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## 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.<sup>1</sup> 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.<sup>2</sup> The ROC is today recognized by only sixteen countries and the Holy See,<sup>3</sup> 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."<sup>4</sup> 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).<sup>5</sup> Living there is akin to living in

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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 . . .").

2. *See* TAIWAN.GOV.TW, [https://www.taiwan.gov.tw/content\\_3.php](https://www.taiwan.gov.tw/content_3.php) (last visited May 23, 2019) ("The ROC was founded in 1912 in China."). For continuing use of "Republic of China" for laws, *see, e.g.,* *News*, LAWS & REGULATIONS DATABASE OF THE REP. OF CHINA, <http://law.moj.gov.tw/> (last visited Apr. 24, 2019).

3. *Diplomatic Allies*, MINISTRY OF FOREIGN AFF., REP. OF CHINA (TAIWAN), <https://www.mofa.gov.tw/en/AlliesIndex.aspx?n=DF6F8F246049F8D6> (last visited June 19, 2019) [hereinafter MINISTRY OF FOREIGN AFFAIRS].

4. *See* STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, *THE ONE-CHINA PRINCIPLE AND THE TAIWAN ISSUE* (2000), *available at* [http://www.gov.cn/english/official/2005-07/27/content\\_17613.htm](http://www.gov.cn/english/official/2005-07/27/content_17613.htm) [hereinafter STATE COUNCIL WHITE PAPER].

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.<sup>6</sup> These three branches create, implement, and interpret laws that are “normative, institutionalized, and coercive.”<sup>7</sup>

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.<sup>8</sup> Law in Taiwan has also been influenced by its long history of indigenous peoples and arrivals of people from across the strait,<sup>9</sup> foreign intervention through colonial rule,<sup>10</sup> and recent, extensive legal transplants from Japan, Germany, and the United States.<sup>11</sup> 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

6. The ROC Government has two additional branches: Control Yuan and Examination Yuan. SUSAN V. LAWRENCE & WAYNE M. MORRISON, CONG. RESEARCH SERV., R 44996, TAIWAN: ISSUES FOR CONGRESS 5 (2017).

7. JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 3 (1970).

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 Fa 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-FA 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* (超越繼承、立足臺灣、邁向國際的法學研究前景, 科技部 104 年傑出研究獎) [Prospects for Legal Research that Surpass Succession, is Based in Taiwan, and Moves Internationally], RENWEN JI SHEHUI KEXUE YANJIU FAZHAN SI (人文及社會科學研究發展司) [DEPT. OF HUMANITIES AND SOCIAL SCIENCES], June 2016, at 97.

to it.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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12. See *Zhe Wei Faguan Gaosu Ni, Faguan Weishenme Laoshi Bei Ma Konglong* (這位法官告訴你，法官為什麼老是被罵恐龍) [*This Judge Tells You Why Judges are Always Called Dinosaurs*], NEXT MAG., June 15, 2016, available at <http://www.nextmag.com.tw/realtimenews/news/40727177>.

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.”).

14. See *Identity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/identity> (last visited Apr. 24, 2019) (one definition as “distinguishing character or personality of an individual”). Used in a different sense, a person can have a “legal identity” (“合法身分”) meaning identification credentials that allow for full social and economic participation in a state. See Mariana Dahan, *Reflections on the Future of Legal Identity*, WORLD BANK (Apr. 28, 2015), <http://blogs.worldbank.org/ic4d/reflections-future-legal-identity>.

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.<sup>16</sup> 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").

16. See, e.g., Ye Qing-Yuan (葉慶元), *Zhengshi "Yingshi Gaige" Dui Woguo Xianzheng Zhifa de Weihai* (正視「英式司改」對我國憲政法治的危殆) [*The Harm of "Tsai Ing-wen-Style Reforms" to Our Country's Constitutional Rule of Law*], STORM MEDIA (風傳媒) (May 14, 2019), <http://bit.ly/2YNVekd> (criticizing proposals to reduce the number of Supreme Court judges); Matthew Strong, *Taiwan Supreme Court to Set Up Grand Chamber*, TAIWAN NEWS (Jan. 18, 2018), <https://www.taiwannews.com.tw/en/news/3344139>.

that to be Taiwanese includes a direct say in the content of legislation?<sup>17</sup> 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,”<sup>18</sup> just as being “American,” “French,” or “Brazilian” are contested concepts.<sup>19</sup> 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.<sup>20</sup>

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

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17. See Brian Hioe, *Referendum Changes a Step Forward for Democratic Experimentalism in Taiwan?*, NEW BLOOM MAG. (Dec. 13, 2017), <https://new-bloommag.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.<sup>21</sup> 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"<sup>22</sup>—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.<sup>23</sup>

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.<sup>24</sup> 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."<sup>25</sup> 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.<sup>26</sup>

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21. See Yang Zhong, *Explaining National Identity Shift in Taiwan*, 25 J. CONTEMP. CHINA 336, 336–37 (2016) (positing that "Taiwanese identity politics has the potential to seriously impact cross-Taiwan Strait relations and regional stability").

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 . . .").

23. Cf. Margaret K. Lewis, *Taiwan's Human Rights Revolution and China's Devolution*, DIPLOMAT (Oct. 3, 2017), <https://thediplomat.com/2017/10/taiwans-human-rights-revolution-and-chinas-devolution/>.

24. See, e.g., Josh Rogin, *China Threatens U.S. Congress for Crossing Its Red Line' on Taiwan*, WASH. POST (Oct. 12, 2017), [https://www.washingtonpost.com/news/josh-rogin/wp/2017/10/12/china-threatens-u-s-congress-for-crossing-its-red-line-on-taiwan/?utm\\_term=.fe7821998ecd](https://www.washingtonpost.com/news/josh-rogin/wp/2017/10/12/china-threatens-u-s-congress-for-crossing-its-red-line-on-taiwan/?utm_term=.fe7821998ecd).

25. *Taiwan Leader's Soft Words Aren't Fooling Anyone*, GLOBAL TIMES (Oct. 11, 2017), <http://www.globaltimes.cn/content/1069783.shtml>.

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.<sup>27</sup> Even the U.S. government makes gaffes. In February

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*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.<sup>28</sup> In July 2017 the White House identified Xi Jinping as the President of the “Republic of China.”<sup>29</sup> In 2006, the Bush administration introduced the PRC’s national anthem as that of the “Republic of China.”<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> Japanese rule extended until its defeat in World War II.<sup>33</sup>

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

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28. See Anthony Tao, *Pentagon Issues Correction After Document Labels Taiwan as Part of China*, SUPCHINA (Feb. 5, 2018), <http://supchina.com/2018/02/05/pentagon-issues-correction-after-document-labels-taiwan-as-part-of-china/>.

29. See Tom Phillips, *Wrong China Policy: White House Calls Xi Jinping President of Taiwan*, GUARDIAN (July 9, 2017), <https://www.theguardian.com/us-news/2017/jul/09/wrong-china-policy-white-house-calls-xi-jinping-president-of-taiwan>.

30. See Joseph Kahn, *In Hu’s Visit to the U.S., Small Gaffes May Overshadow Small Gains*, N.Y. TIMES (Apr. 22, 2006), <http://www.nytimes.com/2006/04/22/world/asia/22china.html>.

31. Richard C. Bush, *The Republic of China in Historical Perspective*, BROOKINGS (June 24, 2011), <https://www.brookings.edu/on-the-record/the-republic-of-china-in-historical-perspective/>.

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>.

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.<sup>34</sup> 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.<sup>35</sup> The KMT government originally relocated to Taiwan with the stated purpose of using it as a base to retake the mainland,<sup>36</sup> a goal that has been abandoned by all but a tiny fringe of people in Taiwan.<sup>37</sup> Today, the ROC flag adopted in 1921 still flies above the President’s office in Taipei,<sup>38</sup> and the official ROC seal from 1929 is still used to authenticate official documents.<sup>39</sup> 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.<sup>40</sup> Sometimes the “ROC” drops out entirely, with even the official government website using the uniform resource locator [www.taiwan.gov.tw/](http://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

34. See *Making Memories*, ECONOMIST (Aug. 12, 1999), <https://www.economist.com/node/232334>.

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”).

36. See SHELLEY RIGGER, WHY TAIWAN MATTERS: SMALL ISLAND, GLOBAL POWERHOUSE 28 (2014).

37. Taiwan’s government ended the National Unification Council and supporting Guidelines for National Unification in 2006. See *Taiwan Scraps Unification Council*, BBC NEWS (Feb. 27, 2006), <http://news.bbc.co.uk/2/hi/asia-pacific/4753974.stm>; ZHONGHUA MINGUO (中華民國) [REPUBLIC OF CHINA (TAIWAN)], GUOJIA TONGYI WEIYUANHUI (國家統一委員會) [NATIONAL UNIFICATION COUNCIL], GUOJIA TONGYI GANGLING (國家統一綱領) [GUIDELINES FOR NATIONAL UNIFICATION] (1991), translated in *Guidelines for National Unification*, WASH. U., <http://collection.law.wustl.edu/Chinalaw/twguide.html> (last visited June 19, 2019).

38. See *National Flag*, OFF. OF THE PRESIDENT, REP. OF CHINA (TAIWAN), <https://english.president.gov.tw/Page/96> (last visited May 23, 2019).

39. See *National Symbols*, OFF. OF THE PRESIDENT, REP. OF CHINA (TAIWAN), <https://english.president.gov.tw/Page/99> (last visited May 23, 2019).

40. See, e.g., *Republic of China (Taiwan) Signs Fisheries Agreement with Japan*, MINISTRY OF FOREIGN AFF. (Apr. 15, 2014), [https://www.mofa.gov.tw/en/News\\_Content.aspx?n=1eaddcfd4c6ec567&s=d879e042d13f9135](https://www.mofa.gov.tw/en/News_Content.aspx?n=1eaddcfd4c6ec567&s=d879e042d13f9135).

all.<sup>41</sup> 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.<sup>42</sup> Sixteen countries have formal diplomatic relations with the ROC, down from twenty-one countries when President Tsai took office in 2016.<sup>43</sup> The Holy See (Vatican) also recognizes the ROC,<sup>44</sup> though there are signs that the Vatican's support is wavering.<sup>45</sup> 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.<sup>46</sup> The United States' “One China Policy”—not to be confused with the PRC's “One China Principle”<sup>47</sup>—stands for the position that “the issues between Beijing and Taiwan must be resolved peacefully and with the assent of the people of Taiwan.”<sup>48</sup>

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41. *President & Vice President*, OFF. OF THE PRESIDENT, REP. OF CHINA (TAIWAN), <https://english.president.gov.tw/Page/40> (last visited May 23, 2019).

42. See TAIWAN AFFAIRS OFFICE & INFORMATION OFFICE OF THE STATE COUNCIL, THE ONE-CHINA PRINCIPLE AND THE TAIWAN ISSUE (Feb. 2000), available at <http://en.people.cn/features/taiwanpaper/taiwan.html>; see also Chun-I Chen, *Legal Aspects of Mutual Non-Denial and the Relations Across the Taiwan Straits*, 27 MD. J. INT'L L. 111, 113–16 (2012).

43. Lawrence Chung, *Taiwanese President Tsai Ing-wen Heads to Latin America to Shore Up Diplomatic Ties*, S. CHINA MORNING POST (H.K.) (Aug. 10, 2018), <https://www.scmp.com/news/china/diplomacy-defence/article/2158821/taiwanese-president-tsai-ing-wen-heads-latin-america> (reporting twenty-two allies including the Holy See).

44. MINISTRY OF FOREIGN AFFAIRS, *supra* note 3.

45. See, e.g., Shannon Tiezzi, *Is Taiwan About to Lose Another Diplomatic Ally?*, DIPLOMAT (Feb. 1, 2018), <https://thediplomat.com/2018/02/is-taiwan-about-to-lose-another-diplomatic-ally/>.

46. See Jacques deLisle, *The 40th Anniversary of the Taiwan Relations Act*, TAIWAN INSIGHT (Mar. 18, 2019), <https://taiwaninsight.org/2019/03/18/the-40th-anniversary-of-the-taiwan-relations-act/> (“[T]he [Taiwan Relations Act] has provided functional replacements for what Taipei lost when Washington ended formal ties and the security pact in 1979.”); LAWRENCE & MORRISON, *supra* note 6, at 7–12 (“Long-standing U.S. Commitments Related to Taiwan”).

47. See STATE COUNCIL WHITE PAPER, *supra* note 4.

48. Richard C. Bush, *An Open Letter to Donald Trump on the One-China Policy*, BROOKINGS (Dec. 13, 2016), <https://www.brookings.edu/blog/order-from-chaos/2016/12/13/an-open-letter-to-donald-trump-on-the-one-china-policy/> (quoting President Bill Clinton's statement in May 2000) (italics omitted); see

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.<sup>49</sup> 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.<sup>50</sup> Taiwan, in turn, has the Taipei Economic and Cultural Representative Office (TECRO) in the United States.<sup>51</sup>

Taiwan's unusual status also complicates its participation in international organizations,<sup>52</sup> particularly as Beijing has increased pressure to reduce Taiwan's "international space."<sup>53</sup> The ROC lost its seat in the United Nations in 1971,<sup>54</sup> is unable to have its representatives participate in UN activities,<sup>55</sup> and has its citizens rebuffed when attempting to enter UN buildings using their ROC passports.<sup>56</sup> Taiwan is limited to using special ter-

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also Richard C. Bush, *A One China Policy Primer*, BROOKINGS (Mar. 2017), <https://www.brookings.edu/research/a-one-china-policy-primer/>.

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 long-time American diplomat.').

51. See *ROC Embassies and Missions Abroad*, TAIWAN EMBASSY, <https://www.taiwanembassy.org/> (last visited Apr. 24, 2019).

52. See generally Pasha L. Hsieh, *The Discipline of International Law in Republican China and Contemporary Taiwan*, 14 WASH. U. GLOBAL STUD. L. REV. 87 (2015); Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 MICH. J. INT'L L. 765 (2007).

53. J. Michael Cole, *How to Wage the Battle for Taiwan's International Space*, TAIWAN SENTINEL (May 4, 2017), <https://sentinel.tw/battle-taiwans-intl-space/>.

54. G.A. Res. 2758, Restoration of the Lawful Rights of the People's Republic of China in the United Nations (Oct. 25, 1971).

55. See Chris Horton, *As U.N. Gathers, Taiwan, Frozen Out, Struggles to Get Noticed*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/world/asia/taiwan-united-nations-joseph-wu.html>.

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)<sup>57</sup> and Olympics<sup>58</sup>—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.’”<sup>59</sup>

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.<sup>60</sup> Martial law was not lifted until 1987 under Chiang's son, Chiang Ching-kuo.<sup>61</sup> The ROC held its first direct presidential election in 1996, with the KMT candidate, Lee Teng-hui, winning.<sup>62</sup> The Democratic Progressive Party (DPP) candidate, Chen Shui-bian, won the presidency in

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<https://www.hongkongfp.com/2017/06/15/not-just-officials-taiwan-students-blocked-visiting-un-public-gallery-geneva/>.

57. *Member Economies*, APEC, <https://www.apec.org/About-Us/About-APEC/Member-Economies> (last visited Mar. 14, 2019).

58. Chen Wei-han, *Push to Change Team Name for Olympics*, TAIPEI TIMES (Jan. 16, 2018), <http://www.taipeitimes.com/News/front/archives/2018/01/16/2003685849>.

59. See Chris Horton, *As China Rattles Its Sword, Taiwanese Push a Separate Identity*, N.Y. TIMES (Oct. 26, 2018), <https://www.nytimes.com/2018/10/26/world/asia/taiwan-name-republic-of-china.html> [hereinafter Horton, *As China Rattles Its Sword, Taiwanese Push a Separate Identity*]; see also Elizabeth Hsu, *Referendum on Changing Sports Team Name to 'Taiwan' Rejected*, FOCUS TAIWAN (Nov. 25, 2018), <http://focus.taiwan.tw/news/aeas/201811250008.aspx>.

60. See Edwin A. Winckler, *Institutionalization and Participation on Taiwan: From Hard to Soft Authoritarianism?*, 99 CHINA Q. 481, 491 (1984).

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 Democratization*, 43 ASIAN STUD. REV. 164, 165 (2019) (refuting claims that “Chiang Ching-kuo established democracy in Taiwan”).

62. See *Taiwan's Democratic Election (Opinion)*, N.Y. TIMES (Mar. 24, 1996), <http://www.nytimes.com/1996/03/24/opinion/taiwan-s-democratic-election.html>.

2000.<sup>63</sup> Power shifted back to the KMT in 2008 with the election of President Ma Ying-jeou.<sup>64</sup> The election of President Tsai in 2016 marked a third peaceful transition of power, a step beyond the “two-turnover test” of new democracies.<sup>65</sup> 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.<sup>66</sup>

Taiwan’s democracy is imperfect,<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> When traveling internationally, they hold passports that have both “Republic of China” and “Taiwan”

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63. See Vincent Wei-cheng Wang, *How Chen Shui-bian Won: The 2004 Taiwan Presidential Election and Its Implications*, 7 J. INT’L SEC. AFF. 33, 33–34 (2004).

64. See Edward Cody, *Taiwan Voters Elect New President*, WASH. POST (Mar. 23, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/22/AR2008032200442.html>.

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/>.

68. See, e.g., Paul R. Katz, *Trauma and Memory — 228 in Taiwan Today*, CHINA BEAT (Mar. 2, 2008), <http://thechinabeat.blogspot.com/2008/03/trauma-and-memory-228-in-taiwan-today.html>.

69. See *Freedom in the World 2019: Taiwan*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2019/taiwan> (last visited May 24, 2019) (rating Taiwan as 93 out of 100, with 100 being the “Most Free”). Taiwan’s score has increased from 89 out of 100 in 2016. See *Freedom in the World 2016: Taiwan*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2016/Taiwan> (last visited Apr. 24, 2019).

emblazoned on the cover.<sup>70</sup> 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.<sup>71</sup> 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).<sup>72</sup> 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.<sup>73</sup> At that time, the island of

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70. See *ROC Passport Places 32nd in Global Rankings by UK Advisory Firm*, TAIWAN TODAY (Jan. 10, 2018), <https://taiwan-today.tw/news.php?unit=10&post=127794>; see also *Apply for a Passport*, BUREAU OF CONSULAR AFF., MINISTRY OF FOREIGN AFF., REP. OF CHINA (TAIWAN) (Aug. 10, 2017), <https://www.boca.gov.tw/cp-139-462-c06c9-2.html>. Travel to the PRC is done under sui generis procedures. See *Mainland Removes Entry Permit Requirements for Taiwan Residents*, CHINA DAILY (June 18, 2016), [http://www.chinadaily.com.cn/china/2015-06/18/content\\_21039772.htm](http://www.chinadaily.com.cn/china/2015-06/18/content_21039772.htm).

71. This has become an issue for companies, not just individuals, with Beijing pressuring changes regarding how Taiwan is identified. See, e.g., Emily Feng & Edward White, *China Reprimands Companies Calling Taiwan and Tibet Independent*, FIN. TIMES (Jan. 15, 2018), <https://www.ft.com/content/3f88cbba-f9b5-11e7-9b32-d7d59aace167>.

72. See Jenna Lynn Cody, *Lost in Translation: How Language is Used to Obfuscate Taiwan's Reality*, MEDIUM (Mar. 9, 2019), <https://medium.com/american-citizens-for-taiwan/lost-in-translation-how-language-is-used-to-obfuscate-taiwans-reality-5b0d11a1a844> (noting that the PRC "does promote the use of 'reunification' over 'unification' to describe 統一 (tǒng yī)").

73. See Wang, *supra* note 9, at 14 ("清朝統治下傳統中國法當道").



Taiwan was subject to laws imposed by Japan as part of its colonial rule, and the influence of this period still lingers today.<sup>74</sup>

Law in Taiwan is also young.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

The 1947 ROC Constitution, as amended multiple times,<sup>78</sup> remains the foundation of the legal system.<sup>79</sup> It established a five-

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74. *Id.*

75. For example, a 2017 conference celebrating the work of Prof. Wang Tay-sheng 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 Iurisprudentiae, 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. FAGUAN XUEYUAN (法官學院) [JUD. YUAN'S JUDGES ACAD.], <http://tpi.judicial.gov.tw/> (last visited Apr. 24, 2019).

78. The Constitution was most recently amended in 2005. See MINGUO XIANFA [CONSTITUTION] (1947) (Taiwan) [hereinafter 1947 ROC Constitution]; see also *Constitution of the Republic of China (Taiwan)*, OFF. OF THE PRESIDENT, REP. OF CHINA (TAIWAN), <http://english.president.gov.tw/Page/93>. Tsung-fu Chen, *The Rule of Law in Taiwan*, in *THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM* 107, 109 (2000), available at [http://www.mansfieldfdn.org/programs/program\\_pdfs/compendium.pdf](http://www.mansfieldfdn.org/programs/program_pdfs/compendium.pdf) [hereinafter Chen, *The Rule of Law in Taiwan*] (explaining that the ROC constitution "was repeatedly and extensively amended in 1991, 1992, 1994, 1997, 1999 and 2000, effectively resulting in a new constitution").

79. See 1947 ROC Constitution, *supra* note 78; cf. Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 152–93 (Larry Alexander ed., 1998) (exploring role of constitutions in creating stable legal systems). Alt-

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.<sup>80</sup> The ROC's early emphasis on legal codes drew heavily on the Continental European civil-law model.<sup>81</sup> 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,<sup>82</sup> 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.<sup>83</sup>

Decades of martial law followed the colonial Japanese period.<sup>84</sup> With the legal system firmly under KMT control, prosecutors and judges were largely instruments of repression rather than of rights vindication.<sup>85</sup> 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

hough 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).

80. *Political System*, OFFICIAL WEBSITE OF THE REP. OF CHINA (TAIWAN), [https://www.taiwan.gov.tw/content\\_4.php](https://www.taiwan.gov.tw/content_4.php) (last visited Apr. 24, 2019).

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”).

82. See generally Tay-sheng Wang, *Translation, Codification, and Transplantation of Foreign Laws in Taiwan*, 25 WASH. INT'L L.J. 307 (2016) [hereinafter Wang, *Translation, Codification, and Transplantation of Foreign Laws in Taiwan*].

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 RECEPTION OF WESTERN LAW* (2000).

84. See Lung-sheng Tao, *Reform of the Criminal Process in Nationalist China*, 19 AM. J. COMP. L. 747, 753 (1971).

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.”<sup>86</sup> The perpetrators were ultimately convicted in Taiwan, and the case helped to accelerate momentum for the end of authoritarian rule.<sup>87</sup>

Pockets of resistance had begun to gain traction in the 1970s, but at great personal costs to the pro-democracy activists.<sup>88</sup> 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.”<sup>89</sup> 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.<sup>90</sup> Such efforts of the *dangwai* (literally “outside the party [KMT]”)

86. Fox Butterfield, *Death of Critic of Taiwan Leader Stirs Fear Among Chinese in U.S.*, N.Y. TIMES (Nov. 2, 1984), <https://www.nytimes.com/1984/11/02/us/death-of-critic-of-taiwan-leader-stirs-fear-among-chinese-in-us.html>; see also *Taiwan Murderer Changes Her Story*, N.Y. TIMES (May 11, 1985), <http://www.nytimes.com/1985/05/11/world/taiwan-murderer-changes-his-story.html> (reporting on case of murdered Taiwanese dissident Henry Liu who was shot in California).

87. See John Pomfret, *Could Khashoggi's Death Trigger Reforms? A 1984 Murder Case Offers Lessons*, WASH. POST (Oct. 22, 2018), [https://www.washingtonpost.com/news/global-opinions/wp/2018/10/22/could-khashoggis-death-trigger-reforms-a-1984-murder-case-offers-lessons/?noredirect=on&utm\\_term=.2e472e307284](https://www.washingtonpost.com/news/global-opinions/wp/2018/10/22/could-khashoggis-death-trigger-reforms-a-1984-murder-case-offers-lessons/?noredirect=on&utm_term=.2e472e307284) (noting that then President Chiang Ching-kuo's “advisers used the incident to push for political reform”).

88. See, e.g., Jane Kaufman Winn & Tang-chi Yeh, *Advocating Democracy: The Role of Lawyers in Taiwan's Political Transformation*, 20 LAW & SOC. INQUIRY 561, 592–94 (1995) (explaining government crackdown following the 1979 Kaohsiung incident, in which activists staged pro-democracy demonstrations).

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,<sup>91</sup> 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.<sup>92</sup> Reform efforts gained traction and culminated in the 1999 National Judicial Reform Conference ("1999 Reform Conference").<sup>93</sup> 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.<sup>94</sup> Affinity groupings based on legal training remain powerful to this day,<sup>95</sup> 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."<sup>96</sup> 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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91. See Albert H.Y. Chen, *A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan*, 37 H.K. L.J. 647, 666 (2007) (describing formation of DPP).

92. See generally TAY-SHENG WANG, *THE PROCESS OF LEGAL MODERNIZATION IN TAIWAN* (2015). For historical context, see also Tao, *supra* note 84, at 750–51 (describing legal developments under the KMT).

93. See Legis. Yuan, 5th Term, 2d Sess., 17th Meeting Rec., 92 LEGIS. YUAN GAZ., 1823–27 (2003) (Taiwan) (reporting Judicial Affairs Committee's discussions of the 1999 conference).

94. See Wang, *Translation, Codification, and Transplantation of Foreign Laws in Taiwan*, *supra* note 82, at 319–20.

95. See Chang, *supra* note 11, at 97.

96. See Jaw-perng Wang, *The Great Leap in Taiwan's Criminal Justice Reform*, Address Before the Asian Law Institute Inaugural Conference: The Role of Law in a Developing Asia (May 27–28, 2004) (on file with author) [hereinafter Jaw-perng Wang, 2004 Address]; *Gailiangshi Dangshiren Jinxing Zhuyi* (改良式當事人進行主義), JUD. YUAN (司法院) (Apr. 2, 2004), <http://www.judicial.gov.tw/work/work02/work02-01.asp>.

file to judges pre-trial, with judges maintaining an investigatory responsibility.<sup>97</sup>

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.<sup>98</sup> 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.<sup>99</sup> Lawyers remained subject to a separate bar exam.<sup>100</sup>

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.<sup>101</sup> The challenges of changing an entrenched bureaucratic structure and ongoing

97. See generally Margaret K. Lewis, *Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT’L L. 651, 663–66 (2009).

98. See *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. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 3–6 (1986) (distinguishing between adversarial 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, *The Impossibility of “Legal Transplants”*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Daniel Berkowitz et al., *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)”).

99. See Chang-fa Lo, *Possible Reform for Legal Education in Taiwan: A Refined “J.D. System”?*, 1 ASIAN J. COMP. L. 1, 4 (2006) [hereinafter Lo, *Possible Reform for Legal Education in Taiwan*] (reporting pass rates in single digits).

100. See *id.*

101. Cf. Christopher R. Hughes, *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.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> Taiwan's Constitutional Court<sup>105</sup> took on a more high-profile role in giving heft to rights that had been, at best, neglected and often flagrantly violated.<sup>106</sup> Repressive practices were gradually curtailed,<sup>107</sup> such as the 1997 stripping of prosecutors' ability to summarily detain suspects without judicial approval.<sup>108</sup> In 2003, the presumption of innocence was made clear

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102. See Jaw-perng Wang, 2004 Address, *supra* note 96.

103. See generally JEROME A. COHEN & MARGARET K. LEWIS, CHALLENGE TO CHINA: HOW TAIWAN ABOLISHED ITS VERSION OF RE-EDUCATION THROUGH LABOR (2013) (analyzing historical development and abolition of the law regarding “hooligans” (“流氓”)).

104. See, e.g., *Xingsu Zhidu Daxiu Zhangxian Renquan* (刑訴制度大修彰顯人權) [Overhaul of the Criminal Procedure System Manifests Human Rights], CHINA TIMES (中國時報), Jan. 15, 2003, at 1 (reporting Criminal Procedure Code revisions as demonstrating clear concern for human rights).

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://jirs.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.

107. See Thomas Weisheng Huang, *Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan*, 19 TEMP. INT'L & COMP. L.J. 1, 4 (2005) (explaining judiciary's “gradual expansion of power” after the end of martial law).

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.<sup>109</sup> 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).<sup>110</sup> 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.<sup>111</sup>

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,<sup>112</sup> 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<sup>113</sup> and allowed corporal punishment for drunk driving.<sup>114</sup>

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dicial.gov.tw/constitutionalcourt/en/p03\_01.asp?expno=392 (requiring legislature to revise the Criminal Procedure Code within two years, which revisions were carried out in 1997).

109. Kingshi Susong Fa (刑事訴訟法) [Code of Criminal Procedure] art. 154 (Taiwan) [hereinafter Criminal Procedure Code], available at <https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=C0010001>.

110. See generally Mark L. Shope, *The Adoption and Function of International Instruments: Thoughts on Taiwan's Enactment of the Act to Implement the ICCPR and the ICESCR*, 22 IND. INT'L & COMP. L. REV. 159 (2012).

111. See Yu-jie Chen, *Socialization in Isolation: Taiwan's Practice of Human Rights Treaties as a Non-UN Member State* (2016) (unpublished J.S.D. dissertation, New York University School of Law) (on-file with author) [hereinafter Chen, *Socialization in Isolation*].

112. Cf. Fort Fu-Te Liao, *The Abolition of the Death Penalty in Taiwan: Why a De Facto Moratorium was Established and Lost*, 11 ASIA-PAC. J. HUM. RTS. & L. 1 (2010).

113. See Wang Yumin *Ti An Sha Tong Pan Sixing Fayu Bu: Buyi* (王育敏提案殺童判死刑 法務部：不宜) [Wang Yumin Proposes Bill That Would Sentence Child Killers to Death – Ministry of Justice: Inappropriate], APPLE DAILY (蘋果日報) (Mar. 30, 2016), [www.appledaily.com.tw/realtimenews/article/new/20160330/827986/](http://www.appledaily.com.tw/realtimenews/article/new/20160330/827986/).

114. See Zheng Zhonglan (政仲嵐), *Taiwan Dizhi Jiujiu yu Xing Qin: Xiang Yinjin Bian Xing Shi Haoshi Ma?* (台灣抵制酒駕與性侵：想引進鞭刑是好事嗎?) [Taiwan Resists Drunk Driving and Sexual Assault: Is It a Good Idea to Introduce Whipping?], BBC (Nov. 24, 2017), <http://www.bbc.com/zhongwen/trad/chinese-news-42105946>.

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.<sup>115</sup> 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<sup>116</sup> is unable to fight crime effectively:<sup>117</sup> “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.”<sup>118</sup> 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

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115. See *Corrupt Judges Handed Lengthy Prison Sentences*, TAIPEI TIMES (July 1, 2011), <http://www.taipetimes.com/News/taiwan/archives/2011/07/01/2003507146>.

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/aip/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.<sup>119</sup>

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.<sup>120</sup> These themes have also run through the author's many conversations with people in Taiwan, both those working inside and outside the legal system.<sup>121</sup>

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.<sup>122</sup>

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], 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/meetings/2> (last visited Apr. 24, 2019) (listing meeting dates).

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).

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.").

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

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.<sup>123</sup> In the run-up to the 2016 elections, then candidate Tsai Ing-wen navigated tricky political waters in building support for her presidential bid.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> 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

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聞網) (June 25, 2017), <https://udn.com/news/story/7339/2544732> (comments by former Vice President of the Judicial Yuan: “我特別高興聽到蔡總統開始強調要從人民的角度看司法問題，而不是問法律菁英有什麼問題”).

123. See, e.g., Jason Pan, *Campaigners Advocating Jury Trial System Protest at Presidential Office*, *TAIPEI TIMES* (Feb. 25, 2017), <http://www.taipei-times.com/News/front/archives/2017/02/25/2003665660>.

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).

125. See Chris Horton, *China and US Square Off in Taiwan's Presidential Race*, *NIKKEI ASIAN REV.* (Apr. 30, 2019), <https://asia.nikkei.com/Spotlight/Asia-Insight/China-and-US-square-off-in-Taiwan-s-presidential-race>; see also Paul Huang, *Polls Show Tsai Ing-wen's Chances at Winning Re-Election Are as Slim as Ever*, *NEWS LENS* (Mar. 18, 2019), <https://international.thenewslens.com/feature/taiwan2020/115650>.

126. *Taiwanese Man Executed for Killing Ex-Wife and Daughter in Island's First Capital Punishment for Two Years*, *AGENCE FRANCE-PRESSE* (Sept. 1, 2018), <https://www.scmp.com/news/asia/article/2162318/taiwan-carries-out-first-execution-two-years>. See also Brian Hioe, *Political Motivations for the Execution of Subway Killer Cheng Chieh?*, *NEW BLOOM MAG.* (May 12, 2016), <https://newbloommag.net/2016/05/12/cheng-chieh-execution/>.

push echoes experiences outside Taiwan in seeking broad legitimacy for legal norms.<sup>127</sup>

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.<sup>128</sup> 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."<sup>129</sup>

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.<sup>130</sup> 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."<sup>131</sup> 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.<sup>132</sup> Today, it is a regular occurrence for groups to openly protest government policies.<sup>133</sup> The most dramatic event in recent years was the 2014 "Sunflower Movement" during which demonstrators occupied

127. See generally Valerie P. Hans, *Trial by Jury: Story of a Legal Transplant*, 51 LAW & SOC'Y REV. 471, 484 (2017) (noting "some scholars argue that citizens in a contemporary democratic society increasingly expect government transparency and accountability").

128. See Oscar Chung, *Embodiments of Excellence?*, 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.").

129. Chen, *The Rule of Law in Taiwan*, *supra* note 78, at 119.

130. Litigants have of course participated. Cf. Yun-Hsien Diana Lin, *Civil Mediation in Taiwan: Legal Culture and the Process of Legal Modernization*, 6 E. ASIA L. REV. 191 (2011).

131. YEH, *supra* note 105, at 245.

132. See *id.* at 37–38; see also *Relation to History in the Sunflower Movement*, 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 . . .").

133. See, e.g., Brian Hioe, *Protests Against Labor Law Changes See Clashes Not Seen Since Sunflower Movement*, NEW BLOOM MAG. (Dec. 24, 2017), <https://newbloommag.net/2017/12/24/labor-protests-historic/>.

the legislature in protest of a trade pact with the PRC.<sup>134</sup> 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.<sup>135</sup>

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.<sup>136</sup> Judges, prosecutors, lawyers, and academics remain at the core of Taiwan's process of legal reform.<sup>137</sup> 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.<sup>138</sup> Rather than limiting

134. See generally Ming-sho Ho, *Occupy Congress in Taiwan: Political Opportunity, Threat, and the Sunflower Movement*, 15 J. E. ASIA STUD. 69 (2015), available at <http://homepage.ntu.edu.tw/~msho/book.files/J43.pdf> (analyzing "intra-elite divisions and the role of alliances with institutional actors as important determinants of protest success").

135. See Nathan Batto, *The Politics of the Marriage Equality Vote*, FROZEN GARLIC (May 21, 2019), <https://frozengarlic.wordpress.com/2019/05/21/the-politics-of-the-marriage-equality-vote/> [hereinafter Batto, *The Politics of the Marriage Equality Vote*] (detailed analysis of the politics behind the legislature's vote to legalize same-sex marriage); William Yang, *Marriage Equality in Taiwan: Time to Re-Engage the Public*, KETAGALAN MEDIA (Feb. 15, 2018), <http://www.ketagalanmedia.com/2018/02/15/marriage-equality-taiwan-time-re-engage-public>.

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. . .").

137. Cf. *Xingshi Susong Fa Daxiu 99 Tiao Shangsu Tiaojian Jiang Bian Yang* (刑事訴訟法大修99條 上訴條件將變嚴格) [*Criminal Procedure Overhaul of 99 Articles — Appeal Requirements Becoming More Strict*], LIBERTY TIMES (自由時報) (Jan. 30, 2018), <http://m.ltn.com.tw/news/society/breaking-news/2327253>.

138. ZHONGHUA MINGUO (中華民國) [REPUBLIC OF CHINA (TAIWAN)], ZONGTONG 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.<sup>139</sup>

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.<sup>140</sup> 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 than genuine reforms.<sup>141</sup>

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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BAOGAO (司法改革國是會議成果報告) [NATIONAL AFFAIRS CONFERENCE ON JUDICIAL REFORM REPORT] 8 (2017), available at <http://www.president.gov.tw/News/21581> [hereinafter 2017 Reform Conference Report] (differentiating current reform effort with the "monopoly" ("獨攬") by legal elites in 1999).

139. Cf. Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135 (2007) (establishing framework of "the recursivity of law").

140. Compare Pierre Legrand, *Jameses at Play: A Tractation on the Comparison of Laws*, 65 AM. J. COMP. L. 1, 16 (2017) (for "culturalists" "the posited law cannot be where comparison stops. Instead, it must be the springboard allowing the comparison to begin its presencing.") with Russell A. Miller, *On Hostility and Hospitality: Othering Pierre Legrand*, 65 AM. J. COMP. L. 191, 205–06 (2017) (responding to Legrand's discussion regarding law's cultural embeddedness and its connection to Derrida's views on the "other" and the "self").

141. See Wei Ke (威克), *Ni Bu Gaoxing, Wo Ye Bu Manyi de Taiwan Sifa Gaige* (你不高興、我也不滿意的台灣司法改革) [*You're Not Happy, and I'm Not Satisfied with Taiwan's Judicial Reform*], BBC (Aug. 16, 2017), <http://www.bbc.com/zhongwen/trad/chinese-news-40954039>; For an airing of various criticisms of the 2017 Reform Conference, see Hsin-po Huang & Jake Chung, *Second Judicial Reform Member Quits*, TAIPEI TIMES (Apr. 29, 2017), <http://www.taipetimes.com/News/taiwan/archives/2017/04/29/2003669625>.

perception to the media, not to information from friends or relatives.<sup>142</sup> The media in Taiwan is very free,<sup>143</sup> 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.”<sup>144</sup> 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.<sup>145</sup>

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

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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].

143. According to Freedom House, “Taiwan’s media environment is one of the freest in Asia, and the vigorous and diverse press reports aggressively on government policies and alleged official wrongdoing.” *Freedom of the Press 2017: Taiwan*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2017/Taiwan> (last visited Apr. 24, 2019).

144. *Taiwan*, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/taiwan> (last visited May 24, 2019).

145. Jonathan Sullivan, *The Coevolution of Media and Politics in Taiwan: Implications for Political Communications*, 2 INT’L J. TAIWAN STUD. 85, 90 (2018) (citing STEWART SOROKA, NEGATIVITY IN DEMOCRATIC POLITICS: CAUSES AND CONSEQUENCES 75 (2014)).

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.<sup>146</sup> Likewise, 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."<sup>147</sup> In some respects the workings of the legal system are already quite open to view, including detailed statistics available on past cases.<sup>148</sup> 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

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146. See, e.g., NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS & FOUNDATION FOR CRIMINAL JUSTICE, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* (2018), available at <https://www.nacdl.org/trialpenaltyreport/>.

147. See, e.g., *Wei Tisheng Sifa Toumingdu, Jianchaguan Jie An Shulei Yinggai Gongkai* (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.<sup>149</sup> 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.”<sup>150</sup>

With respect to the transparency of the reform process, there were public discussions surrounding the 1999 Reform Conference.<sup>151</sup> 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.<sup>152</sup> The dedicated website includes sections for each of the five sub-committees,<sup>153</sup> providing meeting minutes, other documents,

149. SIFA YUAN (司法院) [JUDICIAL YUAN], TAIWAN GAODENG FAYUAN GAOXIONG FENYUAN 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”).

150. 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>.

151. 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).

152. 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).

153. *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).



and video footage with simultaneous sign-language interpretation.<sup>154</sup> Video of the over-eight-hour closing meeting is also available.<sup>155</sup> A month after the 2017 Reform Conference's conclusion, President Tsai's office issued a 152-page report on the proceedings.<sup>156</sup> 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."<sup>157</sup> 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."<sup>158</sup> The government also maintains a website dedicated to judicial reforms, including semi-annual reports on progress.<sup>159</sup>

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.<sup>160</sup> Vestiges of the

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154. *Zongtong Fu Sifa Gaige Guo Shi Huiyi Di Wu Fenzu Di Yi Ci Huiyi* (總統府司法改革國是會議第五分組第一次會議) [First Meeting of the Fifth Sub-Committee of the Presidential National Affairs Conference on Judicial Reform], SIFA GAIGE GUO SHI HUIYI (司法改革國是會議) [NAT'L AFF. CONF. ON JUD. REFORM] (Mar. 1, 2017), <https://justice.president.gov.tw/meeting/15>.

155. 「Zongtong Fu Sifa Gaige Guo Shi Huiyi」Zongjie Huiyi (「總統府司法改革國是會議」總結會議) [Concluding Meeting of the Presidential National Affairs Conference on Judicial Reform], SIFA GAIGE GUO SHI HUIYI (司法改革國是會議) [NAT'L AFF. CONF. ON JUD. REFORM] (Aug. 11, 2017), <https://justice.president.gov.tw/meeting/55>.

156. 2017 Reform Conference Report, *supra* note 138.

157. Huang & Chung, *supra* note 141.

158. Tsai Ing-wen, Address at the Republic of China's 106th Double Tenth National Day Celebration (Oct. 10, 2017), translated in *President Tsai Delivers 2017 National Day Address*, TAIPEI ECON. & CULTURAL OFF., MUSCAT, OMAN (Oct. 10, 2017), <http://english.president.gov.tw/NEWS/5231> [hereinafter Tsai, 2017 National Day Address].

159. See SIFA GAIGE JINDU ZHUIZONG PINGTAI (司法改革進度追蹤平台) [TRACKING PLATFORM FOR THE PROGRESS OF JUDICIAL REFORMS], <https://judicialreform.gov.tw> (last visited May 24, 2019).

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.<sup>161</sup> The Constitutional Court held these secretive practices unconstitutional in 2008.<sup>162</sup>

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.<sup>163</sup> The possibility of broadcasting trials outside courthouses was on the agenda of the 2017 Reform Conference,<sup>164</sup> and debate continued after the Conference's conclusion.<sup>165</sup>

A number of concerns have dampened enthusiasm for broadcasting trials, such as the safety of participants at trial, the “right to be forgotten,”<sup>166</sup> and the erosion of the presumption of innocence.<sup>167</sup> 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. & POL'Y 163, 175 n.85 (2010) (noting that trials for sexual assault are not open unless both the victim and court agree).

161. Jerome A. Cohen & Margaret K. Lewis, *How Taiwan's Constitutional Court Reined in Police Power: Lessons for the People's Republic of China*, 37 FORDHAM INT'L L.J. 863, 869 (2014).

162. *Id.* at 870.

163. See Piao-Hao Hsu, *The Right to Be Forgotten and its Ramifications in Taiwan, China and Japan*, BLOG DROIT EUROPÉEN (June 2017), <https://blog-droiteuropeen.files.wordpress.com/2017/06/bobby-article-taiwan-final-version.pdf>. See generally Lawrence Chung, *Taiwan's First Lady Charged with Graft*, S. CHINA MORNING POST (H.K.), Nov. 4, 2006, at 1.

164. 2017 Reform Conference Report, *supra* note 138, at 37.

165. Sifa Yuan (司法院) [Judicial Yuan], Fating Gongkai Bosong Xianguan Yiti Gong Tihui (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.”).

167. Piao-Hao Hsu, *supra* note 163 (conference materials on file with author).

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.”<sup>168</sup> 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.<sup>169</sup>

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.<sup>170</sup> Instead, rulings are commonly based on the case file and other written sources.<sup>171</sup> In early 2017, the court took the bold move of broadcasting oral argument in the same-sex marriage case.<sup>172</sup> Recent debates have addressed whether the court should adopt as general practice both the holding of oral argument and the broadcasting of those arguments.<sup>173</sup>

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

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168. REVIEW OF THE INITIAL REPORTS OF THE GOVERNMENT OF TAIWAN ON THE IMPLEMENTATION OF THE INTERNATIONAL HUMAN RIGHTS COVENANTS: CONCLUDING OBSERVATIONS AND RECOMMENDATIONS ADOPTED BY THE INTERNATIONAL GROUP OF INDEPENDENT EXPERTS ¶ 67 (2013), available at [https://bim.lbg.ac.at/sites/files/bim/CORs\\_01032013.pdf](https://bim.lbg.ac.at/sites/files/bim/CORs_01032013.pdf).

169. See Kai-ping Su, *Criminal Court Reform in Taiwan: A Case of Fragmented Reform in a Not Fragmented Court System*, 27 WASH. INT’L L.J. 203, 218–19 (2017).

170. See Cohen & Lewis, *supra* note 161.

171. For an analysis of the Constitutional Court’s work, see David S. Law & Wen-chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011).

172. See Yang Ko-wen & William Hetherington, *Council of Grand Justices to Broadcast Live Discussion of Same-Sex Marriage*, TAIPEI TIMES, Feb. 11, 2017, <http://www.taipetimes.com/News/front/archives/2017/02/11/2003664765>.

173. 2017 Reform Conference Report, *supra* note 138, at 43.

along with the court's interpretation.<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup> Groups have sought greater access to information on old cases and have obtained exonerations using newly uncovered evidence.<sup>177</sup> In turn, they are calling attention to the troublesome practices used in past investigations and trials to galvanize reform efforts. One proposal in

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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).

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, *Wrongful Conviction*, OXFORD BIBLIOGRAPHIES, <http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0118.xml> (last modified July 24, 2012).

176. TAIWAN YUANYU PINGFAN XIEHUI (台灣冤獄平反協會) [TAIWAN INNOCENCE PROJECT], <http://twinnocenceproject.org> (last visited Apr. 24, 2019).

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), available at <http://twinnocenceproject.org/news.php?lang=en>.

the 2017 Reform Conference was to introduce an entity that resembles conviction integrity units popping up across the United States<sup>178</sup> and similar efforts in Europe.<sup>179</sup>

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.<sup>180</sup> 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.<sup>181</sup> Martial law was officially imposed in 1949 and stretched until 1987.<sup>182</sup> The four decades of martial law saw “massive suppression, murder, and imprisonment of political dissidents. . . .”<sup>183</sup> 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.”<sup>184</sup> Shortly after the DPP gained a majority in

178. See NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016 2 (Mar. 7, 2017), available at [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2016.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf).

179. 2017 Reform Conference Report, *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.

180. 2017 Reform Conference Report, *supra* note 138, at 28 (“研議建立戒嚴時期疑似不當審判之有罪判決救濟機制”). For a discussion of the broader push for transitional justice, see generally Ernest Caldwell, *Transitional Justice Legislation in Taiwan Before and During the Tsai Administration*, 27 WASH. INT’L L.J. 449 (2018).

181. See Chris Horton, *Taiwan Commemorates a Violent Nationalistic Episode, 70 Years Later*, N.Y. TIMES (Feb. 26, 2017), [https://www.nytimes.com/2017/02/26/world/asia/taiwan-1947-kuomintang.html?\\_r=0](https://www.nytimes.com/2017/02/26/world/asia/taiwan-1947-kuomintang.html?_r=0) [hereinafter Horton, *Taiwan Commemorates a Violent Nationalistic Episode*].

182. *Taiwan Ends 4 Decades of Martial Law*, N.Y. TIMES (July 15, 1987), available at <https://www.nytimes.com/1987/07/15/world/taiwan-ends-4-decades-of-martial-law.html>.

183. Thomas J. Shattuck, *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/>.

184. Caldwell, *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.<sup>185</sup> As of December 2018, the government had “frozen assets worth billions of dollars of private companies and non-governmental organizations that have been determined to be KMT affiliates. . . .”<sup>186</sup>

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

1995 February 28 Incident Disposition and Compensation Act, and 1998 Compensation Act for Improper Trials on Charges of Sedition and Espionage During the Martial Law Period).

185. Zhengdang Ji Qi Fu Sui Zuzhi Budang Qude Caichan Chuli Tiaoli (政黨及其附隨組織不當取得財產處理條例) [The Act Governing the Settlement of Ill-Gotten Properties by Political Parties and Their Affiliate Organizations] (promulgated Aug. 10, 2016) (Taiwan), available at <https://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0030286>.

186. Nien-Chung Chang-Liao & Yu-Jie Chen, *Transitional Justice in Taiwan: Changes and Challenges*, WASH. INT'L L.J. (forthcoming 2019) (manuscript at 14–15) (on file with author).

187. Cujin Zhuaxing Zhengyi Tiaoli (促進轉型正義條例) [Act on Promoting Transitional Justice] (promulgated Dec. 27, 2017) (Taiwan), available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0030296>; see also Cheng-hsiang Fan et al., *Transitional Justice Law Milestone for Taiwan's Democracy*, FOCUS TAIWAN (Dec. 6, 2017), <http://focus taiwan.tw/news/aip/201712060017.aspx>.

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.”).

189. See Sean Lin, *Lawmakers Pass Transitional Justice Act*, TAIPEI TIMES (Dec. 6, 2017), <http://www.taipetimes.com/News/front/archives/2017/12/06/2003683504>.

190. See Brian Hioe, *Anger After KMT Disrupts Transitional Justice Commission Meeting*, NEW BLOOM MAG. (Dec. 12, 2018), <https://newbloom-mag.net/2018/12/12/transitional-justice-disrupt/>.

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.<sup>191</sup> 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,<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup> The desire for clarity in the legal system begins by making the debate about reforms itself more accessible. It further combines efforts to

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191. See Erica Orden, *MOMA Attendance Hits Record High*, WALL ST. J. (June 29, 2010), <https://www.wsj.com/articles/SB10001424052748703964104575335301840480246>.

192. *Clarity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/clarity>.

193. See, e.g., SIFAYUAN DA FAGUAN HUIYI (司法院大法官會議) [COUNCIL OF GRAND JUSTICES], INTERPRETATION NO. 710 (July 5, 2013), available at [http://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=710](http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=710).

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.<sup>195</sup>

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.<sup>196</sup> 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,<sup>197</sup> complete with a how-to YouTube video.<sup>198</sup> 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.<sup>199</sup>

The usually formal Judicial Yuan has even gone so far as to incorporate comic drawings and social messaging “stickers.”<sup>200</sup>

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”).

197. *Caipan Shu Yongyu Cidian Ziliao Ku Chaxun Xitong* (裁判書用語辭典—資料庫查詢系統) [Dictionary of Terms Used in Judicial Decisions – Database Search System], JUD. YUAN (司法院), <http://terms.judicial.gov.tw/Search.aspx> (last visited Apr. 24, 2019).

198. Judicial Yuan Sifa Yuan Yingyin (Judicial Yuan 司法院影音), *Caipan Shu Yongyu Cidian Ziliao Ku Chaxun Xitong [Ruhe Shiyong Ben Xitong] Jieshao Duanpian* (裁判書用語辭典 資料庫查詢系統 [如何使用本系統] 介紹短片) [Dictionary of Terms Used in Judicial Decisions – Database Search System [How To Use This System] Introductory Video], YOUTUBE (Aug. 8, 2017), <https://www.youtube.com/watch?v=lmeAc5SwF94&feature=youtu.be>.

199. *Sifa Yuan Guihua Jianzhi Caipan Shu Yongyu Cidian Ziliao Ku 8 Yuedi Shangxian Shiyong* (司法院規劃建置裁判書用語辭典資料庫 8月底上線試用) [Judicial Yuan Plans to Set Up a Dictionary of Terms Used in Judicial Decisions To Begin Use at the End of August], JUD. WKLY. (司法院周刊), May 19, 2017, available at <http://www.judicial.gov.tw/jw9706/pdf/20170519-1850-1.pdf>.

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,<sup>201</sup> through which information on judicial procedures are portrayed using cartoon drawings.<sup>202</sup> 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.<sup>203</sup> 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.<sup>204</sup> 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<sup>205</sup> 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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TAIWAN (June 13, 2014), <http://focustaiwan.tw/news/asoc/201406130020.aspx> (“Over 96 percent of Taiwanese Internet users in a survey said they had used social networking sites within the previous two weeks”).

201. See Rosalie Chan, *What Makes These Chat Apps Popular in Certain Asia Countries*, INVERSE INNOVATION (Mar. 17, 2017), <https://www.inverse.com/article/29223-asian-countries-chat-apps> (reporting that 80% of Taiwan uses LINE).

202. Sifa Yuan (司法院), LINE, [https://page.line.me/judicial\\_yuan](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).

204. *Sifa Yuan LINE Guanfang Zhanghao Ji Caipan Shu Yongyu Cidian Shangxian Lajin yu Minzhong Juli* (司法院LINE官方帳號及裁判書用語辭典上線 拉近與民眾距離) [*Judicial Yuan LINE Account and Dictionary of Terms Used in Judicial Decisions are Online, Closing the Gap With the People*], JUD. WKLY. (司法院周刊) (Aug. 11, 2017), <http://www.judicial.gov.tw/jw9706/pdf/20170811-1862-1.pdf>.

205. Cf. RICHARD SCARRY, *BUSY BUSY TOWN* (2000), available at <https://www.penguinrandomhouse.com/books/161319/richard-scarrys-busy-busy-town-by-written-and-illustrated-by-richard-scarry/9780307168030/>.



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.<sup>206</sup> In Taiwan, there is a conversation about how best to incorporate international norms into domestic practice through a process of "vernacularization."<sup>207</sup> 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<sup>208</sup>). 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

206. See generally SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006).

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.").

208. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

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.”<sup>209</sup>

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.<sup>210</sup> The authors of the Facebook page and related webpage<sup>211</sup> 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.<sup>212</sup> A post in February 2018, for instance, used colorful diagrams to explain a draft proposal to amend administration litigation procedures.<sup>213</sup> Another Facebook page, “法操FOLLOW,” has over 60,000 followers.<sup>214</sup> FOLLOW takes a more contentious stance towards the current system, asking if the decisions of “dinosaur judges” make people want to curse.<sup>215</sup> 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).

210. Yiqi Du Panjue (一起讀判決) (@legal.taiwan), FACEBOOK, <https://www.facebook.com/legal.taiwan/> (last visited Apr. 24, 2019); cf. Chung & Kao, *supra* note 200 (reporting Facebook’s vast penetration in Taiwan).

211. YIQI DU PANJUE (一起讀判決), <https://casebf.com/> (last visited Apr. 24, 2019).

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 Xiuzheng 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/](https://casebf.com/2018/02/27/administrative_pyramid/).

214. Fa Cao FOLLOW (法操FOLLOW) (@followfollow), FACEBOOK, <https://www.facebook.com/followfollow/> (last visited Apr. 24, 2019) and related website Fa Cao FOLLOW (法操FOLLOW), <https://www.follow.tw/> (last visited Apr. 24, 2019).

215. Fa Cao FOLLOW (法操FOLLOW) (@followfollow), *About*, FACEBOOK, [https://www.facebook.com/pg/followfollow/about/?ref=page\\_internal](https://www.facebook.com/pg/followfollow/about/?ref=page_internal) (last visited Apr. 24, 2019) (“恐龍法官的判決常讓你氣到破口大罵”).

“Watchout Citizenedu” (“沃草公民學院”), with over 27,000 followers, tackles legal issues as well as broader topics of public concern.<sup>216</sup>

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).<sup>217</sup> The “Plain Law Movement” (“法律白話文運動”) Facebook page has over 88,000 followers.<sup>218</sup> 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.”<sup>219</sup> Legal writing style was part of the 2017 Reform Conference’s agenda.<sup>220</sup> 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.”<sup>221</sup>

216. Wo Cao Gongmin Xueyuan (沃草公民學院 – Watchout Citizenedu) (@citizenedu), FACEBOOK, <https://www.facebook.com/citizenedu/> (last visited Apr. 24, 2019); Wo Cao Gongmin Xueyuan (沃草公民學院 – Watchout Citizenedu) (@citizenedu), *About*, FACEBOOK, [https://www.facebook.com/pg/citizenedu/about/?ref=page\\_internal](https://www.facebook.com/pg/citizenedu/about/?ref=page_internal) (last visited Apr. 24, 2019).

217. See, e.g., Lai Peixuan (賴佩璇), *Sifa Baihuawen Yundong? Faguan Panjue Xie* 「*Qingjin Honghuang Zhi Li*」 *Yin Re Yi* (司法白話文運動? 法官判決寫「窮盡洪荒之力」引熱議) [*Judicial Plain Language Movement? Judges' Opinion [Exhausting the Power of Antiquity] Prompts Heated Debates*], UDN NEWS (聯合新聞網) (June 7, 2017), <https://udn.com/news/story/7321/2510196>.

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).

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。”).

220. 2017 Reform Conference Report, *supra* note 138, at 70–71.

221. See Su Weirong (蘇位榮), *Sigai Huiyi Tongguo Panjueshu Yaorang 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.<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup> Especially compared to the United States,<sup>225</sup> there has been little emphasis on legal research and writing or other more practical skills.<sup>226</sup> Clinical legal education has also been slow to take hold.<sup>227</sup> As a result, law students tend not to have experience explaining the law to clients or other non-

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*Passes that Judicial Opinions Must be Understandable to People*], UDN NEWS (聯合新聞網) (Mar. 25, 2017), <https://udn.com/news/story/7321/2363796>.

222. Kaufman Winn & Yeh, *supra* note 88, at 573–74 (explaining history of restrictions on bar passage rates).

223. The collection of laws is available in a number of print versions which, due to frequent amendments, require continuous updating. See *Xiao Liufa 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](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.”).

225. See, e.g., *Legal Education Panel Solicits Input on Teaching Skills, Testing and Expanding Access*, A.B.A. (Feb. 7, 2018), [https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/legal\\_education\\_panel/](https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/legal_education_panel/).

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.”<sup>228</sup> Critics have used the term “black box” to describe other government decisions made behind closed doors.<sup>229</sup> DPP legislators criticized the proposed changes, with one calling them “a bid to manipulate students’ view of history.”<sup>230</sup>

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.<sup>231</sup> Components of this debate include how to teach the fundamentals of the legal system and the rights and duties of being a citizen.<sup>232</sup> 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).

230. Rachel Lin et al., *DPP Legislator Slams Textbook Changes*, TAIPEI TIMES (Jan. 19, 2014), <http://www.taipetimes.com/News/front/archives/2014/01/19/2003581611>.

231. See Gerrit van der Wees, *Taiwan’s History Textbook Protests: One Year Later*, DIPLOMAT (Aug. 1, 2016), <https://thediplomat.com/2016/08/taiwans-history-textbook-protests-one-year-later/>.

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.<sup>233</sup> 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.<sup>234</sup> 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.<sup>235</sup> Taiwan’s Digital Minister, Audrey Tang, explained, “I would say Taiwan is

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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).

235. See Chris Horton, *The Simple but Ingenious System Taiwan Uses to Crowdfund Its Laws*, MIT TECH. REV. (Aug. 21, 2018), <https://www.technologyreview.com/s/611816/the-simple-but-ingenious-system-taiwan-uses-to-crowdfund-its-laws/>.

about civil society learning the functions of the government and, to a degree, collaborating.”<sup>236</sup>

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.<sup>237</sup> The Criminal Procedure Code even allows for private prosecutions by alleged crime victims and, in some situations, family members or agents.<sup>238</sup> 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<sup>239</sup> and Taiwan Alliance to End the Death Penalty<sup>240</sup> 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

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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).

237. See Fa Lanke (法蘭客), *Jiancha Guan Wei Beigao Bu Qisu Chufen Shi, Gaosu Ren Youwu Qita Jiuji Tujing?* (檢察官為被告不起訴處分時，告訴人有無其他救濟途徑?) [When the Prosecutor Does Not Indict, What Relief Channels Does the Complainant Have?], UDN NEWS (聯合新聞網) (Nov. 17, 2014), <http://blog.udn.com/frankbetty/19060050> (explaining options available to complainants when prosecutors decline to bring charges).

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

239. *Guanyu Women* (關於我們) [About Us], JUD. REFORM FOUND. (財團法人民間司法改革基金會), <https://www.jrf.org.tw/about> (last visited Apr. 24, 2019).

240. *Guanyu Women* (關於我們) [About Us], TAIWAN ALLIANCE TO END THE DEATH PENALTY (台灣廢除死刑推動聯盟), <http://www.taedp.org.tw/en/about> (last visited Apr. 24, 2019).



into domestic law.<sup>241</sup> Nevertheless, this is participation for discrete purposes. It is also participation by a relatively small circle of social activists.<sup>242</sup> 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").<sup>243</sup> 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.<sup>244</sup> 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.<sup>245</sup> 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.<sup>246</sup> The Judicial Yuan further created a webpage dedicated to "dialogue" ("對話") between the judiciary and public.<sup>247</sup>

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241. See Chen, Socialization in Isolation, *supra* note 111, ch. 4, 203–56 ("Taiwan's Self-Established UN-Type Human Rights Treaty Review").

242. Cf. Yu-jie Chen, *Localizing Human Rights Treaty Monitoring: Case Study of Taiwan as a Non-UN Member State*, 35 WIS. INT'L L.J. 277 (2018).

243. 2017 Reform Conference Report, *supra* note 138, at 12.; see also *Xinwen yu Huodong* (新聞與活動) [*News and Activities*], *Tuidong Sifa Gaige Tougou* 「Duoyuan Shengyin Quanmin Canyu」 Rang Si Gai Wang Qian Maijin (推動司法改革 透過「多元聲音 全民參與」讓司改往前邁進) [*Promoting Judicial Reform Through "Multiple Voices, Participation of All People" to Move Judicial Reform Forward*], OFF. OF THE PRESIDENT, REP. OF CHINA (TAIWAN) (中華民國, 總統府) (Nov. 25, 2016), <http://www.president.gov.tw/NEWS/20910>.

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).

246. *You Hua Yao Shuo* (有話要說) [*Have Something To Say*], SIFA GAIGE GUO SHI HUIYI (司法改革國會會議) [NAT'L AFF. CONF. ON JUD. REFORM], <https://justice.president.gov.tw/opinions/> (last visited Apr. 24, 2019).

247. *Sifa Gaige Fangan & Jindu: Si, Sifa yu Shehui Duihua* (司法改革 方案 & 進度: 四, 司法與社會對話) [*Judicial Reform, Plan & Progress: Four, Dialogue Between the Judiciary and Society*], JUD. YUAN (司法院), <http://www.judicial.gov.tw/ten/ten.html#4> (last visited Apr. 24, 2019).

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.<sup>248</sup> These judges have largely aged out of the system, but criticism of judges has if anything intensified.<sup>249</sup> The bribery conviction in 2011 of several judges created a new stain on the judiciary.<sup>250</sup> Strong public backlash against what was seen as lenient sentencing of a convicted paedophile further eroded public opinion.<sup>251</sup> 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."<sup>252</sup>

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.<sup>253</sup> 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.<sup>254</sup> 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").

250. See *Corrupt Judges Handed Lengthy Prison Sentences*, *supra* note 115.

251. See *Judges Incur Fury Over Pedophile Sentencing*, CHINA POST, Aug. 26, 2010.

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

253. See Jonathan Chin, "Citizen Judges" Bill Drafted by Judicial Yuan, *TAIPEI TIMES* (Dec. 1, 2017), <http://www.taipeitimes.com/News/front/archives/2017/12/01/2003683227>. See generally Margaret K. Lewis, *Who Shall Judge? Taiwan's Exploration of Lay Participation in Criminal Trials*, in *TAIWAN AND INTERNATIONAL HUMAN RIGHTS – A STORY OF TRANSFORMATION* (William P. Alford, Jerome A. Cohen, & Chang-fa Lo eds., 2019). The proposed system is heavily influenced by the Japanese Saibanin system. Cf. Hans, *supra* note 127, at 488–89 (explaining structure of the Japanese system).

254. See, e.g., Ouyang Mengping (歐陽夢萍), *Taipei De Yuan Juban Moni Fat-ing Guomin Faguan Canyu Shenpan* (台北地院舉辦模擬法庭 國民法官參與審判 [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.<sup>255</sup> 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.<sup>256</sup> At the debriefing conference following the mock trial, each of the six lay judges and two alternates were asked their opinions on the process.<sup>257</sup> They gave interviews with the media as well.<sup>258</sup> Also present at the mock trial was a popular blogger,<sup>259</sup> who, while wearing jeans and hip sneakers, was asked by the suit-attired judicial officials for his opinion on the proceedings.<sup>260</sup>

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. . . .”<sup>261</sup> At her 2018 National Day Address, however, she mentioned transitional justice but did not highlight judicial reform.<sup>262</sup> At a separate speech also in October 2018, President

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*Adjudication*], RADIO TAIWAN INT'L (中央廣播電臺) (Jan. 29, 2018), <https://news.rti.org.tw/news/view/id/392654>.

255. See Li Zhihua (李志華) & Hu Jingshun (胡景順), *Shilin 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/2018209S16M1>.

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

257. Personal Observations at Taipei District Court, in Taipei, Taiwan (Jan. 30, 2018) (notes on file with author) [hereinafter Jan. 30, 2018, Personal Observations].

258. See, e.g., Lin Shuyuan (林淑媛), *Guomin Faguan Houxuan Ren Pi Moni Fating Zuoxiu Bei Yuan: Hehu Guiding* (國民法官候選人批模擬法庭作秀 北院：合乎規定) [*Candidates for Citizen Judges Approve of Mock Trial Performance, Taipei District Court, In Accordance with Rules*], CENT. NEWS AGENCY (中央通訊社) (Feb. 1, 2018), <https://www.cna.com.tw/news/asoc/201802010182.aspx>.

259. Tai Ke Juchang TKstory (台客劇場TKstory), YOUTUBE, [https://www.youtube.com/channel/UCghPiQi\\_uyjF1YHKj-FhGw/videos](https://www.youtube.com/channel/UCghPiQi_uyjF1YHKj-FhGw/videos) (last visited Apr. 24, 2019).

260. Jan. 30, 2018, Personal Observations, *supra* note 257.

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

262. *President Tsai Delivers National Day Address*, OFF. OF THE PRESIDENT, REP. OF CHINA (TAIWAN) (Oct. 10, 2018), <https://english.president.gov.tw/News/5548>.

Tsai reassured that judicial reform was continuing apace.<sup>263</sup> 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.<sup>264</sup> 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.<sup>265</sup> 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."<sup>266</sup> 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

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263. *Tsai Touts Taiwan's Judicial Reform, Democratic Development*, TAIWAN TODAY (Oct. 2, 2018), <https://taiwantoday.tw/news.php?unit=2&post=142587>.

264. 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>.

265. 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).

266. *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 ZUIXIN DONGTAI (司法最新動態) (Nov. 30, 2017), <http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=299832>.

of lay participation as “the more involved, the more understanding, thus, the more trust.”<sup>267</sup> Further promising, Japan’s approximately decade-long experience with lay participation in serious criminal trials has garnered generally positive reviews.<sup>268</sup> 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.”<sup>269</sup> 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.”<sup>270</sup> Another example is concern for victims’ rights which, although predating President Tsai’s tenure,<sup>271</sup> has gathered momentum. The 2017 Reform Conference included victims’ rights as a prominent topic.<sup>272</sup> A push for greater accessibility is further seen in the Tsai Administration’s proposal that the Constitutional Court be able to re-

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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 . . .”).

269. Mary Gallagher, *Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness*, 40 LAW & SOC’Y REV. 783 (2006).

270. Tsai, 2017 National Day Address, *supra* note 158.

271. See, e.g., Lin, *supra* note 160.

272. 2017 Reform Conference Report, *supra* note 138, at 17–26.

view final rulings of the courts of last resort in addition to deciding the constitutionality of laws and regulations.<sup>273</sup> If adopted, this would give citizens a more direct path to a constitutional ruling.<sup>274</sup> 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.”<sup>275</sup>

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.<sup>276</sup> 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.<sup>277</sup> 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.<sup>278</sup>

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273. 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.

274. See *Tsai Touts Taiwan's Judicial Reform, Democratic Development*, *supra* note 263.

275. *President Tsai's Remarks at 2018 International Conference on Constitutional Court and Human Rights Protection*, *supra* note 273.

276. 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).

277. See Sifa Yuan Linxuan Lüshi, Jiaoshou, Fujiaoshou, Zhuli Jiaoshou Zhuan Ren Fayuan Faguan Shencha 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/Law-Class/LawAll.aspx?pcode=A0020152>.

278. 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”)<sup>279</sup> could fuel populist sentiments and diminish the judiciary’s role as the protector of rights of even unpopular defendants.<sup>280</sup> 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.<sup>281</sup> 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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2017 Reform Conference Report, *supra* note 138, at 51–59 (discussing proposals to diversify channels for people to become judges and prosecutors as well as changes to training). Despite the criticism of the youth of some professional judges, the draft law on citizen participation allows people as young as twenty-three years old to serve as lay judges.

279. 2017 Reform Conference Report, *supra* note 138, at 8.

280. Cf. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

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.”<sup>282</sup> 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.”<sup>283</sup> 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.”<sup>284</sup> 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.”<sup>285</sup> In English, the word

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282. John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES (Dec. 23, 2009), <http://www.nytimes.com/2009/12/24/us/24judges.html>; see also Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997) (comparing a judge’s awareness of reelection to having a crocodile in your bathtub that cannot be ignored); see generally Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929 (2016) (arguing that decisions become more hostile to criminal defendants as attack advertising increases).

283. Brian Hioe, *Challenges of Judicial Reform Facing the Tsai Administration Behind Recent Controversy*, NEW BLOOM MAG. (May 4, 2017), <https://new-bloommag.net/2017/05/04/judicial-reform-tsai/>.

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<sup>286</sup> and the “process by which a set of individuals interacts to create a shared sense of identity or group consciousness.”<sup>287</sup> In Chinese, different characters express these distinct concepts:<sup>288</sup> (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?<sup>289</sup> 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

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286. *Identity*, *supra* note 14.

287. Angie Andriot & Timothy J. Owens, *Identity*, OXFORD BIBLIOGRAPHIES, <http://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0025.xml> (last modified Apr. 24, 2012).

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.”<sup>290</sup> 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.<sup>291</sup> 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?”<sup>292</sup> The long-term trend following democratization was an uptick in Taiwanese identity.<sup>293</sup> This was followed by a modest decline,<sup>294</sup> 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).

291. In addition, how people in Taiwan self-identify is a distinct question from their views on cross-strait relations, specifically whether there should be unification with the PRC. See, e.g., Matthew Strong, *Referendum About Taiwan Independence of Unification Should be Allowed: Poll*, TAIWAN NEWS (Jan. 1, 2018), <https://www.taiwannews.com.tw/en/news/3339102>; Yan-ling Chiu & Jonathan Chin, *Majority Reject Unification: Poll*, TAIPEI TIMES (May 31, 2016), <http://www.taipeitimes.com/News/front/archives/2016/05/31/2003647521>.

292. Nathan Batto, *The State of (Out of Date) Public Opinion*, FROZEN GARLIC (Sept. 26, 2017), <https://frozengarlic.wordpress.com/2017/09/26/the-state-of-out-of-date-public-opinion/>.

293. *Id.*

294. See Dongtao Qi, *Why is Taiwanese Nationalism Declining?*, IPP REV. (Feb. 13, 2018), <http://ippreview.com/index.php/Blog/single/id/650.html> (“Tsai’s moderate and pragmatic stance on cross-strait relations might have produced a moderate and pragmatic trend in Taiwanese nationalism.”).

real-world experiences in which China clumsily continually reminds Taiwanese that they are a different group of people.”<sup>295</sup> 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”)<sup>296</sup> by virtue of growing up in a democracy that is protective of civil and political rights.<sup>297</sup> 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.<sup>298</sup> 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.<sup>299</sup> Nonetheless, economic reliance on

295. Batto, *supra* note 292; see also Fang-Yu Chen et al., *The Taiwanese See Themselves as Taiwanese, Not as Chinese*, WASH. POST (Jan. 2, 2017), <https://wapo.st/2FxUfp2> (examining trends in self-identification and finding that “ROC residents increasingly identify as Taiwanese rather than Chinese”).

296. Marie-Alice McLean-Dreyfus, *Taiwan: Is There a Political Generation Gap?*, INTERPRETER (June 9, 2017), <https://www.lowyinstitute.org/the-interpreter/taiwan-there-political-generation-gap>; see also Szu-chien Hsu, President, Taiwan Found. for Democracy, *A Political Profile of Taiwan’s Youth: Democratic Support, Natural Independence, and Commitment to Defense*, Presentation Before the Global Taiwan Institute in Wash., D.C. (Apr. 3, 2018), in *Details and Presentation About the TFD Survey on the Taiwanese Young People’s Political Attitudes Released*, TAIWAN FOUND. DEMOCRACY, <http://www.tfd.org.tw/opencms/english/events/data/Event0680.html> (last visited Apr. 24, 2019) (report by the Taiwan Foundation for Democracy concluding that “[t]he essence of ‘natural independence’ actually is ‘anti-unification’”).

297. For a critique of the current human rights situation in Taiwan, see AMNESTY INT’L, *TAIWAN: GOVERNMENT MUST ACT ON HUMAN RIGHTS REVIEW* (2017), available at <https://www.amnesty.org/en/documents/asa38/5531/2017/en/>.

298. Rebecca Lin, *The DPP’s True Rival: Xi Jinping*, COMMONWEALTH MAG. (Jan. 5, 2018), <https://english.cw.com.tw/article/article.action?id=1796>.

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<sup>300</sup> 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).<sup>301</sup> The Han Chinese population can also be broken down into further subcomponents, such as based on the distinction between Holo and Hakka people.<sup>302</sup> Part of Taiwan's current population can trace their lineage back to the original indigenous inhabitants.<sup>303</sup> Today there are sixteen officially recognized indigenous groups.<sup>304</sup> The Dutch and Japanese colonial periods brought additional layers of diversity.<sup>305</sup> Add to this landscape that, particularly in light of demographic trends, the government is making

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<https://www.nytimes.com/2018/01/30/world/asia/taiwan-airlines-lunar-new-year.html>.

300. See *People: Fact Focus*, TAIWAN.GOV.TW, [https://www.taiwan.gov.tw/content\\_2.php](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.").

301. Dominic Meng-Hsuan Yang & Mau-Kuei Chang, *Understanding the Nuances of Waishengren*, CHINA PERSP., Sept. 15, 2010, at 108.

302. *The Republic of China Yearbook 2016: Geography & Demographics*, EXEC. YUAN, REP. OF CHINA (TAIWAN) (2016), <https://english.ey.gov.tw/cp.aspx?n=1082F2A7077508A4>.

303. See Linda van der Horst, *The Evolution of Taiwanese Identity*, DIPLOMAT (June 10, 2016), <https://thediplomat.com/2016/06/the-evolution-of-taiwanese-identity/>.

304. *Introduction to the Tribes*, HUALIEN INDIGENOUS PEOPLES DEPT., [http://ab.hl.gov.tw/en-us/Explore/Ethnic\\_GroupIntro](http://ab.hl.gov.tw/en-us/Explore/Ethnic_GroupIntro) (last visited Apr. 24, 2019).

305. See J. Bruce Jacobs, *Taiwan's Colonial Experiences and the Development of Ethnic Identities: Some Hypotheses*, TAIWAN COMP. PERSP., July 2014, at 47–59.

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

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.<sup>307</sup> 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

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306. Shih Hsiu-chuan, *Taiwan to Review Immigration Policy to Attract Talents*, FOCUS TAIWAN (Nov. 10, 2017), <http://focus.taiwan.tw/news/aip/201711100029.aspx>; see also Sinclair Prowse, *Taiwan’s Growing Multiculturalism*, DIPLOMAT (Feb. 5, 2015), <https://thediplomat.com/2015/02/taiwans-growing-multiculturalism/>.

307. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

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).<sup>308</sup>

#### 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”<sup>309</sup> 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.”<sup>310</sup> 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 . . . .”<sup>311</sup>

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,

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308. See J. Michael Cole, *Chinese Warns of ‘Soft’ and ‘Insidious’ Taiwan Independence Forces*, NEWS LENS (July 27, 2016), <https://international.thenewslens.com/article/45216>.

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

310. Chris Horton, *In Taiwan, Young Protesters and Ex-Presidents Chafe Against China*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/world/asia/taiwan-chiang-kai-shek.html>.

311. Chen Wei-han, *DPP to Mark 30 Years Since End of Martial Law*, TAIPEI TIMES (July 13, 2017), <http://www.taipeitimes.com/News/front/archives/2017/07/13/2003674448>.

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.”<sup>312</sup> 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.”<sup>313</sup> 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[,]”<sup>314</sup> 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.”<sup>315</sup>

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.<sup>316</sup> 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.

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312. David Helvey, Principal Deputy Assistant Secretary of Defense for Asian and Pacific Security Affairs, Upgrading U.S.–Taiwan Relations for the 21st Century, Remarks at the Global Taiwan Institute, Wash., D.C. (Sept. 14, 2017), *available at* <http://globaltaiwan.org/wp-content/uploads/2017/09/ASD-Prepared-Remarks-for-GTI-Annual-Symposium-FINAL.pdf>.

313. Michael Richard Pence, U.S. Vice President, Remarks on the Administration’s Policy Toward China at the Hudson Institute, Wash., D.C. (Oct. 4, 2018), *available at* <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/>.

314. *EU Representative Praises Taiwan Democracy*, TAIWAN TODAY (Aug. 10, 2015), <https://taiwantoday.tw/news.php?unit=2,23&post=3723> (quoting head of European Economic and Trade Office in Taiwan).

315. *Canada Congratulates Tsai on Elections*, GOV’T CANADA (Jan. 17, 2016), <http://international.gc.ca/world-monde/taiwan/news-nouvelles/2016/01-17-elections.aspx?lang=eng>.

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.<sup>317</sup> 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.<sup>318</sup> The road to May 24, 2019, was politically bumpy,<sup>319</sup> but the legislature finally passed a bill one-week shy of the deadline.<sup>320</sup> The news—especially that these would be the first same-sex marriages in Asia—received international acclaim<sup>321</sup> and even prompted a celebratory Tweet from Ellen DeGeneres to her 77.7 million followers.<sup>322</sup> President Tsai responded, “Thank you, Ellen! I am proud to serve this country where #LoveWins, so everyone has the right to marry. Everyone!”<sup>323</sup>

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.

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317. See Press Release, *supra* note 105.

318. *Id.*

319. See Batto, *The Politics of the Marriage Equality Vote*, *supra* note 135.

320. See Austin Ramzy, *Taiwan's Legislature Approves Asia's First Same-Sex Marriage Law*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/world/asia/taiwan-gay-marriage.html>.

321. See, e.g., Chris Horton, *After A Long Fight, Taiwan's Same-Sex Couples Celebrate New Marriages*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/world/asia/taiwan-same-sex-marriage.html>; Ralph Jennings, *Hundreds of Same-Sex Couples Marry in Taiwan on First Day It's Legal*, L.A. TIMES (May 24, 2019), <https://www.latimes.com/world/asia/la-fg-taiwan-gay-same-sex-marriage-20190524-story.html>; William Yang, *I Feel Lucky: Taiwan Holds First Gay Marriages in Historic Day For Asia*, GUARDIAN (May 24, 2019), <https://www.theguardian.com/world/2019/may/24/taiwan-holds-first-gay-marriages-in-historic-day-for-asia>.

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.”).

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. . . ."<sup>324</sup> The upcoming 2020 presidential and legislative election is the next obvious event for Taiwan to turn world attention to its democratic achievements.<sup>325</sup> 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.<sup>326</sup> 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. . . ."<sup>327</sup>

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324. *What to Do About China's "Sharp Power"*, ECONOMIST (Dec. 14, 2017), <https://www.economist.com/news/leaders/21732524-china-manipulating-decision-makers-western-democracies-best-defence>. See generally JOSEPH S. NYE, JR., *SOFT POWER, THE MEANS TO SUCCESS IN WORLD POLITICS* (2004).

325. *Presidential, Legislative Elections to be Held Concurrently in 2020*, FOCUS TAIWAN (Jan. 31, 2019), <http://focus.taiwan.tw/news/aip/201901310018.aspx>.

326. See Margaret K. Lewis, *Taiwan's Enduring Death Penalty*, EAST ASIA FORUM (Nov. 1, 2017), <http://www.eastasiaforum.org/2017/11/01/taiwans-enduring-death-penalty/>.

327. *Taiwan Carries Out First Execution in Two Tears*, STRAITS TIMES (Sept. 1, 2018), <https://www.straitstimes.com/asia/east-asia/taiwan-carries-out-first-execution-in-two-years> (first alteration in original).

Similarly, despite calls for a more inclusive society that welcomes foreigners,<sup>328</sup> a draft refugee law has long been stalled in the legislature.<sup>329</sup> 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.<sup>330</sup> 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.<sup>331</sup> 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.<sup>332</sup> President Xi Jinping has moved to consolidate his power and has

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328. The Tsai Administration has proposed legislation to attract skilled professionals from overseas. See Liu Meng-chun, *New Immigration Act a Positive Step*, TAIPEI TIMES (May 22, 2018), <http://www.taipeitimes.com/News/editorials/archives/2018/05/22/2003693485>.

329. See Margaret K. Lewis, *Taiwan: A Refuge Without a Refugee Law*, TAIWAN INSIGHT (June 4, 2019), <https://taiwaninsight.org/2019/06/04/taiwan-a-refuge-without-a-refugee-law/>; *Opinion: It's Time for Taiwan to Act on Refugee Protection*, NEWS LENS (Sept. 20, 2018), <https://international.the-newslens.com/article/104517>.

330. Jan. 30, 2018, Personal Observations, *supra* note 257.

331. Cf. Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35 (1992); see also Miki Caul Kittilson, *In Support of Gender Quotas: Setting New Standards, Bringing Visible Gains*, 1 POL. & GENDER 638 (2005).

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”<sup>333</sup> that is starkly seen in the ongoing arbitrary detention of approximately a million Uighurs and members of other Muslim minority groups.<sup>334</sup> Intense censorship of political debate includes blocking Winnie the Pooh images because of their past use in mocking President Xi.<sup>335</sup> 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.”<sup>336</sup> 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.<sup>337</sup> 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.”<sup>338</sup> The

333. Jerome A. Cohen, *China is Likely to Enter Another Long Period of Severe Dictatorship*, COUNCIL FOREIGN REL. (Feb. 28, 2018), <https://www.cfr.org/blog/china-likely-enter-another-long-period-severe-dictatorship>; see also Richard McGregor et al., *Xi Won't Go*, CHINAFILE (Feb. 25, 2018), <http://www.chinafile.com/conversation/xi-wont-go>.

334. See, e.g., Jessica Batke, *Where Did the One Million Figure for Detentions in Xinjiang's Camps Come From?*, CHINA FILE (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/>.

336. Christie Chen, *President Opens Book Fair Lauding Taiwan's Diversity, Freedom*, CHINA POST (Feb. 6, 2018), <https://chinapost.nownews.com/20180206-224813>.

337. Phil Walter, *What is an Existential Threat?*, REAL CLEAR DEF. (Feb. 9, 2016), [https://www.realcleardefense.com/articles/2016/02/10/what\\_is\\_an\\_existential\\_threat\\_109009.html](https://www.realcleardefense.com/articles/2016/02/10/what_is_an_existential_threat_109009.html).

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.<sup>339</sup> It only gained the name “1992 Consensus” when then Chairman of the KMT, Su Chi, coined the term in 2000.<sup>340</sup> The “1992 Consensus” is incompatible with the DPP’s charter,<sup>341</sup> and President Tsai has been unwavering in her rejection of it as a framework for cross-strait relations.<sup>342</sup> Beijing has taken a number of actions to press the Tsai administration to change its stance,<sup>343</sup> such as establishing diplomatic relations with several ROC allies<sup>344</sup> and blocking Taiwan’s attendance at the World Health Assembly.<sup>345</sup>

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

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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).”); *see also* Chun-I Chien, *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”).

340. *See* Yu-Jie Chen & Jerome A. Cohen, *China-Taiwan Relations Re-Examined: The “1992 Consensus” and Cross-Strait Agreements*, 14 U. PA. ASIAN L. REV. 1, 9 (2019).

341. Richard C. Bush, *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 . . .”).

342. *See* Shannon Tiezzi, *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’”).

343. *Mainland Spokesman Says Cross-Strait Communication Mechanisms in Suspension*, XINHUA NET (June 26, 2016), [http://news.xinhuanet.com/english/2016-06/26/c\\_135466191.htm](http://news.xinhuanet.com/english/2016-06/26/c_135466191.htm).

344. Richard Bernstein et al., *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>.

345. Chris Horton, *Blocked by China, Taiwan Presses to Join U.N. Agency’s Meeting*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/world/asia/taiwan-world-health-china.html>.

2017,<sup>346</sup> vowing to defeat independence “in any form.”<sup>347</sup> 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.<sup>348</sup> 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.<sup>349</sup>

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.<sup>350</sup> 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.’”<sup>351</sup> Following President Tsai’s inauguration in May 2016, a PRC-state-run

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346. Richard C. Bush, *What Xi Jinping Said About Taiwan at the 19th Party Congress*, BROOKINGS (Oct. 19, 2017), <https://brook.gs/2Fzfu0> [hereinafter Bush, *What Xi Jinping Said About Taiwan at the 19th Party Congress*].

347. *Xi Vows Resolve, Ability to Defeat ‘Taiwan Independence’*, CHINA DAILY (Oct. 18, 2017), [http://www.chinadaily.com.cn/china/19thpcnationalcongress/2017-10/18/content\\_33404680.htm](http://www.chinadaily.com.cn/china/19thpcnationalcongress/2017-10/18/content_33404680.htm).

348. Russell Hsiao, *CCP Central Committee’s 2018 Taiwan Affairs Meeting Affirms Xi’s “Soft-Hard” Approach*, GLOBAL TAIWAN INST. (Feb. 21, 2018), <http://globaltaiwan.org/2018/02/21-gtb-3-4/>.

349. Fan Fenlie Guojia Fa (反分裂國家法) [Anti-Secession Law], (promulgated by Presidential Decree No. 34, Mar. 14, 2005, effective Mar. 14, 2005), art. 8 (China), *translated in Constitution and the Related Laws: Anti-Secession Law*, NAT’L PEOPLE’S CONG. OF THE PEOPLE’S REP. OF CHINA (全國人民代表大會), [http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content\\_1384099.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384099.htm) (last visited Apr. 24, 2019).

350. See LAWRENCE & MORRISON, *supra* note 6, at 4.

351. Alan D. Romberg, *Cross-Strait Relations: Skepticism Abounds*, CHINA LEADERSHIP MONITOR, Sept. 2017, at 3. A different framing for an emphasis on distinct Taiwanese culture is “Taiwanization.” See, e.g., Zhong, *supra* note 21, at 348.

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."<sup>352</sup> 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.'"<sup>353</sup> 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."<sup>354</sup> In January 2018, Xinhua stressed "that any attempt to separate Taiwan from China will not be tolerated."<sup>355</sup> 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."<sup>356</sup>

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."<sup>357</sup> Interestingly, the Tsai administration's report on the

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352. *Cross-Strait Ties Enter Era of Uncertainty Under Tsai*, GLOBAL TIMES (May 20, 2016), <http://www.globaltimes.cn/content/984175.shtml>.

353. *Endorsing One-China Principle Only Way to Break Deadlock in Cross-Strait Ties: Spokesperson*, XINHUA NET (Apr. 28, 2017), [http://news.xinhuanet.com/english/2017-04/28/c\\_136244368.htm](http://news.xinhuanet.com/english/2017-04/28/c_136244368.htm).

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\\_136299231.htm](http://www.xinhuanet.com/english/2017-05/20/c_136299231.htm).

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](http://www.xinhuanet.com/english/2018-01/31/c_136939759.htm).

356. *Separatist Attempt Doomed to Fail: Chinese Mainland Spokesperson*, XINHUA NET (Oct. 10, 2018), [http://www.xinhuanet.com/english/2018-10/10/c\\_137523851.htm](http://www.xinhuanet.com/english/2018-10/10/c_137523851.htm).

357. Yeh & Chang, *supra* note 76, at 822.

2017 Reform Conference begins by stating that judicial reform is the issue of utmost concern to the “Taiwanese” (“台灣人”).<sup>358</sup> 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.<sup>359</sup> 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.”<sup>360</sup> 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.

360. People’s Daily, China (@PDChina), TWITTER (May 17, 2019, 12:09 AM), <https://twitter.com/PDChina/status/1129282711695314944>.

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].<sup>361</sup>

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.<sup>362</sup>

Legal reforms are thus neither an explicit item in the list of complaints that Beijing has against the Tsai administration, nor are they irrelevant.<sup>363</sup> A question then is how to articulate what

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](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-southchinasea-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.<sup>364</sup> 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,”<sup>365</sup> 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.<sup>366</sup> 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.<sup>367</sup> In contrast to the PRC, people in Taiwan already

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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).

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. Rowling 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.

366. See, e.g., *Jingda Jiaoshou Lin Yushun: Guomin 「Faguan」 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.apple-daily.com/new/realtime/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>.

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.<sup>368</sup> 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.<sup>369</sup> 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."<sup>370</sup> Taiwan's legal system by comparison, is increasingly unaligned with that of the PRC, with no signs of this trend changing.

## CONCLUSION

A frequent refrain is the need to maintain the status quo in cross-strait relations.<sup>371</sup> 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").

370. *Anson Chan Wins O'Connor Justice Prize*, ARIZ. ST. U. (Feb. 19, 2018), <https://campus.asu.edu/content/anson-chan-wins-o%E2%80%99connor-justice-prize-0>.

371. See Ching-hsin Yu, *The Centrality of Maintaining the Status Quo in Taiwan Elections*, BROOKINGS (Mar. 15, 2017), <https://www.brookings.edu/opinions/the-centrality-of-maintaining-the-status-quo-in-taiwan-elections/>.

from the status quo.<sup>372</sup> 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,<sup>373</sup> and a pro-independence rally and march in October 2018 drew thousands of people.<sup>374</sup> 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.

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372. See *Taiwan's President Assures World's Representatives of Cross-Strait Status Quo*, TAIWAN NEWS (Feb. 28, 2018), <https://www.taiwannews.com.tw/en/news/3373440>.

373. See *Taiwan Independence Referendum Launched, Backed by Former Presidents*, FOCUS TAIWAN (Feb. 28, 2018), <http://focus taiwan.tw/news/aip/201802280006.aspx>.

374. See Horton, *supra* note 59.