Forging Taiwan’s Legal Identity

Margaret K. Lewis

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FORGING TAIWAN’S LEGAL IDENTITY

Margaret K. Lewis*

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INTRODUCTION

There is no Taiwanese law. “Taiwan” does not exist as an independent state under that official name, and there are no laws issued by the “Taiwanese” government.¹ From a strictly

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¹. This Article does not seek to take a position on the long-standing philosophical debates on the minimum necessary conditions for the creation of a “legal system.” Compare JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE
legal perspective, the Republic of China (ROC) was established in 1912 and is the formal title of the government now based in Taipei. The ROC is today recognized by only sixteen countries and the Holy See, and its existence is vehemently denied by the People’s Republic of China (PRC). In the eyes of Beijing, the ROC ceased to exist in 1949, and the island of Taiwan is an “inalienable part of China” that is beset by “separatist forces.” Despite this complicated backdrop, “Taiwan” looks, feels, and acts like a country operating under that name. The “ROC” title is largely relegated to formal government pronouncements, and it would be surprising indeed for a ROC passport holder to respond that she came from the “Republic of China” instead of simply “Taiwan.” A complex set of laws and institutions are at work in Taiwan (defined here as the areas under actual control of the ROC government based in Taipei). Living there is akin to living in

Determined (Isaiah Berlin et al. eds., 1954) (legal system as requiring sovereign to which subjects render obedience) with H.L.A. Hart, The Concept of Law 50 (1961) (critiquing Austin in part based on persistence of law after initial sovereign has perished); see generally Sean Coyle, Hart, Raz and the Concept of a Legal System, 21 L. & Phil. 275 (2002) (critiquing legal positivism’s view of the concept of a legal system). The starting point here, rather, is that there is a legal system applying to people present in Taiwan (as a geographic entity), but it still officially exists under the name of “the Republic of China,” which itself has a disputed basis as a sovereign entity that is capable of enacting laws. To have a “Taiwanese” legal system, there needs to be an explanation of what is the “Taiwan” behind these laws, and, as explained later in this Article, this question is fraught. Cf. Joseph Raz, The Identity of Legal Systems, 59 Cal. L. Rev. 795, 813 (1971) (“A theory of law must be based, at least partly, on a theory of state . . . .”).


5. See About Taiwan, Official Website of the Rep. of China (Taiwan), https://www.taiwan.gov.tw/about.php (last visited Apr. 24, 2019) (ROC “is situated in the West Pacific between Japan and the Philippines. Its jurisdiction extends to the archipelagoes of Penghu, Kinmen and Matsu, as well as numerous other islets.”).
any number of countries with a legislature, executive, and judiciary. These three branches create, implement, and interpret laws that are “normative, institutionalized, and coercive.”

A debate is underway in Taiwan concerning the path of legal reforms. The law applied in Taiwan today is rooted in the codes that were written in mainland China and then applied to Taiwan after World War II by the Nationalist Party led by Chiang Kai-shek. Law in Taiwan has also been influenced by its long history of indigenous peoples and arrivals of people from across the strait, foreign intervention through colonial rule, and recent, extensive legal transplants from Japan, Germany, and the United States. There has been a heavily technocratic bent to reforms with experts dominating the legal system’s development. Now, over thirty years since the end of martial law and over twenty years since the first direct presidential election, there are increasing calls for the legal system to be more engaged with the broader population. The unflattering depiction of judges as “dinosaurs” who are out of touch with contemporary concerns epitomizes the perceived gap between the institutions that implement the legal system and the people who are subject

8. This Article uses the Romanization commonly applied to proper names. In the absence of established convention, it uses Pinyin as the default.
9. See Wang Taisheng (王泰升), Gaishu Taiwan Pa de Lishi, Sixiang yu Faxue (概述台灣法的歷史, 思想與法學) [An Overview of Taiwan’s Legal History, Thought and Study], 290 TAIWAN L.J. (台灣法學雜誌) 13, 13–14 (2016) (explaining influence on Taiwan’s legal development of indigenous peoples and contacts with the Qing Dynasty); cf. J. Bruce Jacobs, Taiwan’s Colonial Experiences and the Development of Ethnic Identities: Some Hypotheses, 5 TAIWAN IN COMP. PERSPECTIVE 47–59 (2014) (examining roles of various ethnic groups in Taiwan’s history).
10. Taiwan was colonized by Japan most recently, but also had periods of Spanish and Dutch rule. See CHANG-FÄ LO, THE LEGAL CULTURE AND SYSTEM OF TAIWAN 1–3 (2006).
11. See, e.g., Chang Wen-chen (張文貞), Chaoyue Ji Shou, Lizu Taiwan, Maixiang Guoji de Faxue Yanjiu Qianjing, Keji bu 104 Nian Jiechu Yanjiu Jiang (超越繼受、立足臺灣、邁向國際的法學研究前景, 科技部 104 年傑出研究成果) [Prospects for Legal Research that Surpass Succession, is Based in Taiwan, and Moves Internationally], RENWEN JI SHEHUI KEXUE YANJU FAZHAN SI (人文及社會科學研究發展司) [DEPT. OF HUMANITIES AND SOCIAL SCIENCES], June 2016, at 97.
Taiwan is facing the challenge of moving from dinosaurs to dynamism. This Article was largely written while living in Taiwan during the 2017–18 academic year and watching the reform debate play out firsthand. It thus focuses on events during this period, though the trends discussed herein are ongoing at the time of final edits in spring 2019. This Article argues that the legal system in Taiwan is undergoing a transformation, albeit through a process that is discordant, muddled, and halting: a new legal identity is slowly being forged. It is being “forged” in the sense that great effort is being expended to bring about change, though the results of that process remain uncertain. The term “identity” has many meanings. As used here, “identity” is the distinguishing characteristics of an entity. This type of “identity” as the key features of a legal system is similar to what Joseph Raz described as material unity:

The material unity of a legal system consists in its distinctive characteristics; it depends on the content of its laws and on the manner in which they are applied. When trying to explain the characteristic features of a legal system we are not, of course, looking for the detailed regulation of every legal institution. Rather, we are looking for the all-pervasive principles and the traditional institutional structure and practices that permeate the system and lend to its distinctive character.


13. As such, this Article goes beyond formal legal rules to also incorporate the broader cultural aspects of reform efforts. Cf. James Gordley, Comparison, Law, and Culture: A Response to Pierre Legrand, 65 AM. J. COMP. L. 133, 135–36 (2017) (Legal scholars have made efforts to “explain[] differences in legal systems in terms of culture. . . . The topic of the Annual Meeting of the American Society of Comparative Law in 2007 was ‘Comparative Law and Culture.’ There was no shortage of speakers, and those present reacted warmly.”).


15. Raz, supra note 1, at 796. An effort to describe the overarching features of Taiwan’s legal system connects to the rich debate regarding “legal culture.”
Complex debates about the legal system’s components continue among law-trained elites in Taiwan, for example, regarding reforms to the Supreme Court’s structure. What is new is the growing emphasis on a more inclusive discussion regarding the general principles that pervade the legal system, with a particular focus on criminal cases that tend to receive significant media attention. This debate has given greater voice to people beyond experts.

Specifically, there is an embracing of greater transparency, clarity, and participation. This trio of animating principles is seen first in the process of legal reform debates, i.e., the public can see the debates, understand the contents of those debates, and contribute their opinions to those debates. These principles are also starting to be embedded in the substance of the new practices that are emerging from this debate, i.e., the public will be able see the legal system operating, understand the decisions made by the system, and add their voices to the ongoing operation of the system. This combination of transparency, clarity, and participation has the potential to weave the values and concerns of contemporary Taiwanese society into the legal fabric.

A yet unanswered question is whether the system that emerges from the reform debate will actually engage people in a meaningful way. To the extent that the legal system in Taiwan develops an identity that stresses connections with the general public, a second layer of “identity” becomes involved: whether that accessible legal system will become part of the group consciousness of people in Taiwan. In other words, what is at stake is not just changes to the legal system itself, but also whether that system will contribute to a shared sense of identity. For example, will a legal obligation to serve as a lay judge be part of what it means to be Taiwanese? Will reforms that lowered the threshold for putting referenda on the ballot engender a sense

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See, e.g., Sally Engle Merry, *What is Legal Culture – An Anthropological Perspective*, 5 J. COMP. L. 40, 43 (2010) (examining “the intellectual origins of the concept of legal culture” and “develop[ing] a more complex model of legal culture by disentangling its constituent parts”).

that to be Taiwanese includes a direct say in the content of legislation? ¹⁷ The creation of a shared identity is of particular importance to Taiwan because the question of what it means to be Taiwanese as compared with Chinese—or some combination thereof—is pervasive. One cannot live in Taiwan today without encountering the many ways that people who call it home wrestle with who they are and what “Taiwan” means.

Creation of a group identity is a messy, complicated process. The many holders of ROC citizenship are not going to converge on a single, uniform conception of what it means to be “Taiwanese,”¹⁸ just as being “American,” “French,” or “Brazilian” are contested concepts.¹⁹ What is relevant here is that a dynamic process is underway that could reshape the legal system applicable to the over twenty-three million people who are ROC citizens, and there is the potential for a shared connection with that legal system to become one facet of what it means to be Taiwanese. This inquiry is important because Taiwan is at a moment of palpable uncertainty about its future.²⁰

The trajectory of legal reforms in Taiwan is largely a domestic matter. It is, however, tied to considerations that extend beyond Taiwan’s borders. The creation of a distinct legal identity has the potential for both rewards and risk depending on how reforms are perceived by audiences in the PRC and around the

¹⁷. See Brian Hioe, Referendum Changes a Step Forward for Democratic Experimentalism in Taiwan?, NEW BLOOM MAG. (Dec. 13, 2017), https://newbloommag.net/2017/12/13/changes_referendum_act/ (suggesting that Referendum Act changes and related reforms may place Taiwan as “an experiment in a more direct form of democracy than many western models”).

¹⁸. See generally CHANGING TAIWAN IDENTITIES (J. Bruce Jacobs & Peter Kang eds., 2017) (analyzing how Taiwanese identities have changed after the Taiwanization process that commenced in the 1990s).

¹⁹. See, e.g., James A. Morone, Still Crazy After All These Years: America’s Long History of Political Delusion, FOREIGN AFF., Mar.—Apr. 2018, at 156 (explaining in reviewing Fantasyland by Kurt Andersen: “Running beneath the parade of con artists and manias that Andersen deftly catalogs glints something more dangerous than illusions: a bitter contest over national identity that political institutions may no longer be able to contain”).

²⁰. See, e.g., Shelley Rigger, Taiwan on (the) Edge, FOREIGN POL’Y RES. INST. (May 17, 2019), https://www.fpri.org/article/2019/05/taiwan-on-the-edge/#.XOFqszuOUcB.email [hereinafter Rigger, Taiwan on (the) Edge] (“At this moment, as Taiwan’s political parties battle over their presidential nominations, I am more worried about the future of the Taiwan Strait than I have ever been.”).
world. On the rewards side, showing the world a legal system that has cast off an authoritarian past can burnish Taiwan’s reputation as a thriving democracy. “Free China” — a misnomer during extended martial law — is an apt description today. A sustained, energetic, and often-contentious conversation between Taiwan’s people and government regarding legal reforms creates a stark contrast to the stifling of public criticism in the PRC. If greater public engagement further results in enhanced protection for human rights, Taiwan has an even stronger case to differentiate itself from the repressive practices that are on the rise across the strait.

Accentuating a distinctive Taiwanese legal identity also carries risk. The current PRC leadership has stressed safeguarding territorial integrity as a core national interest for which there is a “red line” that cannot be crossed. PRC-state-run media has railed against ROC President Tsai Ing-wen that she has been “pushing forward all types of ‘implicit’ and ‘cultural’ Taiwan independence since assuming office.” Thus, while there is much to applaud in the open debate concerning the future of Taiwan’s legal system, cultivating a distinctive identity that downplays historic ROC roots also could raise the PRC government’s ire if construed as part of what is pejoratively described by Beijing as President Tsai’s de-Sinicization political agenda.


22. Formosa Declaration, TIME, Nov. 3, 1958, at 20 (“After [Secretary of State John Foster] Dulles departed, the Communists stopped shelling for a while, and Red Defense Minister Peng Teh-huai, in a broadcast beamed at the Free Chinese, announced that shore batteries would hold their fire every other day . . . .”).


26. See, e.g., 58% Tairen Ziren Zhongguoren Chuang 6 Nian Xin Gao (58% 台人自認中國人 創6年新高) [58% of Taiwanese Self-Identify as Chinese — A
This is not to say that Taiwan’s introduction of lay participation in criminal trials will prompt Beijing to invade. The implication is that engaging Taiwan’s general population in legal reform debates and the actual operation of the resulting legal system is but one of many ingredients in developing a broader “Taiwanese” identity. The more conspicuous the indications of “soft” Taiwan independence become, the more they could exacerbate already tense relations with Beijing. This Article does not take a normative position on those tensions as a good or bad thing. Whether tension is a tool necessary to effectuate positive change or a path towards destructive conflict is for the people of Taiwan to evaluate. The claim is simply that warnings from the PRC government cast a gentle pall over the reshaping of the legal system into one that is unabashedly Taiwanese.

Part I of this Article provides context by introducing the nuanced terminology that is inextricable from living in Taiwan today. Part II turns to law and outlines the historical development of the legal system in Taiwan. Part III argues that transparency, clarity, and participation are animating principles of the current reform debate and are beginning to emerge as characteristics of Taiwan’s inchoate legal identity. Embedding these values into Taiwan’s legal identity could, in turn, help foster a shared sense of identity among the populace regarding what it means to be Taiwanese. Part IV looks beyond Taiwan’s borders to posit that reshaping Taiwan’s legal identity has the potential both to boost Taiwan’s international standing and to further chafe cross-strait tensions. A question to watch is whether the shadow of Beijing might serve as a damper on legal innovation in Taiwan, a point of contrast that emboldens Taiwan to celebrate its distinct system, or perhaps some combination thereof.

I. THE COMPLICATED TERMINOLOGY OF TAIWAN

The terminology surrounding Taiwan is complex and sensitive. Even the U.S. government makes gaffes. In February

New 6 Year High], CHINA TIMES (中時電子報) (Oct. 19, 2018), https://www.chinatimes.com/newspapers/20181019000204-260309 (positing that the poll “reflects the utter failure of the DPP government’s ‘de-sinicization’” (“這反映民進黨政府「去中國化」徹底失敗”).

27. See LAWRENCE & MORRISON, supra note 6, at 4–5 (“Nomenclature”).
2018, the Trump administration issued a correction on an official Pentagon report after labeling Taiwan as part of the PRC.\textsuperscript{28} In July 2017 the White House identified Xi Jinping as the President of the “Republic of China.”\textsuperscript{29} In 2006, the Bush administration introduced the PRC’s national anthem as that of the “Republic of China.”\textsuperscript{30} The Republic of China (ROC) is the official name of the state that was established in 1912 after the last emperor of China’s Qing Dynasty fell.\textsuperscript{31} Years in Taiwan are still counted from this date such that 2019 is year 108. At the time of the ROC’s founding, the island of Taiwan was under Japanese colonial rule, having been transferred following the Sino-Japanese War.\textsuperscript{32} Japanese rule extended until its defeat in World War II.\textsuperscript{33}

The end of World War II did not cease hostilities in China. The ROC government—under the Nationalist Party (Kuomintang or KMT)—and Chinese Communist Party (CCP) had at times worked together against the Japanese in the-enemy-of-my-enemy-is-my-friend fashion. This at best wary cooperation gave way to a civil war that resulted in the KMT fleeing to the island of Taiwan and to Mao Zedong proclaiming the establishment of the PRC on October 1, 1949. This physical division of territorial control persists.

The PRC government based in Beijing controls all of mainland China along with Hainan, several smaller islands, Hong Kong


\textsuperscript{32} For a condensed timeline of Taiwan’s history, see Taiwan Profile – Timeline, BBC (Jan. 9, 2018), http://www.bbc.com/news/world-asia-16178545.

\textsuperscript{33} See Lo, supra note 10, at 3 (explaining purpose of Japanese policy toward the colony of Taiwan as “to weaken the Taiwanese people’s consciousness about their identity”).
since 1997, and Macau since 1999. The ROC government based in Taipei controls the island of Taiwan along with surrounding islands and the more distant Kinmen archipelago, portions of which are “barely more than a mile” from the mainland shore. The KMT government originally relocated to Taiwan with the stated purpose of using it as a base to retake the mainland, a goal that has been abandoned by all but a tiny fringe of people in Taiwan. Today, the ROC flag adopted in 1921 still flies above the President’s office in Taipei, and the official ROC seal from 1929 is still used to authenticate official documents. Over the years, however, the use of “Taiwan” has come to dominate. Sometimes phrasing is combined: for example, the “Republic of China (Taiwan)” is used when signing certain international agreements. Sometimes the “ROC” drops out entirely, with even the official government website using the uniform resource locator www.taiwan.gov.tw/ without an “ROC” to be found. The official English introduction of President Tsai uses the word “Taiwan” ten times but “Republic of China” does not appear at

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35. Alan Taylor, Taiwan’s Kinmen Islands, Only a Few Miles from Mainland China, ATLANTIC (Oct. 8, 2015), https://www.theatlantic.com/photo/2015/10/taiwans-kinmen-islands-only-a-few-miles-from-mainland-china/409720/ (noting that the island of Taiwan itself “lies about 100 miles (161 kilometers) east of mainland China”).
all. Put simply, the de facto name is “Taiwan” with “Republic of China” relegated to limited use in specific contexts.

How foreign governments and international organizations view Taiwan is fraught. The PRC government sees Taiwan as part of its territory and the ROC as a historical state that ceased to exist upon founding of the PRC. Sixteen countries have formal diplomatic relations with the ROC, down from twenty-one countries when President Tsai took office in 2016. The Holy See (Vatican) also recognizes the ROC, though there are signs that the Vatican’s support is wavering. The United States shifted official diplomatic relations from the ROC to the PRC on January 1, 1979, but maintains a close unofficial relationship with Taiwan. The United States’ “One China Policy”—not to be confused with the PRC’s “One China Principle”—stands for the position that “the issues between Beijing and Taiwan must be resolved peacefully and with the assent of the people of Taiwan.”

44. MINISTRY OF FOREIGN AFFAIRS, supra note 3.
47. See STATE COUNCIL WHITE PAPER, supra note 4.
The U.S. government presence in Taiwan is through the American Institute in Taiwan (AIT), which is partially staffed by career diplomats and serves functions like issuing visas and providing U.S.-citizen services as an embassy would. The opening of a substantial new AIT compound in Taipei in June 2018 reinforced both physical similarities to U.S. embassies and operational similarities to how the United States conducts formal diplomatic relations with countries around the world. Taiwan, in turn, has the Taipei Economic and Cultural Representative Office (TECRO) in the United States.

Taiwan’s unusual status also complicates its participation in international organizations, particularly as Beijing has increased pressure to reduce Taiwan’s “international space.” The ROC lost its seat in the United Nations in 1971, is unable to have its representatives participate in UN activities, and has its citizens rebuffed when attempting to enter UN buildings using their ROC passports. Taiwan is limited to using special ter-

49. See AMERICAN INSTITUTE IN TAIWAN, https://www.ait.org.tw; see also LAWRENCE & MORRISON, supra note 6, at 15–17.
50. Cf. Rebecca Tan, The U.S. Government Has Opened a Huge New Facility in Taiwan, and China Isn’t Happy, WASH. POST (June 18, 2018), https://wapo.st/2X6GpQn (“I offer you this [building], a tangible symbol that the United States is here to stay,’ said Kin Moy, the AIT’s director and a longtime American diplomat.”).
56. See, e.g., Elson Tong, Not Just Officials: Taiwan Students Blocked from Visiting UN Public Gallery in Geneva, H.K. FREE PRESS (June 15, 2017),
minology when participating in the few international organizations that allow its presence, such as “Chinese Taipei” for the Asia-Pacific Economic Cooperation (APEC)\(^{57}\) and Olympics\(^{58}\)—with a referendum failing to pass in November 2018 that asked “whether Taiwan should compete at international sporting events under that name, rather than ‘Chinese Taipei.’”\(^{59}\)

Domestically, Taiwan has undergone a radical political shift since the KMT moved the ROC capitol to Taipei in the late 1940s. Taiwan was for decades a fierce dictatorship with Generalissimo Chiang Kai-shek persecuting those who dared to question the KMT’s lock on power.\(^{60}\) Martial law was not lifted until 1987 under Chiang’s son, Chiang Ching-kuo.\(^{61}\) The ROC held its first direct presidential election in 1996, with the KMT candidate, Lee Teng-hui, winning.\(^{62}\) The Democratic Progressive Party (DPP) candidate, Chen Shui-bian, won the presidency in

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61. See Linda Chao & Ramon H. Myers, *The First Chinese Democracy: Political Life in the Republic of China on Taiwan* 149 (1998) ("On July 14 [1987], President Chiang Ching-kuo issued a special decree that at zero hour martial law should be lifted; on July 15 martial law ended."). It is undisputed that martial law was lifted while Chiang Ching-kuo was ROC President, but the significance of his role in Taiwan’s democratization is subject to debate. Compare Shelley Rigger, *Studies on Taiwan’s Democracy and Democratization*, 1 Int’l J. Taiwan Studies 141, 144 (2018) (disagreeing with efforts “to write President Chiang Ching-kuo out of Taiwan’s democratization history”) with J. Bruce Jacobs, *Myth and Reality in Taiwan’s Democratisation*, 43 Asian Stud. Rev. 164, 165 (2019) (refuting claims that “Chiang Ching-kuo established democracy in Taiwan”).

Power shifted back to the KMT in 2008 with the election of President Ma Ying-jeou. The election of President Tsai in 2016 marked a third peaceful transition of power, a step beyond the “two-turnover test” of new democracies. At the time of writing, Taiwan was gearing up for its next presidential election in January 2020 with a host of contenders vying to unseat President Tsai.

Taiwan’s democracy is imperfect, and the legacy of the authoritarian past is still felt, but deep divisions between the mainlanders who arrived in the 1940s and the then existing population have diminished dramatically. There are now approximately 23.5 million ROC citizens who, when in Taiwan, enjoy robust protection of civil and political rights, as demonstrated by a score of 93 out of 100 on Freedom House’s 2019 scorecard of Freedom in the World. When traveling internationally, they hold passports that have both “Republic of China” and “Taiwan”


65. Cf. SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 267 (1991) (“The party or group that takes power in the initial election at the time of transition loses a subsequent election and turns over power to those election winners, and if those election winners then peacefully turn over power to the winners of a later election.”).

66. See Rigger, Taiwan on (the) Edge, supra note 20 (explaining contenders “as Taiwan’s political parties battle over their presidential nominations”).

67. See Julian Baum & Gerrit van der Wees, Taiwan’s Imperfect Democracy, DIPLOMAT (Feb. 7, 2012), https://thediplomat.com/2012/02/taiwans-imperfect-democracy/.


emblazoned on the cover. The Republic of China lingers, but Taiwan is now firmly in the forefront.

In sum, while there is general agreement that there is an island named Taiwan, the status of that geographic feature and of the people living on it and nearby islands remains subject to highly politicized debate. The choice of terminology used to describe Taiwan conveys the speaker’s political views. Likewise, referring to the land across the Taiwan Strait as “China” as compared with “mainland China” carries political connotations, as does use of “unification” versus “re-unification” in English for the Chinese word tongyi (with the latter implying that Taiwan and the PRC—not just a broader conception of “China”—were once a combined entity). Daily life goes on against this complicated backdrop: people seek to enter into business transactions and settle disputes, obtain justice when harmed by others, buy property, get married and perhaps divorced, and otherwise organize society’s interactions. The next Part turns to how the legal system that governs these interactions has developed.

II. HISTORICAL DEVELOPMENT OF LAW IN TAIWAN

In some ways Taiwan has a long legal history. The foundational ROC laws were drawn up nearly a century ago with influence from Qing Dynasty legal codes. At that time, the island of
Taiwan was subject to laws imposed by Japan as part of its colonial rule, and the influence of this period still lingers today.\(^{74}\)

Law in Taiwan is also young.\(^ {75}\) Martial law was lifted only three decades ago, and criminal justice in particular has undergone seismic reforms in the intervening years. There are vibrant debates within Taiwan regarding legal reforms, as well as conversations that span jurisdictions, most prominently connecting domestic developments to those seen in its East Asian neighbors of South Korea and Japan.\(^ {76}\) Throughout Taiwan’s democratic transition, there has continuously been a structured system of laws that governs life of people living there. People may disagree about the nature of the legal system applicable to Taiwan today, but it is uncontroversial that there are well-established laws and institutions in place that help order society.\(^ {77}\)

The 1947 ROC Constitution, as amended multiple times,\(^ {78}\) remains the foundation of the legal system.\(^ {79}\) It established a five-

\(^{74}\) Id.

\(^{75}\) For example, a 2017 conference celebrating the work of Prof. Wang Taysheung was titled “Twenty Years of Taiwan’s Legal History” (“台灣法律史二十年”), emphasizing the dramatic changes in recent decades. International Symposium on the Past, Present, and Future of Taiwan Legal History, Institutum Jurisprudentiae, Academia Sinica (Nov. 30–Dec. 1, 2017) (on file with author).

\(^{76}\) See generally Jiunn-rong Yeh & Wen-Chen Chang, The Emergence of East Asian Constitutionalism: Features in Comparison, 59 Am. J. Comp. L. 805, 822 (2011) (positing that “the constitutional experiences in East Asia have developed into a distinctive model that is not included in existing constitutional theories”).

\(^{77}\) Indeed, much of this Article was written in the library of one of those institutions: the Judicial Yuan’s Judges Academy ([法官學院]), and for their hospitality I am grateful. Faguanyueyuan (法官學院) [JUD. YUAN’S JUDGES ACAD.], http://tpi.judicial.gov.tw/ (last visited Apr. 24, 2019).


branch (or “Yuan” in Chinese) system of government with an Examination Yuan (in charge of examining and managing civil servants) and Control Yuan (an ombudsman-type role) joining the more standard tripartite structure of executive, legislative, and judicial branches. The ROC’s early emphasis on legal codes drew heavily on the Continental European civil-law model. These foundational laws have over the years been supplemented by an extensive web of subsidiary laws and regulations. The ROC legal system replaced Japanese colonial laws in Taiwan after World War II, though the influence of Japan’s legal system continues with many Taiwanese scholars having received training in Japan and proposed legal reforms, like lay participation in criminal trials, drawing on Japan’s experience.

Decades of martial law followed the colonial Japanese period. With the legal system firmly under KMT control, prosecutors and judges were largely instruments of repression rather than of rights vindication. The KMT used a variety of legal and extralegal measures to silence dissent, even reaching abroad. The New York Times reported in 1984 that the murder in San Francisco of Taiwanese dissident Henry Liu “stirred widespread fear among Chinese intellectuals in the United States that they may have suffered injuries to their dignity or human rights.”

Though the 1947 ROC Constitution was in effect during martial law, the Temporary Provisions Effective During the Period of Communist Rebellion consolidated power in the president’s hands. See, e.g., DENNY ROY, TAIWAN: A POLITICAL HISTORY (2003).

81. See Weitseng Chen, Twins of Opposites: Why China Will Not Follow Taiwan’s Model of Rule of Law Transition Toward Democracy, 66 AM. J. COMP. L. 481, 517–18 (2018) [hereinafter Chen, Twins of Opposites] (explaining that the legal system established by the KMT prior to move to Taiwan was “one modeled on continental law systems in Europe, especially Germany”).
83. For a discussion of the significant influence of Japan on Taiwan’s legal development see TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895–1945: THE RECEIPTION OF WESTERN LAW (2000).
85. See Tay-sheng Wang, The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country, 11 PAC. RIM L. & POL’Y J. 531, 554 (2002) (“In the context of authoritarian rule, the KMT judicial authorities usually paid limited attention to the dignity or human rights of the accused.”).
be in danger.” The perpetrators were ultimately convicted in Taiwan, and the case helped to accelerate momentum for the end of authoritarian rule. Pockets of resistance had begun to gain traction in the 1970s, but at great personal costs to the pro-democracy activists. A number of government critics were legally trained, including recipients of degrees from prestigious American law schools. For example, Yeh Jiunn-rong—the former Minister of Education and Minister of the Interior, as well as renowned constitutional law scholar—recalled that, while studying law at Yale in 1987, he received a “request[] by a lawyer friend to cast a vote from abroad in order to get the desired ‘regime change’ in the Taipei Bar Association that had long been controlled by lawyers of military origin.” Soon after Lu Hsiu-lien returned to Taiwan in the late 1970s with a Harvard law degree, she was imprisoned for over five years because of her pro-democracy activities. Such efforts of the dangwai (literally “outside the party [KMT]”)


89. Jiunn-rong Yeh, Taiwan’s Transitional Constitutionalism, Address Before the University of Wisconsin School of Law Conference: Law and Democratization in Taiwan and Korea: Twenty Years’ Experience (Oct. 19–20, 2007), https://perma.cc/YQ4C-P62P. For the role of lawyers in Taiwan’s democratic transition see Chen, Twins of Opposites, supra note 81, at 520–23.

90. See generally HSIU-LIEN LU, MY FIGHT FOR A NEW TAIWAN (2014); see also Emily Newburger, The Rivals, HARV. L. BULL. (July 23, 2006), https://today.law.harvard.edu/feature/the-rivals/ (retelling the experiences of Lu Hsiu-lien and Ma Ying-jeou who were classmates at Harvard).
movement of the 1970s laid the basis for the DPP, now one of Taiwan’s two main political parties. Lu Hsiu-lien went on to become Vice President under the first President from the DPP, Chen Shui-bian.

Democratization in the 1990s brought profound changes to people’s civil and political rights, but the legal system was structurally still closely tied to the long-standing ROC codes. Reform efforts gained traction and culminated in the 1999 National Judicial Reform Conference (“1999 Reform Conference”). The overall exercise at the 1999 Reform Conference was a conversation among legal experts, many of whom had received graduate training in Germany, Japan, or the United States. Affinity groupings based on legal training remain powerful to this day, though they are far from the sole defining characteristic of experts’ views. Nonetheless, the desire to transplant aspects of the foreign systems with which various experts were familiar—and the tension among different approaches—was an overarching theme of legal reforms in the late 1990s. A key decision was to move away from the existing practice of deciding cases based predominantly on the case file and towards a “reformed adversarial system.” The envisioned system would place greater emphasis on the presentation of evidence, including witnesses, at trial, but retain the past practice of transferring the entire case

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95. See Chang, *supra* note 11, at 97.
file to judges pre-trial, with judges maintaining an investigatory responsibility.\textsuperscript{97}

The “reformed adversarial system” was in theory meant to incorporate aspects of an American-style adversarial proceeding while continuing the legal system’s continental European “inquisitorial” bent that was both built into the foundational ROC legal codes and reflected in the laws brought over during the Japanese colonial period.\textsuperscript{98} The system further retained the existing practice of selecting judges and prosecutors through a unified “judicial officer” (“司法官”) civil-servant exam that was followed by combined training before separation into two tracks.\textsuperscript{99} Lawyers remained subject to a separate bar exam.\textsuperscript{100}

Decisions from the 1999 Reform Conference were partially incorporated into the Criminal Procedure Code. Thorough implementation of reforms was stymied in part by political divisions between the DPP-controlled presidency and a strong KMT presence in the legislative and judicial branches.\textsuperscript{101} The challenges of changing an entrenched bureaucratic structure and ongoing


\textsuperscript{98} See \textit{Yiwu Bianhu Zhuanqu (義務辯護專區) [Special Area of the Obligation to Defend]}, JUD. YUAN (司法院), http://www.judicial.gov.tw/work/work02/work02-30.asp (last visited Apr. 24, 2019) (describing change from inquisitorial system to a reformed adversarial system); Cf. \textit{Mirjan R. Damaska, The Faces of Justice and State Authority} 3–6 (1986) (distinguishing between inquisitorial and inquisitorial proceedings as descendants of historical systems as compared with using these terms as ideal types). Comparative law literature is rife with discussion of the challenges of successfully using “legal transplants,” as seen in the 1999 reforms to criminal procedure in Taiwan. See, e.g., Pierre Legrand, \textit{The Impossibility of “Legal Transplants”}, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Daniel Berkowitz et al., \textit{The Transplant Effect}, 51 AM. J. COMP. L. 163, 167 (2003) (classifying countries into “those that developed their formal legal order internally (origins) and those that received their formal legal order from other countries (transplants)”).


\textsuperscript{100} See id.

\textsuperscript{101} Cf. Christopher R. Hughes, \textit{Challenges and Opportunities for Unification After Taiwan’s 2000 Presidential Election, in Contemporary China: The Dynamics of Change at the Start of the New Millennium} 157 (Jürgen Haacke & Peter W. Preston eds., 2002), available at http://eprints.lse.ac.uk/10699/ (explaining challenge that ongoing KMT political strength posed to President Chen following the 2000 election).
disagreements among legal experts as to whether the 1999 Reform Conference chose the best path for Taiwan further complicated reforms. Conversations regarding casting off vestiges of the authoritarian past continued in the 2000s and culminated in such measures as the repeal of a law that allowed secretive quasi-criminal trials in so-called “hooligan” cases. Protracted debates regarding the organization of the legal system did not, however, result in dramatic change with respect to the general processes by which cases moved through the courts. In short, there was tinkering, but no transformation.

The 1990s and 2000s also saw increasing consciousness of rights. Taiwan’s Constitutional Court took on a more high-profile role in giving heft to rights that had been, at best, neglected and often flagrantly violated. Repressive practices were gradually curtailed, such as the 1997 stripping of prosecutors’ ability to summarily detain suspects without judicial approval. In 2003, the presumption of innocence was made clear

102. See Jaw-perng Wang, 2004 Address, supra note 96.
105. The 大法官會議, literally “Council of Grand Justices,” interprets the constitution and unifies the interpretation of laws. 1947 ROC Constitution, supra note 78, art. 78. It is commonly referred to in English as the Constitutional Court. See, e.g., Press Release, Republic of China (Taiwan), Constitutional Court, Same Sex Marriage Case (May 24, 2017), available at http://ejrs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=267570. For an excellent explanation of how the ROC Constitution has changed over the years, see Jiunn-rong Yeh, The Constitution of Taiwan: A Contextual Analysis (2016).
106. See Margaret K. Lewis, Constitutions Across the Strait, in International Engagement in China’s Human Rights (Chen Dingding & Titus Chen eds., Routledge, 2015); Chen, The Rule of Law in Taiwan, supra note 78, at 110.
108. SIFAYUAN DA FAGUAN HUIYI (司法院大法官會議) [COUNCIL OF GRAND JUSTICES], INTERPRETATION NO. 392 (Dec. 22, 1995), available at http://www.ju-
in the Criminal Procedure Code. The other branches of government have likewise supported human rights norms since the lifting of martial law. In 2009, then President Ma signed the ratification instruments of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Taiwan could not actually deposit those instruments due to its international status. Instead, the legislature incorporated the contents of the two covenants into domestic law.

Enhancing human rights has been a major thread running through legal reform discussions. There have simultaneously been calls for a stronger response to crime. Judges have been criticized for being too lenient in sentencing, especially in cases involving children and other sympathetic victims. Taiwan’s retention of the death penalty is tied to these sentiments, as is periodic proposed legislation with a zealous anti-crime bent. These include failed bills that would have required the death penalty in certain cases with a child victim and allowed corporal punishment for drunk driving.


Whether the criticism be that the government is too weak in protecting human rights or too weak in striking at crime, both views are tied to negative perceptions of the legal system. Judges, in particular, have been singled out as unresponsive to the concerns of contemporary society. The conviction of a small number of judges on corruption charges created ripple effects of tarnishing the broader judiciary and bolstering fears that vestiges of the authoritarian era remain. The government has also struggled to communicate legal reforms to the public. For example, “reformed adversarial system,” which is a cumbersome phrase in Chinese (改良式當事人進行主義), is not a catchy slogan. It is with this backdrop of a zeitgeist of dissatisfaction that President Tsai took office in 2016.

III. NEW DEVELOPMENTS IN TAIWAN’S LEGAL IDENTITY

President Tsai gave a renewed push to protracted debates regarding legal reforms. In her May 2016 inaugural remarks, she highlighted “social fairness and justice” as a key area for her administration to address and cautioned that people feel the current judicial system is unable to fight crime effectively: “The judicial system must respond to the needs of the people. It will no longer be a judicial system for legal professionals only, but for everyone. Judicial reform is not only the business of legal professionals; it must be inclusive. These are my expectations for judicial reform.” She announced her intention to convene a conference to address these issues. The National Affairs Conference on Judicial Reform (司法改革國是會議) (the “2017 Reform Conference”) kicked off in November 2016 but held the bulk of

116. Though often termed as “judicial” reform, debate extends beyond judges to include the work of police, prosecutors, and other actors in the legal system. Judges receive disproportionate emphasis but are not the exclusive subject of the debate.
117. Tsai Ing-wen (蔡英文), Zongtong Jiu Zhi Yan Shuo (總統就職演說) [Inaugural Address] (May 20, 2016) (Taiwan), translated in Full Text of President Tsai’s Inaugural Address, FOCUS TAIWAN (May 20, 2016), http://focus taiwan.tw/news/aipl/201605200008.aspx (“社會的公平與正義” [social fairness and justice] and “司法無法有效打擊犯罪” [judicial system is unable to fight crime effectively]).
118. Id.
meetings from spring 2017 until its conclusion in August 2017.\footnote{119} This Part argues that transparency (Part III.A), clarity (Part III.B), and participation (Part III.C) are emerging as animating principles of Taiwan’s legal system. They both are infused into the process of legal reform debates and are starting to be embedded in the substance of the reforms themselves. Though the conversation is not explicitly structured around these three themes, they encapsulate the many initiatives falling under the overarching goal of reducing the gap between the public and the legal system.\footnote{120} These themes have also run through the author’s many conversations with people in Taiwan, both those working inside and outside the legal system.\footnote{121}

Changing a legal system is a complicated, messy process. This is true in Taiwan as in other jurisdictions. One challenge is that greater public involvement can be an unsettling disruption to long-entrenched bureaucratic norms. That said, judges, prosecutors, and other actors in the legal system are beleaguered by the lack of trust in their work: adjusting their established routines is a price many, though not necessarily all, will pay in order to boost morale. In June 2017, Former Vice President of the Judicial Yuan, Su Yeong-chin, wrote that he was happy about President Tsai’s emphasis on looking at legal issues from the people’s perspective instead of just focusing on elites.\footnote{122}

\begin{footnotesize}
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\item \footnote{119}{See President Tsai Launches Judicial Reform in Taiwan, TAIWAN TODAY (July 12, 2016), http://taiwan-today.tw/news.php?unit=2,6,10,15,18&post=3923; Fenzu Huiyi Jilu (分組會議紀錄) [Record of Sub-Committee Meetings], SIEA GAIGE GUO SHI HUIYI (司法改革國是會議) [NAT’L AFF. CONF. ON JUD. REFORM], https://justice.president.gov.tw/meetings/2 (last visited Apr. 24, 2019) (listing meeting dates).}
\item \footnote{120}{See, e.g., Si: Canyu, Touming, Qinjin de Sifa (四：參與、透明、親近的司法) [Four: Participation, Transparency, Close Justice], JUD. REFORM FOUND. (財團法人民間司法改革基金會), https://www.jrf.org.tw/keywords/73 (last visited Apr. 24, 2019).}
\item \footnote{121}{Cf. James Q. Whitman, The Hunt for the Truth in Comparative Law, 65 AM. J. COMP. L. 181, 189 (2017) (“There is no way to understand an alien culture without throwing oneself into it. But that does not mean that individual empathetic interpretations are purely arbitrary. There is a test of the truth of what the individual scholar says: That test is whether his descriptions seem right and plausible to others who know the cultures he describes, and whether they seem to make sense of what would otherwise be confusing phenomena.”).}
\item \footnote{122}{Su Yongqin (蘇永欽), Mingjia Zonglun / Su Yongqin: Si Gai de Hongguan Siwei (名家縱論／蘇永欽：司改的宏觀思維) [Su Yeong-chin Discusses: Overarching Thinking Behind Judicial Reforms], UDN NEWS (聯合新}
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The potential political gains from sympathizing with public dissatisfaction even if ultimately little changes in practice has prompted doubts about the sincerity of government rhetoric. In the run-up to the 2016 elections, then candidate Tsai Ing-wen navigated tricky political waters in building support for her presidential bid. As President Tsai now looks ahead to a highly uncertain 2020 election, she faces criticism on a number of fronts ranging from domestic economic policies to cross-strait relations. The first execution carried out during Tsai’s presidency in August 2018 raised questions about her commitment to human rights and legal reforms in the face of popular pressures. She has to decide how to build and then spend her political capital. It is entirely possible that the debates about how to reform legal institutions will be more bluster than substance, fading from the spotlight before systemic changes take hold and leaving underlying issues to be rehashed at another judicial reform conference years down the road. Yet this Article argues that it would be a mistake to quickly brush aside the current reform debate as mere political posturing. There is a concerted effort—even if some actors might be motivated by political expediency—to make the legal system less rarefied and distant. This


124. See generally Lev Nachman, Misalignment Between Social Movements and Political Parties in Taiwan’s 2016 Election, 58 ASIAN SURV. 874 (2018) (explaining ideological tension between the DPP and leftist activists).


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push echoes experiences outside Taiwan in seeking broad legitimacy for legal norms.\textsuperscript{127}

It is also important to emphasize the long-simmering nature of current reform efforts. The goal of increasing the public’s voice in the legal system has accelerated under President Tsai but has much deeper roots.\textsuperscript{128} An initial step was to even get people to use the courts: reforms in the 1990s, for example, sought to expand access to small claims courts such that “[t]he people are encouraged to resolve their disputes in courts.”\textsuperscript{129}

Forging a new legal identity through a transparent, clear, and participatory process also does not mean that the public has until this point been passive.\textsuperscript{130} Professor Yeh Jiunn-rong wrote in 2016 that “Taiwan has displayed a pattern of strong civic engagement in support of constitutional reform, championing a model of ‘civic constitutionalism’, beyond representative democracy.”\textsuperscript{131} Proponents of legal reforms have long used public demonstrations to bring attention to the need for changes to the system. Looking back to 1990, protestors in the Wild Lily Movement included nullifying authoritarian-era laws and pursuing constitutional reform among their key demands.\textsuperscript{132} Today, it is a regular occurrence for groups to openly protest government policies.\textsuperscript{133} The most dramatic event in recent years was the 2014 “Sunflower Movement” during which demonstrators occupied

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\item[\textsuperscript{127}] See generally Valerie P. Hans, \textit{Trial by Jury: Story of a Legal Transplant}, 51 \textit{LAW & SoC’Y REV.} 471, 484 (2017) (noting “some scholars argue that citizens in a contemporary democratic society increasingly expect government transparency and accountability”).
\item[\textsuperscript{128}] See Oscar Chung, \textit{Embodiments of Excellence?}, \textit{FREE CHINA REV.} (Taiwan), Aug. 1, 1998, at 12 (noting results of a 1998 government poll: “Only 52 percent of more than 1,000 persons polled thought that Taiwan’s judges were reliable . . . and some 70 percent thought that judges were politically biased.”).
\item[\textsuperscript{129}] Chen, \textit{The Rule of Law in Taiwan}, supra note 78, at 119.
\item[\textsuperscript{131}] YEH, supra note 105, at 245.
\item[\textsuperscript{132}] See id. at 37–38; see also \textit{Relation to History in the Sunflower Movement}, \textit{DAYBREAK} (July 24, 2017), https://daybreak.newbloommag.net/2017/07/24/sunflower-history-past-movements/ (“[S]tudent movements as the Wild Lily Movement have played a major historical role in the process of democratization . . . .”).
\end{itemize}
the legislature in protest of a trade pact with the PRC. Public opinion is also expressed through the legislature, which is selected via democratic elections and must approve changes to laws. As with any elected body, the legislators are aware of their constituents’ views, which was evident during heated debates leading up to the May 2019 legalization of same-sex marriage.

What we are seeing today is a shift from the protestors being just outside the government’s door to instead gradually being let into the room as part of the conversation. Giving greater voice to the public in shaping legal reforms does not mean casting aside legal expertise. Judges, prosecutors, lawyers, and academics remain at the core of Taiwan’s process of legal reform. Their contributions have been invaluable to shaping the legal system. Unlike at the 1999 Reform Conference, however, they do not have a “monopoly” on the conversation. Rather than limiting


136. For a broader sociological discussion of the role of elite intellectualism, and push-back against that tradition, in protests in Taiwan, see Ming-sho Ho, A Revolt Against Chinese Intellectualism: Understanding the Protest Script in Taiwan’s Sunflower Movement of 2014, MOBILIZING IDEAS (Dec. 2, 2014), https://mobilizingideas.wordpress.com/2014/12/02/a-revolt-against-chinese-intellectualism-understanding-the-protest-script-in-taiwans-sunflower-movement-of-2014/ (“In place of the ultra-serious tone of Chinese intellectualism, the Sunflower Movement incorporated many elements from the youth popular culture.”). For a comparative perspective see Hans, supra note 127, at 473 (“Comparative law scholars point to the important roles legal elites play in the movement of laws and legal institutions. . .”).


138. ZHONGHUA MINGUO (中華民國) [REPUBLIC OF CHINA (TAIWAN)], ZHONGTONG FU (總統府) [OFFICE OF THE PRESIDENT], SIFA GAIGE GUO SHI HUIYI CHENGGUO
the legal system’s crafting to law-trained elites, there is growing pressure to incorporate the broader public in an iterative process of lawmaking involving ongoing interactions that gradually move the system towards a norm equilibrium.139

What that norm equilibrium might look like is subject to great speculation. There are questions concerning what legal revisions will be enacted, as well as the follow-on question of what changes to the black-letter law will mean in the larger cultural context.140

To the extent that incorporating new viewpoints is seen as a means to an immediate end, then public involvement may not become embedded into the ongoing functioning of the legal system. Namely, the cynical view is that rhetoric of public involvement is more for public relations then genuine reforms.141

Even if reform efforts are sincere, the result might not be a pronounced increase in long-term public involvement. It is possible that public dissatisfaction with the judiciary is more due to the perception of judges’ work than actual disagreement with that work. A public opinion poll conducted by the Judicial Yuan found that a majority of respondents connected their negative

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perception to the media, not to information from friends or relatives.\textsuperscript{142} The media in Taiwan is very free,\textsuperscript{143} and it also tends to be highly polarized: Reporters Without Borders noted in their 2019 World Press Freedom Index that “Taiwan’s journalists are suffering from a very polarized media environment dominated by sensationalism and the pursuit of profit.”\textsuperscript{144} Jonathan Sullivan explains as follows regarding the complicated dynamics of coevolving media, civil society, and political spheres in Taiwan:

Governments, parties, and politicians have reduced control over what is said about them, by whom, and even the reproduction of their own words (Soroka, 2014: 75). On the other hand, the emergence of social media as a vehicle for unmediated communication has become established as a powerful means to reach voters and citizens directly.\textsuperscript{145}

Accordingly, because the media is in part fueling negative views of the legal system, increasing transparency and clarity such that more information is transmitted directly from the government to the citizenry might bolster public confidence without a concomitant need for actual participation. It is unlikely, however, that greater transparency and clarity alone, without accompanying substantive reforms, will be enough to mollify public concerns.

Heightened transparency and clarity could make the public realize that they are even more dissatisfied with the legal system than originally thought. In such case, public participation may be seen as all the more necessary to change how the system actually operates. As mock trials across Taiwan of the proposed lay-judge system demonstrated, however, the devil is in the details: proclaiming public participation in the abstract is much more difficult in practice.

\textsuperscript{142} Judicial Yuan, Introducing Lay Participation in Taiwan: Focusing on Lay Participation in Moot Courts (2016) (on file with author) [hereinafter Judicial Yuan, Introducing Lay Participation in Taiwan].


easier than structuring the procedures by which such participation will occur.

A further possible outcome of the reform debate is that the attributes that come to define Taiwan’s legal identity in the popular consciousness might not accurately reflect reality. In America, for example, the jury trial captures people’s imaginations as a defining characteristic. The right to a jury is enshrined in the U.S. Constitution and glorified in movies and television. In reality, jury trials make up but a sliver of criminal cases. Like-wise, the effort described below to inject lay decisionmakers into criminal cases might be contained to a small percentage of cases. Yet this procedural shift could influence how the broader citizenry views the judicial system. If over time the public feels more connected to the legal system, this phenomenon could help foster a shared sense of identity among the populace regarding what it means to be Taiwanese (Part III.D). For now, although where the reform path will lead is not clear, that the principles of transparency, clarity, and participation are helping to shape that path is.

A. Transparency

Legal reform discussions in Taiwan are rife with language of “transparency.” In some respects the workings of the legal system are already quite open to view, including detailed statistics available on past cases. Access to an online database provides an important window into the system, but pages of numbers do not tell the full story of how that system actually operates. Today

147. See, e.g., Wei Tisheng Sifa Toumingdu, Jianchaguan Jie An Shulei Ying-gai Gonghai (為提升司法透明度，檢察官結案書類應該公開) [For the Promotion of Transparent Justice, Prosecutors’ Case-Closing Documents Should Be Released], SIFA GAIGE GUO SHI HUIYI (司法改革國是會議) [NAT’L AFF. CONF. ON JUD. REFORM], https://justice.president.gov.tw/issue/14 (last visited Apr. 24, 2019); Sifa Touming Hua (司法透明化) [Judicial Transparency], SIFA GAIGE GUO SHI HUIYI (司法改革國是會議) [NAT’L AFF. CONF. ON JUD. REFORM], https://justice.president.gov.tw/opinion/443 (last visited Apr. 24, 2019).
148. See SIFA TONGJI (司法統計) [JUDICIAL STATISTICS], https://www.judicial.gov.tw/juds/ (last visited Apr. 24, 2019).
there is a push to “open the courts’ doors” both literally and figuratively.\footnote{Sifa Yuan (司法院) [Judicial Yuan], Taiwan Gaodeng Fayuan Gaoxiong Fen Yuan Dakai Fayuan Damen, Reqing Yaoqing Gaoxiong Shi Qiaotou Qu 35 Wei Difang Yijian Lingxiu Dao Fayuan Canguan (臺灣高等法院高雄分院打開法院大門，熱情邀請高雄市橋頭區35 位地方意見領袖到法院參觀) [Kaohsiung Branch of the Taiwan High Court Opened the Court’s Doors and Warmly Welcomed 35 Local Opinion Leaders from Qiaotou District of Kaohsiung City to Visit the Court] (2017) (“打開法院大門”).} This connects to President Tsai’s broader pledge made during her campaign for president that “[m]y government will not just communicate. I will also demand it to be transparent.”\footnote{Tsai Ing-wen (蔡英文), Wuda Zhengzhi Gaige (五大政治改革) [Five Major Political Reforms], Light Up Taiwan (點亮台灣 ) (Aug. 16, 2015), http://iing.tw/posts/51, translated in Tsai Ing-wen’s Five Major Reforms, Light Up Taiwan (Aug. 16, 2015), http://iing.tw/en/21.}

With respect to the transparency of the reform process, there were public discussions surrounding the 1999 Reform Conference.\footnote{See 1999 Quanguo Sigai Huiyi (1999全國司改會議) [1999 National Judicial Reform Conference], Jud. Reform Found. (民間司法改革基金會), https://www.jrf.org.tw/keywords/7 (last visited Apr. 24, 2019) (compilation of documents related to 1999 reform conference).} Nevertheless, the Conference largely played out behind closed doors. In part the lack of access to the inner workings of the 1999 Reform Conference is attributable to technological changes: the Internet was still in its infancy. In contrast, transparency was a stated goal for the 2017 Reform Conference.\footnote{2017 Reform Conference Report, supra note 138, at 12 (section of report detailing steps taken to make the sub-committees’ discussions and relevant documentation available to the public).}

The dedicated website includes sections for each of the five sub-committees,\footnote{Fenzu Jieshao (分組介紹) [Sub-Committee Introductions], Sifa Gaige Guo Shi Huiyi (司法改革國是會議) [Nat’l Aff. Conf. on Jud. Reform], https://justice.president.gov.tw/meetinggroup (last visited Apr. 24, 2019).} providing meeting minutes, other documents,
and video footage with simultaneous sign-language interpretation. Video of the over-eight-hour closing meeting is also available. A month after the 2017 Reform Conference’s conclusion, President Tsai’s office issued a 152-page report on the proceedings. This official record is extensive, but of course does not capture the informal discussions among participants. Lawyer Chen Chung-yen, for example, withdrew from the preparatory committee for the conference because “several important discussions had been conducted in a ‘black box’ behind closed doors.”

The government has continued transparency initiatives since the 2017 Reform Conference concluded. President Tsai promised in October 2017 that “the government will have a biannual report to the people on the progress of [judicial] reform.” The government also maintains a website dedicated to judicial reforms, including semi-annual reports on progress.

With respect to transparency of the system that the reform process is creating, reform discussions are addressing the limited access to information from the investigation stage all the way through to the Constitutional Court’s practice of largely deciding cases without oral argument. One focus of debate has been on broadcasting trials. Opening trials to public in-person view followed in the wake of democratization.

Vestiges of the

156. 2017 Reform Conference Report, supra note 138.
157. Huang & Chung, supra note 141.
160. Criminal trials are generally open to the public with closure allowed in limited circumstances. See, e.g., Chih-Chieh Lin, Failing to Achieve the Goal:
authoritarian era held on into the 2000s with so-called “public security tribunals” (“治安法庭”) handling hooligan cases using closed-door proceedings and secret witnesses. The Constitutional Court held these secretive practices unconstitutional in 2008.

The reform debate has placed increasing emphasis on whether physical access to courtrooms is sufficient. Cameras have been allowed in courtrooms on limited occasions. For instance, court proceedings in the 2006 graft case of former President Chen’s wife were showed on closed-circuit television in the court auditorium because of intense public interest. The possibility of broadcasting trials outside courthouses was on the agenda of the 2017 Reform Conference, and debate continued after the Conference’s conclusion.

A number of concerns have dampened enthusiasm for broadcasting trials, such as the safety of participants at trial, the “right to be forgotten,” and the erosion of the presumption of innocence. There are already worries that some government officials are undermining the presumption of innocence by providing unauthorized information to the media. The international experts who evaluated Taiwan’s implementation of the

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A Feminist Perspective on Why Rape Law Reform in Taiwan Has Been Unsuccessful, 18 DUKE J. GENDER L. & POLY 163, 175 n.85 (2010) (noting that trials for sexual assault are not open unless both the victim and court agree).


162. Id. at 870.


165. Sifa Yuan (司法院) [Judicial Yuan], Fating Gongkai Bosong Xianguan Yiti Gongkai Bosong Xianguan (法庭公開播送相關議題共體會) [Hearing on Issues Related to the Public Broadcasting of Courts] (Oct. 11, 2017) (notes from hearing convened by the Judicial Yuan on file with author).

166. Cf. Piao-Hao Hsu, supra note 163; Jeffrey Rosen, The Right to Be Forgotten, 64 STAN. L. REV. ONLINE 88, 88 (2012) (“In theory, the right to be forgotten addresses an urgent problem in the digital age: it is very hard to escape your past on the Internet now that every photo, status update, and tweet lives forever in the cloud.”).

ICCPR in 2013 called on the government to “take effective administrative and criminal measures to punish officials who release information about criminal cases to the media in violation of the laws and regulations designed to safeguard the presumption of innocence.” The concern now is that selective use of trial footage could further color views of a defendant’s guilt. Moreover, the road to a final not-guilty verdict tends to be particularly long in Taiwan: second-instance trials are essentially “do overs” of the initial trials—comprehensively addressing issues of both facts and law—and prosecutors are allowed to appeal not-guilty verdicts.

While proposals to broadcast trials have received strong pushback, there is support for greater emphasis on oral arguments before the Constitutional Court. The court has a beautiful courtroom in which to hold arguments (and can also welcome independent experts to weigh in on a case), but it has done so on only rare occasions. Instead, rulings are commonly based on the case file and other written sources. In early 2017, the court took the bold move of broadcasting oral argument in the same-sex marriage case. Recent debates have addressed whether the court should adopt as general practice both the holding of oral argument and the broadcasting of those arguments.

The Constitutional Court is already more transparent than other courts in Taiwan in one notable respect: allowing for concurring and dissenting opinions. Justices can publish their individual views on a case, which are posted on the court’s website.

170. See Cohen & Lewis, supra note 161.
along with the court’s interpretation.\textsuperscript{174} This option is not available for judges in other courts. Indeed, even if a judge on a three-judge collegial panel disagrees with the verdict, it is standard practice for the dissenting judge to sign the verdict. Moreover, the dissenting judge can be assigned to write the opinion. There is no trace whether the verdict was unanimous or merely a majority, let alone why a dissenting judge decided as he did. A longstanding tendency to focus on collegiality that can tip towards conformity means it is unlikely this practice will change soon.

The calls for greater transparency apply to past cases too. Work by Taiwan’s Innocence Project, other civil society groups, and academics have drawn attention to the fact that Taiwan, like all countries, is not immune to wrongful convictions.\textsuperscript{175} The conditions for an innocence project took time to develop as Taiwan shifted towards democracy. The Taiwan Innocence Project was not founded until 2012, though efforts to overturn wrongful convictions predate its establishment.\textsuperscript{176} Groups have sought greater access to information on old cases and have obtained exonerations using newly uncovered evidence.\textsuperscript{177} In turn, they are calling attention to the troublesome practices used in past investigations and trials to galvanize reform efforts. One proposal in

\begin{itemize}
  \item \textsuperscript{174} Constitutional interpretations, along with concurring and dissenting opinions if any, are available at SIFA YUAN DA FAGUAN (司法院大法官) [CONSTITUTIONAL COURT, JUDICIAL YUAN, R.O.C.], https://www.judicial.gov.tw/constitutionalcourt/P03.asp (last visited Apr. 24, 2019).
  \item \textsuperscript{175} Here, “wrongful conviction” refers “to the convictions of factually innocent persons. . . . This definition excludes persons who have committed the act and mens rea of crimes but whose convictions were obtained in violation of constitutional or other procedural rights in a manner not deemed harmless error by appellate courts.” Marvin Zalman, \textit{Wrongful Conviction}, OXFORD BIBLIOGRAPHIES, http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0118.xml (last modified July 24, 2012).
  \item \textsuperscript{176} TAIWAN YUANYU PINGFAN XIEHUI (台灣冤獄平反協會) [TAIWAN INNOCENCE PROJECT], http://twinnocenceproject.org (last visited Apr. 24, 2019).
  \item \textsuperscript{177} See YUANYU PINGFAN XIEHUI (冤獄平反協會) [TAIWAN ASSOCIATION FOR INNOCENCE], 2016 GONGZUO BAOGAO (2016 工作報告) [2016 ANNUAL REPORT] (2016), \textit{available at} http://twinnocenceproject.org/news.php?lang=en.
\end{itemize}
the 2017 Reform Conference was to introduce an entity that resembles conviction integrity units popping up across the United States\textsuperscript{178} and similar efforts in Europe.\textsuperscript{179}

The 2017 Reform Conference further addressed how transitional justice (轉型正義) could be used to help rectify “improper trials” held during the martial law era.\textsuperscript{180} On February 28, 1947, and the days following, the KMT killed thousands of protestors who were enraged at the new government’s treatment of the existing population.\textsuperscript{181} Martial law was officially imposed in 1949 and stretched until 1987.\textsuperscript{182} The four decades of martial law saw “massive suppression, murder, and imprisonment of political dissidents...”.\textsuperscript{183} There are unanswered questions regarding the treatment of government critics during this period as well as regarding the finances of the KMT and related organizations. Consequently, another aspect of the transparency debate is accessing information about the authoritarian past.

Prior to the DPP taking control of the presidency and legislature in 2016, “the KMT-dominated legislature introduced three important (but limited) pieces of legislation related to transitional justice.”\textsuperscript{184} Shortly after the DPP gained a majority in

\begin{thebibliography}{99}
\item \textsuperscript{179} 2017 Reform Conference Report, \textit{supra} note 138, at 28 (discussing possible establishment of a 刑事確定案件檢視機制). Taiwan already has in place laws addressing compensation for wrongful detentions (刑事補償法) and state compensation more generally (國家賠償法), though concerns have been raised about their adequacy.
\item \textsuperscript{183} Thomas J. Shattuck, \textit{Taiwan’s White Terror: Remembering the 228 Incident}, FOREIGN POL’Y RES. INST. (Feb. 27, 2017), https://www.fpri.org/article/2017/02/taiwans-white-terror-remembering-228-incident/.
\item \textsuperscript{184} Caldwell, \textit{supra} note 180, at 462 (discussing the 1995 Act Governing the Recovery of Damage of Individual Rights During the Period of Martial Rule,
2016, the legislature passed the Act Governing the Settlement of Ill-gotten Properties by Political Parties and Their Affiliate Organizations.\textsuperscript{185} As of December 2018, the government had “frozen assets worth billions of dollars of private companies and nongovernmental organizations that have been determined to be KMT affiliates. . . .”\textsuperscript{186}

In December 2017, the legislature passed the Act on Promoting Transitional Justice.\textsuperscript{187} Under the Act, a nine-member Transitional Justice Commission has the power to investigate documents from the martial-law era.\textsuperscript{188} In addition, “Criminal cases found to have been unjustly adjudicated on are to be reinvestigated by the committee, with defendants granted retrial.”\textsuperscript{189} The Commission, however, has been beset by political divisions, including the resignation of the deputy chair after exposure of his anti-KMT remarks.\textsuperscript{190}

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188. See Jane Rickards, Coming to Terms with the Past, TAIWAN BUS. TOPICS (Sept. 18, 2018), https://topics.amcham.com.tw/2018/09/coming-to-terms-with-the-past#. For a discussion of the severe repression under martial law, see CHAO & MYERS, supra note 61, at 52 (“To enforce compliance with martial law, the Taiwan Garrison Command, Security Bureau, police, and military courts arrested, tried, and imprisoned or executed any individual they considered a threat to national security and public order.”).


\end{flushleft}
These cumulative efforts towards transparency are a departure from the traditional legal world that, while not opaque, required significant effort and expertise to access. Even if Taiwan succeeds in bringing intense sunlight into the legal system, it remains to be seen whether the public will take advantage of added transparency. Furthermore, even if the courts’ doors are thrown open, will people understand what they see? This is where clarity comes in.

B. Clarity

Access does not automatically bring understanding. The Museum of Modern Art in New York City has millions of visitors annually. Without the help of audio tours, docents, apps, and other resources, many of these millions with access to the art would not grasp the meaning behind the abstract work. Likewise, simply showing people the legal system’s workings is vastly different from helping them to comprehend the import of what they are viewing. Clarity, in the sense of being easily understood, is hard to achieve.

At a minimum, the Constitutional Court has held that substantive laws must be clear and specific enough to satisfy the principle of legal clarity. A basic understanding of what behavior the law proscribes is, however, a far cry from grasping how the legal system actually operates. A 2015 survey conducted by the Judicial Yuan found that 71.6 percent of respondents reported not understanding the legal system. The desire for clarity in the legal system begins by making the debate about reforms itself more accessible. It further combines efforts to

194. JUDICIAL YUAN, INTRODUCING LAY PARTICIPATION IN TAIWAN, supra note 142.
change aspects of the legal system to make it more easily understandable with efforts to educate the public about how the system works.  

Debates about the relative merits of adversarial and inquisitorial models are hard enough for law professors to decipher, let alone someone without any legal training. The current round of reform debates has deemphasized legal lingo like “reformed adversarial system” in favor of more catchy terminology, such as “citizen judge” ("國民法官") for the proposed lay participants at trial. To help people understand legal terminology that might require some explanation, the judiciary launched an online dictionary in August 2017, complete with a how-to YouTube video. The Judicial Yuan explained that the initiative was meant to increase dialogue between the judiciary and public, as well as to help people “fully understand” legal terminology.

The usually formal Judicial Yuan has even gone so far as to incorporate comic drawings and social messaging “stickers.”

195. Scholars have discussed at length the connection between understanding laws and legitimacy. See, e.g., Randall Peerenboom, Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China, 23 MICH. J. INT'L L. 471, 479 n.17 (2002) (“[Max Weber] maintained that citizens were more likely to find clear, predictable laws that are fairly applied by an autonomous judiciary legitimate, and that they would be more likely to comply—without the need for coercion—with laws they found legitimate.”) (citing MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., 1954)).

196. Cf. DAMAŠKA, supra note 98, 3–6 (different uses of “adversarial” and “inquisitorial”).


200. Social media has deep penetration in Taiwan. See Jalen Chung & Evelyn Kao, Taiwanese Love Social Networks, Especially Facebook: Survey, FOCUS
The Judicial Yuan has an account on the popular LINE social media platform,\(^\text{201}\) through which information on judicial procedures are portrayed using cartoon drawings.\(^\text{202}\) For example, a drawing regarding efforts to strengthen translation services depicts a woman with hearts coming out of her head as she translates between Chinese and English.\(^\text{203}\) That using LINE would help close the distance between the judiciary and the public was a stated aim when establishing the account in August 2017.\(^\text{204}\) The LINE account both provides a way for the judiciary to communicate directly with the citizenry and is designed to do so in an easily understandable, fun manner. A judge at the Taipei District Court initiated a similar measure to make the judicial system more accessible and even cute: he drew the following Richard-Scarry-esque\(^\text{205}\) poster to promote the proposed lay-judge system, which depicts the six lay-judges as various animals found in Taiwan and exhorts people to participate in the common task of defending justice.

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\(^{202}\) Sifa Yuan (司法院), LINE, https://page.line.me/judicial_yuan (last visited Apr. 24, 2019).

\(^{203}\) Sifa Yuan (司法院), LINE (Feb. 7, 2018, 11:30PM) (last visited Apr. 24, 2019). Although the Judicial Yuan’s LINE account is new, the use of cute graphics has long been common in Taiwan as apparent from the LINE “sticker” shop, LINE STORE, https://store.line.me/home/en (last visited Apr. 24, 2019), and the fleet of EVA Air “Hello Kitty” planes, HELLO KITTY: EVA AIR, http://www.evakitty.com/tw/ (last visited Apr. 24, 2019).


Efforts to convey laws in accessible language and images recalls Sally Merry’s work on how domestic actors bring international human rights norms into domestic spheres. In Taiwan, there is a conversation about how best to incorporate international norms into domestic practice through a process of “vernacularization.” The pathways for the initial permeation of international human rights norms into Taiwan are interesting because Taiwan is largely excluded from international organizations. What this Article focuses on is the intra-country conversation as domestic legal elites transmit information to the broader citizenry. Aspects of this conversation within Taiwan have direct connections to international human rights norms (e.g., to the presumption of innocence and requirement of an impartial tribunal in the ICCPR). Other aspects are tied to considerations of Taiwan’s distinct legal history (e.g., how a mixed-bench format for lay participation—as compared with an American-style jury—is more aligned with the civil law tradition from the ROC legal codes and historical Japanese influence). Experts thus need to explain both legal norms that have been explicitly

207. See Chen, Socialization in Isolation, supra note 111, at 89–90 (“I borrow the concept of ‘vernacularization’ proposed by Sally Merry in explaining how the international human rights discourse is translated into another discourse more familiar to the local audience.”).
brought in from abroad in recent years and those that have developed within Taiwan over many decades. To be effective, this conversation requires a move away from legal lingo towards terminology that is understandable to people without specialized training: “Vernacularizers take the ideas and practices of one group and present them in terms that another group will accept. This is not the work of a single person.”

This work is not the government’s alone. Initiatives to demystify the legal system extend beyond official channels. Over 47,000 people follow the “Read Judgments Together” (“一起讀判決”) page on Facebook. The authors of the Facebook page and related webpage are anonymous though widely rumored that at least some are judges. This is understandable considering that the media’s tendency to paint the judiciary in a negative light has left frustrated judges seeking avenues to express their views directly to the public. The site is self-described as a place to share judgments, essays, and other legal information. A post in February 2018, for instance, used colorful diagrams to explain a draft proposal to amend administration litigation procedures. Another Facebook page, “法操FOLLAW,” has over 60,000 followers. FOLLOW takes a more contentious stance towards the current system, asking if the decisions of “dinosaur judges” make people want to curse. The Facebook page

209. Peggy Levitt & Sally Merry, Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States, 9 GLOBAL NETWORKS 441, 446 (2009).
212. Jianjie (簡介), Yiqi Du Panjue (一起讀判決), https://casebf.com/%e7%b0%a1%e4%bb%8b/ (last visited Apr. 24, 2019).
213. Sifa Yuan de Xingzheng Susong Fa Xizheng Cao’an (司法院的行政訴訟法修正草案) [Judicial Yuan’s Draft Amendments to the Administrative Procedure Law], Yiqi Du Panjue (一起讀判決) (Feb. 27, 2018), https://casebf.com/2018/02/27/administrative_pyramid/.
“Watchout Citizenedu” (“沃草公民學院”), with over 27,000 followers, tackles legal issues as well as broader topics of public concern.\textsuperscript{216} Going a step beyond explaining the meaning of legal documents, there are efforts underway to actually change how judges and prosecutors write. Part of the schooling for trainee judges and prosecutors is learning the esoteric conventions expected of their writing. These norms tend to result in a dense legalese that is difficult for even native Chinese speakers to understand. Frustration over the lack of accessibility has given rise to a debate over how to move towards use of plain language (白話文).\textsuperscript{217} The “Plain Law Movement” (“法律白話文運動”) Facebook page has over 88,000 followers.\textsuperscript{218} The group’s website features a photo of youngish, casually attired people who describe themselves as having legal training and using new media to spread the seeds of rule of law: “For the average person, because the contents of the law that should serve the people are as hard to understand as classical Chinese, the laws are increasingly removed from the people.”\textsuperscript{219} Legal writing style was part of the 2017 Reform Conference’s agenda.\textsuperscript{220} The relevant sub-committee passed a resolution supporting the move towards plain language, which was hailed by reform advocates as a way to “make people understand court judgments.”\textsuperscript{221}

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\textsuperscript{218} Falu Baihuawen Yundong — Plain Law Movement (法律白話文運動 — Plain Law Movement) (@plainlaw.me), FACEBOOK, https://www.facebook.com/plainlaw.me/ (last visited Apr. 24, 2019).

\textsuperscript{219} Women Shi Shui (我們是誰) [Who Are We], PLAIN L. MOVEMENT (法律白話文運動), https://plainlaw.me/whoarewe/ (last visited Apr. 24, 2019) (“對一般人而言，本該為人民服務的法律，因為內容有如文言文難懂，反而離人民越來越遠.”).

\textsuperscript{220} 2017 Reform Conference Report, supra note 138, at 70–71.

\textsuperscript{221} See Su Weirong (蘇位榮), Sigai Huiyi Tongguo Panjueshu Yuorang Renren Kandong (司改會議通過 判決書要讓人人看懂) [Judicial Reform Meeting
Much of the heavily stylized legal language is inculcated during the two-year training period that future judges and prosecutors undergo following selection through a highly competitive exam. The issue, however, starts earlier. Law school in Taiwan remains heavily focused on learning the contents of the “small six laws” ("小六法"): the compilation of the six foundational laws composed of the Constitution, Civil Code, Criminal Code, Administrative Code, Civil Procedure Code, and Criminal Procedure Code. Heavily highlighted and flagged versions are de rigueur for law students. This is logical when considering the incentives of students are to focus on passing the extremely competitive exams that will determine if they can become a judge, prosecutor, or lawyer. Especially compared to the United States, there has been little emphasis on legal research and writing or other more practical skills. Clinical legal education has also been slow to take hold. As a result, law students tend not to have experience explaining the law to clients or other non-


223. The collection of laws is available in a number of print versions which, due to frequent amendments, require continuous updating. See Xiao Liu的 Souxun Jieguo (小六法搜尋結果) [Small Six Laws Search Results], ESLITE, http://www.eslite.com/Search_BW.aspx?query=%E5%B0%8F%E5%85%AD%E6%B3%95(last visited Apr. 24, 2019) (search result on webpage of major Taiwan bookstore with various editions of the small six laws).

224. Lo, Possible Reform for Legal Education in Taiwan, supra note 99, at 4 (“[M]any [law] students spend most of their time at preparation schools learning pure examination techniques and neglecting university legal education.”).


226. Some law schools in Taiwan are encouraging greater experimentation, such as National Chiao Tung University School of Law in Hsinchu City, which “has been traditionally placing significant focus on integrating legal theory with real-world practices.” National Chiao Tung University: Institute of Technology Law—Doctoral Degree, STUDY IN TAIWAN, https://www.studyintaiwan.org/programs/program/3173 (last visited Apr. 24, 2019).

227. See generally Serge A. Martinez, Reinventing Clinical Legal Education: Taiwanese Adaptation of an American Model, in LEGAL THOUGHTS BETWEEN THE EAST AND WEST IN THE MULTILEVEL LEGAL ORDER 491–504 (2016) (“Taiwan’s legal educators have resisted clinical education for a very long time, and there are several practical obstacles to implementing an American-style clinic.”).
legally-trained audiences, nor is this skill presented as integral to working in the legal profession.

One important component of achieving greater clarity is changing how people in the legal profession express their work. A clear message alone, however, is insufficient: someone needs to be listening. Tens of thousands of people engaging in legal discussions on Facebook is impressive, yet it is only a small percentage of the overall population of Taiwan. The most direct way to cultivate understanding among the younger generation is through schools.

A point of controversy in post-martial-law Taiwan has been how to teach topics like history and civics that are laden with political overtones. Tensions came to a head under President Ma in 2015 when students protested “black box textbooks,” so called because they were seen as being “pushed through by undemocratic, untransparent means”: “Planned textbook revisions as pushed for by the KMT would, for example, continue to claim that Taiwan is a part of the ‘Republic of China’ which is the rightful master of mainland China.”

Critics have used the term “black box” to describe other government decisions made behind closed doors. DPP legislators criticized the proposed changes, with one calling them “a bid to manipulate students’ view of history.”

The DPP moved quickly once retaking power in 2016 to scrap the KMT’s proposed changes and undertake the contentious process of reviewing the national education system curriculum. Components of this debate include how to teach the fundamentals of the legal system and the rights and duties of being a citizen. This is challenging even in places that do not have the

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228. Brian Hioe, Five Days of Struggle Against Black Box Education in Taiwan, NEW BLOOM MAG. (Aug. 3, 2015), https://newbloom-mag.net/2015/08/03/five-days-against-black-box-education/.

229. Id. (explaining that “black box” was also used to describe the opaque process when the KMT sought legislative approval for the Cross-Strait Service Trade Agreement in 2014).


232. 2017 Reform Conference Report, supra note 138, at 7 (stating that education on the rule of law is insufficient, “法治教育的不足”).
layers of political complexity seen in Taiwan.233 For people writing textbooks in Taiwan, they face the thorny task of explaining the legal system to students without the curriculum being viewed as a political ploy by one party or the other.

One response is to sidestep political controversy by writing bland textbooks, but a failure to provide a robust civics curriculum largely relegates public education to diffuse public-information campaigns that do not directly reach citizens as a captive audience in a classroom. A rare exception occurred at a mock trial attended by the author in spring 2018 at the district court for the Penghu islands, an archipelago in the Taiwan Strait. The pool of “citizen judges” first attended a training session on the procedures for the mock trial as well as an introduction to the legal system more generally. Only then did they participate in the mock trial. Even if lay participation is adopted, it is expected to involve only a small percentage of the population because it will at least initially be limited to specified serious criminal cases.234 Accordingly, as discussed further in Part C below, obtaining a clearer understanding of the legal system through direct involvement at trial will be the exception rather than the norm.

C. Participation

Participation is a theme that runs throughout the Tsai administration’s initiatives, as seen in the online discussion platform for direct citizen input on proposed legislation.235 Taiwan’s Digital Minister, Audrey Tang, explained, “I would say Taiwan is

233. See, e.g., About, iCIVICS, https://www.icivics.org/about (last visited Apr. 24, 2019) (initiative by Justice Sandra Day O’Connor to improve civics education: “The practice of democracy is not passed down through the gene pool. It must be taught and learned anew by each generation of citizens.”).

234. See Guomin Canyu Xingshi Shenpan Caoan Jianbiao (國民參與刑事審判草案簡表) [Table on the Draft Lay Participation in Criminal Trials], CITIZEN PARTICIPATION (國民法官), http://social.judicial.gov.tw/LayJudge/Promoted/Preliminarydraftexplanation (last visited Apr. 24, 2019) (explaining that draft law would apply to crimes for which the lightest punishment is over seven-years’ imprisonment or where a person dies as a result of an intentional crime).

about civil society learning the functions of the government and, to a degree, collaborating.”

Participation is likewise a third overarching theme in the legal reform debate: people not only can see and comprehend the legal system but actually be part of its operation. A range of people outside of law-trained elites have of course been directly involved in the legal system for years as litigants, witnesses, and defendants. People in Taiwan also have a limited ability to participate in the government’s decision whether to bring charges because prosecutors must issue a “non-prosecution letter” (“不起訴書”) when they do not indict, and the complainant, or his family, may seek review of the decision. The Criminal Procedure Code even allows for private prosecutions by alleged crime victims and, in some situations, family members or agents. These roles are often not voluntary and, even when some choice is involved, not desirable.

Another current avenue of limited participation is through the activities of non-governmental organizations (NGOs). Civil society actors like the Judicial Reform Foundation and Taiwan Alliance to End the Death Penalty have long brought attention to areas that they believe in need of reform. Civil society is, however, more akin to outsiders who are allowed occasional incursions into the legal system’s ivory tower than ongoing occupants thereof. The government has, for example, included a variety of NGOs in the periodic, self-imposed review process since Taiwan incorporated the contents of the ICCPR and ICESCR

236. Id. (describing Tang as a “famed hacker who helped the thousands of Sunflower protesters build and maintain their internal communications network” and now a cabinet-level official focused on digital issues).


238. Criminal Procedure Code, supra note 109, arts. 319–43.


into domestic law. Nevertheless, this is participation for discrete purposes. It is also participation by a relatively small circle of social activists. The participation that the current reform effort seeks to nurture is one that is both more inclusive and systemic. Routinizing involvement of the general citizenry could diminish the public perception of the legal system as an aloof object that is out of touch with the concerns of the average person on the street.

One of the 2017 Reform Conference’s slogans was “Multiple Voices, Participation of All People” (“多元聲音、全民參與”). The very structure of the conference mandated involvement by requiring that more than fifty percent of each sub-committee’s members be non-legal experts. This was in stark contrast to the expert-centric debate at the 1999 Reform Conference. Members of the sub-committees for the 2017 Reform Conference included human rights activists, writers, doctors, and even family members of crime victims. These non-legal experts had an equal vote in the decisions. For the much broader population who did not directly participate, the Conference website included a link for people to leave comments, along with links to social media sites like Twitter and Facebook. The Judicial Yuan further created a webpage dedicated to “dialogue” ("對話") between the judiciary and public.

244. 2017 Reform Conference Report, supra note 138, at 12.
245. Fenzu Jieshao (分組介紹) [Sub-Committee Introductions], supra note 153 (links to listings of each sub-committee’s members).
Although the 2017 Reform Conference wrapped up in August 2017, efforts at including public voices in the ongoing reform debate continue. A focal point has been continuing the conference’s work on lay participation in criminal cases. Discussions regarding some sort of jury system have percolated for decades, in part because of concerns of lingering bias by judges who have ties to the authoritarian era. These judges have largely aged out of the system, but criticism of judges has if anything intensified. The bribery conviction in 2011 of several judges created a new stain on the judiciary. Strong public backlash against what was seen as lenient sentencing of a convicted paedophile further eroded public opinion. In 2015, only 22 percent of respondents in a government survey agreed with the statement that “most judges can decide cases independently” and only 38.5 percent agreed that “judges usually will try to impose appropriate sentences.”

In late 2017, the Judicial Yuan released a draft law on using a mixed bench of professional and lay judges for certain serious criminal cases. The draft grants lay participants votes with respect to both guilt and sentencing. In 2018, courts around Taiwan held mock trials to test-run the proposed system. The author of this Article observed mock trials at Taipei, Shihlin, and

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248. Cf. 2017 Reform Conference Report, supra note 138, at 6 (stating that “the legal system must go past the shadow of the authoritarian system” “司法體系必須走出威權體制的陰影”).

249. See Su Yongqin (蘇永欽), supra note 122 (comments by former Vice President of the Judicial Yuan regarding problem of lack of confidence in the judiciary, “司法信任問題”).


252. JUDICIAL YUAN, INTRODUCING LAY PARTICIPATION IN TAIWAN, supra note 142.


254. See, e.g., Ouyang Mengping (歐陽夢萍), TAIPEI DISTRICT COURT HOLDS A MOCK TRIAL, CITIZEN JUDGES PARTICIPATE IN THE
Penghu District Courts. In Taipei’s Shihlin District Court, more than 1300 people volunteered to be lay judges in a mock trial. In Taipei District Court, cameras were allowed in the courtroom for portions of the proceedings as the lay judges were selected and then participated in the mock trial. At the debriefing conference following the mock trial, each of the six lay judges and two alternates were asked their opinions on the process. They gave interviews with the media as well. Also present at the mock trial was a popular blogger, who, while wearing jeans and hip sneakers, was asked by the suit-attired judicial officials for his opinion on the proceedings.

At the time of writing, debate about the draft law was ongoing. The Judicial Yuan has not set a firm timeline for transmission to the legislature. President Tsai stated at her 2017 National Day Address that “the Judicial Yuan will accelerate the pace of reform...” At her 2018 National Day Address, however, she mentioned transitional justice but did not highlight judicial reform. At a separate speech also in October 2018, President

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255. See Li Zhihua (李志華) & Hu Jingshun (胡景順), Shihlin Di Yuan Ban Moni Fating 1300 Duo Ren Qiang Dang Guomin Faguan (士林地院辦模擬法庭1300多人搶當國民法官) [Shihlin District Court Holds a Mock Trial, More Than 1300 People Grab Chance to be a Citizen Judge], FTV NEWS (民視新聞) (Feb. 9, 2018), https://news.ftv.com.tw/news/detail/20180209S16M1.

256. Personal Observations at Taipei District Court, in Taipei, Taiwan (Jan. 29, 2018) (notes on file with author).


261. Tsai, 2017 National Day Address, supra note 158.

Tsai reassured that judicial reform was continuing at pace.\footnote{Tsai Touts Taiwan’s Judicial Reform, Democratic Development, TAIWAN TODAY (Oct. 2, 2018), https://taiwantoday.tw/news.php?unit=2&post=142587.} Yet the introduction of lay judges remains contentious, with one prominent criticism by proponents of an American-style jury being that the lay judges will be too easily swayed by the professional judges’ opinions.\footnote{See, e.g., Zheng Hongda (鄭鴻達), Guomin Faguan Moni Shenpan Peishen Tuan Xiehui Pi Faguan Gan (國民法官模擬審判 陪審團協會批法官干) [Citizen Judges Mock Trial, Jury Association Criticizes Judicial Intervention], LIBERTY TIMES NET (自由時報) (Feb. 1, 2018), http://news.ltn.com.tw/news/politics/breakingnews/2329268.} The mixed-bench format is, nonetheless, more inclusive of lay people’s input than the “trial observation system” (“觀審制”) considered in the 2000s. That system would have allowed lay people to express opinions without actually conferring voting power.\footnote{See GUOMIN CANYU XINGSHI SHENPAN WANGZHAN (國民參與刑事審判網站) [WEBSITE FOR CITIZEN PARTICIPATION IN CRIMINAL TRIALS], https://web.archive.org/web/20171125151056/http://www.judicial.gov.tw/LayParticipation/intro08.asp (last visited Apr. 24, 2019).} The draft law is notable not only for giving lay people a direct say in the outcome of criminal trials, but also for making sure those lay people are bringing a distinct viewpoint from the judges: it explicitly excludes lawyers, law professors, and other members of the legal profession writ large from serving as “citizen judges.”\footnote{Sifa Yuan 「 Guomin Canyu Xingshi Shenpan Fa Caoan Chugao 」 Fabu Jizhehui Xinwengao (司法院, 「 國民參與刑事審判法草案初稿」發布記者會新聞稿) [Judicial Yuan, Press Release of Press Conference on Release of the “Draft Law on Citizen Participation in Criminal Adjudications”], SIFA ZUXIN DONGTAI (司法最新動態) (Nov. 30, 2017), http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=299832.} The six spots are to bring fresh voices into the courtroom, not amplify the existing ones.

Speculation continues whether, if the law in some form indeed passes, greater contact with the legal system will improve people’s perceptions. Earlier mock trials held by the Judicial Yuan involving lay participation painted a largely positive view, even if people were just interviewed but not then selected to participate in the mock trial. The Judicial Yuan summarized the goal
of lay participation as “the more involved, the more understanding, thus, the more trust.” Further promising, Japan’s approximately decade-long experience with lay participation in serious criminal trials has garnered generally positive reviews. The response to public participation could end up being more mixed. To borrow a phrase that Mary Gallagher used in her studies of legal aid plaintiffs in the PRC, perhaps greater participation in the legal system will foster some form of “informed disenchantment”: “Disenchantment with the promises of the legal system does not lead to despondency, but to more critical, informed action.” Such a complex result short of glowing reviews would still be a success for Taiwan’s legal system by creating an informed basis for sustained, thoughtful conversations between the government and citizenry regarding the future path of legal reforms.

Citizen participation in criminal trials has been the marquee proposal of the reform debate, but it is far from the only initiative for drawing the public into the legal system. President Tsai has called for a more inclusive process for evaluating the performance of judges and prosecutors, saying these mechanisms will involve “participation by more external members, increasing professionalism and impartiality.” Another example is concern for victims’ rights which, although predating President Tsai’s tenure, has gathered momentum. The 2017 Reform Conference included victims’ rights as a prominent topic. A push for greater accessibility is further seen in the Tsai Administration’s proposal that the Constitutional Court be able to re-

267. JUDICIAL YUAN, INTRODUCING LAY PARTICIPATION IN TAIWAN, supra note 142. But see Su, supra note 169 (cautioning that current reform efforts could lead to counterproductive results).
268. See Hans, supra note 127, at 488–89 (noting that post-trial surveys of Saibanin “routinely show citizens have generally very positive responses to their participation. Scholars have documented broader effects as well; there is now a great deal more transparency and citizens’ knowledge of the legal system has increased . . .”).
270. Tsai, 2017 National Day Address, supra note 158.
271. See, e.g., Lin, supra note 160.
view final rulings of the courts of last resort in addition to deciding the constitutionality of laws and regulations.\footnote{See President Tsai’s Remarks at 2018 International Conference on Constitutional Court and Human Rights Protection, OFF. OF THE PRESIDENT, REP. OF CHINA (TAIWAN) (Oct. 1, 2018), https://english.president.gov.tw/NEWS/5534. For an explanation of the constitutional court’s current powers, see YEH, supra note 105, at 162–65.} If adopted, this would give citizens a more direct path to a constitutional ruling.\footnote{See Tsai Touts Taiwan’s Judicial Reform, Democratic Development, supra note 263.} President Tsai has expressed her hope that the reform, which is modeled on practices used in Germany, will assist justices in Taiwan “to guide the stable development of our democratic constitutional order and to protect the constitutional rights of our people in a more effective and comprehensive manner.”\footnote{President Tsai’s Remarks at 2018 International Conference on Constitutional Court and Human Rights Protection, supra note 273.}

Another facet to the conversation about more diverse participation in the legal system is renewed attention on proposals to broaden the way that judges and prosecutors are selected.\footnote{For a look at the composition of Taiwan’s judiciary in a comparative perspective, see Neil Chisholm, The Faces of Judicial Independence: Democratic Versus Bureaucratic Accountability in Judicial Selection, Training, and Promotion in South Korea and Taiwan, 62 AM. J. COMP. L. 893 (2014).} Lawyers have for over a decade been able to become judges and prosecutors, though the path is cumbersome and of questionable desirability when viewed from both financial and prestige perspectives.\footnote{See Sifa Yuan Linxuan Lûshì, Jiaoshou, Fujiaoshou, Zhuli Jiaoshou Zhuan Ren Fayuan Faguan Shenchë Banfa (司法院遴選律師, 教授, 副教授, 助理教授轉任法院法官審查辦法) [Judicial Yuan Examination Methods for Selection of Lawyers, Professors, Associate Professors, Assistant Professors, and Lecturers to Transfer and Become Court Judges] (promulgated by the Judicial Yuan, Nov. 6, 2006) (Taiwan), available at https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=A0020152.} Encouraging more seasoned lawyers to shift from private practice to the bench is one way of countering criticism of young “baby” (“娃娃”) judges, so pejoratively labelled because of their selection often straight out of school without diverse life experience.\footnote{See, e.g., Wang Hongshun (王宏舜), Jianshao 「Wawa Faguan」 Weilai Faguan, Jiancha Guan Yao Xianguo Wuguan (減少 「娃娃法官」 未來法官, 檢察官要先過五關) [Decrease Future “Baby Judges,” Prosecutors Must Pass Five Levels], UDN NEWS (聯合新聞網) (Apr. 15, 2017), https://udn.com/news/story/9939/2404493 (criticizing “baby judges”); see also}
In sum, the various initiatives seek to mitigate the pronounced “us” (legal elites) versus “them” (general public) dichotomy by infusing outside voices into the everyday workings of the legal system. This process is not an unqualified good, as there are valid concerns that calling for “people’s justice” (“人民的司法”) could fuel populist sentiments and diminish the judiciary’s role as the protector of rights of even unpopular defendants. While bearing the potential pitfalls in mind, there is much to celebrate in the legal reform debate. There is also the possibility that resulting changes could have implications beyond the confines of the legal system. The common enterprise of understanding and even contributing to the workings of the legal system has the potential to become a facet of what it means to be Taiwanese.

D. From Legal Identity to Taiwanese Identity

Legal reforms in Taiwan are very much a work in progress. While no legal system exists in an entirely static state, Taiwan is experiencing a time of significant flux. It is uncertain what characteristics will ultimately define the legal system in Taiwan, but there is palpable momentum to weave the principles of transparency, clarity, and participation into its fabric. Today, people in Taiwan can vote for their president, legislative representatives, and a host of local offices. Yet they have little understanding of, let alone direct say in, the workings of the legal system.

This Article is not endorsing electing judges via popular vote, which Justice Sandra Day O’Connor sagely warned can make

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281. See Political System, supra note 80; Kevin Hsu, How Does Taiwan’s Parliamentary Election Work, KETAGALAN MEDIA (Dec. 26, 2015), http://www.ketagalanmedia.com/2015/12/26/how-does-taiwans-parliamentary-election-work/. The most recent elections for local officials were held in November 2018. Tsai Ing-wen will be up for reelection in 2020, at which time members of the Legislative Yuan will also be elected.
judges no more than “politicians in robes.”282 Nor is it claiming that judges, prosecutors, and other officials in the legal system—particularly those with life tenure—do not care about the broader citizenry. It is positing that the stark barriers between the public and the legal system have encouraged a rift that in turn has created at least the perception of a one-way street in which the system acts upon people but does not seriously consider their views. Brian Hioe explained in *New Bloom*—an online magazine founded by a group of students and activists—that “calls for judicial reform probably return to the widespread sense that laws in Taiwan [are] something outside of the reach of the public and that, in this way, Taiwan’s legal system is widely seen as undemocratic.”283 The reform efforts discussed in Parts III A–C above seek in various ways to change both the perception and, to at least a certain extent, the reality that Taiwan’s legal system has been aloof from the people to which it applies.

If reforms result in people feeling more connected with the legal system, this can lay a foundation for an ongoing integration of public feedback into its operations and development. This process could stir a change in “legal consciousness,” explained by Sally Merry as “a term developed to describe the way individuals experience and understand the law and its relevance to their lives.”284 A shift in consciousness from the legal system as something generally outside of what it means to be Taiwanese to one of many facets of a common experience could help foster a changing collective identity. The U.S. Congressional Research Service explains, “President Tsai’s Democratic Progressive Party embraces a strong Taiwanese identity.”285 In English, the word

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284. Merry, supra note 15, at 51.

285. LAWRENCE & MORRISON, supra note 6, at 42.
“identity” conveys both the concept of the distinguishing characteristics of an entity and the “process by which a set of individuals interacts to create a shared sense of identity or group consciousness.” In Chinese, different characters express these distinct concepts: (1) distinguishing characteristics of a thing and (2) a sense of group consciousness.

What is beyond the scope of this Article—and what is ripe for sociologists, social anthropologists, and experts in other fields to explore—is an in-depth analysis of how changes to the legal system could connect to the conception of identity in the latter sense of a shared conception of what it means to be “Taiwanese.” Will the experience of reading more accessible judicial writings, of watching clips of court arguments on television, of seeing cartoons explaining laws, and of sitting together as lay judges be one more strand that binds people together as not just living in geographic proximity, but also as being engaged in a shared enterprise? Will the citizenry develop a collective sense of expectation that their opinions will be heard and heeded by actors working in the legal system? Going a step further, will they feel a growing sense of common pride that—despite persisting shortcomings—they live in a place where their voices are not squelched by the legal system but rather help shape that system?

The question of what ingredients will contribute to Taiwanese identity is of particular importance in part because debates about “identity” pervade political discussions in Taiwan. As Shelley Rigger observed, “Students of Taiwan domestic politics

288. The characteristics of an entity are best expressed as its 特色 or 特質. In the context of collective Taiwanese identity, the better phrasing is 認同, which conveys a meeting of minds.
289. The idea of how law connects with “place” is even more complex in Taiwan than other jurisdictions because of the contested nature of “Taiwan.” Cf. Legrand, supra note 140, at 101–02 (When discussing “locatedness”: “Law emerges only in and through place. . . . Law and place are inextricably enmeshed, which means, incidentally, that law can be constitutive of place in its turn. . . .”).
have identified national identity as the primary cleavage shaping public opinion and driving political allegiance.” People generally agree that identity is an important issue for Taiwan but disagree as to the current state of affairs. What it means to be “Taiwanese” versus “Chinese” or some combination of both is tough to pin down. Surveys trying to measure identity are not surprisingly notoriously fraught. This is in part because identity is not a binary choice. It is also due to varying interpretations about what terms mean: to ask someone if she is “Chinese” can carry ethnic, cultural, and national implications. These different usages are more easily expressed in Chinese than English, though, even in Chinese, terminology is subject to idiosyncratic understandings by the people being polled.

Taiwan’s Election and Democratization Study (TEDS) periodically surveys people on the following question: “In Taiwan, some people think they are Taiwanese. There are also some people who think that they are Chinese. Do you consider yourself as Taiwanese, Chinese or both?” The long-term trend following democratization was an uptick in Taiwanese identity. This was followed by a modest decline, but Nathan Batto cautioned in 2017 about over-interpreting those results: “For now, my working hypothesis is that long-term drivers of Taiwanese identity are still in place. Younger people identify more strongly as Taiwanese than older people, and this is driven by education and

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290. Shelley Rigger, The China Impact on Taiwan’s Generational Politics, in TAIWAN AND THE ‘CHINA IMPACT’ 70, 70 (Gunter Schubert ed., 2016) (disentangling the various “identity elements” (e.g., ethnicity, partisanship, etc.) and supporting a more nuanced approach).


293. Id.

real-world experiences in which China clumsily continually reminds Taiwanese that they are a different group of people.”

Robust public interaction with Taiwan’s legal system, which is increasingly distinct from that of the PRC as further explained in Part IV below, has the power to become a starker indicator that people in Taiwan “are a different group of people.”

For Taiwan’s youth, if reforms are accompanied by expanded education efforts, then movement towards an inclusive, dynamic legal system could have a greater impact on their sense of what it means to be Taiwanese. As noted above, how to teach children about the government is a politically sensitive task. It is frequently said that the youth of Taiwan are “naturally independent” (‘天然獨’ or ‘自然獨’) by virtue of growing up in a democracy that is protective of civil and political rights. That said, stagnating wages and broader questions about Taiwan’s economic and political future have added another layer to the debate: there are indications of a “brain drain” from Taiwan to the PRC. Working in the PRC does not mean losing ties with Taiwan, especially because frequent flights across the strait make it so people can work regularly on one side but still spend substantial time on the other. Nonetheless, economic reliance on


299. Cross-strait flights have, however, become an issue with increasing cross-strait tension. See Chris Horton, Taiwan Retaliates Against Chinese Airlines, Hampering Lunar New Year Travel, N.Y. TIMES (Jan. 30, 2018),
China is seen as a factor that could work to erode Taiwanese identity.

A number of factors beyond age influence the identity of people who call Taiwan home. Though Taiwan’s population is predominantly ethnically Han Chinese who can trace their heritage across the Taiwan Strait, this group roughly divides into those whose ancestors came with the Nationalists after World War II (外省人) and those who were already in Taiwan (本省人). The Han Chinese population can also be broken down into further subcomponents, such as based on the distinction between Holo and Hakka people. Part of Taiwan’s current population can trace their lineage back to the original indigenous inhabitants. Today there are sixteen officially recognized indigenous groups. The Dutch and Japanese colonial periods brought additional layers of diversity. Add to this landscape that, particularly in light of demographic trends, the government is making

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300. See People: Fact Focus, TAIWAN.GOV.TW, https://www.taiwan.gov.tw/content_2.php (last visited May 24, 2019) (explaining “Taiwan may be described as a predominantly Han Chinese society, with more than 95 percent of the population claiming Han ancestry”); see also Razib Khan, The World’s Largest Ethnic Group: Han Chinese, from North to South, MEDIUM (Feb. 16, 2018), https://blog.insito.me/the-worlds-largest-ethnic-group-han-chinese-from-north-to-south-e509d66db58d (“The ethnogenesis of the Han dates to the first millennium B.C.—as the Zhou dynasty took the helm from the Shang dynasty.”).


a push to create an “immigrant-friendly” environment that welcomes new people to Taiwan.306

This is all to say that the forces shaping Taiwanese identity are varied and complex, and Taiwan is a more diverse place than often recognized. Going forward, what this Article first recommends watching is whether an enhanced, communal connection to the legal system becomes a bit of the glue that binds people together despite variations in ethnicity, age, gender, sexual orientation, socio-economic status, political views, and other identifying personal characteristics. And, second, enhanced attention is warranted regarding what forces are at work in creating strands among the citizenry and legal system: government actors aiming to bolster popular support and/or out of a sincere belief that a more responsive legal system is best for Taiwan; civil society groups seeking to help shape the legal system and, in turn, further the causes that they support; academics hoping to nudge the legal system from its somewhat muddled state towards whatever they may see as the better path for Taiwan; and/or average people on the street because they are invested in the future of the place they call home and they see their opinions as bettering the odds for its success.

IV. AUDIENCES BEYOND BORDERS: THE REWARDS AND RISK OF A TAIWANESE LEGAL IDENTITY

What form Taiwan’s legal identity will take is of primary interest to those who will live under that system. It is also of interest to comparative law scholars who have long debated the prospects and perils of legal transplants as well as how external inspiration can combine with internal innovations.307 Because of the geopolitical implications, Taiwan’s domestic legal developments have significance to outside audiences beyond the arcane world of legal academia.

On the one hand, there are potential soft-power rewards in demonstrating to the world how Taiwan is a thriving democracy


that is actively incorporating the citizenry into its formerly authoritarian government (Part IV.A). On the other hand, there is the risk that celebrating a transformation of the legal system into a more inclusive, dynamic entity might be seen by Beijing as an element of de-Sinicization and pro-Taiwanization (Part IV.B). A push to distance the legal system from its traditional ROC roots is a far cry from an official declaration of hard independence (e.g., a proclamation of the establishment of the “Republic of Taiwan”); however, the PRC government has also voiced its firm resistance to moves that it sees as contributing to “soft independence” (e.g., cultivating a sense of distinctive Taiwanese identity even if stopping short of announcing official formation of a state under the “Republic of Taiwan” or a similar name).308

A. Soft Power

Taiwan is an energetic, sometimes to the point of raucous, democracy. In 2018, the national holiday commemorating the harsh repression following the 1947 “228 Incident”309 saw protesters splashing red paint on Chiang Kai-shek’s tomb and “two former presidents call[ing] for a referendum in April 2019 on whether to replace the Republic of China . . . with a Republic of Taiwan.”310 This exuberance can make governing challenging, though President Tsai has repeatedly hailed these hard-won gains: “[F]reedom and democracy Taiwan enjoys today is not a matter of course. Freedom is not a given and democracy is not a gift from rulers. Everything we have today was won by the struggles of Taiwanese . . . .”311

Foreign governments have praised Taiwan’s free atmosphere as well. For example, U.S. Principal Deputy Assistant Secretary of Defense for Asian and Pacific Security Affairs, David Helvey,


309. See Horton, Taiwan Commemorates a Violent Nationalistic Episode, supra note 181.


said in September 2017 that Taiwan is “a model for the region and the world with its market economy and its vibrant, prosperous, free, and orderly democratic society.”\textsuperscript{312} In October 2018, U.S. Vice President Mike Pence stated that “America will always believe that Taiwan’s embrace of democracy shows a better path for all the Chinese people.”\textsuperscript{313} The former head of the European Economic and Trade Office in Taiwan praised that “[t]he EU and Taiwan are very close from the perspectives of a democratic society and economic development[,]”\textsuperscript{314} and the Canadian government sent a congratulatory message to President Tsai on her election victory affirming that “Taiwanese and Canadians share similar values with regard to democracy, freedom and human rights.”\textsuperscript{315}

Current efforts to break down barriers between the people and the legal system add another layer to Taiwan’s story of dedication to democracy and the rule of law. That Taiwan’s developing legal identity is one facet of this story is largely unknown outside Taiwan. Based on the author’s experience, many foreigners in Taiwan are also unaware of the debate.\textsuperscript{316} In part this is understandable because meetings where people discuss the legal system do not grab international headlines like street protests and other more colorful displays of civil and political rights. Moreover, because the workings of the legal system are of most immediate concern to domestic audiences, it makes sense that the government would focus messaging internally.


\textsuperscript{316} Outside of the academic interests of foreign legal scholars, most foreigners would like to avoid contact with Taiwan’s legal system. Cf. Raleigh Holmes, Volunteers Needed to Visit Taoyuan Prisoner for Foreigners, CENTER (Dec. 7, 2016), https://www.communitycenter.org.tw/volunteers-needed/.
Taiwan’s government has struggled to burnish its international reputation as a defender of human rights, rule of law, and democracy. Events unfolding while completing this Article suggest, however, that this might be changing. The May 2019 introduction of same-sex marriage stands out as an example of when foreign attention focused on Taiwan’s domestic legal affairs. The Constitutional Court ruled on May 24, 2017, that the ROC Constitution required the government to permit same sex marriage.\textsuperscript{317} The Court gave the legislature two years to pass legislation implementing this decision; otherwise, same-sex couples would by default be able to register their marriages.\textsuperscript{318} The road to May 24, 2019, was politically bumpy,\textsuperscript{319} but the legislature finally passed a bill one-week shy of the deadline.\textsuperscript{320} The news—especially that these would be the first same-sex marriages in Asia—received international acclaim\textsuperscript{321} and even prompted a celebratory Tweet from Ellen DeGeneres to her 77.7 million followers.\textsuperscript{322} President Tsai responded, “Thank you, Ellen! I am proud to serve this country where #LoveWins, so everyone has the right to marry. Everyone!”\textsuperscript{323}

What is uncertain at the time of writing is whether Taiwan can harness this momentum to increase its presence on the international stage. Certainly, photos of happy couples more easily capture media attention than debates about judicial reforms.

\textsuperscript{317} See Press Release, supra note 105.
\textsuperscript{318} Id.
\textsuperscript{319} See Batto, The Politics of the Marriage Equality Vote, supra note 135.
\textsuperscript{322} Ellen DeGeneres (@TheEllenShow), TWITTER (May 23, 2019, 6:53 PM), https://twitter.com/TheEllenShow/status/1131740052172750848 (“Taiwan is now the first Asian country to allow marriage equality. Let’s celebrate every step in the right direction.”).
\textsuperscript{323} 蔡英文 Tsai Ing-wen (@iingwen), TWITTER (May 24, 2019, 4:26 AM), https://twitter.com/iingwen/status/1131884081547866112.
The challenge is how to use the positive exposure from the same-sex marriage success to amplify Taiwan’s “soft power” in the sense of “harness[ing] the allure of culture and values to add to a country’s strength. . .” The upcoming 2020 presidential and legislative election is the next obvious event for Taiwan to turn world attention to its democratic achievements. Yet freedom is not just gauged by periodic free elections, but also by the many ways that the government exerts its coercive power over individuals. That Taiwan is examining how to make the legal system more transparent, clear, and participatory is a new chapter in Taiwan’s casting off of its authoritarian past. Wide projection of this story is not something that the government can achieve singlehandedly. Even if the government hones its messaging for foreign audiences, it will rely heavily on the media (both domestic and international), civil society, and individual citizens to continue transmitting those messages abroad once the excitement about marriage equality fades.

Nor is Taiwan’s legal journey always going to be as joyous as in the wake of the same-sex marriage law’s passage. The process of forging Taiwan’s legal identity is complex. It remains uncertain at what pace the process of grappling with legal issues will result in increased substantive protections for human rights. The death penalty, for example, remains widely popular, and President Tsai largely avoided commenting on this controversial issue during her campaign and initial two years in office. In August 2018, her administration carried out its first execution, with the deputy justice minister commenting, “Abolishing (the) death sentence is an international trend and a long-term goal for the justice ministry . . . but there is no consensus in our country. . . ”


Similarly, despite calls for a more inclusive society that welcomes foreigners, a draft refugee law has long been stalled in the legislature. If, however, a more inclusive legal system leads to greater attention on how the system treats fundamental freedoms, this could in turn encourage even greater compliance with the ICCPR, ICESCR, and other international human rights treaties that Taiwan has incorporated into domestic law. For instance, the disproportionate number of male lay-judges was raised at the conference following the Taipei District Court’s mock trial in January 2018. That there were only two women in this particular case was a result of random selection, not intentional discrimination. The observation, however, led to discussion about the pros and cons of explicitly taking gender diversity into consideration. Such conversations are an entrée into a deeper discussion about how the legal system can both support and undermine human rights. And showing these discussions to the world adds data points regarding Taiwan’s commitment to these rights.

Drawing attention to Taiwan’s legal reform efforts can further evidence the yawning gap with the situation across the strait. President Xi Jinping has moved to consolidate his power and has

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332. See, for example, Weitseng Chen’s response to the “convergence theory” (that China might follow Taiwan’s developmental path): “[T]his Article argues that China is unlikely, despite the striking similarities between the two sides, to follow Taiwan’s trajectory of the rule of law transition that eventually facilitated the transformation of an authoritarian regime into a full-fledged democracy.” Chen, Twins of Opposites, supra note 81, at 485.
engaged in “increasingly repressive and arbitrary government” that is starkly seen in the ongoing arbitrary detention of approximately a million Uighurs and members of other Muslim minority groups. Intense censorship of political debate includes blocking Winnie the Pooh images because of their past use in mocking President Xi. Compare this squelching of free expression with President Tsai’s remarks when opening a book fair in Taipei: “Why is Asia’s most important book fair held in Taiwan?” Because we have a democratic political system, a free society and because a diversity of positions and voices can be found in this land, stirring creativity.” Diverse opinions stirring creativity in the forging of Taiwan’s legal identity presents an additional point of differentiation to show the world.

B. Soft Independence

The term “existential threat” has become cliché, but people in Taiwan indeed live with the threat that Beijing will permanently change the way that they are governed and will do so against their will. Tensions are high across the Taiwan Strait. President Tsai has angered Beijing by not endorsing the “One China Principle” or related so-called “1992 Consensus.”


334. See, e.g., Jessica Batke, Where Did the One Million Figure for Detentions in Xinjiang’s Camps Come From?, CHINAFILE (Jan. 8, 2019), http://www.chinafile.com/reporting-opinion/features/where-did-one-million-figure-detentions-xinjiangs-camps-come; Stephanie Nebehay, 1.5 Million Muslims Could Be Detained in China’s Xinjiang: Academic, REUTERS (Mar. 13, 2019), https://reut.rs/2Gu0wmf.

335. See Josh Rudolph, Sensitive Words: Xi to Ascend His Throne (Updated), CHINA DIGITAL TIMES (Feb. 28, 2018), https://chinadigitaltimes.net/2018/02/sensitive-words-emperor-xi-jinping-ascend-throne/.


338. LAWRENCE & MORRISON, supra note 6, at 42–44 (explaining “1992 Consensus” and its relation to the “idea that Taiwan and mainland China are parts of ‘one China’”).
latter served as a construct to facilitate cross-strait relations during the previous KMT-led administration, but it is not a binding agreement.\textsuperscript{339} It only gained the name “1992 Consensus” when then Chairman of the KMT, Su Chi, coined the term in 2000.\textsuperscript{340} The “1992 Consensus” is incompatible with the DPP’s charter,\textsuperscript{341} and President Tsai has been unwavering in her rejection of it as a framework for cross-strait relations.\textsuperscript{342} Beijing has taken a number of actions to press the Tsai administration to change its stance,\textsuperscript{343} such as establishing diplomatic relations with several ROC allies\textsuperscript{344} and blocking Taiwan’s attendance at the World Health Assembly.\textsuperscript{345}

President Xi stressed a stern approach towards Taiwan during his address at the Nineteenth Party Congress in October.

\begin{itemize}
\item \textsuperscript{339} Id. at 38 (“The term referred to an agreement reportedly reached during meetings in November 1992 between two semi-official organizations, the PRC’s Association for Relations Across the Taiwan Strait (ARATS) and Taiwan’s Straits Exchange Foundation (SEF).”); \textit{see also} Chun-I Chien, \textit{Legal Aspects of Mutual Non-Denial and the Relations Across the Taiwan Straits}, 27 MD. J. INT’L L. 111, 118 (2012) (explaining how President Ma’s use of “mutual non-denial” was “effective in moving Taiwan and Mainland China toward closer cultural, social, trade, and investment ties”).
\item \textsuperscript{341} Richard C. Bush, \textit{Cross-Strait Relations: Not a One-Way Street}, BROOKINGS (Apr. 22, 2016), https://www.brookings.edu/blog/order-from-chaos/2016/04/22/cross-strait-relations-not-a-one-way-street/ (“[Tsai] is the leader of the [DPP], which 25 years ago stated the clear objective creating a Republic of Taiwan—in effect, Taiwan independence. That objective is still in the party’s charter, but only a small majority of the island’s public shares that goal . . . .”).
\item \textsuperscript{342} \textit{See} Shannon Tiezzi, \textit{Facing Chinese Pressure, Taiwan’s President Tsai Seeks ‘Survival Niche’}, DIPLOMAT (Oct. 10, 2018), https://thediplomat.com/2018/10/facing-chinese-pressure-taiwans-president-tsai-seeks-survival-niche/ (noting “Tsai’s refusal to overtly embrace the ’1992 Consensus’”).
\item \textsuperscript{344} Richard Bernstein et al., \textit{The World is Deserting Taiwan. How Should the U.S. Respond?}, CHINAFILE (June 14, 2017), http://www.chinafile.com/conversation/world-deserting-taiwan-how-should-us-respond.
\end{itemize}
2017, vowing to defeat independence “in any form.” In February 2018, the CCP “affirmed the continuation of Beijing’s two-pronged ‘soft-hard’ strategy of using both hard and soft measures against Taiwan[,]” i.e., using carrots and sticks. That big sticks may someday be used is explicit in PRC law. The 2005 PRC Anti-Secession Law states the goal of “peaceful reunification” but further outlines the conditions for use of “non-peaceful means”:

In the event that the “Taiwan independence” secessionist forces should act under any name or by any means to cause the fact of Taiwan’s secession from China, or that major incidents entailing Taiwan’s secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China’s sovereignty and territorial integrity.

It would be a jaw-dropping surprise if President Tsai chose the road of hard independence by declaring establishment of the “Republic of Taiwan,” although that phrasing is in the DPP’s Charter. Even President Tsai’s more subtle moves are raising the PRC leadership’s ire. As Alan Romberg noted in September 2017, “Attention to ‘cultural independence’ has risen on the Mainland’s list of concerns about ‘soft independence.’” Following President Tsai’s inauguration in May 2016, a PRC-state-run

350. See LAWRENCE & MORRISON, supra note 6, at 4.
newspaper opined, “What can be assured is that DPP’s rule will make the suggestion of Taiwan independence further expand in Taiwan society” and that “certain people are still holding on to the fantasy that ‘soft independence’ might be workable.”\textsuperscript{352} In April 2017, the PRC government complained that the Tsai administration had “indulged and supported a series of activities aimed at ‘de-sinicization’ and ‘Taiwan independence.’”\textsuperscript{353} In May 2017, the official Xinhua news agency reported, “Over the past year, the DPP administration has not ceased its promotion of de-sinicization and ‘Taiwan independence’ activities in the island’s cultural sector.”\textsuperscript{354} In January 2018, Xinhua stressed “that any attempt to separate Taiwan from China will not be tolerated.”\textsuperscript{355} The spokesperson for the PRC State Council’s Taiwan Affairs Office warned in October 2018 that “[a]ny separatist attempt that relies on foreigners to build itself up, intensify antagonism, damage cross-Strait relations or change Taiwan’s status is doomed to fail.”\textsuperscript{356}

Law in Taiwan has always been distinct from that used in the PRC, but a conspicuous unmooring of the legal system from the one originally established by the ROC government is yet another manifestation of a move away from the cross-strait status quo. It is not just a question of whether the contents of the ROC legal system are in flux, but rather whether the ROC legal system is being supplanted by a Taiwanese system. Professors Jiunn-rong Yeh and Wen-Chen Chang explain, for example, how “incremental reforms have brought Taiwan a vibrant constitutional democracy whose institutions and respective functions are very different from what was originally written in the ROC Constitution.”\textsuperscript{357} Interestingly, the Tsai administration’s report on the

\begin{itemize}
\item\textsuperscript{352} Cross-Strait Ties Enter Era of Uncertainty Under Tsai, GLOBAL TIMES (May 20, 2016), http://www.globaltimes.cn/content/984175.shtml.
\item\textsuperscript{354} Xinhua Insight: What Has DPP Brought to Taiwan Over the Past Year?, XINHUA NET (May 20, 2017), http://www.xinhuanet.com/english/2017-05/20/c_1362999231.htm.
\item\textsuperscript{355} Attempt to Split China Not to Be Tolerated, XINHUA NET (Jan. 31, 2018), http://www.xinhuanet.com/english/2018-01/31/c_136939759.htm.
\item\textsuperscript{357} Yeh & Chang, supra note 76, at 822.
\end{itemize}
2017 Reform Conference begins by stating that judicial reform is the issue of utmost concern to the “Taiwanese” (“台灣人”). \(^{358}\)

The only times that the 152-page report even mentions the “Republic of China” is in proper names and in dates that follow the convention of using the ROC founding to count years. \(^{359}\) The 2017 Reform Conference was about Taiwan’s legal system, not that of the ROC.

It is highly improbable that Beijing would deem cultivating a distinct legal identity alone as a sufficient attempt “to separate Taiwan from China” such that retaliatory measures were warranted. Nonetheless, the more that legal reforms appear to be the creation of a uniquely Taiwanese legal system—and particularly one that emphasizes the openness and participation so lacking in the PRC—the more that this phenomenon looks like yet another step towards soft independence.

Stating “Taiwan” instead of “Republic of China” in the report is, admittedly, only words on paper. The more interesting test will come as legal reforms take hold in increasingly conspicuous ways. At present, there is no indication that the PRC leadership’s view of legal reforms across the strait is a factor that people in Taiwan are pondering in setting the reform agenda. Even if people in Taiwan involved in the reform process have cross-strait relations at least somewhat in mind, it would be surprising if Taiwanese officials said openly that their decisions on domestic legal issues were being influenced by concerns about how Beijing might respond. Nor has the PRC leadership expressed its views publicly on the legal reform discussions that are currently underway in Taiwan. The May 2019 same-sex marriage bill did, however, prompt a cross-strait tiff. The PRC’s People’s Daily tweeted, “Local lawmakers in #Taiwan, China, have legalized same-sex marriage in a first for Asia, according to local media reports.” \(^{360}\)

Taiwan’s Ministry of Foreign Affairs retorted,

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\(^{358}\) 2017 Reform Conference Report, supra note 138, at 3.

\(^{359}\) For example, the Report mentions the “ROC” Bar Association (中華民國律師公會), but even the Bar Association translates its name as the “Taiwan Bar Association” despite “Taiwan” not being in the Chinese version. See http://www.twba.org.tw/en/News.asp. In President Tsai’s 2018 National Day address, she “used the term ‘Taiwan’ 48 times, compared with four mentions of ‘Republic of China’ and two references to the ‘Republic of China in Taiwan.’” Horton, supra note 59.

WRONG! The bill was passed by our national parliament & will be signed by the president soon. Democratic #Taiwan is a country in itself & has nothing to do with authoritarian #China. [People’s Daily] is a commie brainwasher & it sucks. JW [Joseph Wu, Minister of Foreign Affairs].

It is unknown whether this Twitter-spat will be anomaly or, instead, if Taiwan’s domestic legal landscape will become a more pronounced element in cross-strait tensions. Nevertheless, the more Taiwan moves away from the established ROC legal system, the more examples there will be of the “soft independence” to which Beijing staunchly objects. Nurturing a distinctive Taiwanese legal identity—like so many aspects of government policies in Taiwan—is thus at least tacitly connected to cross-strait relations. The connection could become more visible if the inchoate identity of the legal system feeds into strengthening a sense of national identity that values civic engagement, especially vis-à-vis the lack of civil and political rights currently available to people in the PRC.

Legal reforms are thus neither an explicit item in the list of complaints that Beijing has against the Tsai administration, nor are they irrelevant. A question then is how to articulate what

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361. 外交部 Ministry of Foreign Affairs, ROC (Taiwan) (@MOFA_Taiwan), Twitter (May 18, 2019, 5:06 PM), https://twitter.com/MOFA_Taiwan/status/1129901169906552833.

362. See generally CONG.-EXECUTIVE COMMISSION ON CHINA, 2018 ANNUAL REPORT 1 (Oct. 10, 2018) (reporting on “the dire human rights situation inside China and the continued downward trajectory, by virtually every measure, since Xi Jinping became Communist Party General Secretary in 2012 and President in 2013 . . . .”).

363. There are legal issues, other than domestic legal reforms in Taiwan, that are of direct concern in cross-strait relations. See, e.g., Greg Torode & J.R. Wu, Taiwan Enters South China Sea Legal Fray, As Group Seeks to Sway International Court, REUTERS (May 10, 2016), https://www.reuters.com/article/us-southchina-sea-taiwan/taiwan-enters-south-china-sea-legal-fray-as-group-seeks-to-sway-international-court-idUSKCN0Y02LD (law of the sea issues over disputed islands); Yu-jie Chen & Jerome A. Cohen, Beijing and Taipei Should End Their Tug of War Over Repatriation of Criminal Suspects, S. CHINA MORNING POST (H.K.) (Sept. 28, 2016), http://www.scmp.com/comment/insight-opinion/article/2023276/beijing-and-taipei-should-end-their-tug-war-over (issues over transfer of criminal suspects); Lewis, supra note 23 (issues over divergent views of what constitutes a criminal offense versus exercise of protected freedoms, as exemplified by the case of imprisoned Taiwanese activist Lee Ming-che).
role they do play in the delicate cross-strait relationship. Gunther Teubner coined the term “legal irritant” to describe how transplanted laws can disrupt an established legal system and trigger a host of unexpected events.\footnote{364. Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 Mod. L. Rev. 11 (1998).} Although Teubner developed the term totally outside of the context of cross-strait relations, the idea of “legal irritant” takes on a twist here: the forging of Taiwan’s legal identity could be seen as an irritant that is legal in nature. Instead of following the advice of “Never Tickle a Sleeping Dragon,”\footnote{365. Hogwarts: Never Tickle a Sleeping Dragon, HARRY POTTER LEXICON, https://www.hp-lexicon.org/thing/never-tickle-sleeping-dragon/ (motto of Hogwarts School of Witchcraft and Wizardry, described by author J.K. Rolling as an “entirely practical piece of advice for the Hogwarts school motto”). While similar to the proverb cautioning “let sleeping dogs lie,” one can only imagine the destruction that a dragon could wreak versus a dog.} championing a dramatic shift away from the status quo of the traditional ROC legal system is one more unwanted tickle of the already-awake dragon in Beijing. The dragon’s irritation could become more pronounced if, for instance, the public in Taiwan takes an active role in the legal system’s scrutiny of government officials. A common question is what would have been the outcome of former President Chen Shui-bian’s corruption case if the trial had included lay judges.\footnote{366. See, e.g., Jingda Jiaoshou Lin Yushun: Guomin 「法官」Guanliao Sifa (警大教授林裕順：國民「法官」官僚司法) [Central Policy University Professor Lin Yushun: Citizen “Judges” Bureaucratize Justice], APPLE DAILY (蘋果日報) (Dec. 8, 2017), https://tw.appledaily.com/new/realtim/20171208/1255359/. For background on how Chen’s case tarnished the reputations of judges and prosecutors, see Political Corruption in Taiwan: Trial and Error, ECONOMIST (Jan. 22, 2009), https://www.economist.com/node/12991373. For how this case haunted the judicial system, see Chung Li-hua & Jake Chung, Control Yuan to Investigate Chen Skit, TAIPEI TIMES (Feb. 23, 2018), http://www.taipeitimes.com/News/front/archives/2018/02/23/2003688073.} That Taiwan is seriously contemplating such hypotheticals stands in marked contrast to the ongoing anti-corruption campaign in the PRC that is firmly within the CCP’s secretive hands.\footnote{367. See Chris Buckley, In China, Fears That New Anticorruption Agency Will Be Above the Law, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/world/asia/china-xi-jinping-anticorruption.html (reporting that Xi “is pushing to establish a new anticorruption agency with sweeping powers to sidestep the courts and lock up anyone on the government payroll for months without access to a lawyer”).}
have a direct say in their government via one-person-one-vote elections. Having the citizenry further directly weigh in on the fate of their government’s officials when accused of misdeeds would make the polarity across the strait all the starker.

In short, the more that the legal system applicable to the over twenty-three million people who call Taiwan home looks both uniquely Taiwanese and distinctly not Chinese, the more that Beijing has another example to label pejoratively as de-Sinicization. Overtures from Beijing that it would continue to allow Taiwan a high-degree of autonomy under a “one country, two systems” model also are met with intense distrust. The erosion of freedoms in Hong Kong makes for a cautionary tale, with these concerns having prompted millions of Hong Kongers to protest as this Article goes to print. When receiving the O’Connor Justice Prize in February 2018, former Hong Kong Chief Secretary Anson Chan warned, “[I]t has become clear that Beijing is now bent on molding Hong Kong’s governance to become more closely aligned with that of the mainland, while still maintaining that ‘One Country, Two Systems’ remains alive and well.”

CONCLUSION

A frequent refrain is the need to maintain the status quo in cross-strait relations. At a February 2018 event with foreign diplomats, President Tsai reaffirmed that she would not depart

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368. Bush, What Xi Jinping Said About Taiwan at the 19th Party Congress, supra note 346 (noting Xi reiterated “one country, two systems” as the “guiding principle (fangzhen) of peaceful reunification”).
369. See, e.g., Huge Turnout by Protesters Keeps Heat on Hong Kong’s Leader, N.Y. TIMES (June 16, 2019), https://www.nytimes.com/2019/06/16/world/asia/hong-kong-protests.html (“Organizers said nearly two million people joined the rally, while the police estimated that 338,000 protesters turned up at the peak of the demonstration along a previously-agreed-upon procession route, implying that its count did not include people who spilled over on to adjacent and parallel roads”).
from the status quo.\textsuperscript{372} There is much room to debate what exactly “status quo” means, but all agree it falls somewhere between, on the one extreme, the PRC and Taiwan combining into a single state with a common government exercising effective control and, on the other, de jure independence for Taiwan under that name. The status quo is a point of repose, but not a final resolution.

Taipei’s pursuit of quietude with Beijing contrasts with the intentional disruption at home. President Tsai moved quickly after her inauguration to address long-brewing dissatisfaction with the legal system. The infusion of public voices has pressed for greater transparency, clarity, and participation as part of ongoing legal-reform discussions. There are indications that these values are starting to take hold. The legal system is untethered from its ROC historical roots, and a new inchoate legal identity is being forged.

In time, collective connections with the legal system could become one of many facets of what it means to be “Taiwanese,” emboldening the people that they are part of the legal system, not just objects upon which it acts. This process will likely gradually play out against the complicated backdrop of Taiwan’s unique status. Yet the timeline could also be more condensed. Two former presidents endorsed holding an independence referendum in 2019,\textsuperscript{373} and a pro-independence rally and march in October 2018 drew thousands of people.\textsuperscript{374} These initiatives fizzled and a referendum to jettison the ROC name is unlikely. The endorsement was, however, a reminder that the citizenry has the power to go beyond defining what it means in the abstract to be Taiwanese to using their votes to resolve the ultimate question of what Taiwan means.


\textsuperscript{373} See Taiwan Independence Referendum Launched, Backed by Former Presidents, FOCUS TAIWAN (Feb. 28, 2018), http://focusntaiwan.tw/news/aipl/201802280006.aspx.

\textsuperscript{374} See Horton, supra note 59.