

Translations

Current Special Laws in Taiwan as an Impediment to the Development of Relations with the People's Republic of China

BY ZENG XIANYI*
AND ZHENG DING**

Those in the international community who are interested in China realize that the issue of Taiwan is a very important and extremely sensitive part of China's affairs. In 1949, the Guomindang (KMT) retreated to Taiwan, and the People's Republic was established under the leadership of the Communist Party of China. In the four decades since then, the nation has been divided for political reasons.

During the last forty years, the KMT and the Communist Party have each overcome difficulties and setbacks and have realized great achievements. Recently, following the trend toward relaxation of international tensions, both sides have taken steps to mitigate hostility and to improve relations. However, sixty years of conflict stand between the KMT and the Communist Party, exposing a confrontation of ideology and different political and legal systems, economic structures, and life styles. There is still a long way to go to further improve relations and eventually to unify the nation.

* Zeng Xianyi is a professor at the People's University of China where he is Director of the Law Department. He is also the Chief Director of the Institute on Taiwan Legal Issues, Director of the Teaching and Research Office of Chinese Legal History, Vice President of the Legal Research Association of China, and an attorney at the Tenth Law Firm of Beijing.

** Zheng Ding received his LL.M. from the Graduate School of the Chinese University of Politics and Law in Beijing. He is a Lecturer in Law at the People's University of China, and is Editor of *Falu Xuexi yu Yanjiu*.

For four decades, the KMT in Taiwan has implemented and expanded a set of special laws and regulations in order to safeguard the authority of the Republic, maintain its single party dictatorship, resist political influence from the Mainland, and confront the Taiwan independence movement and other political opposition forces. These special laws, which violate the principles of the Republic's own constitution, have been the main tools used by the Taiwan government to deprive political opponents of their democratic rights. Even more important, the laws and regulations create an obstacle to the further improvement of relations across the Taiwan Strait.

I. ETHICS, ORTHODOXY AND AUTHORITY: THE THEORETICAL AND IDEOLOGICAL BASIS OF THE CURRENT SPECIAL LAWS IN TAIWAN

China is a nation which is acutely sensitive toward and appreciative of its history. Over several thousand years of history, a system of civilization was created called the "traditional culture." Influenced by this traditional culture, the people learned lessons from the cycles of order and disorder and the ups and downs of history, eventually realizing an elaborate set of criteria to guide their judgment. These criteria were based on pursuit of the ideals of "ethics in culture"¹ and "orthodoxy in politics."² It is these concepts of cultural ethics and political orthodoxy which the KMT avails itself of in order to justify and uphold its legal authority. The theoretical and ideological basis of the current legal system in Taiwan is that the KMT legal authority is supported by ethics and orthodoxy.

A. *Traditional Moral Concepts in Chinese Culture*

In the past, Confucian philosophy played a dominant role in every aspect of Chinese life. With respect to the criteria for judging individual behavior, Confucianists advocated the idea that every individual had to scrupulously abide by the ethical code required of his or her status—that is, a father should be kindhearted while a son filial; an elder brother should be caring while a younger brother respectful; a husband should be righteous while a wife attentive; elders should be benevolent while the younger obedient. Moreover, everyone was required to set an example of *zhong* (loyalty), *xiao* (piety), and *jieyi* (moral integrity) for others.³ In the area of politics, Confucianists

1. See *infra* text at sec. I(A).

2. See *infra* text at sec. I(B).

3. See XU TONGZU, *ZHONGGUO FALU YU ZHONGGUO SHEHUI* (Chinese Law and Chinese Society) 278-79 (1981).

advocated the concept of *neixian waiwang* (be a saint first and then a monarch) which called for a ruler to be first and foremost an incarnation of ethics, a sage, and a man of virtue who was benevolent and forbearing.⁴

After Confucius' death, and especially after Dong Zhongshu of the West Han Dynasty called for veneration of the Confucian philosophy and abrogation of all other schools of thought, the Confucian philosophy became the basic criteria for judging people and formed the rules of individual behavior for many generations.⁵ Ordinary people piously complied with these criteria and rules. In traditional society, these criteria and rules could not be doubted or violated. Violators of the standards were considered to be rebels opposed to their superiors. Neither society nor their families would accept them. However, this highly structured system of cultural ethics favored mainly the rulers, as it did not allow any change of the existing authorities or social order. The structure also forced people to obey authority and to act in compliance with the expectations of their status.

The KMT has consistently preached these traditional ideas of ethics. Jiang Jieshi (Chiang Kai-shek), the iron-handed politician of the early 20th Century in China, wrote in *The Fate of China* :

To teach the people with ethics how to save the country. . . is to reinstate and develop the long-standing ethics in China. More important, we must carry forward ethical standards that emphasize etiquette and justice and a sense of honor. This system of ethics is the *siwei bade* (four relations, eight virtues) which is based on loyalty and piety.⁶

Jiang Jingguo, the second president of the Republic from the Jiang family, was also well-known for his loyalty and piety.⁷

Chinese society in the early 20th century and the current society in Taiwan have been deeply influenced by these traditional ideas. Based upon this cultural foundation, and considering itself to be the

4. J. FAIRBANK, *THE UNITED STATES AND CHINA* 53-55 (1971).

5. *ZHONGGUO FALU SIXIANG SHI* (History of Chinese Legal Thought) 167 (China Legal Publishing House ed. 1982) [hereinafter *CHINESE LEGAL THOUGHT*].

6. JIANG JIESHI, *ZHONGGUO ZHI MINGYUN* (The Fate of China) 141 (1946). *Siwei bade* is akin to the discussion accompanying *supra* note 3. *Siwei*, the four relations, refers to *li* (right), *yi* (justice), *lian* (honesty), and *chi* (humiliation). *Bade*, the eight virtues, includes *zhong* (loyalty), *xiao* (filial piety), *ren* (benevolence), *ai* (love), *xin* (trust), *yi* (righteousness), *he* (peace), and *ping* (fairness). MAO JIAQI, *TAIWAN: SANSHI NIAN* (1949-1979) (Taiwan: Thirty Years 1949-1979) 10 (1988).

7. Yan Xinheng, *Jianggu Zongtong Jingguo Xiansheng de Dianfan yu Zhihui*, 69 *JINDAI ZHONGGUO* 108, 112 (1989).

incarnation of traditional ethics, the KMT classifies the Communist Party as the proponent of "heretical beliefs," made up of rebels of Chinese social tradition. This classification justifies the legislation of the special laws and regulations aimed at suppressing and punishing those rebels.

B. Political Orthodoxy in China

In China, cultural ethics were always associated with notions of political orthodoxy. Beginning with the Tangwu Revolution in ancient times, there were conflicts between orthodox and unorthodox dynasties in China.⁸ In his *Spring and Autumn Annals*, Confucius found deep meaning in historical events and advocated the orthodoxy of the Zhou Dynasty, criticizing government officials and foreigners as unorthodox.⁹

Being considered orthodox in this way eventually took on great importance. Leaders who were able to prove their orthodoxy could both justify their own authority to govern and also discredit those opposed to their rule by labeling them unorthodox. This notion was embodied in the term *hanzei bu lianli* (all those who are not orthodox are incompatible).¹⁰ It can also be seen in frequent use of the word *wei* (false or puppet) in all official historical records from feudal times.

In a similar way, the KMT has considered itself the only orthodox school of thought in China while condemning the Communist Party as puppets and bandits who violate traditional moral concepts and political orthodoxy. The KMT has subsequently based many provisions of the special laws and regulations to suppress and exclude the Communists upon this philosophy.

*C. The Ideal of "A Great Unified Dominion"*¹¹

Attempting to persuade the Han emperor Han Wendi (141-87 A.D.) to control people's thought and punish those who attempted to

8. Tang was the leader of a tribe living on the lower reaches of the Yellow River. He founded the Shang Dynasty, which was the first Chinese dynasty. See YOU SHAOYI & WU CHUANTAI, *ZHONGGUO ZHENGZHI FALU ZHIDU JIANSHI* (A Brief History of China's Political and Legal Systems) 134 (1982).

9. *Id.*

10. See Chen Jianwu & Wu Muchun, *Shinian Lai Liang'an Guanxi Fazhan zhi Fenxi*, 1 *TAIWAN YANJIU* 17, 18 (1989).

11. The Qin Dynasty, 221-207 B.C., which gave China its name in Western languages, unified the country and established the traditional imperial system. All this was the work of the first emperor, Qin Shihuang, a strong ruler who vigorously consolidated his power. The ideal of a "great unified dominion and uniformity" arose at that historical moment, requiring unified territories, a unified legal system, and unity in the thought of the people. *CHINESE LEGAL THOUGHT*, *supra* note 5, at 137.

rebel against the government, the Confucianist Dong Zhongshu said: "A great unified dominion is the natural rule in the world and the only way that history has progressed from ancient times to today."¹² The ideal of a unified dominion required unification both of politics and territory, and of people's thought. This, in turn, related back to the notion of political orthodoxy. Any orthodox ruler who believed *shou ming yu tian* (that he received instructions directly from Heaven)¹³ had to make every effort to unify territory and the government. Otherwise, the orthodoxy and legitimacy of his power would be doubted. Following the ancient Chinese saying, "what is divided must eventually be reunited,"¹⁴ territorial and political unification became an important guiding principle in Chinese history.

This traditional idea of unification remains a heavy political burden on the Taiwan government, which insists that it embodies orthodox Chinese philosophy. To justify its orthodoxy, the KMT in Taiwan has advocated fighting the Communists and reviving the Republic, calling the island of Taiwan a "rejuvenation base."¹⁵ As part of this effort, the KMT has also promulgated special laws and regulations to help resist the Communists.

D. Legal Authority and the Special Laws of the Republic of China

Governments seek to legitimize their power by claiming they are founded upon legal authority. Such authority becomes the foundation of their administrative and political systems. In China, a government's legitimacy also depends on the historical and cultural notion of political orthodoxy. As a result, the KMT attempted to establish its legitimacy both by relying on the legal authority of the Constitution of the Republic of China adopted in 1946 as well as by taking over the name "Republic of China" and deeming the Republic to be orthodox.

One must view the KMT claims of legitimacy within the context of historical events. In 1911, under the leadership of Dr. Sun Yat-Sen, the KMT established the first republic in the history of China.¹⁶ The Republic made a positive and lasting impression on the Chinese people and was officially recognized by many countries around the world. Later, however, various groups invoked the Republican name

12. *Id.* at 166-67.

13. J. FAIRBANK, *supra* note 4, at 53-55.

14. LUO GUANZHONG, SANGUO YANYI (The Romance of the Three Kingdoms) 2 (1981 edition).

15. Da Baolin, *Guomin Xiaoxue Shehui Kexue Taiwan Shi Xiacai zhi Jiantou*, 19 TAIWAN WENTI 70, 76 (1989).

16. REPUBLIC OF CHINA: A REFERENCE BOOK 19 (1983) [hereinafter REFERENCE].

to serve their own purposes, including feudal warlords.¹⁷

After purging and suppressing the Communists in 1927, the KMT government of Nanjing came to call itself the Republic. Since there was a close relationship between the KMT and Dr. Sun, this was an attempt to show the continuation of Dr. Sun's Republic and to achieve a dominant position in Chinese politics and social opinion.¹⁸ To affirm their legal legitimacy, the KMT convened the First National Congress and passed the Constitution of the Republic of China in 1946,¹⁹ though it excluded the Communists and several democratic parties from the convention.

Nonetheless, the KMT political position and legal authority was soon challenged. First, the KMT government retreated to Taiwan and lost the majority of the Chinese domain, its jurisdiction becoming limited to several islands.²⁰ Second, on October 1, 1949, the Communists founded the People's Republic of China on the Mainland.²¹ In addition to controlling most of China's territory, the new People's Republic of China government became officially recognized by an increasing number of countries in the international community. Today, the People's Republic of China is generally viewed as the sole legitimate representative of China.²² Third, having retreated to Taiwan, the KMT was no longer able to maintain a political system based on a constitution enacted for the Mainland.²³ For example, representatives of the National Congress, which constituted the Republic's legislative body, could not be elected under constitutional procedural requirements.²⁴

Facing these numerous challenges to its legitimacy, the KMT government on Taiwan has stood firmly by its views that "all those who are not orthodox are incompatible" and that Chinese must "fight

17. See J. SHERIDAN, *CHINA IN DISINTEGRATION* 57 (1975).

18. YOU & WU, *supra* note 8, at 423-24.

19. REFERENCE, *supra* note 16, at 83.

20. J. SHERIDAN, *supra* note 17, at 245.

21. J. FAIRBANK, *supra* note 4, at 327.

22. Lu Bing, *Ping Taiwan Dangju de Waijiao Tupo*, LIAOWANG ZHOUKAN, Aug. 8, 1988, at 6.

23. This statement by the authors is in reference to the fact that the political structure described in the constitution has been altered in practice as a response to the ROC's relocation and changed situation. The means of alteration are the Temporary Provisions Effective During the Period of Communist Rebellion, promulgated in May of 1948, as discussed *infra* at sec. II(A), which are referred to in the article as the Interim Regulations Effective During the Period of Rebellion. See REFERENCE, *supra* note 16, at 84.

24. The National Assembly of the ROC represents all areas within the nation's boundaries. These boundaries encompass the areas occupied by the PRC. The first National Assembly was elected in 1947, but subsequent elections have not been possible in the Mainland voting districts. See *id.* at 87-88.

the Communists and revive the country.”²⁵ Under the pretense of national emergency, the KMT enacted a number of special laws to maintain its own power and authority and to counter Communist influence from the Mainland. These laws restrict political rights and democratic principles of the constitution and the criminal laws.²⁶ Among other things, the laws provide for exercise of special presidential powers, restructuring of the legislature, repression of the Communist Party, and prohibition of any contact between Taiwan and the Mainland. For decades, these special laws and regulations have played a very important role in controlling political and social life in Taiwan and have become a pillar of the KMT authority.

II. THE CURRENT SITUATION OF SPECIAL LAWS IN TAIWAN

In general, a special law is an unusual law drawn as a response to the necessities of times of emergency. Making a special law should be an unusual phenomenon in the political life of a country. However, it seems that the KMT takes for granted the ability to draft special laws.

In the early years of the Republic, under the leadership of Sun Yat-Sen, the KMT played a positive role in fighting the feudal Qing dictatorship, founding the bourgeois Republic, and promoting the development of modern history under the political philosophy of *Sanmin Zhuyi* (“The Three People’s Principles: Nationalism, Democracy, and the Livelihood,” put forward by Sun Yat-sen) and the principle of a democratic republic.²⁷ To some extent, this represented progress in modernizing the legal system of China. However, after the 1927 political and military confrontation between the KMT and the Communist Party,²⁸ it was difficult to suppress the Communist Party and other opposition forces by enforcing regular laws and regulations. As a result, various special laws and regulations were enacted that violated the principles of democracy.

In 1927, a special criminal law was promulgated, called the Interim Regulations for Suppressing Bandits.²⁹ Later, many other special laws and regulations were adopted, including the Interim Penal Law for Counterrevolutionary Crimes, the Emergency Penal Law for Endangering the Republic, the Law Concerning Voluntary Surrender of Members of the Communist Party, Interim Procedures for the Punishment of Bandits, and the Emergency Procedures Con-

25. YOU & WU, *supra* note 8, at 475.

26. *Id.* at 490-93.

27. J. SHERIDAN, *supra* note 17, at 144-45.

28. *See id.* at 172-73.

29. YOU & WU, *supra* note 8, at 441.

cerning the Safeguarding of Social Order During Periods of Rebellion.³⁰ On the whole, these laws were enacted primarily to suppress the Communist Party.

More than thirty such laws and regulations creating special crimes and special punishments existed before 1947, and since then more than thirty similar laws and regulations have been promulgated. They apply to almost all areas of social life, including the structure of government, assignment of the state powers, civil matters, criminal matters, and procedures. The most influential laws, those forming a foundation for the development of the special legal system, are the following three groups of laws:³¹

*A. Interim Regulations Effective During the Period of Rebellion*³²

Governing Taiwan for the past four decades, the KMT has based its authority mainly on the 1948 Interim Regulations Effective During the Period of Rebellion (the Interim Regulations).³³ The Interim Regulations were designed to justify the KMT's political and legal system during times of emergency. Without these regulations, the forty year history of Taiwan would have been rewritten.

The victory of the Anti-Japanese War and the negotiations between the KMT and the Communist Party in Chongqing gave Chinese people the hope of a democratic new China. Unfortunately, the civil war was not over. The KMT overestimated its political and military strength available to fight the Communists. Certain of success,

30. *Id.*

31. The three groups of laws discussed in the text are considered to be the most important. Other early laws which have served an important function in suppressing opposition include: Nong, Kuang, Gang, Shang Guanli Tiaoli (Administrative Regulations for Agriculture, Mining, Industry and Commerce)(promulgated Oct. 6, 1938; amended 1973) 22 ZHONGHUA MINGUO XIANXING FAGUI HUIBIAN (Compilation of Current Laws and Regulations of the Republic of China) 13777 [hereinafter CURRENT LAWS]; Fanghai Binyi Zhizui Tiaoli (Provisions Concerning Punishment for Avoiding the Draft)(promulgated June 29, 1940) 12 *id.* at 6901; Fanghai Guobi Zhengzhi Tiaoli (Provisions on Punishment for Tampering with National Currency)(promulgated July 15, 1935; amended Oct. 18, 1943, Sept. 4, 1973) 34 *id.* at 20247; Zhengzhi Zousi Tiaoli (Provisions on Punishment For Smuggling)(promulgated March 11, 1948; amended Dec. 29, 1955, Nov. 11, 1969, Jan. 23, 1978, June 26, 1985) *id.* at 20257; Zhengzhi Daofei Tiaoli (Provisions on Punishing Robbers and Bandits)(promulgated Apr. 8, 1944; amended June 5, 1957) *id.* at 20253; Dongyuan Kanluan Shiqi Laosi Jiaofen Chulu Banfa (Measures Concerning the Handling of Labor Disputes and Capital for Mobilization During Times of Emergency) (promulgated Nov. 1, 1947) 5 *id.* at 2845.

32. Dongyuan Kanluan Shiqi Linshi Tiaokuan (Interim Regulations Effective During the Period of Rebellion)(adopted April 18, 1948, promulgated May 10, 1948; amended Mar. 17, 1972) 1 CURRENT LAWS, *supra* note 31, at 21 [hereinafter Interim Regulations].

33. YOU & WU, *supra* note 8, at 484.

the KMT drafted the Constitution of the Republic in 1946.³⁴ The constitution was apparently based on Sun Yat-Sen's ideas of the separation of five powers,³⁵ and was guided by the principle that a government is created by a constitution, that powers are separated and balanced, and that the president's powers should be limited.³⁶ Soon after this constitution came into effect, the KMT began losing battles with the Communists and the domestic economy deteriorated.³⁷ In this precarious time, it would have been impossible to save the KMT government if the government were to be run pursuant to the new constitution. The KMT had a choice: democracy or dictatorship. They chose the latter, enacting the Interim Regulations shortly before retreating from the Mainland to Taiwan in 1949.³⁸

At the Conference on Implementing the Constitution which began in March of 1948, the KMT proposed the establishment of a new legal system to be founded upon the Interim Regulations. This system would be superimposed over the system created by the constitution, and would give the president special powers to deal with various political and military matters during times of emergency.³⁹ Wang Shijie, a proponent of the changes, explained the purpose of the proposal at the conference as follows:

The basic purpose of the proposal made by our 700 representatives is to implement the constitution as well as to suppress rebellion. . . . The constitution substantially limits the president's powers in times of emergency. If we do not have a proper remedy for the limitation, and after the conference still implement the constitution, then we will not be able to cope with rebellions and eliminate the danger therein. Moreover, in order to overcome difficulties in times of emergency, the government would have to misinterpret the constitution, and as a result the constitution would become a mere scrap of paper. In so doing, all our efforts in making

34. REFERENCE, *supra* note 16, at 83.

35. Sun Yat-sen adopted the Western concept of separation of political powers in China. In addition to the legislative, executive, and judicial powers, he added an examination power in charge of testing all government officials, and a supervisory power with the authority to supervise other departments' exercise of power. One department was not allowed to encroach on the domain of another. YOU & WU, *supra* note 8, at 374-75. The KMT government structure is based on this theory and divided into five departments. *Id.* at 424.

36. CHINA HANDBOOK 157 (1950).

37. J. FAIRBANK, *supra* note 4, at 313-14.

38. The Interim Regulations were adopted by the National Assembly on April 18, 1948, and the KMT moved to Taiwan in 1949. REFERENCE, *supra* note 16, at 83-84.

39. YOU & WU, *supra* note 8, at 484, 488.

the constitution would be wasted.⁴⁰

It was under such circumstances that the Interim Regulations were enacted. In 1954, five years after retreating to Taiwan, the KMT convened the 7th session of the second conference of the National Congress and continued to uphold the Interim Regulations.⁴¹ During the past four decades, the Interim Regulations have been amended four times.⁴²

The Interim Regulations consist of eleven articles and function as a special constitution. They effect the following modifications of the constitution: a) reconciliation of the powers necessary to suppress rebellion with the constitutional limitations on power. The Interim Regulations provide legal grounds to justify all other special laws and regulations beyond those necessary to suppress rebellion; b) extension of the president's powers and his term of office. For example, article 1 of the Interim Regulations provides that the president has unlimited power to exercise his discretion in order to suppress rebellion.⁴³ Therefore, articles 39 and 43 of the constitution, which restrict the president's powers, are no longer effective.⁴⁴ Another example is that under article 3 of the Interim Regulations, the president's term could be indefinite,⁴⁵ which overrides the constitutional restriction in this respect.⁴⁶ Moreover, articles 4 and 5 of the Interim Regulations authorize the president to establish special organizations without considering any constitutional restrictions, and to supervise all administrative agencies and the personnel department of the central government;⁴⁷ and c) authorization to the president, in his discretion, to appoint representatives of the National Congress.⁴⁸ This provision invalidates the constitutional requirement that all representatives be elected by the populace.⁴⁹

Additional powers of the president include the power to interpret the Interim Regulations.⁵⁰ This is the basis upon which the KMT has exercised military control in Taiwan for several decades. The Taiwan

40. LIN JIDONG, *ZHONGHUA MINGUO XIANFA SHILUN* (Annotation of the Constitutional Law of the Republic of China) 408-09 (1981).

41. MAO, *supra* note 6, at 90.

42. See *The Government of Taiwan*, 1 *CURRENT LAWS*, *supra* note 31, at 21-23.

43. Interim Regulations, *supra* note 32, art. 1, at 21.

44. *ZHONGHUA MINGUO XIANFA* (Constitution of the Republic of China) arts. 39, 43 (1946) 1 *CURRENT LAWS*, *supra* note 31, at 4 [hereinafter ROC Constitution].

45. Interim Regulations, *supra* note 32, art. 3, at 21.

46. ROC Constitution, *supra* note 44, art. 40, at 4.

47. Interim Regulations, *supra* note 32, arts. 4, 5, at 21.

48. *Id.* art. 4, at 21.

49. ROC Constitution, *supra* note 44, arts. 26, 64, at 3, 6.

50. MAO, *supra* note 6, at 18.

government, for example, proclaimed martial law under article 1 of the Interim Regulations,⁵¹ and under article 4 drew up the Organizational Program for the National Security Conference,⁵² the most powerful agency in the government. In times of emergency, the National Security Conference acts independently of the Five Departments of the central government. This Conference possesses seven important powers, including the power to make policies for the government.⁵³

A series of special laws and regulations have been enacted based on the Interim Regulations.⁵⁴ Although these special laws and regulations contain provisions related to the constitution, civil law, civil procedure, criminal law, and criminal procedure, they are similar in that most impose a penalty. They not only extend the scope of application of regular law and criminal law, but they also are beyond the original limits of conviction and the limitations on the imposition of

51. See *infra* notes 61-67 and accompanying text.

52. Dongyuan Shiqi Guojia Anquan Fa Huiyi Zuzhi Ganyao (Organizational Program for the National Security Conference) (promulgated Feb. 1, 1967) 1 CURRENT LAWS, *supra* note 31, at 119.

53. *Id.* art. 1(2), at 119.

54. Laws passed which were based on the Interim Regulations include: Kanluan Shiqi zai Taiwan Gongsi Xuanqu Gudong Guquan Xingshi Tiaoli (Regulations for the Exercise of Rights of Shareholders of Companies from Enemy-Occupied Areas to Taiwan During the Suppression of Rebellions) (promulgated Apr. 24, 1964) 21 CURRENT LAWS, *supra* note 31, at 13067; Kanluan Shiqi Fajin Fakuan Tigao Biaozhun Tiaoli (Regulations for Raising the Amounts of Fines in Time of Suppressing Rebellions) (promulgated May 25, 1962; amended Jan. 9, 1970) 18 *id.* at 10833; Zhengzhi Banluan Tiaoli (Regulations for Suppressing Rebellions) (promulgated June 21, 1949; amended July 26, 1958) 12 *id.* at 6907; Kanluan Shiqi Jiansu Feidie Tiaoli (Regulations for Informing Against Bandits and Espionage in Time of Suppressing Rebellions) (promulgated June 13, 1950; amended Dec. 28, 1954) 12 *id.* at 6911; Kanluan Shiqi Jiansu Liumang Tiaoli (Regulations for Informing Against Hooligans in Time of Suppressing Rebellions) (promulgated July 19, 1985) 7 *id.* at 4116; Kanluan Shiqi Jiansu Liumang Tiaoli Shixing Xize (Implementation Rules of Regulations for Informing Against Hooligans in Time of Suppressing Rebellions) (promulgated Nov. 27, 1985) 7 *id.* at 4125; Fanghai Junji Zhizui Tiaoli (Regulations for Inflicting Punishments on Criminals Divulging Military Secrets in Time of Suppressing Rebellions) (promulgated May 6, 1954; amended May 4, 1954, Feb. 8, 1972) 12 *id.* at 6929; Kanluan Shiqi Tanwu Zhizui Tiaoli (Regulations for Inflicting Punishments On Embezzlers in Time of Suppressing Rebellions) (promulgated July 15, 1963; amended Aug. 17, 1973) 34 *id.* at 20261; Kanluan Shiqi Suqing Yandu Tiaoli (Regulations Concerning Elimination of Drugs During Times of Rebellion) (promulgated June 3, 1955; amended June 21, 1973) 34 *id.* at 20265; Qudi Feiwei Wupin Banfa (Procedures for Banning Products Made by the Communists) (1974) XINBIAN LIUFA CHANZHAO PANJIE QUANSHU (The Six Laws with Reference to the Interpretation of the Courts) 659 (Lin Jidong, Zheng Yubo, Cai Dunming & Gu Dengmei eds. 1986) [hereinafter SIX LAWS]; Kanluan Shiqi Jinsuo Renfan Chuli Tiaoli (Regulations for Handling Prison Affairs in Time of Suppressing Rebellions) (promulgated Aug. 23, 1954; amended Nov. 13, 1981) 18 CURRENT LAWS, *supra* at 11013; Kanluan Shiqi Gongzhi Renyuan Xuanju Banbian Fa (Law for Election and Removal of Government Officials in Time of Suppressing Rebellions) (promulgated May 14, 1980; amended July 8, 1983) 2 *id.* at 765; and Kanluan Shiqi Junren Hunyan Tiaoli (Regulations Concerning Soldiers' Marriage in Time of Suppressing Rebellions) (promulgated Jan. 5, 1959; amended Jan. 10, 1947, Aug. 13, 1959, Dec. 21, 1974) 8 *id.* at 4675.

penalties. The penalties prescribed by articles 2 and 4 of the Interim Regulations,⁵⁵ for example, are more severe than those in articles 100(1), 101, and 103 of the Criminal Law.⁵⁶ It is under these special laws and regulations that the KMT has controlled the society of Taiwan for several decades.

B. National General Mobilization Law and Interim Measures Concerning Punishment for Impairment of the National General Mobilization Law

The National General Mobilization Law⁵⁷ was enacted during the Anti-Japanese War, but still exists as a special law and has had an important role for several decades in Taiwan. The National General Mobilization Law was drafted in 1942 to mobilize the nation's resources to further the resistance effort, and was used expansively by the wartime government. The government exercised complete control over production of war materials, transportation, supplies, and confiscation of property. The law also allowed for restriction of rights that were later granted to the people by the constitution. In June of the same year, the Nationalist government announced the Interim Regulations Concerning Punishment for Impairment of the National General Mobilization Law,⁵⁸ whose fifteen articles provided for extremely harsh punishments upon its violation.

It is acceptable to draft such extraordinary laws during periods of invasion by an enemy or times of national crisis. However, when the war with Japan ended, terminating the precondition upon which the special laws and regulations had been based, the KMT government continued to use the powers conferred by adopting the laws and regulations into a continuing special legal system. Together with the Interim Regulations, a foundation was formed for an unusual legal unified rule in Taiwan.

In 1951, the Taiwan Administrative Department announced Measures Concerning the Issuing of Orders Under the National Gen-

55. Interim Regulations, *supra* note 32, arts. 2, 4, at 21.

56. Zhonghua Minguo Xingfa (Criminal Law of the Republic of China) arts. 100(1), 101, 103 (adopted Jan. 1, 1935, promulgated July 1, 1935) 34 CURRENT LAWS, *supra* note 31, at 20209.

57. Guojia Zongdongyuan Fa (National General Mobilization Law) (promulgated Mar. 29, 1942, effective as of May 5, 1942) [hereinafter General Mobilization Law] XINBIAN JIBEN LIUFA CHANZHAO FALING PANJIE QUANSHU (The Basic Six Laws and Reference to the Interpretation of the Courts) 576 (Lin Jidong, Zheng Yubo, Cai Dunming & Gu Dengmei eds. 1983) [hereinafter BASIC LAWS].

58. Fanghai Guojia Zongdongyuan Fa Zhengfa Zanxing Tiaoli (Interim Regulations Concerning Punishment for Impairment of the National General Mobilization Law) (promulgated June, 1942; amended Dec. 25, 1953) 34 CURRENT LAWS, *supra* note 31, at 20251.

eral Mobilization Law During Suppression of Rebellions.⁵⁹ According to these measures: "The present is a time of organization to suppress rebellion, and in accordance with the provisions of the National General Mobilization Law, the government can, if necessary, use the National General Mobilization Law to issue orders and draft regulations to assemble and utilize human resources, and limit the people's constitutional rights without being subject to constitutional restriction."⁶⁰ The National General Mobilization Law is, along with the Interim Regulations, one of the primary bases for the present special Taiwan legal system.

C. Martial Law and the National Security Law Concerning Mobilization

Martial law was declared in 1934 and continued until 1987.⁶¹ The original law contained thirteen provisions. The president presented an amendment to article 8 in 1949. This law was later modified to apply to Taiwan, and has been the basis for military control for several decades.

There are three main aspects to Taiwan's martial law regulations. First, in areas under the control of the government, administrative, and judicial officials must obey the directives of the highest military command.⁶² Second, where martial law has been imposed, the people are subject to military trial.⁶³ Under this provision, countless people in Taiwan have been tried in military courts for the crime of being a bandit or associating with a bandit. Third, people's democratic rights are restructured.⁶⁴ During the period of martial law, the highest military commander has the power to restrict gatherings, associations, demonstrations, and petitions, and can censor speech and discussion, education, news, magazines, books, notices and announcements, banners, and other publications which he believes will interfere with military affairs. He has the power to limit religious activities and regulate strikes or the boycott of sales, classes, or businesses. He can open and retain private letters and telegrams and can enter and search houses, vehicles, or buses. Military commanders can also search people. These provisions actually negate the regular social

59. Kanluan Shiqi Yi Zongdongyuan Fa Banfa Fagui Mingling Banfa (Measures Concerning the Issuing of Orders Under the National General Mobilization Law During Suppression of Rebellions) (promulgated Dec. 8, 1951) SIX LAWS, *supra* note 54, at 1132.

60. *Id.* preface, at 1132.

61. Jieyan Fa (Martial Law) (promulgated Nov. 29, 1934; amended 1949; repealed July 15, 1987) BASIC LAWS, *supra* note 57, at 21 [hereinafter Martial Law].

62. *Id.* arts. 6, 7, at 22.

63. *Id.* arts. 8, 9, at 22.

64. Martial Law, *supra* note 61, art. 2, at 21.

procedures which are called for in the constitution and replaces them with military rules.

On May 19, 1949, the KMT issued a notice concerning the government of Taiwan and the garrison headquarters of Taiwan, which declared martial law for all of Taiwan as of May 20, 1949.⁶⁵ This notice extended the 1934 Martial Law, with its 1949 amendment, to Taiwan in order to strengthen the KMT control over their new home territory. In the ensuing 38 years, the basis for the authority of the Taiwan government was martial law and martial order,⁶⁶ which was implemented with an iron fist. Beginning in the late 1970s, international views and the domestic situation in Taiwan changed, leaving the authorities in Taiwan no choice but to lift martial law and eliminate the thirty or so less important regulations and orders related to martial law.⁶⁷ This took place on July 15, 1987.⁶⁸

Although martial law has been eliminated and Taiwan is temporarily released from 38 years of military control, many laws that have their foundation in martial law still continue to exist. More importantly, before martial law was lifted, under the pretense of ensuring national security and safeguarding the stability of society, the Taiwan authorities adopted the National Security Law Concerning Mobilization,⁶⁹ and the Administrative Department announced the Implementing Regulations for the National Security Law Concerning Mobilization.⁷⁰ These two laws strictly regulate entry to and exit from Taiwan,⁷¹ inspection of people,⁷² and traffic and security control⁷³ during times of rebellion. Many of the restrictive aspects of

65. ZHOU TUO & WEI DAYE, *TAIWAN DASHI JIYAO* (Summary of Taiwan History) 20 (1982).

66. See R. Clough, *The Political System of Taiwan*, in *THE TAIWAN EXPERIENCE 1950-1980* 353 (Hsiung ed. 1981).

67. The Taiwan authorities have issued approximately 30 regulations and orders related to martial law, including laws which control bandits and the importing of bandits' newspapers, books, and magazines.

68. Li Mu, *Zhongguo Zhengzhi Biange de Shuguang*, *ZHONGGUO ZHI CHUN*, Jan. 1987, at 87.

69. Taiwan Dongyuan Kanluan Shiqi Guojia Anquan Fa (National Security Law Concerning Mobilization) (promulgated July 1, 1987) 1 *CURRENT LAWS*, *supra* note 31, at 391 [hereinafter National Security Law].

70. Dongyuan Kanluan Shiqi Guojia Anquan Fa Shixing Xize (Implementing Regulations for the National Security Law Concerning Mobilization) (promulgated July 3, 1987) 1 *CURRENT LAWS*, *supra* note 31, at 391 [hereinafter Security Implementing Regulations].

71. National Security Law, *supra* note 69, art. 3, at 391; Security Implementing Regulations, *supra* note 70, ch. 2, arts. 4-18, at 391.

72. National Security Law, *supra* note 69, art. 4, at 391; Security Implementing Regulations, *supra* note 70, ch. 3, arts. 19-20, at 391.

73. National Security Law, *supra* note 69, art. 5, at 391; Security Implementing Regulations, *supra* note 70, ch. 4, arts. 25-28, at 391.

martial law have been preserved through the adoption of these two laws, such that Taiwan is still under partial military control with emergency restrictions on people's democratic rights.

III. CURRENT SPECIAL LAWS OF TAIWAN AND RELATIONS ACROSS THE TAIWAN STRAIT

Much of the modern history of China is the history of political struggles between the KMT and Communist parties. Although the two parties managed to cooperate with each other at times, they always ended up in conflict because of their opposing political programs and other historical factors. In 1949, the Mainland Chinese finally chose the Communist Party and the KMT was forced to retreat to Taiwan. Since then, the KMT has regarded the Mainland authorities and the Communists as their "enemy number one."⁷⁴

Today, while relations across the Strait have relaxed somewhat, most KMT policy makers continue to maintain the notion of "ourselves and the enemy."⁷⁵ Through its various special laws, the KMT government still seeks to restrict and exclude any influence of the Communist Party in Taiwan. In this way, the special laws have remained an obstacle to further improvement of relations across the Strait.

A. *The Position of the Chinese Communist Party and the Mainland Authorities towards the Current Special Laws*

The special laws are the product of decades of conflict between the KMT and Communists and are wholly directed at the Mainland authorities. The Taiwan government regards the Communist Party of China and its government in Beijing as a "rebel organization" of "communist bandits," and has a hostile attitude towards communist propaganda, communist organizations and any political contacts with the Mainland.

First, Taiwan's current special laws prohibit any form of communist propaganda. Article 2 of the National Security Law Concerning Mobilization expressly provides: "Peoples' assembly and association shall not violate the constitution, support communism, or demand division of the country."⁷⁶ Similar provisions appear in the Law Concerning Demonstrations and Assemblies in Times of Emergency

74. Chen & Wu, *supra* note 10, at 19.

75. According to modern Chinese political views, people are always divided into two classes: ourselves and the enemy. The contradiction between the two cannot be compromised. They must wage a struggle between each other.

76. National Security Law, *supra* note 69, art. 2, at 6.

(1989).⁷⁷

Second, a number of current special laws provide that the Communist Party and the mainland authorities are "rebel organizations" and "rebel associations." Individual members of the Communist Party or government are "traitors," "bandits," and "spies" under the law, subject to criminal punishment and restrictions on entry to Taiwan. It is apparent that in the Interim Regulations "rebellion" refers to the activities of The Communist Party of China.⁷⁸

To some extent, if the Communist Party were no longer considered a "rebel" organization, most of the special laws and regulations would lack foundation. Indeed, the Communist Party remains the primary target of almost all special laws. Article 1 of the Program for Implementation of the Constitution in Time of Mobilization to Suppress Rebellion (1947) provides: "This program is formulated in accordance with the national mobilization of the National Conference in order to put down communist rebellion."⁷⁹ This anti-communist goal can be seen in other laws and regulations as well. Article 1 of the Regulations Concerning Elimination of Drugs During Times of Rebellion provides: "These regulations are formulated specially for the purpose of eliminating drugs, preventing communist ideological poison, and implementing the policy of prohibition."⁸⁰

Other special regulations state that "traitors," "bandits," and those involved in "espionage" must be punished under criminal laws. Under the Regulations for Suppressing Rebellions, those who, in violation of article 100(1) of the Criminal Law, "sabotage the state system, occupy state land, alter the constitution, or subvert the government," are traitors who must be punished by execution.⁸¹ Article 4 of the Regulations provides that whoever donates goods or money to traitors faces a minimum ten-year prison sentence and possibly execution or life imprisonment.⁸² Article 5 subjects those who "participate in any rebel organization or assembly" to the possibility of life imprisonment.⁸³ The Chief Judge Conference of the Taiwan

77. Dongyuan Kanluan Shiqi Jihui Youxing Fa (Law Concerning Demonstrations and Assemblies in Times of Emergency) (adopted Jan. 11, 1988, promulgated Jan. 20, 1988) 2 ZHONGHUA MINGUO FAGUI HUIBIAN (Compilation of Laws and Regulations of the Republic) 1101 (Legislative Dept. ed.).

78. See Interim Regulations, *supra* note 32.

79. Dongyuan Kanluan Wancheng Xianzheng Shishi Gangyao (Program for Implementation of the Constitution During Times of Rebellion) (promulgated July 19, 1947) 1 CURRENT LAWS, *supra* note 31, art.1, at 25.

80. Regulations Concerning Elimination of Drugs During Times of Rebellion, *supra* note 54, art. 1, at 20265.

81. Regulations for Suppressing Rebellions, *supra* note 54, art. 1, at 6907.

82. *Id.* art. 4, at 6907.

83. *Id.* art. 5, at 6908.

Department of Justice has also ruled that youths who join rebel organizations and do not voluntarily surrender when reaching age fourteen become subject to criminal liability.⁸⁴ Though officially called criminal laws, these provisions are clearly distinguishable from laws for ordinary criminals.

Recently announced national security laws also include anti-communist provisions. They state that whoever joins the Communist Party or other "rebel organizations" or participates in their activities, and whoever visits "enemy-occupied areas" (the Mainland) to help the Communists, may not enter or exit Taiwan.⁸⁵

Third, Taiwan current special laws expressly limit any economic exchange or contact with the Mainland. For several decades, the KMT in Taiwan have used slogans such as "mobilization to suppress rebellion," "restoration of the State," and "fight the communist bandits" to save face and boost morale. Any products from communist territory cannot be imported into Taiwan and any act of aiding the bandits must be punished. The Administrative Regulations for Agriculture, Mining, Industry and Commerce in Times of Emergency, now in force for five decades, provides: "During the special period, the Ministry of the Economy shall, according to national requirements, restrict or prohibit import and export of designated articles."⁸⁶ Violators face either detention, a one-year prison sentence, or a fine of no more than one thousand yuan.⁸⁷ Article 29 of these regulations provides that whoever, for the purpose of making a profit or acting as a middleman, supplies raw materials or other articles to the enemy is to be sentenced to a minimum of seven years up to life in prison.⁸⁸

B. Taiwan's Current Special Laws Obstruct the Development of Relations Across the Strait

For several decades, the KMT has followed a policy of resisting, restricting, and preventing communist influence. This policy is embodied in a series of special laws and regulations. As long as these special laws and regulations remain in force, there will be great difficulty in improving relations across the Strait.

Under the special laws, the Communist Party, its Mainland government and many democratic parties and associations are deemed to

84. Sifa Dafaguan Huiyi Jieshi Huiji (Collection of Interpretations by the Chief Judge Conference) BASIC LAWS, *supra* note 57, at 634, 642.

85. See National Security Law, *supra* note 69.

86. Administrative Regulations for Agriculture, Mining, Industry, and Commerce, *supra* note 31, art. 13, at 13778.

87. *Id.* art. 32, at 13780.

88. *Id.* art. 29, at 13780.

be "rebel groups" or "rebel organizations" and shall therefore be suppressed and exterminated. According to KMT policy, it is not a question of improving relations but only of how to recover the Mainland and suppress the Communist Party. However, because the Communist Party has effectively dominated the Mainland for forty years and won support from inside and outside China, the KMT lacks a market to sell its banner that "the Communist Party is a rebel organization." In recent years, the Taiwan authorities have actually changed their original stand as to relations with the Mainland.⁸⁹ However, because the existing special laws confine the Mainland authorities to being nothing more than a rebel group, it is impossible to improve relations significantly. No change can take place unless the Taiwan government expressly extinguishes the special laws.

The severity of punishments under the special laws is also a barrier to improved relations. According to provisions in the special laws, whoever participates in the Communist Party or a related organization is to receive punishment under criminal laws.⁹⁰ As some of these punishments are very severe, people become inhibited from making contact with Mainland Chinese. This is especially a problem since the mainland Communist Party has more than 40 million members and the number of government officials and workers in state-run enterprises and institutions is even greater. If "whoever joins a rebel organization or participates in a related gathering" shall be investigated and held liable or shall be restricted in the right to enter Taiwan,⁹¹ then normal contact between people on the two sides of the Strait is impossible. Even though the Taiwanese authorities intend to redefine some personal contact as "unofficial relations,"⁹² this category of contacts would be extremely limited.

Another obstacle created by the current special laws is an express limitation against economic contact across the Strait.⁹³ If the Taiwan authorities strictly enforce these laws, those who do business with the Mainland would commit the crime of "aiding the bandits." As defined in the Interim Regulations, they could potentially be sentenced to death. It is clear that the special laws constitute a definite threat to normalized trade across the Strait.

89. In 1987, for example, the KMT removed longstanding bars to contacts between Taiwan nationals and their compatriots on the Mainland. *Asia 1988 Yearbook*, FAR E. ECON. REV. 241-44 (1988).

90. See *supra* text at sec. III(A).

91. See *supra* note 85.

92. Liu Qinbo, *Lun Zhiding Taiwan Yu Dalu Renmin Guanxi Fa*, 45 *FALU YUEKAN*, Feb. 1989, at 5.

93. See *supra* notes 86-88 and accompanying text.

C. *Taiwan's Current Special Laws and the Interim Regulations Concerning People's Relations Between Taiwan and the Mainland Region (draft)*

Early in 1989, under great domestic and international pressure, the Ministry of Legal Affairs drafted the Interim Regulation Concerning the People's Relations Between Taiwan and the Mainland Region (draft) (Regulations on Relations).⁹⁴ The Ministry later submitted the draft to the Administration Department's Group for Mainland Affairs for consideration and then to the Department of Legislation for examination and approval. It was the first time that the Taiwanese authorities have officially and positively dealt with the issue of contact with the Mainland through legislation.⁹⁵ It shows that they have taken a flexible attitude towards the problem and their efforts deserve attention and praise.

The regulations themselves, however, are not a complete break with past KMT policies. Some provisions in the regulations are reasonable, which is worth noting. For example, they recognize the effect of legal acts conducted on the Mainland and conditionally recognize the effect of civil arbitration awards and legal documents made there.⁹⁶ At the same time, the overall framework of the regulations still distinctly reflects the KMT's long-standing anti-communist, pro-Republic of China stance. Like the special laws, articles 1 and 2 of the regulations still insist on recognition of the legal authority of the Republic of China.⁹⁷ Moreover, the provisions concerning deportation,⁹⁸ inheritance,⁹⁹ and voluntary surrender of Mainland people who join "rebel organizations" are derived from the Regulations for Suppressing Rebellions;¹⁰⁰ the provisions of the Regulations on Relations regarding investment, trade, import of products manufactured

94. Taiwan Diqu yu Dalu Diqu Renmin Guanxi Zhanxing Tiaoli Cao'an Tiaowen (Draft Interim Regulations Concerning the People's Relationship between Taiwan and the Mainland Areas) Lian He Bao, Feb. 1, 1989, at 1 [hereinafter Regulations on Relations]. In writing this article the authors utilized this earlier draft that has since been revised. The changes do not affect the authors' argument. See Taiwan Diqu yu Dalu Diqu Liang'an Renmin Guanxi Zhanxing Tiaoli (Draft Interim Regulations Concerning the People's Relationship between Taiwan and the Mainland) Zhongguo Shi Bao, Oct. 10, 1989 [hereinafter New Draft].

95. Liu Qinbo, *supra* note 92, at 5.

96. Regulations on Relations, *supra* note 94, arts. 10, 22, 23, at 1; New Draft, *supra* note 94, arts. 5, 16, 17.

97. Regulation on Relations, *supra* note 94, arts. 1, 2, at 1; New Draft, *supra* note 94, arts. 1, 2.

98. Regulation on Relations, *supra* note 94, art. 7, at 1; New Draft, *supra* note 94, art. 20.

99. Regulation on Relations, *supra* note 94, art. 15, 16, at 1; New Draft, *supra* note 94, arts. 9, 10.

100. Regulations for Suppressing Rebellions, *supra* note 54, art. 5, at 6903.

on the Mainland, and shipping and communication¹⁰¹ are similar to relevant provisions in the Provisions on Punishment for Smuggling,¹⁰² the Procedures for Banning Products Made by the Communists,¹⁰³ and the Administration Regulations for Agriculture, Mining, Industry, and Commerce.¹⁰⁴

IV. THE FUTURE OF TAIWAN'S SPECIAL LAWS

Since ancient times, laws have represented the will of rulers. That Taiwan's special laws have remained in effect for such a long time reflects the confusion and despair in the thinking of Taiwan's rulers. For decades, the KMT has used political propaganda and many special laws and regulations to control Taiwan's security and maintain its own survival. To do so may be important to strengthen and safeguard the party's domination. However, the progress of human affairs has rendered the rationale and legitimacy of such rigid controls questionable.

First, there has been a trend toward relaxation of tensions in the world political environment, and the international community has continued to become more rational and civilized. Thus, it is contrary to these positive world trends to use extralegal means to deal with domestic and international affairs.

Second, since the mid-1970s, with Taiwan's continued economic development, Taiwan's middle class has gained increasing political strength and become a strong voice in the demand for more democracy. More and more people have realized the importance of implementing a constitutionally-based government and of repealing the special laws.

Finally, some of the conditions which made Taiwan's current special laws possible are gradually disappearing. The Communist Party has been the major enemy with which the Nationalists could justify its power on Taiwan. Now, however, it is futile to denigrate or to be hostile toward the Communist Party since the Communists have made great achievements and won broad-based support among the population. Moreover, in recent years, the Communist Party has made every effort to relax tensions across the Taiwan Strait, to which the KMT has made some positive response. We hope the Taiwan

101. Regulations on Relations, *supra* note 94, arts. 26, 27, 30, 31, at 1; New Draft, *supra* note 94, arts. 26, 27, 29, 30.

102. Provisions on Punishment for Smuggling, *supra* note 31, art. 11(1), at 20258.

103. Procedures for Banning Products Made by the Communists, *supra* note 54, art. 6, at 659.

104. Administrative Regulations for Agriculture, Mining, Industry, and Commerce, *supra* note 31, arts. 1, 13, at 13777, 13778.

authorities will take further steps to remove the obstacles caused by the special laws and make efforts to accomplish the great cause of national reunification.

