Bridge Across the Formosa Strait: Private Law Relations Between Taiwan and Mainland China

TUNG-PI CHEN*

I. INTRODUCTION

Driven by forces of economic expansion and nationalist sentiment, as well as by political and economic pragmatism, Taiwan and the People's Republic of China (PRC) are moving toward a closer informal relationship. This paper will examine a number of legal issues arising from renewed relations between the two regions. It will first review the background to the current relationship in the political and economic contexts. In subsequent sections, the legal problems of establishing private relations in an environment of mutual public non-recognition will be discussed. Specifically, the paper will justify a legal framework for private relations, will analyze new laws and policies dealing with these relations, and will examine special problems of the PRC-Taiwan relationship. Throughout this discussion, the emphasis will be on providing a theoretical and practical basis for renewed private relations.

After the Communist victory and the establishment of the PRC in 1949, interaction between the people of Taiwan and the people of Mainland China came to a virtual standstill. The defeated Kuomintang (KMT),[1] while retaining control only over Taiwan and nearby smaller islands,[2] continued to assert the existence of the Republic of China (ROC) whose purported territories included all the provinces and regions of Mainland China. The PRC likewise claimed that its territories included all areas of China, including Taiwan. Thus, the persistent position of both regimes has been that there is only one China of which it is the sole legitimate government.

The intransigence of both regimes resulted in an almost complete breakdown of private and commercial relations between Taiwan and

* Professor of Law, Queen's University, Kingston, Canada. The author wishes to acknowledge with thanks the financial assistance of the Social Sciences and Humanities Research Council of Canada and the aid of his assistant, Shawn Scromeda.

1. Also known as the Nationalist Party.

2. The full area of "Taiwan" under control of the KMT includes only the islands Taiwan and the Pescadores and the offshore islands Quemoy and Matsu.

the PRC. While both developed extensive private and commercial contacts with the rest of the world—with or without diplomatic recognition—they remained isolated from each other. Direct contact was non-existent and indirect contact was extremely limited. Indirect trade, for instance, could be carried out only in a clandestine manner and never exceeded the dismal level of US$50 million annually.[3] Contacts between separated spouses and family members, as well as bequests or successions across the Formosa Strait were forbidden.[4] Even as political upheavals, economic development, and international events transformed the domestic situations of the two regimes and their individual relationships with the rest of the world, their relationship with each other remained essentially stagnant for more than thirty years.

Recently, however, there have been marked changes. In 1983, Deng Xiaoping, supreme leader of the PRC, proposed a plan for the peaceful reunification of Taiwan and Mainland China under the "one country, two systems" formula, offering Taiwan terms even more favorable than those devised for China's takeover of Hong Kong in 1997.[5] Under this plan, the PRC would recognize Taiwan as a special administrative region[6] with its own government, with its own domestic laws, with an independent judicial system, and with an independent armed forces. In return, the government in Taiwan would be required to abandon its claim to authority over the Mainland and to recognize the PRC as its sole international representative.[7]

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3. For years, Taiwanese customers clandestinely purchased Mainland Chinese medicinal herbs, tea, and other native products, the value totalling a mere US$50 million per year. Mainland customers imported limited quantities of goods from Taiwan, the value of which never exceeded US$50,000 per year. Li Dahong, *Mainland-Taiwan Economic Relations on the Rise*, BEIJING REV., Apr. 3-9, 1989, at 24.

4. *See* The Martial Law (promulgated Nov. 29, 1934) LAW REVISION PLANNING GROUP, EXECUTIVE YUAN, LAWS OF THE REPUBLIC OF CHINA 1026 (1961) [hereinafter LAWS OF THE ROC]. The law was replaced a few years ago. Tung-yüan K'an-luan Shih-ch'i Kuo-chia An-ch'üan (Law of National Security During the Time for Mobilization and for Suppression of Rebellion and its Implementing Regulations) (promulgated July 15, 1987) 1 CHUNG-HUA MIN-KUO HSIEN-HSING FA-KUI HUI-PIEN (Compilation of Current Laws and Regulations of the Republic of China). PRC restrictions were contained in various scattered policy statements.

5. This proposal first became known in a discussion between Deng Xiaoping and Professor Yang Liyu of Seton Hall University. For an account of the discussion and for a summary of the proposal, see Deng Xiaoping, *An Idea for the Peaceful Reunification of the Chinese Mainland and Taiwan*, in FUNDAMENTAL ISSUES IN PRESENT-DAY CHINA 19 (1987); *see also* Harrison, *Taiwan After Chiang Ching-Kuo*, FOREIGN AFFAIRS 790, 798-99 (1988).

6. The PRC Constitution allows the government to establish special administrative regions as necessary. ZHONGHUA RENMIN GONGHEGUO XIANFA (Constitution of the People's Republic of China) art. 31 (1982), *trans. in* [1 Business Regulation] CHINA LAWS FOR FOREIGN BUSINESS (CCH-Austl.) ¶ 4-500, 4-500(32).

7. The proposal is similar in most respects to the plan under which the PRC shall regain

Similarly, the KMT has recently opted for a more flexible and pragmatic foreign policy and countered Deng's proposal with the "one country, two governments" concept. Under this formula, the governments in Taipei and Beijing would be considered as equals, each with extensive authority over only their respective present areas of control and with joint international status.[8]

While each side has firmly rejected the proposal of the other—the difference over the sensitive issue of international representation hinders any potential agreement—the proposals together demonstrate a substantial change in attitudes on both sides of the Formosa Strait.[9] Both Beijing and Taipei, under certain conditions, are now willing to recognize the authority of the other within their respective geographic jurisdictions.

The new attitude is making an effective difference. Although political reconciliation between the Nationalists and the PRC may be stalled and the former may still officially profess the "Three Nos" policy of "no contacts, no negotiation, and no compromise,"[10] tension between the two has been lessening. The PRC has made continued efforts to promote the development of trade with Taiwan.[11]

The Taiwan authorities, moving more cautiously, have also

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sovereignty over Hong Kong in 1997. *See* A Draft Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1366; *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China for Solicitation of Opinions*, BEIJING REV., May 9-15, 1988, at 23.

8. For Taiwan's official position on the "one country, two governments" idea and for the PRC's firm negative response, see *New Changes in the Relations Between the Two Sides of the Strait as Seen from the Proposal on "One Country, Two Governments,"* Foreign Broadcast Information Service—Daily Report, China [FBIS—China], May 31, 1989, at 110. For comments from Taiwan's perspective, see Chao, *Lun Yige Zhongguo Liang ge Dui Deng Zhengfu Wenti*, 28 WENTI YU YANCHIU, May 10, 1989, at 1; and from the PRC's perspective, see Li Jiaquan, *Taiwan's New Mainland Policy Raises Concern*, BEIJING REV., May 22-26, 1989, at 19; Zhou, LIAOWANG (Haiwai Ban), May 15, 1989, at 22, *trans. in A Look at the "One Country, Two Equal Governments" Theory from the Perspective of International Law*, FBIS—China, June 6, 1989, at 128-29.

9. In the past, Taiwan and the PRC refused to have diplomatic relations with any nation that recognized the other. As a result, only some twenty-odd countries recognized Taipei while over 120 recognized Beijing. The Taiwan authorities, in pursuing flexible diplomacy, have recently succeeded in attracting official recognition from Grenada, Liberia, and Belize. Reacting to this development, Beijing has severed diplomatic ties with these nations. *See* McGregor, *Taiwan Makes Creative Use of Its Cash in Campaign to End Its Diplomatic Isolation*, Asian Wall St. J. Weekly, Aug. 21, 1989, at 17; *Asian Briefs*, Asian Wall St. J. Weekly, Oct. 23, 1989, at 24.

10. For Taiwan's "Three Nos" policy, see Leung, *Taiwan Officials Urge Reunification Compromises*, Hong Kong Standard, Apr. 12, 1989, at 6, *reprinted in* FBIS—China, Apr. 13, 1989, at 59.

11. *See, e.g.*, *Yan Mingfu on Trade Cooperation with Taiwan*, FBIS—China, Apr. 7, 1989, at 79.

adopted more liberal measures in their relations with the PRC. As a result, personal and commercial relationships across the Formosa Strait are developing at a rapid pace. Contacts between the people of Taiwan and those of Mainland China have become common.[12] After the July, 1987, lifting of martial law in Taiwan, over 400,000 Taiwanese visited the Mainland.[13] Direct postal and telecommunication services have also been established.[14] Trade between Taiwan and Mainland China has expanded quickly. Between 1979 and 1987, indirect trade reached US$5.5 billion.[15] This represents an increase of nearly twenty times over the combined total of the previous thirty years and an average annual growth rate of forty-five percent. By 1988, Taiwan had become the sixth largest trading partner of the PRC (after Japan, Hong Kong, the United States, West Germany, and Singapore), and the PRC had become Taiwan's number five trading partner (after the United States, Japan, Hong Kong, and Canada).[16] Businesses in Taiwan, attracted by cheap labor and other incentives offered by the PRC,[17] have invested large amounts to create new manufacturing enterprises in Mainland China. By 1988, there were some 400 such projects, and total investment topped US$600 million—more than three times the total amount invested over the preceding decade.[18] In April, 1989, an athletic team from Taiwan participated in a sporting event on the Mainland for the first time in more than forty years.[19] Many cultural, academic, artistic, scientific, and other contacts have also been made. These non-governmental exchanges culminated in the visit by Taiwan's Finance Minister, Shirley Kuo, to Beijing in May, 1989, to attend the annual meeting of the

12. *See How Far Will ROC's Open-Up Policy Toward Mainland Go?*, CNA (Taipei), May 3, 1989, *reprinted in* FBIS—China, May 11, 1989, at 54-55.

13. *See* LIAOWANG (Haiwai Ban), Apr. 10, 1989, at 9, *trans. in Yan Mingfu Talks Freely About the Taiwan Question*, FBIS—China, Apr. 19, 1989; *see also* Li Dahong, *supra* note 3, at 26.

14. Only since June, 1989, could telephone and telegram contacts originate from Taiwan.

15. This includes US$1.1 billion of goods from Mainland China and four times that amount from Taiwan. *See* Li Dahong, *supra* note 3, at 25.

16. *See Dalu Chengwei Tai Diwuda Maoyi Duishou*, Renmin Ribao [RMRB] (Haiwai Ban), Oct. 13, 1988, at 1.

17. *See* Guowuyuan Guanyu Guli Taiwan Tongbao Touzi de Guiding (State Council Regulations for Encouraging Investment by Taiwanese Compatriots) (promulgated July 3, 1988), *trans. in* [2 Special Zones & Cities] CHINA LAWS FOR FOREIGN BUSINESS (CCH-Austl.) ¶ 96-500.

18. Li Dahong, *supra* note 3.

19. *Taiwan Gymnastics Squad Leaves for Mainland*, CNA (Taipei), Apr. 17, 1989, *reprinted in* FBIS—China, Apr. 19, 1989, at 68. The event is doubly significant because the competition was international (the Asian Junior Gymnastics Championships) with the athletes from Taiwan participating as a separate team under the name "Chinese Taipei".

Asian Development Bank.[20] It was the first time in the past forty years that a high-level Taiwanese official set foot on the Chinese Mainland.

New private relationships have been permitted, and even encouraged, by the authorities of Taiwan and of the PRC. In the PRC, whose restrictions against contacts with Taiwan were largely uncodified, changes have come through shifts in policy statements. Recent statements from Mainland China, including those made after the Tiananmen Square crackdown, consistently indicate that Beijing advocates, and will continue to allow, direct and extensive private relationships between the people of Taiwan and those of the PRC.[21] Taipei, meanwhile, has been more cautious in easing restrictions on contacts with the PRC.[22] Many of these restrictions continue to be detailed in formal legislation. For instance, Taiwan is insistent that all contacts be indirect. Trade, travellers, and mail cannot pass directly between Taiwan and Mainland China but must first pass through an intermediary—most often Hong Kong, Japan, or Singapore. Only through their Hong Kong and other foreign subsidiaries do Taiwanese businesses own and control enterprises on the Mainland.

The wide disparities in prosperity and in military power between Taiwan and the PRC make the KMT hesitant to remove all administrative restrictions.[23] Taipei is wary of large numbers of visitors from Mainland China wishing to stay permanently as economic refugees. The military threat of the PRC also makes the KMT hesitant to allow

20. Fu, *ADB Publicity Shines in Taipei*, Taipei Int'l Service, May 4, 1989, *reprinted in Commentary Examines "Breakthrough" ADB Meeting*, FBIS—China, May 11, 1989, at 55.

21. *See, e.g.*, Ta Kung Pao (HK), Sept. 7, 1989, at 1, 2, *trans. in Beijing Authoritative Person Reiterates That Policy Toward Taiwan Remains Unchanged*, FBIS—China, Sept. 12, 1989, at 58-59.

22. For Taiwan's current official policy toward Mainland China, see the text of a speech, entitled Chung-hua Min-kuo te Ta-lu Cheng-ts'e (The ROC's Mainland Policy), delivered by the KMT's director of the Executive Yuan Information Bureau, Shao Yi-min, at the American Enterprise Institute, *reprinted in* Shih-chieh Jih-pao, Aug. 8, 1989, at 37.

23. The wide disparity between the two regions is demonstrated by the following figures:

	Taiwan	China
Annual per Capita Income (US$)	4,600	300
Foreign Exchange Reserves (US$billions)	76	14
Military Personnel (millions)	0.25	3.2

Harrison, *supra* note 5, at 791, 798; Kohut, *Taiwan: Will it Ever Fit?*, South China Morning Post (Saturday Rev.), June 24, 1989, at 1, *reprinted in* FBIS—China, June 27, 1989, at 80; Leung, *Beijing on Course to Exhaust Foreign Reserves, Report Says*, Asian Wall St. J. Weekly, Oct. 9, 1989, at 2.

unrestricted contact. The recent political turmoil and brutal crackdown on the pro-democracy movement in Mainland China have done nothing to ease these tensions. Nevertheless, despite continued political tension and legal restrictions and the temporary setback in attitudes toward the PRC arising from the Tiananmen Square incident, extensive private contacts across the Formosa Strait seem to be here to stay.[24]

II. A LEGAL FRAMEWORK FOR PRIVATE RELATIONS

A. A General Theory

Closer contacts between Taiwan residents and PRC residents pose an apparent legal dilemma. Private contacts regularly develop into legal relationships, raise legal questions, and create situations that deteriorate into legal disputes. Basic issues like the legal capacity of persons, jurisdiction, and recognition and enforcement of court judgments and of arbitration awards demand resolution. Specific disputes in areas such as contracts, property, marriage, adoption, and succession inevitably arise. Generally, the problems do not raise serious theoretical difficulties. The traditional legal order, expressed in domestic substantive law, in rules of conflict, and to a lesser extent, in principles of public international law, is usually sufficient to resolve such disputes. Taiwan and the PRC, however, do not recognize each other as separate states. Indeed, in the absence of compromise solutions for the problems of coexistence and of reunification, they officially continue to regard each other as rebel regimes within each other's territory. The problem of how the rival regimes can justify and build a legal framework for private relationships between their people in an environment of non-recognition and of official hostility urgently requires a solution.

Orthodox international law scholarship holds that "no judicial existence can be attributed to an unrecognized government. . . . [B]oth [an] unrecognized government and its acts are a nullity."[25] By the strictest application of this theory, an unrecognized government, its agents, and its legal creations have no legal status, capacity, or diplomatic immunity, and the judgments of its courts are unenforceable in the country that does not recognize the government.

Strict adherence to this orthodox doctrine would be extremely detrimental to the conduct of private relations between Taiwan and the PRC. Since 1949, neither the PRC nor Taiwan has exerted real

24. *See Liangan Maoyi Shinianjian Chengzhang Sishiwu Bei*, Guoji Ribao, Aug. 21, 1990, at 2; *see also Haixia Liangan Hadong Guanxi de Fazhan*, RMRB, Dec. 28, 1988, at 5.

25. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 145-47 (1947).

legal authority over each other's areas of control. Strict non-recognition theory would therefore create a "legal vacuum" in each jurisdiction from the other's point of view. It would also severely discourage expansion of economic ties and would cause considerable injustice to those with established private relations. Orthodox theorists would answer that mutual recognition would solve all these problems. But as has been discussed, a political accord between the PRC and Taiwan leading to mutual recognition is difficult, if not impossible, for the near future. As is the case whenever two rival regimes coexist, Taiwan and Mainland China require a legal basis for private relations independent of official recognition.

There is a modern alternative to the orthodox view. According to the newer theory, recognition of foreign law in private international law is largely independent of recognition of foreign governments in public international law.[26] Public recognition is an executive act, influenced by moral approval of foreign governments and constrained by the vagaries of international politics. Recognition in private international law, whether through a judicial, administrative, or legislative act, is influenced by considerations of fairness to the parties and by a desire to facilitate private relations. Since the fundamental aims of public and private recognition are different, they can operate independently. Thus, the modern theory holds that the capacity, laws, and immunity of a firmly established but unrecognized foreign government can be given full legal effect in the domestic jurisdiction, provided of course that such recognition is not contrary to the public policy of the forum.[27]

The overwhelming weight of legal scholarship over the last quarter century supports the latter theory.[28] By acknowledging reality, the theory promotes fairness to the parties. The orthodox view presumes that the judicial, administrative, and executive branches

26. The terms "private international law" and "conflict of laws" are used interchangeably in this paper.

27. *See* A. ANTON, PRIVATE INTERNATIONAL LAW 82-85 (1967).

28. *See* Grieg, *The Carl-Zeiss Case and the Position of an Unrecognised Government in English Law*, 83 LAW Q. REV. 96 (1967); Leslie, *Non-Recognition of Governments and the Conflict of Laws: The Rhodesian Situation*, 19 JURID. REV. 127 (1974) [hereinafter Leslie]; Kindred, *Foreign Governments Before the Courts*, 53 CAN. BAR REV. 602 (1980); Nedjati, *Acts of Unrecognised Governments*, 30 INT'L & COMP. L.Q. 388 (1981) [hereinafter Nedjati]; *see also The Doctrine of Recognition - A Case Note on Bilang v. Rigg*, 7 VICT. U. WELLINGTON L. REV. 477 (1975); Casenotes, *Access to United States Courts by Juristic Entities Created by Unrecognized Governments: Federal Republic of Germany v. Elicofon, Motion to Intervene by Kunstsammlungen zu Weimar (E.D.N.Y. 1972)*, 12 COLUM. J. TRANSNAT'L L. 155 (1973); Notes of Cases, *Unrecognised States and Domestic Law*, 50 MOD. L. REV. 84 (1987); Tsutsui, *Subjects of International Law in the Japanese Courts*, 37 INT'L & COMP. L.Q. 325 (1988) [hereinafter Tsutsui].

must all speak with one voice on matters of recognition. But the executive itself will often hold an implicit policy of split recognition: it may allow or even encourage private relations with de facto foreign governments while international political realities prevent it from extending official recognition. In such a situation, the "one voice" argument in fact supports the modern view. The courts will conflict with the executive unless they recognize the latter's dual policy. In any case, dangers of inconsistency on matters of recognition are minimized by looking to the public policy of the jurisdiction.

Furthermore, the modern theory is solidly grounded in the well-known doctrine of necessity in private international law. This doctrine was first described in the 17th century by Hugo Grotius,[29] the father of international law. The doctrine of necessity now holds that acts done by an unlawful regime to preserve order and good government should be obeyed by citizens and should be enforced by the courts. It forms the theoretical foundation of international practice and has been approved by the International Court of Justice (ICJ) in a 1970 Namibia case. In that case, the ICJ ruled:

> [W]hile official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[30]

Finally, if the conflict of laws rules in one country disregard the doctrine of necessity and do not recognize the effect of laws and measures of unrecognized governments, the result would be a legal vacuum: legally sanctioned transactions would not exist; companies legally established by the laws of unrecognized governments would be considered non-existent and could not sue or be sued in the non-recognizing jurisdiction; marriages established under the laws of unrecognized governments would be void; children born under these marriages would be illegitimate; and court judgments on divorce, succession, and commercial affairs would be nullities.[31] Common sense,

29. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 91-94 (A.C. Campbell trans. 1901).

30. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 56 (Advisory Opinion of June 21).

31. For an explanation of the theory of a legal vacuum, see, for example, Lord Wilberforce's opinion in Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 2 All E.R. 536, 575-92 (H.L.).

as well as personal and commercial needs, require an approach which avoids these unhappy consequences.

1. Inter-State Practice

International practice varies, but the trend is toward adoption of the newer, more pragmatic view. In Great Britain and in the United States, the orthodox doctrine still holds considerable influence. In *GUR Corp. v. Trust National Bank of Africa*,[32] the English Court of Appeal did not question the orthodox view even as it applied a well-known exception to it.[33] Similarly, applying the orthodox doctrine, a federal District Court in New York held that an unrecognized government could not bring suit in *Republic of Panama v. Republic National Bank of New York*.[34] Nevertheless, frequent and imaginative exceptions to the strict rule have weakened the orthodox doctrine in both English and American courts. In *GUR Corp.* for instance, the Court of Appeal applied the exception devised by the House of Lords in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)*, which allows unrecognized governments to bring suit if they can be viewed as a "subordinate body" of a recognized government.[35] Similarly, the traditional doctrine applied in *Republic of Panama* has been sidestepped in other American cases that allow an unrecognized government to bring suit if the State Department indicates that it has no objections.[36]

In other countries, the law views the modern doctrine with even more favor. Judicial practice in France, West Germany, Holland, and Switzerland is to give full legal status to the acts of unrecognized regimes for private law purposes.[37] Japanese courts also follow the modern view.[38] Of special interest in this regard is the current

32. [1986] 3 W.L.R. 583.

33. For holdings in accordance with the orthodox view, see Adams v. Adams, [1970] 3 All E.R. 572 (P.); Luther v. Sagor, [1921] 1 K.B. 456; City of Berne v. Bank of England, 9 Ves.Jun. 347, 32 Eng.Rep. 636 (Ch. 1804).

34. 681 F.Supp. 1066 (S.D.N.Y. 1988); *see also* Pfizer Inc. v. India, 434 U.S. 308 (1978); Federal Republic of Germany v. Elicofon, 358 F.Supp. 747 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974), *reh'g denied*, 416 U.S. 952 (1974).

35. [1966] 2 All E.R. at 548. Other exceptions to strict orthodox theory are discussed in Nedjati, *supra* note 28, at 398-401 (citing Re Al-Fin Corporation, [1969] 3 All E.R. 396 (Q.B.)); Luigi Monta of Genoa v. Cechofracht Co. Ltd., [1956] 2 Q.B. 552.

36. *See, e.g.*, Transportes Aeroes de Angola v. Ronair, Inc., 544 F.Supp. 858 (D. Del. 1982). For exceptions to the orthodox doctrine that have been applied by U.S. courts, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220 (1933); Upright v. Mercury Business Machines Co., 213 N.Y.S.2d 417 (App. Div. 1961).

37. *See* Nedjati, *supra* note 28.

38. *See* Tsutsui, *supra* note 28, at 326-31.

Kokaryo case[39] in which the government of Taiwan is seeking to evict pro-PRC students from an Osaka dormitory to which it claims title. The defendants demurred, claiming that since the Japanese government no longer recognizes Taiwan, the Taiwan government cannot assert title to property in Japan. The Osaka High Court has rejected the defendant's argument, ruling that Taiwan's lack of public international status does not negate its civil capacity.

Where judicial practice is mixed, legislatures have frequently stepped in to ensure the application of the modern approach. The United States' Taiwan Relations Act (TRA)[40] is an outstanding example of a legislative solution to the problems created by non-recognition of governments. After the United States terminated diplomatic relations with Taiwan in 1979 and gave full recognition to the PRC, it avoided the usual domestic legal complications by enshrining in law the status of the Taiwan government.[41] The TRA generally provides that the application of U.S. law to Taiwan shall not be affected by de-recognition.[42] Other provisions of the TRA deem Taiwan to be a foreign country for the purposes of U.S. laws[43] and preserve under U.S. law the private rights and obligations of Taiwan[44] and the status of Taiwanese law.[45] Still other provisions of the TRA go beyond regulation of private international relationships, maintaining the American defense policy with regard to Taiwan[46] and preserving treaty rights and obligations.[47] These provisions treaded softly but certainly across the line separating public and private international law and thus proved to be a source of controversy in U.S.-PRC relations.[48] Nevertheless, the TRA's private law provisions provide a good model of

39. 107 HANJI 890 (Kyoto District Court 1977), *review granted and reh'g ordered*, 115 HANJI 1053 (Osaka High Court 1982), *rev'd*, 131 HANJI 1199 (Kyoto District Court 1986), *aff'd*, 119 HANJI 1232 (Osaka High Court 1987). This case is cited and discussed in Tsutsui, *supra* note 28, at 328-31. The case is presently under appeal to the Supreme Court of Japan.

40. 22 U.S.C. §§ 3301-3316 (1988).

41. See V. Li, *The Law of Non-Recognition: The Case of Taiwan*, 1 NW. J. INT'L L. & BUS. 134 (1979), for an academic explanation and defense of legislatively provided de facto status.

42. 22 U.S.C. § 3303(a) (1988).

43. *Id.* § 3303(b)(1).

44. *Id.* § 3303(b)(3).

45. *Id.* § 3303(b)(4).

46. *Id.* § 3301(b).

47. *Id.* § 3303(c); *see also id.* §§ 3305-3311 (providing for the "American Institute in Taiwan" and for a "Taiwan instrumentality" through which quasi-diplomatic relations are furthered).

48. PRC commentators have vehemently criticized the United States' Taiwan Relations Act. *See, e.g.*, Zhuang, *On the U.S. "Taiwan Relations Act"* (pts. 1 & 2), BEIJING REV., Sept. 7, 1981, at 19, BEIJING REV., Sept. 14, 1981, at 23; *see also Washington's Anti-China Current*, BEIJING REV., July 19, 1982, at 9.

legislative implementation of the modern theory.[49]

2. Intra-State Practice

The bulk of inter-state conflict of laws practices therefore supports the theory that political non-recognition does not affect private legal relations. However, an additional complicating factor exists in the application of the theory to relations between Taiwan and the PRC: each regime does not merely fail to recognize the other but rather views the other as a rebel regime within its sovereign territory. The issue may be framed as whether the modern view can accommodate recognition by the legitimate government of the private laws of a rebel regime within its country.

This issue was extensively canvassed in a series of cases arising from the American Civil War. These cases concern recognition by the federal courts of the effect of laws and measures of the Confederate governments. For example, in *United States v. Insurance Cos.*,[50] the U.S. Supreme Court held that corporations formed under the laws of a rebel state during the course of the rebellion had legal capacity to sue in federal courts, provided that the act of incorporation of the company had no hostile effect upon the United States but was merely an ordinary act affecting private rights such as would have taken place in peacetime. The Court reached much the same conclusion in *Baldy v. Hunter*,[51] where it recognized bonds issued during the Civil War by the Confederate State of Georgia for non-war purposes. In *Horn v. Lockhart*,[52] the Supreme Court, in accordance with the public policy exception, did not recognize the bonds issued by the Confederate government to finance its war effort.

A more recent example of this situation arose in the British colony of Southern Rhodesia after the 1965 Unilateral Declaration of Independence (UDI) by the government of Ian Smith. The British Parliament promulgated laws invalidating UDI, revoking the legislative powers of the rebel government, and dismissing Premier Smith and his ministers. The United Nations called for economic sanctions against the regime. English courts refused to give recognition to the laws and acts of Ian Smith's rebel government in Southern Rhodesia.[53] To mitigate the harsh consequences of the initial judicial posi-

49. It is interesting to note that the Philippines are considering the adoption of a Philippine-Taiwan Mutual Benefit Relations Act patterned after the U.S. Taiwan Relations Act. *See* FBIS—China, Apr. 18, 1989, at 59.

50. 89 U.S. 99 (1874).

51. 171 U.S. 388 (1898).

52. 84 U.S. 570 (1873).

53. Adams v. Adams, [1970] 3 All E.R. 572 (P.).

tion, the British government issued orders in council that allowed the courts in the United Kingdom to take jurisdiction in Rhodesian marriage and divorce cases and to give effect to certain judgments and decrees of Rhodesian courts.[54]

The weight of legal theory, as well as judicial, administrative, and legislative practices worldwide, indicate that there are solid theoretical bases and precedents for establishing normal private law relationships between Taiwan and the PRC. The two governments need not reach an agreement on public recognition in order to allow full private relations, and the establishment of such relations need not lead to any public international law consequences. Further, the fact that each government officially views the other as a rival—rather than merely as an unrecognized regime—provides no serious barriers to the establishment of private relations.

Finally, the overlap between the PRC's "one country, two systems" reunification proposal and Taiwan's "one country, two governments" concept provides a strong policy basis upon which private law relations can be built. As discussed earlier, while the governments continue to disagree over the issue of international representation, both seem willing to recognize the de facto authority of the other over private matters within their respective territories. Even without full agreement on the reunification proposals, authorities on both sides can use the common ground as a starting point for legislative initiatives facilitating private relationships.

B. A Particular Theory: Inter-Regional Conflict of Laws

In keeping with the rival positions of the PRC and of Taiwan and with the determination of each to adhere to a "one country" policy, an inter-regional conflict of laws approach is most appropriate for establishing a legal framework for private relations. As both reunification proposals suggest, each side can view the other as a separate regional jurisdiction for private law purposes. Using this framework, each side can apply its own established private international law rules to regulate inter-regional relations.

The practice of inter-regional conflict of laws, most often arising under federal systems, provides an instructive precedent. In some regional systems, a federal constitution requires that each jurisdiction

54. Southern Rhodesia (Matrimonial Jurisdiction) Order 1970, S.I. 1970, No. 1540; Southern Rhodesia (Marriages, Matrimonial Causes and Adoptions) Order 1972, S.I. 1972, No. 1718.

See Leslie, *supra* note 28, for a full discussion of the legal effects of the Unilateral Declaration of Independence in Southern Rhodesia.

gives special consideration to the laws of the other. The full faith and credit clause in the U.S. Constitution, article IV, section 1, is the obvious example. In other systems, no special treatment is expressly mandated by a supreme law, either because there is no federal constitution or because the constitution is silent on the question.[55] The United Kingdom and Canada, respectively, are examples. Ordinary legislation or established practice in these countries does give certain special treatment to the laws or judgments of sister jurisdictions over those of foreign countries. Whether or not there is some degree of special treatment, the basic approach in all situations, at least with regard to conflict of laws, is to use the same rules for inter-regional and international purposes. As the prominent British private international lawyer, Ronald Graveson, notes:

> [O]ne is bound to suggest that outside the narrow strip of common ground with public international law represented (*inter alia*) by sovereign and diplomatic immunity, the non-application of public international law to inter-regional systems has no importance whatever. It does not affect the range or substance of rules of inter-regional conflict of laws, which are in principle analogous to and often identical with those of States in the international sense. For the unit of conflict of laws is the legal system, not the national State as such.[56]

Thus, there is no need to create an entirely new system of law to deal with private inter-regional relations. It is almost always possible to incorporate established principles of private international law.

The PRC and Taiwan would be well advised to adopt the private inter-regional model. A central constitution or any treaty arrangement regulating private relations between Taiwan and Mainland China is, of course, out of the question for the foreseeable future.[57] However, nothing prevents each jurisdiction from separately enacting laws to govern private relations between them.

To satisfy constitutional requirements, these laws would likely have to be enacted by the supreme legislature of each jurisdiction, rather than by their judicial or administrative organs. Since the PRC has clearly revoked all laws of the KMT in its first constitution, the

55. *See* J.G. CASTEL, CANADIAN CONFLICT OF LAWS 197-99 (1975).

56. Graveson, *Problems of Private International Law in Non-Unified Legal Systems*, 141 RECUEIL DES COURS 187, 216-17 (1974); *see also* J.G. CASTEL, *supra* note 55, at 197-200.

57. In the author's view, the lack of an inter-regional conflicts regime in the Sino-British Joint Declaration and the Draft Hong Kong Basic Law, *supra* note 7, is a serious shortcoming of these documents.

Common Programme of 1949,[58] any revival of the status of Nationalist law in the PRC would require legislation by the National People's Congress. Similarly, in Taiwan, many statutes treat the Mainland regime as a rebel organization and deem any act favorable to that regime as treason.[59] These statutes are clearly inconsistent with recognition of PRC law for private law purposes. The Legislative Yuan, Taiwan's legislative body, would have to amend these laws.

Ideally, the laws of Taiwan and of the PRC establishing a system of private inter-regional law would be general in nature. As discussed above, there is no need for each jurisdiction to enact an entirely new body of law regulating private relations. Indeed, it would be extremely impractical to do so, given the enormous body of law which would require attention in such diverse fields as conflict of laws, inter-jurisdictional commercial law, etc. Simple provisions incorporating each jurisdiction's established private international law in these areas will usually be sufficient. For instance, in the field of conflict of laws, the PRC could simply deem that Taiwan is a separate legal jurisdiction for the purposes of chapter VIII of the General Principles of Civil Law[60] and of other conflicts provisions.[61] Similarly, Taiwan could amend its Law Governing the Application of Laws to Civil Matters Involving Foreign Elements so that the conflicts rules would also apply to the PRC.[62]

Certain aspects of Taiwan's and the PRC's existing private international law rules would require amendment or replacement when incorporated as private inter-regional law. Specifically, nationality is an important connecting factor in the international conflicts rules of Taiwan and of the PRC,[63] but it would be inappropriate for inter-regional conflict of laws. As both governments maintain that there is but one China and one nationality, domicile or residence should

58. Article 17 of the Common Programme of the Chinese People's Political Consultative Conference, 1949, declares, "All laws, decrees and judicial systems of the Kuomintang which oppress the people shall be abolished." FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 34, 41 (A. Blaustein ed. 1962).

59. See, for example, the Taiwanese laws cited *supra* note 4. Moreover, articles 4(4) and 4(6) of the Statute on Punishment Against Rebellion (effective June 21, 1949) make any act of transporting goods for or supplying funds to the rebel a criminal offense punishable with no less than 10 years in prison. The offense may even result in life imprisonment or death.

60. General Principles of Civil Law of the People's Republic of China ch. VIII, arts. 142-50 (adopted Apr. 12, 1986) [2 Business Regulation] CHINA LAWS FOR FOREIGN BUSINESS (CCH-Austl.) ¶ 19-150(145)-(152) [hereinafter PRC Civil Law].

61. For an analysis of the PRC's rules for conflict of laws, see T.P. Chen, *Private International Law of the People's Republic of China: An Overview*, 35 AM. J. COMP. L. 445 (1987).

62. *See* LAWS OF THE ROC, *supra* note 4, at 828.

63. *See, e.g., id.* art. 1; PRC Civil Law, *supra* note 60, art. 143, at ¶ 19-150(145); *see also* T.P. Chen, *supra* note 61.

replace nationality as a connecting factor for conflicts rules governing relations between Taiwan and the PRC. Moreover, problems related to succession and to multiple marriages arise from the nature of the relationship between Taiwan and Mainland China and again require special treatment.[64]

The special nature of the relationship between the two rivals also demands an expanded role for the public policy test. Some form of public policy reservation is implicit (and sometimes explicit) in all private conflict of laws systems. Each jurisdiction can justifiably deny private law application whenever it would be contrary to the fundamental community interests of the forum. The precise scope of the public policy test is indeterminate, but generally it is used sparingly in the case of private inter-regional law. Jurisdictions within the same nation, which recognize common or complementary interests, would normally give more generous treatment to each other's laws. However, the relationship between Taiwan and the PRC is one of mutual non-recognition and of distrust. Taiwan continues to be wary of the military intentions of the PRC, while the latter is seriously concerned about separatist sentiment within Taiwan. In this political climate, an expanded public policy test is justified. The test should never be applied in an arbitrary or excessive manner lest it stifle private relations between the two regions.

III. FIRST ATTEMPTS: NEW TAIWANESE LAW AND PRC POLICY

During the past two years, the PRC and Taiwan have each taken initial steps toward the creation of systems of laws regulating their relationship. On August 9, 1988, the Vice-President of the Supreme People's Court, Ma Yuan, outlined the policy of the Court toward a selected series of substantive issues of civil law relations between individuals from the two sides of the Formosa Strait.[65] While the occasion was an address at a press conference, the policy statement may safely be regarded as quasi-law because it came from such a senior official. The Taiwan government took a more substantial step in 1989, promulgating a draft law intended to address the entirety of private Taiwan-PRC relations. The Taiwan law, the Provisional Act

64. *See infra* text accompanying notes 90-98.

65. Address by Ma Yuan, First News Conference Held by the Supreme People's Court (Aug. 9, 1988), *Some Legal Issues of the People's Court Dealing With Civil Cases Relating to Taiwan, reprinted in* COLLECTION OF THE LAWS OF THE PRC 369 (Wang Huaian, Gu Min, Lin Zhun & Sun Wanzhong eds. 1989) (in Chinese) [hereinafter COLLECTION]. The volume also contains a number of guiding instructions on related matters issued by the Supreme People's Court. *See id.* at 554-55, 512-13.

on the Relationship Between the People of the Taiwan Region and the People of the Mainland Region (Taiwan's Mainland Relationship Act or TMRA),[66] is by far the more comprehensive step and shall be the focus of the following analysis.[67] The first of the following sections shall discuss and critique the general nature of the Taiwan law as a document setting out the framework for normalized private legal relations. Subsequent sections shall discuss several substantive issues addressed by the new law, with comparisons where pertinent with the PRC policy statement.[68]

A. Taiwan's Mainland Relationship Act: A Workable Framework?

At a basic level, Taiwan's Mainland Relationship Act is a major step forward. The structure of the TMRA is built around recognition of two fundamentally distinct legal systems of the "Taiwan Region" and of the "Mainland Region."[69] Most significantly, a number of the provisions of the TMRA indirectly but effectively recognize the authority of PRC law in the context of private inter-regional law. Article 5, for instance, gives legal recognition to civil law relationships established in the Mainland Region provided they are not contrary to the ROC Constitution and to public policy. Article 12 allows approved organizations and legal persons created under the laws of the PRC to engage in juridical acts. Article 17 makes civil judgments and arbitration awards rendered in the Mainland Region enforceable by an order of the court, again with the proviso that they be consistent with the ROC Constitution and with public policy. To some extent, the TMRA gives effect to the modern theory outlined above, authorizing and recognizing private law relations despite the continued absence of political recognition.

As an implementation of the newer theory, however, the TMRA is only a partial success. The TMRA contains no general provision to serve as a foundation for full private law recognition. The United

66. Draft Provisional Act on the Relationship Between the People of the Taiwan Region and the People of the Mainland Region, *reprinted in* Chung-kuo Shih-pao, Oct. 10, 1989 [hereinafter Taiwan's Mainland Relationship Act]. A partial translation of this draft is produced as an appendix to this paper.

67. An unofficial draft law of similar nature was also prepared by a group of Mainland academics. *See* TAIWAN LAW RESEARCH INSTITUTE, *Act on the Relationship Between the People of the Mainland Region and the People of the Taiwan Region*, in TAIWAN FALÜ YANJIU (Taiwan Law Studies) 10 (1989) (in Chinese).

68. For a Mainland critique of the law, see Xie, *On Taiwan's "Draft Provisional Act on the Relationship Between the People of the Taiwan Region and the People of the Mainland Region"*, 5 FAXUE 40 (1989) (in Chinese).

69. Taiwan's Mainland Relationship Act, *supra* note 66, art. 2.

States' Taiwan Relations Act[70] is a good source for comparison in this regard. The provisions of the TRA make it clear that lack of recognition does not affect the application of U.S. law with respect to Taiwan, that whenever U.S. law refers to foreign countries it refers equally to Taiwan, and that the law of Taiwan can be applied as *lex causae*.[71] In contrast, the TMRA, having no such general provisions, gives recognition to individual aspects of PRC law on an ad hoc basis.

At least three possible reasons can be identified to account for Taiwan's failure to expressly recognize a separate PRC private law jurisdiction. The first reason is the fear that a sweeping recognition of Mainland China as a legal unit may be interpreted as political acquiescence to the PRC as a separate state or legitimate government. The second concern is a constitutional one. The Taiwan authorities may fear that recognition of the PRC's private law would be tantamount to undermining the ROC Constitution which recognizes only its own law as the legitimate law of the land. A third possible interpretation of the piecemeal approach to the recognition of PRC law is that withholding full recognition is a bargaining tool for securing some assurance of non-aggression.

It is clear from the theoretical discussion in the preceding parts of this paper that the first two reasons for Taiwan's hesitance are completely unfounded. The modern theory of conflict of laws makes recognition of private law relationships independent of political recognition of the government under which they were formed. Express recognition of a separate PRC private law jurisdiction is not tantamount to recognition of a rival government or of a rival constitution.

The third possible reason, retention of a bargaining tool, is a matter for political judgment. How effective a bargaining tool it would be is uncertain. Furthermore, the goal of such bargaining, a non-aggression pact, may be of relatively little value. More meaningful assurances of non-aggression will come from extensive, mutually beneficial economic relations and private cooperation. Express recognition by Taiwan of a separate PRC private law jurisdiction is the vital step toward establishing such conditions.

The partial and ad hoc approach presently being pursued by Taiwan results, inevitably, in numerous legal problems which will complicate the establishment of normal private relations. The bulk of Taiwan's Mainland Relationship Act is devoted to substantive law provisions governing private relations between Taiwan and Mainland

70. *See supra* note 40 and accompanying text.
71. 22 U.S.C. § 3303(a), (b)(1), (b)(4) (1988).

China. Among the provisions are those regulating entry and immigration of people from both sides,[72] bigamy (resulting from separation of spouses after 1949),[73] adoption of children,[74] succession,[75] enterprise ownership,[76] and intellectual property.[77] These substantive provisions are far from comprehensive. The area of commercial relations especially lacks regulation. The TMRA, in fact, recognizes its own lack of comprehensiveness with numerous articles making vast areas of law subject to regulations to be promulgated and to measures to be taken by the Executive Yuan, Taiwan's highest-level executive body.[78] These articles delegating the law-making authority to the Executive Yuan merely delay the solutions to the need for further regulations (perhaps as a means of buying time in order to crystallize policy). Instead of incorporating existing private international law to govern Taiwan-PRC relations—the approach suggested by the application of private inter-regional law—Taiwan seems determined to embark on the cumbersome task of drafting an entirely new body of substantive provisions, mixing private law and public administrative law in one statute.

Taiwan's approach is not conducive to stability and to flexibility, two vital considerations in the law-making process. Administrative law, inextricably linked to ever-changing policy, is subject to frequent amendments. The instability is accentuated by Taiwan's uncertain relationship with the PRC. To incorporate matters of private law into the realm of administrative law is to subject them to unnecessary upheaval and discredit. Taiwan is making a fundamental mistake in its new Mainland Relationship Act by failing to sever private law provisions from matters of administrative law.

Another deficiency in the TMRA is its lack of conflict of laws provisions; the TMRA does not provide or incorporate any choice of law rules. There is also no general provision giving recognition to PRC law as possible *lex causae* for conflict of laws purposes. Only article 6 addresses something close to the subject, stating: "A juridical act creating a civil law relationship or an event occurring both in the Taiwan Region and in the Mainland Region shall be deemed to have been created or to have occurred in the Taiwan Region." The exact meaning of this article is far from clear. Perhaps the intention is

72. Taiwan's Mainland Relationship Act, *supra* note 66, arts. 18-23.
73. *Id.* arts. 7, 41.
74. *Id.* art. 8.
75. *Id.* arts. 9-10, 36.
76. *Id.* arts. 14-15.
77. *Id.* art. 25.
78. *See generally, id.* arts. 4, 7, 11, 14-15, 18-19, 23, 25-35, 37-39.

to make the law of Taiwan the *lex causae* for all situations where conflict of laws arise. If this is the case, then Taiwan's Mainland Relationship Act indeed would require no other choice of laws rules. Such a solution, however, would be highly unusual according to the standards of most conflict of laws systems—including those of Taiwan.[79] It would also be highly unsatisfactory because private relationships validly established under the law of the PRC may suddenly become invalid if the law of Taiwan is applied. This interpretation conflicts with the spirit, if not the terms, of article 5 which gives recognition to civil law relationships established in the PRC.[80]

A more likely (and more literal) interpretation of article 6 would have it only as a deeming provision determining the locus of events as a connecting factor when the place of occurrence of a juridical act is at issue and uncertain.[81] Under this interpretation, article 6 would not itself be a choice of law rule; rather, it would be of indirect assistance in conflict of laws, helping to determine jurisdiction and the governing substantive law in cases where locus is the connecting factor. The problem with this interpretation of article 6 is that it leaves undetermined the actual choice of law rules. Perhaps, Taiwan intends to apply the same rules as are used in its existing private international law. Taiwan may also intend to promulgate specific substantive rules in each area of law to be adopted by the Executive Yuan. The TMRA gives no indication of what is intended. Obviously, the conflict of laws aspect of Taiwan's Mainland Relationship Act deserves reconsideration and clarification.

Also causing problems in the framework for legal relations between Taiwan and Mainland China is the very restricted scope for use of documents originating from Mainland China. Article 16 provides: "Documents originating from the Mainland Region shall be presumed authentic only if they have been authenticated by an agency designated or established or a social organization authorized to do so by the Executive Yuan."

The reluctance of the KMT government to give Mainland Chinese documents validity is a natural corollary of its fear of giving implicit recognition to the government of the PRC because many or most documents in question would be issued by the PRC government.

79. *See* Law Governing the Application of Laws to Civil Matters Involving Foreign Elements, LAWS OF THE ROC, *supra* note 4, at 828.

80. Article 10, however, could easily be read down so as to be consistent with the extreme interpretation. The provision could be read as giving recognition only to civil relationships consistent with the laws of Taiwan.

81. For example, unless a deeming provision is applied, a contract finalized during a telephone conversation could be considered as occurring in either region.

This hesitancy, though understandable in the context of this particular issue, is again largely unfounded but will not quickly disappear.

The situation gives rise to a current need to use an established intermediary to authenticate legal documents from the Mainland. Even under optimistic scenarios of rapprochement between the two regimes, it would be impossible for the Nationalist government itself to establish any formal organization on the Mainland. One solution is for Taiwan to use non-government intermediaries from Western countries which have established themselves on the Mainland. Recently, for example, the International Red Cross has been used by both sides as an intermediary to authenticate death certificates on one side for use on the other. The Red Cross, however, has expressed unwillingness to get involved in political matters, which limits its usefulness in an intermediary capacity.[82]

The two governments should consider other possible intermediaries. Various prominent Western law firms, for example, have branch offices in major PRC and Taiwan cities. Their presence provides an especially practical solution to the need for an intermediary as the services would be backed with professional accountability for potential abuse of authority.

B. Issues of Substantive Law

Those articles of Taiwan's Mainland Relationship Act which address issues of substantive law generally take a hesitant and restrictive approach to opening private relations with the PRC. Almost all relationships are subject to "approval" by the "authorities." For example, entry of PRC residents is restricted, Taiwan guarantors are to guarantee exit, and expulsion is within the wide discretion of the authorities;[83] adoption of children from Mainland China is restricted;[84] succession rights of people from Mainland China to Taiwan estates are limited;[85] the legal status of PRC organizations and legal persons is subject to approval;[86] and ownership of Taiwan corporations by PRC people, organizations, and legal persons is forbidden.[87] Violators of these provisions are subject to criminal sanctions.[88]

82. *The Red Cross Organization's Authentication Renders Effect to Documentation*, The World Daily, Aug. 31, 1989, at 28.

83. *See* Taiwan's Mainland Relationship Act, *supra* note 66, arts. 19-21.

84. *Id.* art. 8.

85. *Id.* arts. 9-10, 36.

86. *Id.* arts. 12-13.

87. *Id.* art. 14.

88. *Id.* arts. 42-53.

The forces behind Taiwan's restrictions are essentially twofold. First, Taiwan continues to deeply mistrust the PRC.[89] It wishes to ensure that all visitors from Mainland China are closely screened and monitored. It also wishes to guard against its vital economic interests falling into PRC ownership. Second, Taiwan fears an influx of economic refugees. With over a billion Chinese on the Mainland and only twenty-one million on Taiwan and with a living standard twenty times higher in Taiwan than in the PRC (in terms of per capita GNP), Taiwan's fears are justifiable. In the following two sections, this paper will discuss how these and other forces have shaped Taiwan and PRC policies in two sensitive areas: succession rights and family law.

1. Succession Rights

Articles 9 and 10 of the TMRA govern succession rights. In both underlying rationale and proposed effect, these articles are misconceived. They create unfair restrictions on the inheritance rights of Mainlanders and excessive administrative burdens. In addition, they are politically counterproductive in promoting the evolution toward a peaceful relationship between the two regimes.

Article 9 stipulates a time limit of one year for a PRC heir to come to Taiwan and to claim the estate of the deceased. This is an unrealistic time frame in which to secure an exit visa from the PRC and to pass through Taiwan's security and various other checks for admission to the island. In the absence of any logic for such a short limitation period, it should be extended to a more reasonable length.

Article 10 embodies the provision that PRC successors to an estate situated within the Taiwan Region are only entitled to a one-half share of their inheritance not exceeding NT$2 million per successor, roughly equivalent to US$80,000.[90] The well-publicized rationale is that PRC heirs have not contributed to the accumulated wealth of the deceased.[91] This argument is weak. The theory of succession has never been based on the beneficiary's contribution to wealth. The restriction and the reason behind it give an impression of petty

89. Taiwan's xenophobia toward the PRC is amply demonstrated by continual charges of information gathering levelled against Mainland fishermen coming too close to the shores of Taiwan. *See, e.g., Defence Official on Fishing Boats' "Intrusions"*, CNA (Taipei), Apr. 20, 1989, *reprinted in* FBIS—China, Apr. 21, 1989, at 68.

90. Normally, according to article 1141 of the Taiwanese Civil Code, "[w]here there are several heirs of the same order, they inherit in equal shares *per capita*. . ." LAWS OF THE ROC, *supra* note 4, at 83. A similar provision is found in articles 10 and 13 of the PRC Succession Law. COLLECTION, *supra* note 65, at 326.

91. *On Succession to the Taiwanese Estate by Mainland Compatriots*, The World Daily, June 1, 1989, at 12.

provincialism.[92]

A preferable solution would be to allow the PRC heirs equal shares in the estate.[93] To safeguard the interests of the heirs and to satisfy Taiwanese political requirements, the successors' rights to collect their shares could be deferred. The estate could be held in trust by the government until such a time when the PRC heirs could benefit substantially from the inheritance without possible government interference and until such a time when the two sides are in a state of peaceful relations. In the interim, a sum from the estate could be extracted for the necessary maintenance of the heirs and dependents which could be far below the US$80,000 maximum allowed in the TMRA. Precedent for this temporary trusteeship can be found by examining American alien inheritance statutes enacted during the immediate post-war era when the United States and the Eastern Block countries were engaged in excessive rivalry. Money and property were often withheld under statutes to safeguard the beneficiary's rights until the person could show that he or she alone would receive the intended benefits and to ensure that American resources would not be used by Eastern Block countries against the U.S.[94]

2. Family Law

Among the most troublesome questions in private Taiwan-PRC inter-regional conflicts are the hundreds of thousands of "successive" marriages contracted by KMT followers who came to Taiwan from Mainland China before the communist takeover in 1949. One or both of the spouses who were married on the Mainland before 1949 have new spouses in Taiwan or in Mainland China through subsequent marriages. The case of Cheng Yuancheng is a typical illustration.[95] Mr. Cheng had been married on the Chinese Mainland in 1940 and went to Taiwan alone on the eve of the downfall of the Nationalist government. He remarried in 1960 in Taiwan and has been living there with his second wife ever since. Until 1986, when his first wife brought an action in Taiwan to annul the second marriage, Mr. Cheng and his second spouse had presumed the first marriage had

92. Mainland commentators have severely criticized article 16. *See, e.g.*, Xie, *supra* note 68, at 40, 42.

93. For theories of wealth by inheritance, see CHEN CHI-YAN, MIN-FA CHI-CHENG (Succession in Civil Law) 10-11 (7th ed. 1984); TAI YAN-HUI & TAI TUNG-HSIUNG, CHUNG-KUO CHI-CHENG FA (Chinese Succession Law) 1-4 (rev. ed. 1986).

94. *See* Dorman, *How "Cold War" Freezes Funds Due to "Iron Curtain" Nationals*, 20 BROOKLYN BARRISTER 54 (1968); *see generally* Note, *Alien Inheritance Statutes and the Foreign Relations Power*, 1969 DUKE L.J. 153.

95. For an excellent discussion of the Cheng case, see Tai Tung-hsiung, FA-HSÜE TSUNG-K'AN, Jan. 1989, at 25.

ended and the latter marriage was valid. Nevertheless, Mr. Cheng's successive marriages, like those of many others, violate the elementary principle of monogamy which constitutes the foundations of Taiwan's marriage system as embodied in its Civil Code and of the PRC's marriage system as provided in its Marriage Law.[96] The action commenced by Cheng's first wife in Taiwan courts to render the Taiwanese marriage void was upheld by all three levels of the judiciary.

The Grand Judicial Council, the Taiwanese body responsible for constitutional interpretation, in an attempt to mitigate the harsh and impractical consequences of the outcome, held the Supreme Court decision to be a violation of article 22 of the Nationalist Constitution which guarantees the "freedoms and rights of the people."[97] The remedial provisions in Taiwan's Mainland Relations Act (articles 7 and 41) confirm the Grand Judicial Council's decision. By doing so, however, they create an extraordinary and unintentional circumstance whereby polygamy would be tolerated in a society where the Civil Code (adopted over a half century ago to replace China's feudal marriage system) has unequivocally established the basic principle of monogamy. The same stance is taken in PRC policy statements,[98] placing Taiwan and the PRC in an identically anomalous position.

A sound measure, which would preserve monogamy while mitigating the harsh consequences created by rendering one of the successive marriages voidable, would be to presume the second marriage valid and the first marriage void from the time of the second marriage. This presumption would be conclusive if both original spouses remarried. If only one spouse remarried, the validity of the first marriage would be contingent on the previously unmarried spouse of the second marriage choosing to opt out of that marriage. The choice would thus be given to the previously unmarried spouse of the second marriage as that individual would be the most innocent victim of the three parties involved. The decision could be made within a pre-

96. The elementary principle of monogamy is expressly stipulated in the Taiwanese Civil Code. Article 985 declares, "A person who has a spouse may not contract another marriage." LAWS OF THE ROC, *supra* note 4, at 304. Violations of the monogamy principle render the second marriage void (article 998(2)) or voidable if the second marriage is contracted before June 5, 1985 (old article 992 before the recent amendments to the Civil Code). Polygamy is a criminal offense punishable by imprisonment. Criminal Code, art. 237, LAWS OF THE ROC, *supra* note 4, at 960-61.

Similar provisions are in article 312 of the PRC Marriage Act of 1980 and in article 180 of the PRC Criminal Code of 1979.

97. *Revival of the Cheng Yuancheng Case*, The World Daily, June 24, 1989, at 12.

98. The PRC seems to have taken a similar position. *See* Address by Ma Yuan, *supra* note 65, para. 1.

scribed time period by means of summary procedure in order for the courts to deal most effectively with the huge number of possible applicants. To protect the interests of spouses, whenever a marriage has been voided, it would still be given civil effect. The spouse of the voided marriage would enjoy all civil rights previously enjoyed, such as the rights to support, inheritance, workman's compensation, and division of property, which are inherent in a marriage.

This solution makes good the expectations of all parties. It recognizes that the ongoing relationship is usually the stronger bond and should prima facie be preserved over another marriage. At the same time, the solution compensates the party whose marriage has been rendered void or voidable by introducing legislation to maintain the civil effect of marriage. By adopting this measure, Taiwan and the PRC can deal fairly with individuals caught in a common and disturbing situation and preserve the basic principle of monogamy.

IV. CONCLUSION

Unless the PRC and Taiwan can reach a compromise for cooperation in the private law sphere, private relations between Taiwan and Mainland China will continue to be impeded and political relations poisoned by an atmosphere of rivalry, suspicion, and intransigence. The problem is well demonstrated by the *Kokaryo* case in which a simple property dispute has been transformed into an international showcase for political and legal maneuvers.[99] A continuation of this attitude of non-cooperation will be harmful to both sides. For both the PRC and Taiwan, an important principle is at stake: unity of the Chinese people. The potentially enormous benefits of a closer economic relationship are also at risk. The economic consequences of continued rivalry will be especially serious for the PRC, which is desperately seeking rapid economic growth. As for Taiwan, the government needs to break out of its isolation and to rejoin the international community. Rebuilding its relationship with the PRC is the first step.

The process of mending relations between Taiwan and the PRC is a painstaking one. The Tiananmen Square crackdown will no doubt impede the process of reconciliation. Nevertheless, important overtures have been made on either side to find legal solutions to private inter-regional conflicts between the two regimes. Continuing these efforts will be of great benefit to the people of both regions, the Tiananmen Square incident notwithstanding.

Taiwan's development of a carefully deliberated and balanced

99. *See supra* note 39 and accompanying text.

Mainland Relationship Act is an important step toward closer relations. The cautious stance in the TMRA may be justified given the disparity in military power and the refusal of the PRC to renounce the use of force for reunification. However, Taiwan must strive to deal more forthrightly with Mainland China as its hesitancy has led to discriminatory treatment of Mainlanders. The outmoded legal provisions are harmful to both sides.

Although the Taiwan-PRC situation is unique, the governments may look to foreign experience on both theoretical and practical levels to help rebuild a prosperous and peaceful relationship.

Appendix

DRAFT PROVISIONAL ACT ON THE RELATIONSHIP BETWEEN THE PEOPLE OF THE TAIWAN REGION AND THE PEOPLE OF THE MAINLAND REGION*

Article 1

This statute is enacted to safeguard national security and social stability, to regulate transactions between the people of the Taiwan Region and the people of the Mainland Region, and to address attendant legal matters. That which is not regulated by this statute shall be covered by other relevant laws and regulations.

Article 2

In this Act,

1) "Taiwan Region" means the free areas situated within the territorial boundaries of this country;
2) "Mainland Region" means all territories of this country other than those in the Taiwan Region;
3) "People of the Taiwan Region" means people who have established registered household residency in the Taiwan Region;
4) "People of the Mainland Region" means people who have established registered household residency in the Mainland Region or people of the Taiwan Region who, having gone to the Mainland Region, have remained there continuously for more than two years.

Article 3

The provisions of this Act pertaining to the people of the Mainland Region apply equally to those travelling and residing abroad.

Article 4

The Executive Yuan may authorize or establish certain public or private organizations to handle matters relating to transactions between the People of the Taiwan Region and the People of the Mainland Region.

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* Translation by Tung-Pi Chen.

Article 5

Civil law relationships established and rights and obligations created in the Mainland Region between People of the Taiwan Region and People of the Mainland Region, between People of the Mainland region themselves, or between People of the Mainland Region and foreign nationals shall be recognized provided that they do not contravene the Constitution of the Republic of China, public order, or good morals.

The above paragraph applies equally to civil law relationships established and rights and obligations created before this Act comes into force.

The above two paragraphs shall not be applicable to rights of which the exercise or transfer is prohibited by law.

Article 6

A juridical act creating a civil law relationship or an event occurring both in the Taiwan Region and in the Mainland Region shall be deemed to have been created or to have occurred in the Taiwan Region.

Article 7

If spouses, one of whom is living in the Taiwan Region and the other in the Mainland Region, are unable to cohabit and if one of the spouses remarried on or before June 4, 1985, no interested party may apply to have the latter marriage declared void; if one of the spouses remarried between June 5, 1985, and November 1, 1987, the latter marriage shall be deemed to be legally valid.

In the previous situation, if both spouses remarried, the original marriage shall be deemed to have ended from the date of the later remarriage.

Article 8

Subject to Article 1079(5) of the Civil Code,[100] the adoption by people of the Taiwan Region of children from the Mainland Region shall also not be recognized by a court if the prospective parents:

1) have any children or adopted children;

2) simultaneously adopt two or more children; or

100. Article 1079(5) of the Civil Code contains the grounds for invalid or voidable adoptions, which includes insufficient age difference between adopter and adoptee, a close familial relationship between the two, and other situations of the lack of capacity.

3) have not had the adoption attested to by a public or private organization authorized by the Executive Yuan.

Article 9

People of the Mainland Region may exercise the rights of succession to estates of the People of the Taiwan Region, except those who have joined a rebel organization and have not renounced their membership.

The rights of succession referred to in the above paragraph may only be exercised within one year of the time that the rights arise. During this period, the successors must enter the Taiwan Region with approval and submit written notice of intention to the court where the deceased last resided. Otherwise, the succession rights shall be deemed to have been abandoned.

If the succession rights arise before this Act comes into force and if the successors from the Mainland Region do not enter the Taiwan Region with approval and submit written notice of intention within one year after this Act comes into force, the succession rights shall be deemed to have been abandoned.

Article 10

The successors from the Mainland Region shall be entitled to only one half of the share prescribed by the Civil Code; the remainder shall belong to the successors from Taiwan.

If the successors of the prior order are all from the Mainland Region and if there are no Taiwanese successors of this order, the successors from the Mainland Region may only succeed to one half of the share prescribed by law, with the remainder distributed among the Taiwanese successors of lower orders.

If the estate has no successors in the Taiwan Region and if all the successors are from the Mainland Region, the successors from the Mainland Region shall be entitled to succeed to only one half of the estate, and the remainder shall belong to the State Treasury.

If the deceased bequests property from an estate to people of the Mainland Region, the bequest shall not exceed one half of the value of the estate.

The total body of property received by any person of the Mainland Region through succession or bequest as prescribed in the above four paragraphs shall not exceed NT$2 million.[101]

101. NT$2 million is approximately US$80,000.

Article 11

The permissibility of interests in immovable property acquired by or created in favor of people of the Mainland Region in the Taiwan Region[102] shall be governed by regulations adopted by the Ministry of Interior.

Regulations mentioned in the above paragraph shall be submitted to the Executive Yuan for approval and promulgation.

Article 12

Legal persons, organizations, or other agencies of the Mainland Region may not engage in juridical acts in the Taiwan Region without the approval of the appropriate authorities.

The terms and conditions for such permission shall be prescribed by regulations drafted by the appropriate authorities for approval and promulgation by the Executive Yuan.

Article 13

Any person engaging in juridical acts with another in the name of a legal person, organization, or other agency of the Mainland Region who has not received approval to engage in such acts from the authorities shall bear joint liability with the legal person, organization, or other agency.

Article 14

People, legal persons, organizations, or other agencies of the Mainland Region may not become shareholders or members of legal persons, organizations, or other agencies of the Taiwan Region without approval from the appropriate authorities.

Article 15

Recognition may be denied to foreign corporations more than twenty percent of whose shares are owned by people, legal persons, organizations, or other agencies of the Mainland Region; those which have been recognized may lose their recognition.

Foreign corporations whose dominant shareholders are people, legal persons, organizations, or other agencies of the Mainland Region are also subject to the same restrictions.

102. The translation preserves the imprecise wording of the original Chinese. "In the Taiwan Region" appears to refer to the place of acquisition or creation. However, these words are most likely intended to refer to the location of the immovable property.

Article 16

Documents originating from the Mainland Region shall be presumed authentic only if they have been authenticated by an agency designated or established or a social organization authorized to do so by the Executive Yuan.

Article 17

Civil arbitration awards rendered in the Mainland Region on disputes arising between People of the Taiwan Region and People of the Mainland Region, between People of the Mainland Region themselves, or between themselves and foreign nationals are enforceable by an order of a court provided that they are not contrary to the Constitution of the Republic of China, to mandatory or prescriptive provisions of law, to public order, or to good morals.

Final civil judgments rendered in the Mainland Region are governed by the same principles as stipulated in the above paragraph.

Article 18

People of the Taiwan Region shall apply to the appropriate authorities for approval before entering into the Mainland Region.

People of the Taiwan Region entering into the Mainland Region upon approval may not engage in activities inconsistent with their approved purpose for entry which may endanger national security or interest.

The terms and conditions for such approval under paragraph one shall be prescribed in regulations to be drafted by the Ministry of Interior for approval and promulgation by the Executive Yuan.

Article 19

People of the Mainland Region may not enter, stay, or reside in the Taiwan Region without the approval of the appropriate authorities.

The terms and conditions for such approval shall be prescribed in regulations to be drafted by the Ministry of Interior for approval and promulgation by the Executive Yuan.

Article 20

People of the Mainland Region who have entered the Taiwan Region may be expelled upon:

1) entering without approval;
2) exceeding their approved period of stay;

3) engaging in activities grossly inconsistent with their approved purpose of entry;
4) engaging in criminal activity, being convicted of a criminal offense by a court, or serving, in whole or in part, a penal sentence; or
5) there being facts indicating that national security or social stability may be endangered by their continued presence in the Taiwan Region.

The above paragraph applies equally to People of the Mainland Region who have entered the Taiwan Region before this Act comes into force.

Article 21

People of the Taiwan Region acting as guarantors for visits from People of the Mainland Region must assist the authorities to enforce the expulsion of guaranteed parties not leaving within their approved period of stay and must bear the expenses incurred to enforce expulsion.

In the above situation, the authorities may prohibit a guarantor from leaving the Taiwan Region until the guaranteed party leaves the Taiwan Region.

The expenses referred to in the first paragraph may be recovered by the authorities by submitting receipts and a statement of account to a court for enforcement.

Article 22

People of the Mainland Region who have been granted admission to the Taiwan Region may not register as a candidate for public office, be employed in the civil or military services or in public-owned enterprises, or organize political parties within three years of the date of household residence registration.

The above paragraph does not apply if other laws and regulations stipulate to the contrary.

Article 23

People of the Mainland Region granted permanent residency in the Taiwan Region may apply to the Ministry of Education for review of their academic credentials and for the issuance of appropriate academic certificates.

The terms and conditions for such reviews and certification shall

be prescribed in regulations to be drafted by the Ministry of Education for approval and promulgation by the Executive Yuan.

Article 24

Taxes on income receivable by people, legal persons, organizations, or other agencies of the Mainland Region from sources in the Taiwan Region shall be withheld and filed at the source.

Article 25

Authors' works of People of the Mainland Region shall receive legal protection only upon submission to the Ministry of Interior for review and approval for registration.

The terms and conditions for such review and registration shall be prescribed in regulations to be drafted by the Ministry of Interior for approval and promulgation by the Executive Yuan.

[*Articles 26* through *35* and *37* through *39* make all communication, correspondence, transportation, investment, trade, financial and other transactions between the Taiwan Region and the Mainland Region, and payments of salaries and pensions to persons residing in the Mainland Region subject to regulations and penalties to be prescribed by the authorities.]

Article 36

The estates of active or retired military personnel with no ascertained successors or with no successors capable of managing their estates shall be managed by the appropriate authorities.

Matters involving the above estates that have been dealt with by appropriate authorities in accordance with regulations shall have legal effect.

The regulations for managing the estates mentioned in paragraph one of this article shall be drafted by the Ministry of Defense and the Executive Yuan Commission on Veterans' Affairs, respectively, for approval and promulgation by the Executive Yuan.

Article 40

A criminal offense committed in the Mainland Region or on a vessel or aircraft of the Mainland Region is subject to prosecution and penal sanctions under the law of the Republic of China even if the criminal offense may have been subject to penal sanctions of the Mainland Region, provided that sanctions imposed under the law of

the Republic of China for this offense may be reduced in whole or in part.

Article 41

If one spouse resides in the Mainland Region, if the other spouse resides in the Taiwan Region, and if either of them entered into another marriage or cohabitation with a third party before November 1, 1987, neither the spouse nor the third party shall be subject to criminal prosecution or sanctions.

[*Articles 42* through *53* impose criminal sanctions for violations of provisions of this Act.]

Article 54

The implementing regulations of this Act and the date when this Act shall come into force shall be prescribed by the Executive Yuan.