



3-31-2019

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Recommended Citation

Saito, Hiroshi (2019) "A Concise Consideration on the Legal Status of Taiwan for Japan from the perspective of the Customary International Law of Recognition," *Japanese Society and Culture*: Vol. 1 , Article 4.

Available at: <https://gensoken.toyo.ac.jp/japanese-society-and-culture/vol1/iss1/4>

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[Received 30 August 2018 / Revised 6 December 2018 / Accepted 10 December 2108]

A Concise Consideration on the Legal Status of Taiwan for Japan from the perspective of the Customary International Law of Recognition*

Hiroshi Saito***

Abstract

Taiwan is one of the most important entities for Japan in the international relations and history. Beijing government has emphasized “One-China Policy” and doesn’t recognize Taiwan as a sovereign state until the present. The issue, whether Taiwan is a *de jure* state, is a legal issue for only Japan based on the international legal systems of recognition and treaty.

In those systems, it is evident for Japan that two peace treaties exist until the present with the Republic of China and the People’s Republic of China. The existence of two treaties means that two sovereign states who did battle against Japan in World War II exist.

Consequently, based on the legal system of recognition of government, Japan did not recognize “the change of recognition of government” in the Republic of China, but gave recognition of state to the People’s Republic of China. As a result, the People’s Republic of China became independent from the Republic of China who succeeded the Qing Dynasty, therefore Taiwan is a sovereign state from standpoint of Japan according to the study of international law.

Key words: Taiwan, China, Japan, Recognition of Government, Khoka-Ryo

1. Introduction

The Japanese Supreme Court made a judgment for the Khoka-Ryo case on 27th March 2007 after its first judgment by Kyoto District Court in 1977¹. The issue was regarding ownership of Khoka-Ryo (a dormitory for Chinese students). Republic of China built Khoka-Ryo before World War II. People’s Republic of China was established after the war when the Beijing government proclaimed the One China policy, which denied the existence of Taiwan as an independent state apart from China. The Khoka-Ryo case fundamentally made the important legal point of whether

* This is a translated version of the existing article “Khoka-Ryo Jiken ni kansuru Ichi-Kousatsu: Taiwan no Houteki-Chii wo Chushin ni” written by the same author, in *Toyo Hogaku*, Vo. 50, No.1 and 2 in merger issue, Toyo University, 2007, pp.180-202. In this version, especially, academic truism and common understanding are abbreviated.

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¹ Case Number (o) No.685(1987), *Saikou Saibansho Minji Hanreishu*, Vo.61, No.2, p.711. Judgment (1977), Kyoto District Court, *Hanrei Jiho*, No.890. Judgment (1982), Osaka High Court, *Hanrei Jiho*, No.1053, *Hanrei Taimuzu*, No.481. Judgment (1986), Kyoto District Court after remanding the case, *Hanrei Jiho*, No.1199, *Hanrei Taimuzu*, No.580. Judgment (1987), Osaka High Court after remanding the case, *Hanrei Jiho*, No.1232, *Hanrei Taimuzu*, No.637.

Taiwan retained ownership of Khoka-Ryo if it was a sovereign state for Japan. Since the Supreme Court judgment had not referred to this issue, we could not understand whether Taiwan was a sovereign state for Japan based on international law².

Taiwan is one of the most important entities for Japan because about 70% of imports for Japan pass through the Taiwan Strait. Therefore, if Taiwan is a part of the People's Republic of China and the Beijing government decides to blockade imports through the strait, people in East Asia including Japan and South and North Korea will be under the control of the Beijing government's policy³. However, the judgment of the Khoka-Ryo case did not suggest a resolution of the legal issue.

We should consider the legal status of Taiwan for Japan from the perspective of the customary international law, especially the traditional system of recognition, because we believe that the answer will be found in a combination of that system and facts even though the Japanese government emphasizes the change of recognition of governments in the international political relationship with the Beijing government⁴.

2. General Facts in History between Japan and China

First, we must understand the facts between Japan and China for considering the international legal system of recognition. The following facts are chosen from some text books for Japanese pupils, as its contents were given official approval including the comments from Beijing government. We believe that they constitute evidentiary facts between the two parties.

In 1895 (Meiji 28), the Shimonoseki Convention between Japan and the Qing Dynasty authorized the transfer of Taiwan Island to Japan.

In 1912, revolutionaries established the Republic of China in Nanjing, and Sun Yat-sen became temporary president. However, Yuan Shikai agreed with the revolutionary army and abdicated Emperor Puyi (extinction of the Qing Dynasty). Yuan Shikai became temporary president of the Republic of China (later renaming the country from "Qing" to the "Republic of China").

In 1915, the Twenty-One Demands was signed between the Government of Japan and the political power of Yuan Shikai. The Pacific War (Anti-Battle against Japan) followed.

In 1945, the war ended, and in 1946 a political consultation meeting with the Kuomintang of China (KMT), the Communist Party and others was held, but their relationship worsened and the civil war in China continued between the KMT and the Chinese Communist Party.

In 1949, the Chinese Communist Party controlled all the Chinese continental territory and the Kuomintang fled to Taiwan.

In 1951, the San Francisco Peace Treaty was concluded, and Japan renounced the territories including Taiwan.

In 1952, Japan concluded the peace treaty with the Republic of China (Taiwan).

² See, Yoshio Hirose, "Khoka-Ryo Soshou to Kokusai Hou," *Hougaku Kenkyu*, No. 46, the Society of Law in Meiji Gakuin University, 1990, pp.1-138. we had to leave other literatures out for want of space.

³ See, Takashi Inoguchi, "Ajia Tairiku Juushi no Gaikou wo," Kazuhisa Nishi, ed., *Weekly Economist*, No. 27th January 2004, Mainichi Shinbunsha, 2004, p.55.

⁴ See, Shigeru Oda (ex-Judge of ICJ), "Khoka-Ryo Soshou Tenmatuki," Kokusaihou Gakkai, *Kokusaihou Gaikou Zasshi*, Vol.107, No.3, 2008, pp.67-97.

In 1972, the Japanese government revoked the peace treaty with the Republic of China and concluded the Japan-China Joint Statement (Japan and the People's Republic of China).

In 1978, The Japan-China Treaty of Peace and Friendship was concluded (Japan and the People's Republic of China).

Second, we must interpret these facts based on the international legal theories of recognition and treaty. In this attempt, we should initially understand two important conditions regarding the legal system of recognition in the customary international law, that is, the recognition is conducted between a *de jure* state (the approved) and a *de facto* state (the recognized), and it is a one-sided process from the approved to the recognized. Therefore, the legal status of Taiwan is not the general issue in the world, but an issue limited between Japan and Taiwan, in other words, the legal status of Taiwan is not a pressing global issue.

In this interpretation, the first premise is the existence of a sovereign state, and if this is denied, the subsequent logical development becomes impossible. The fact that the Qing Dynasty was recognized as a sovereign state is evident from the conclusion of numerous treaties with Western countries. Therefore, following on from this, the point is the recognition of government in China.

The Shimonoseki Convention of 1895 resulted in Taiwan becoming a territory of the Empire of Japan. In 1912, a revolutionary group established the Republic of China in Nanjing, but this was simply the group's name in the Qing Dynasty and the sovereign state of the Republic of China was not formally established. Sun Yat-sen was named the temporary president of the rebellious group at this point. There was conflict between the central government of Qing (Emperor Puyi) and the rebellious group (the "Republic of China"), resulting in an incident under the domestic law of the Qing. Hence, an army was dispatched from the central government (Emperor Puyi) under commander Yuan Shikai to crush the rebellious group.

However, Yuan Shikai agreed to support the revolution and opposed the central government, resulting in the revolution's success. It was widely understood that the revolution could destroy the Qing Dynasty, and this occurred, resulting in the collapse of the central government in a sovereign state, which continued under the control of the revolutionary government. From the perspective of the international law, the government was changed by revolution, and the sovereign state had not collapsed. Therefore, the point at issue is recognition of government.

Japan claimed the Twenty-One Demands to the revolutionary government of Yuan Shikai in 1915, and it was concluded as a formal international agreement between two parties. Although the contents of the Demands were discriminatory and unfair, knowing that the Demands were concluded as an international agreement meant that Japan recognized the revolutionary government as a just one of the Qing Dynasty. At that time, the government of Yuan Shikai became the authorized government for Japan, and formally changed its name from the Qing Dynasty to the Republic of China.

In 1945, the war between Japan and China ended, but a civil war between the central government (KMT) and a rebellious or opposing group (at that time, the Chinese Communist Party) continued under the domestic law. We could not confirm whether recognition of belligerency was given to the rebellious group concerned during the civil war.

In 1949, the Chinese Communist Party won and controlled all the continental territory of the

Republic of China, and KMT escaped to the island of Taiwan. It is described in text books that the People's Republic of China as a sovereign state was just established. However, the Republic of China as a sovereign state was retained, and the Chinese Communist Party as the revolutionary administration could govern the greater part of the state, instead of the central government which only had authority to govern the island of Taiwan from a legal standpoint. In this condition, it was possible for Japan to recognize the Chinese Communist Party as a new central government in the Republic of China, but this was not the case.

In 1951, Japan concluded the San Francisco Peace Treaty and renounced the island of Taiwan, and the island reverted to the Republic of China as successor of the Qing Dynasty with whom the Shimonoseki Treaty concluded. This interpretation was justified by articles 3 and 10 of the peace treaty between Japan and the Republic of China in 1952.

Japan concluded the peace treaty with the above-mentioned Republic of China, because of a request by United States according to its foreign policy to communist states. At that time, the Chinese Communist Party was an illegal group in the Republic of China even though it governed almost all the territory from the Japanese government's standpoint.

In 1972, Japan concluded the Joint Communique of the governments of Japan and the People's Republic of China and announced (without agreement from Taiwan) through the Japanese Foreign Ministerial Statement the lapse of the peace treaty with the Taipei government representative of the Republic of China, in accordance with the Fukko Three Principles (Three Principles of Reconstruction with the People's Republic of China). However, the peace treaty with the Republic of China was unlike a legislative treaty, a contract treaty to close the state of war. Once a contract treaty was concluded, its legal effect was fixed and it was impossible to change it without the consent of the parties concerned. Therefore, since the announcement of the lapse of the peace treaty was sent only from one side to another concerned party concerned, its legal effect became be invalid.

In 1978, Japan concluded the Treaty of Peace and Friendship between Japan and the People's Republic of China. This treaty was considered to nullify the peace treaty with the Taipei government and establish a new treaty between the Beijing government and Japan. Nevertheless, this is incompatible with international legal theories of recognition and treaty. The opinion admitting the lapse of the peace treaty with the Taipei government assumes that the lapse meant the exchange of the government of the Republic of China on condition that there is only one sovereign state calling itself the "Republic of China." If this idea is valid, the identity of the sovereign state would be retained and the legal effect of the peace treaty would also be retained. Therefore, as a result, it was not necessary to re-conclude the new peace treaty because a treaty is an agreement among states, and even if a government was changed, the agreement remains effective between the concerned parties. The peace treaty between Japan and the Republic of China was a contract treaty and an agreement between two sovereign states, therefore the Taipei government and Beijing government must exist in the same sovereign state. Japan did not have to conclude the peace treaty again with the same state.

However, the fact that Japan re-concluded the new peace treaty with the Beijing government meant the existence of two separate sovereign states that fought against Japan in the World War II, and therefore, Japan should have concluded the two peace treaties with the two sovereign states. We believe that one was the Republic of China as a sovereign state and another was the People's

Republic of China as a *de facto* state constituted during the war. The conclusion of the Peace and Friendship Treaty with the Beijing government indicates a recognition of government that separated and became independent from the Republic of China and governs all the territory except the island of Taiwan which is still under the central government of the Republic of China. Japan recognized the Beijing government as an authorized government in the People's Republic of China based on necessary recognition conditions according to the customary international law. As a result, Japan admitted two sovereign states by the conclusion of two peace treaties, but the conclusion of the Peace and Friendship Treaty with the Beijing government meant only a recognition of state, and not government for Japan from the perspective of legal theory.

3. Interpretation of the Joint Communiqué

There is an opposing argument to the above-mentioned consideration. The important point is the content of the Joint Communiqué, especially in the second and third paragraphs. The second paragraph states "The Government of Japan recognizes that Government of the People's Republic of China as the sole legal Government of China." The third paragraph states "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."⁵

The issues are the meaning of "China" in the second paragraph and "understands and respects" in the third paragraph.

(1) The meaning of "China"

It is generally reasoned to exchange recognition of government in accordance with the second paragraph. The opinion that admits "change of a legitimate government" emphasizes that the term "China" means "a State." This "State" implies that the State has historical identity and continuity even though there were some, such as the Qing Dynasty, the Republic of China or the People's Republic of China in the history of that geographical area. Hence, the second paragraph refers to "China" as the sovereign state represented by the People's Republic of China⁶.

It was the context of this interpretation of the phrase that Japan renounced the status of Taiwan as "China" after the end of the war. We postulate that the meaning of "China" in this phrase might be the one state that has historical identity and continuity grounded as expressed in the second paragraph. However, it is evident that the most important issue is the expression of "China." In other words, the Joint Communiqué indicates "the sole legal Government of China," a State or geographical area defined as "China," is a vague basis for strict legal interpretation⁷.

Although we could find two phrases in which "China" was expressed in the Joint Communiqué.

⁵ *Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, September 29, 1972* < <https://www.mofa.go.jp/region/asia-paci/china/joint72.html> >, See, Nisuke Ando, "Khoka-Ryou Jiken wo meguru Kokusaihou jou no Sho Mondai," Hayashi, Yamate, Kouzai, eds., *Kokusaihou no Shin Tennkai*, Toshin Do, 1989, pp.226-227.

⁶ *Supra*, note (6), pp.92-93.

⁷ *Supra*, note (4), p.58.

First, we could not clearly comprehend the meaning of “China” because Japan had not recognized the People’s Republic of China during World War II, and second, there was the expression of “both governments,” we must ascertain the “China” to be the Republic of China.

Considering the international and political situation in which the Joint Communiqué was prepared and applied in the peace treaty with the Taipei government, there was no clear understanding of “China,” and hence the expression of “China” was deliberately obscured.

(2) The meaning of “understands and respects”

The third phrase indicates “The Government of Japan fully understands and respects this stand of the Government of the People’s Republic of China.” This expression creates a misunderstanding, that is, the Government of Japan complied with or agreed on the assertion of the Beijing government.

The Beijing government alone asserts that Taiwan is a part of the territory of the People’s Republic of China in the phrase. But the Government of Japan did not clearly express its consent despite writing “understands and respects.” Other states, for example, the Netherlands, the U.S.A., United Kingdom, Australia, or Brazil, avoided the words “agree” or “recognize,” but adopted the expression of “respect” or “take note,” and therefore, there was nothing unique in this manner of diplomatic negotiation in fact, it was universal⁸.

The eighth paragraph of the Potsdam Proclamation, theory is a provision for restoration of the island of Taiwan to the Republic of China, which had been completed by that time. As a result, the Government of Japan had not recognized Taiwan as a part of territory of the People’s Republic of China until the present.

4. A *Fait Accompli* and *Khoka-Ryo* Case

As mentioned above, it is a rational and legal understanding for Japan that the Republic of China including its government is a successor of the Qing Dynasty from which the People’s Republic of China separated and became independent in accordance with the interpretation of history and the system of customary international law for recognition. In other words, there are two sovereign states for Japan, and therefore no vague state called only “China.”

Furthermore, about 50 years have passed after the conclusion of the peace treaty with the Taipei government and about 30 years have passed after the Joint Communiqué with the Beijing government; those two states have continued to exist independently in an international society and they have different legal, political and economic systems. Their sphere of influence or territory has been clearly divided and it appears that they have the will, the ability, and competence to keep the relationship in good faith with other states after World War II, which established the idea for illegality of war or armed conflicts in the international society.

Considering the above-mentioned facts, we must doubt the legal consideration in which the *Khoka-Ryo* case is examined based on the opinion that the change of recognition of government involves only one state. We must begin to consider that the *Khoka-Ryo* case is the legal issue, meaning that the People’s Republic of China became independent, as a new sovereign state, from

⁸ Lin Jin-Jing, *Sengo no Nikka-Kankei to Kokusai Hou*, Yuhikaku, 1987, pp.106-110.

the Republic of China. Therefore, the argument⁹ over the complete succession or incomplete succession of government would be void, and become a problem of whether the real right of Khokar-Ryo must belong to the Republic of China (Taiwan). Traditional ways of thinking have greatly been influenced by the international political power of the Beijing government, and have always slighted the legal nature on the recognitions of state and government that are the decidedly one-sided between the two parties concerned.

5. Two Issues under Consideration

We must consider two issues, namely the issues of China's representation in the U.N. and the doctrines on the peace treaty with the Taipei government.

(1) The Issue of China's Representation

This concerns which government of state represents "China" as a member of the Security Council in the U.N. It has been disputed for about 20 years of international tactics. As a result, the Beijing government took the position.

At first, "China" had to mean the Republic of China, and therefore this was an issue of a choice of governments that could represent the Republic of China. Subsequently, it was necessary to decide an issue of collective recognition based on the opinion that there were two sovereign states¹⁰.

At any rate, there are some people who believe that the legitimate government of "China" is not the Taipei government but the Beijing government. Legal positions of those two governments, however, are individual issues for Japan, and therefore the issue of representation in the Security Council is only a legal subject in the U.N., as both issues are in different legal dimensions to each other.

(2) Doctrines on the peace treaty with Taipei government

In the Peace Conference to end World War II, since the U.S.A was opposed to United Kingdom with regards to the issue on representation of "China," both the Taipei and Beijing governments were not invited. The Government of Japan concluded the peace treaty with the Taipei government through a special request by the U.S. government, and therefore the condition of war with "China" came entirely to an end for Japan. In contrast, however, there is an opinion that the Taipei government is considered as an administration that remains active, which infers whether it is possible for the Government of Japan to settle with the remaining administration, and since an applicable sphere of that treaty is "all of sphere at present or in the future governed by Taipei Government" (in Exchange of Notes), one must ask whether the peace treaty applies to the sphere of continental territory where Taipei government does not govern.

Presently, there is no convincing idea or opinion. In the case that the peace treaty is not applied to the sphere of continental territory, the People's Republic of China had to be established as a *de*

⁹ See, *supra*, note (7), we had to leave other literatures out for want of space.

¹⁰ This idea is following. First, the international society recognizes the independent of the People's Republic of China from the Republic of China, after that, U.N. decides which has the position of permanent member of the Security Council. This method was adopted in case the Soviet Union collapsed and which independent state was become a successor.

facto state during World War II or before the peace treaty with the Taipei government. Therefore, the Joint Communiqué and the Peace and Friendship Treaty with the Beijing government translated to a procedure of recognition of state as an implied recognition. The Declarative Theory justifies it. In contrast, in the case that the Beijing government is considered as a rebellious group that is against the domestic law in the Republic of China as one state, accordingly this rebellious group governs a sphere of continental territory of the Republic of China. The Joint Communiqué and the Peace and Friendship Treaty with the Beijing government (rebel group) meant an approval of its independence from the republic of China and a procedure of recognition of state as an implied recognition. The Constitutive Theory justifies it.

There are possibly two disparate theories on recognition in accordance with the interpretation of the facts of those issues.

6. Tentative Conclusion

It is evident that the Republic of China and the People's Republic of China as *de jure* states exist for Japan from a perspective of the customary international law in the systems of recognition and treaty even though there was some diplomatic tact, and consequently we understand that the terms of "one China" or "two Chinas" are unclear and non-legal expressions. No "China" that has the official name of a sovereign state or *de jure* state in the international legal theory has existed until the present, and it is required for distinguishing between an expression of everyday experience and one of legal terminology. As a result, it is the legal conclusion that Taiwan is a sovereign state or *de jure* state for Japan.

However, there are some legal issues, for example, whether the recognition of the Yuan Shikai administration or government would be a *de facto* or tentative recognition in consideration of confusing situations at that time, and whether this *de facto* recognition would be applied to the Taipei government. In this case, we must consider whether Japan could conclude the peace treaty which was very important for the parties concerned, or whether the conclusion of its peace treaty could mean recognition of government.

An opinion based on "change of recognition of government" emphasizes that the Taipei government could not have a legal title or be in a legal position to conclude an important treaty such as a peace treaty in its situation where it governs only one island of the Republic of China. In the ensuing case, that is, of the Taipei government as a legitimate government of the Republic of China that confines itself to the island of Taiwan, has been resisting the Beijing government as a rebellious group in the sphere of territory regarded as the Republic of China. It is possible to interpret that the peace treaty between Japan and the Republic of China was effective, and the change of recognition of government occurred in the same state, and a new legitimate government re-concluded the peace treaty with Japan. In this case, the new legitimate government is the government of the Republic of China from the perspective of the continuous identity of a state. This interpretation indicates that Japan gave recognition of government to the Beijing administration in one state by re-conclusion of the peace treaty in the implied approval.

The interpretation might be valid if the Taipei government lost the controlling power of the island of Taiwan and collapsed. However, in fact, this situation has not occurred up to the present, and a part of continental territory and the island have both constituted different political, economic,

and social systems independently. Furthermore, the fact that about eighteen states have recognized the Taipei government as a legitimate government of the Republic of China as a sovereign state¹¹ suggests that the Republic of China as a successor of the Qing Dynasty maintains an international legal position as a sovereign state and hence the validity of the peace treaty with Japan. We must study this issue in more detail, especially from the perspective of international legal theories of recognition and treaty.

Lastly, if Taiwan is a sovereign state, this is a crucial problem for Japan, because much of the import trade for Japan utilizes the Taiwan Strait. Therefore, this issue poses a national security and life-line challenge in the future for the Japanese. Here we can realize the inherent nature of the system of recognition in the customary international law, that is, its influence through diplomatic policy.

¹¹ There are seventeen countries opening diplomatic relations with Taiwan in August 2018.
< <https://www.mofa.go.jp/mofaj/area/taiwan/data.html> >

