to be most friendly to the United States, and then unfetter the sovereignty of the island to them.

In Scenario 3, the U.S. President can, in conjunction with the Venezuelan President, issue a *Caracas Communique*, and specify that Venezuela is the lawful government of the area. (Due to the separation of powers doctrine, his actions in this regard are not subject to review by the U.S. Judiciary or the U.S. Congress.) He can wait for the Venezuelans and Cubans to determine how the annexation will proceed. When the Venezuelan civil government is set up in Cuba and ready to assume control, the U.S. President can then unfetter the sovereignty of the island to them.

Hence we may say that the territorial sovereignty of Cuba is being held in trust, in the form of a fiduciary obligation,⁰³ by the principal occupying power, and this is an interim status condition. This also corresponds to the analysis given above in regard to the disposition of “territorial title” of occupied territory over which the sovereignty has been renounced in the peace treaty, but without the specification of a receiving country. Clearly, the title to the territory escheats to “the conquerer,” which in the post-Napoleonic period is “the (principal) occupying power.” This is not ownership, but more of a “quasi-trusteeship.”

For the situation of Taiwan, the following facts provide a convenient summary.

Location of Sovereignty: Synopsis for Taiwan

(1) All attacks on Japanese fortifications and installations in Taiwan during WWII were carried out by U.S. military forces. According to the customary laws of warfare in the post Napoleonic period, the United States will be the principal occupying power.

(2) General MacArthur, head of the USMG, delegated matters regarding the Japanese surrender ceremonies and occupation of Taiwan to Chiang Kai-shek. For the USMG, this is simply a "principal" to "agent" relationship.^{04, 05, 06}

(3) In the post-war peace treaties, the sovereignty of Taiwan was not awarded to the ROC, hence Taiwan remains under the administrative authority of the USMG, and this is an interim status condition.⁰⁷ In the SFPT, Article 4b clearly states that the USMG has final disposition rights over "Formosa and the Pescadores." In addition, Article 23 reconfirms the United States as the principal occupying power.

The conclusion of this analysis is that the United States is holding the sovereignty of Taiwan "in trust," and in the Shanghai Communiqué⁰⁸ the U.S. President is making arrangements for the future handover of this sovereignty to the People's Republic of China, which is recognized as the sole legitimate government of China! However, at the present time, Taiwan is still under U.S. administrative authority, and its inhabitants should be enjoying "fundamental rights" under the U.S. Constitution, as do the inhabitants in all other U.S. overseas territories.⁰⁹

CUBA & TAIWAN

A closer examination of the situations of Cuba (according to the Treaty of Paris) and Taiwan (according to the San Francisco Peace Treaty) may be made as follows:

(Diagram 1)

Item	Treaty of Paris specifications for Cuba	SFPT specifications for Taiwan
United States is the (principal) occupying power	Article 1	Article 23
Original "owner" did indeed cede the territory	Article 1	Article 2(b)
No "receiving country" was specified (i.e. "limbo cession")	Article 1	Article 2(b)
USMG has disposition rights over the territory	Article 1	Article 4(b)
Military government is present, and military occupation is a reality	Article 1	Article 4(b) and the Hague Conventions (1907)

Citizenship of the Local Populace: Synopsis for Taiwan

Based on the decision in *Gonzales v. Williams*, 192 U.S. 1 (1904) and other relevant Insular Cases of the Supreme Court which deal with nationality matters, after the April 11, 1899, treaty cession when Puerto Rico was still under the administrative authority of the USMG, and before the promulgation of the Foraker Act, May 1, 1900, the local people were "island citizens of the Puerto Rico cession."

Hence, in Cuba, after the coming into effect of the treaty, when Cuba was under the administrative authority of the USMG (before independence on May 20, 1902) the local people were "island citizens of the Cuba cession."

In Taiwan, after the coming into effect of the SFPT, with Taiwan under the administrative authority of the USMG, the local people are "island citizens of the Taiwan cession."

Of course, the U.S. flag should be flying. Taiwan is foreign territory under the dominion of the United States, which is "unincorporated territory under USMG." Taiwan fully qualifies as a Type 1 Insular Area of the United States, or more colloquially it is a "quasi-trusteeship under the United States Military Government within the insular law framework."

The passport issued to Taiwanese citizens would be similar to a "trusteeship" one, and would fall under the category of "U.S. national, non-citizen." This is a *jus soli* nationality based on the U.S. Supreme Court's Insular Cases, and not based on the 14th Amendment to the U.S. Constitution.

Taiwanese persons currently carry a Republic of China passport, which is the passport of a non-sovereign nation. Clearly, they have the right to a passport issued under United States' administrative authority, since this is part of the "liberty" guaranteed them by the Fifth Amendment to the U.S. Constitution, and such liberty is considered a "fundamental right."¹⁰

Footnotes:

01. In April 1898, Senator Henry M. Teller (1830 – 1914) of Colorado proposed an amendment to the draft of a US declaration of war against Spain which proclaimed

that the United States would not establish permanent control over Cuba. It specified that the United States "hereby disclaims any disposition of intention to exercise sovereignty, jurisdiction, or control over said island except for pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." The amendment passed the Senate on April 19, and Congress declared war against Spain on April 22. In compliance to the spirit of the Teller Amendment, after Spanish troops left the island in 1898, Cuba was ceded in the peace treaty of April 11, 1899, and the United States occupied Cuba until May 20, 1902.

02. In *DeLima v. Bidwell*, 182 U.S. 1 (1901), the US Supreme Court stated: "Cuba is under the dominion of the United States."

03. Generally speaking, a fiduciary obligation (also called "fiduciary relationship") arises where one person or agency, as the result of the transfer of certain authority by others, possess unilateral power or discretion on a matter affecting a third person or group of people. The first party (the trustee) is obligated to exercise the power or discretion with loyalty and care, and solely for the benefit of the third party (the beneficiary). In the situation of Taiwan, a fiduciary relationship arises under the "law of occupation," with the United States Military Government as trustee, the Taiwanese people as beneficiaries, and the property of Japan (i.e. Formosa and the Pescadores) held by the USMG as the trust corpus.

04. In a "principal" – "agent" relationship, one person (or group) has legal authority to act for another. Such relationships arise from explicit appointment, written or oral, or by implication. Such a relationship is based on the Latin maxim "Qui facit per alium, facit per se," which means "he who acts through another is deemed in law to do it himself." Hugo Grotius spoke of agency in his treatise On the Law of War and Peace (1625). Under the law of war, an agency relationship between the military troops of one country and another country is common and accepted international practice.

05. In *Ex Parte Milligan*, 71 U.S. 2 (1866), speaking of the different types of military jurisdiction under the US Constitution, the US Supreme Court held that military government is "to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents." (Belligerents are the "parties" to the hostilities of war.)

06. As quoted in the US Supreme Court case of *Madsen v. Kinsella*, 343 U.S. 341 (1952):

In speaking of the nature of military government, Colonel William Winthrop, in his authoritative work on Military Law and Precedents (second edition, 1920 reprint), says on page 800: "Military government . . . is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of administration. Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist. . . . The local laws and ordinances may be left in force, and in general should be, subject however to their being in whole or in part suspended and others substituted in their stead -- in the discretion of the governing authority."

07. In the Small Wars Manual of the United States Marine Corps (1940), published by the United States Government Printing Office, Chapter XIII, "Military Government," on pages 2 to 3, the following description is notable: "[M]ilitary government founded on actual occupation is an exercise of sovereignty, and as such dominates the country which is its theatre in all branches of administration whether administered by officers of the occupying forces or by civilians left in office. It is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except insofar as the same may be permitted to exist. Civil functionaries who are retained will be protected in the performance of their duties. The local laws and ordinances may be left in force, and in general should be subject, however, to their being in whole or in part suspended and others substituted in their stead, in the discretion of the governing authority."

internet: <<http://www.au.af.mil/au/awc/awcgate/swm/ch13.pdf>>

08. In the Shanghai Communique, (First Joint Communique of the United States of America and the People's Republic of China), February 28, 1972, the following three paragraphs are particularly important.

(1) There are essential differences between China and the United States in their social systems and foreign policies. However, the two sides agreed that countries, regardless of their social systems, should conduct their relations on the principles of respect for the sovereignty and territorial integrity of all states, non-aggression against other states, non-interference in the internal affairs of

other states, equality and mutual benefit, and peaceful coexistence. International disputes should be settled on this basis, without resorting to the use or threat of force. The United States and the People's Republic of China are prepared to apply these principles to their mutual relations.

(2) The Chinese side reaffirmed its position: the Taiwan question is the crucial question obstructing the normalization of relations between China and the United States; the Government of the People's Republic of China is the sole legal government of China.

(3) The United States 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.

09. As a general rule, fundamental rights, applicable to all individual subject to the sovereignty of the United States, are "inherent, although unexpressed principles which are the basis of all free government." See relevant analysis in the US Supreme Court cases of *Downes v. Bidwell*, 183 U.S. 244 (1901) and *Dorr v. United States*, 195 U.S. 138 (1904). The concept that fundamental rights apply to all US territories is discussed in detail in the November 1997 Report: US Insular Areas -- Application of the US Constitution, edited and compiled by the United States General Accounting Office, as a Report to the Chairman, Committee on Resources, House of Representatives.

internet: <<http://www.gao.gov/archive/1998/og98005.pdf>>

10. See *Kent v. Dulles*, US Supreme Court, 357 U.S. 116 (1958). The right to travel was emerging at least as early as the Magna Carta (June 15, 1215). Three Human Rights in the Constitution of 1787 included (1) Freedom of Debate, (2) Freedom of Movement, (3) Prohibition of Bills of Attainder, and show how deeply engrained in American history this freedom of movement is.

The present Constitution of the United States came into force on March 4, 1789.