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# CRIMINAL COURT REFORM IN TAIWAN: A CASE OF FRAGMENTED REFORM IN A NOT-FRAGMENTED COURT SYSTEM

Kai-Ping Su<sup>†</sup>

*Abstract:* This Article examines the character of Taiwan’s criminal court system and proposed court reforms. Taiwan’s criminal court is a not-fragmented system, distinct from the fragmented American criminal court. In fact, with hierarchical control in prosecutorial rulings and central administration of judicial decision-making, Taiwan’s criminal court system can be deemed a relatively centralized and bureaucratic organization. Given this context, when Taiwan’s criminal justice system disappoints the people, judges take the blame for the failures of the system. To resolve the serious problem of public distrust in judges and the court system, Taiwan’s government and the judicial authority make “responding to expectations of the people” the ultimate goal of current court reform. Nonetheless, although this goal appears to be simple and intuitive, this Article argues that, due to its fragmented nature, this goal is not equal to its task. This Article further argues that pursuing the fragmented goal of court reform in a not-fragmented system like Taiwan’s criminal court may very possibly lead to conflicts of important values and generate a counterproductive result.

Cite as: 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 (2017).

## I. INTRODUCTION

The courts are an institution whose powers are extremely limited; yet they are frequently called upon to perform Herculean tasks.<sup>1</sup>

Taiwan’s court system has faced serious problems of public distrust since 2010. This crisis of confidence directly led to the resignation of the president of the Judicial Yuan—the head of Taiwan’s highest judicial authority and the Chief Justice of the Constitutional Court—and gave rise to a series of court reforms. Among the implemented and proposed reforms, “lay participation” has received the most public interest. The general idea of lay participation has been promoted by Taiwan’s highest judicial authority since 2011 and was deemed the most significant issue at the National Affairs Conference on Judicial Reform in 2017.<sup>2</sup> Why is the general idea of lay

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<sup>1</sup> MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL xiii (1983).

<sup>2</sup> While the version of lay participation which Taiwan will adopt is still under discussion, the general idea of lay participation, that which involves ordinary citizens in trials, has been set as a default reform by Taiwan’s government and the highest judicial authority. Part IV and Part V of this Article have further discussion about this phenomenon.

participation so attractive that Taiwan's judicial reform embraces it so tightly? Is lay participation necessary to achieve a particular *goal* of Taiwan's court reform? If so, what is the *goal* of Taiwan's court reform? Can this goal, if achieved, resolve all issues with public confidence?

By examining the nature of Taiwan's criminal court system and exploring the goal of Taiwan's court reform, Part I of this Article attempts to answer these questions in a historical and functional context. Part II brings to light the unique "reformed adversarial system" implemented in Taiwan's criminal courts and introduces the four procedures that criminal court judges can choose when trying a case. Under this reformed system, Taiwan's judges are empowered to investigate evidence in court and dictate criminal proceedings. This crucial background information provides context for the subsequent problem of public distrust and proposed solutions thereof.

With an understanding of this issue, Part III uses Professor Malcolm M. Feeley's argument, presented in his classic book "*Court Reform on Trial: Why Simple Solutions Fail*,"<sup>3</sup> about the feature of fragmentation in the American criminal justice system, to further explore Taiwan's criminal courts. Feeley suggests that fragmentation is the "most visible quality of the criminal court,"<sup>4</sup> and further proposes that it is "the central and continuing obstacle[] to change in the criminal justice system."<sup>5</sup> This Article uses Feeley's analytical approach of the three theoretical bases—the adversary process, due process, and professionalism<sup>6</sup>—and finds that Taiwan's criminal court is a not-fragmented system. Instead, many mechanisms provided by law and court practices in Taiwan's court system contribute to the dominant position of judges in criminal trials. These mechanisms also compel legal professionals involved in the system, including judges, prosecutors, and defense attorneys, to collaborate on several common objectives.

Part IV introduces the serious problem of public distrust that Taiwan's court system faces. This section explains the incidents that caused the crisis of confidence and gave birth to the 2017 Judicial Reform Conference. Although other reforms have been proposed, lay participation has stood out. Different versions of lay participation have been vigorously and relentlessly supported by the judicial authority in Taiwan.

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<sup>3</sup> FEELEY, *supra* note 1.

<sup>4</sup> *See id.* at 9.

<sup>5</sup> *See id.* at 205.

<sup>6</sup> *See id.* at 11.

Part V discusses why the judicial authority has deemed lay participation the remedy for this crisis. This Article uses two analytical structures to analyze this phenomenon: analysis based on stages of innovation and analysis based on historical and functional perspectives. In particular, this Article applies Feeley's analytical structure of innovation to Taiwan's court reform. Additionally, it doubts that the problem of distrust has been diagnosed correctly, and it furthermore predicts the difficulty of initiation and implementation in carrying out the reform made by the Judicial Reform Conference.

Part VI argues that the ultimate goal of Taiwan's current judicial reform is "responding to expectations of the people."<sup>7</sup> Nevertheless, this Article holds that, even in Taiwan's not-fragmented criminal court system, a fragmented goal of reform, like responding to the expectations of the people, has little chance of succeeding. Due to the fragmentation inherent in this goal of court reform, planned changes resulting from pursuing this goal will likely conflict and offset each other and thus may eventually lead to a counterproductive result.

In conclusion, borrowing Feeley's words, this Article answers the question: "Why do simple solutions fail?" in Taiwan's context. The goal of responding to the expectations of the people seems like a simple, natural, and intuitive remedy for the crisis in public trust, but the vague and overgeneralized nature of this simple remedy undermines its potential to direct and coordinate distinct values to a successful court reform. Ultimately, this Article also suggests that the predictable failure of the goal of responding to the expectations of the people does not necessarily foreshadow the failure of particular proposals such as lay participation or other planned changes. Each planned change may still work, but the contradictions and conflicts between these uncoordinated changes will result in the collapse of the court reform.

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<sup>7</sup> While "(building a judicial system) responding to expectations of the people" was mentioned by Taiwan's President Tsai In-Wen with the other two targets, "(building a judicial system) belonging to the people" and "being trusted by the people," this Article argues that only "responding to expectations of the people" is the genuine goal of Taiwan's court reform. More discussion about "responding to expectations of the people" can be found *infra* Section IV.C. *Guanyu sifa gaige guo shi huiyi* (關於司法改革國是會議) [About the National Affairs Conference on Judicial Reform], OFFICIAL WEBSITE JUD. REFORM CONF., <https://justice.president.gov.tw/aboutus/3/> (last visited Apr. 20, 2017).

## II. CHARACTERS OF TAIWAN'S CRIMINAL COURT SYSTEM

### A. *The "Reformed Adversary System"*

In 2002, Taiwan's criminal justice system transformed its long-standing inquisitorial structure, in which the court was actively involved in the investigation of facts and was responsible for "finding the truth,"<sup>8</sup> into a so-called "reformed adversary system."<sup>9</sup> This new system is billed as a "reformed" one because it is not a typical adversarial system, where the parties are responsible for presenting evidence before an essentially passive and neutral adjudicator.<sup>10</sup> Instead, Taiwan's reformed adversarial system can be viewed as a hybrid of the adversarial system and the inquisitorial system. Its hybrid nature is particularly apparent in the 2002 amendment of Article 163 of the Code of Criminal Procedure ("CCP"),<sup>11</sup> which provides: "The court *may*, for the purpose of discovering the truth, *ex officio investigate evidence*; in case for the purpose of maintaining justice or discovering facts that are critical to the interest of the accused, the court *shall ex officio investigate evidence*."<sup>12</sup>

Here, in the reformed adversary system, while prosecutors bear the burden of proof as to the crime charged,<sup>13</sup> judges are also authorized to investigate evidence in court instead of sitting back and taking a passive umpire role. In addition, judges are even *required* to actively investigate evidence, specifically regarding "maintaining justice or discovering facts that are critical to the interest of the accused."<sup>14</sup> The lawmakers and advocates for the hybrid system expected that the aforementioned obligation would prevent

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<sup>8</sup> For the history and development of Taiwan's criminal court and procedure, 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, 551-54 (2002).

<sup>9</sup> *Gai liang shi dang shi ren jin xing zhu yi yi* (改良式當事人進行主義) can be translated as a "reformed," "modified," or "improved" adversary system. The first two characters "gai" ("改") and "liang" ("良") actually mean "changing" something and making it "better."

<sup>10</sup> See FRANKLIN STRIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM* 181 (1996).

<sup>11</sup> XING SHI SU SONG FA (刑事訴訟法) [CODE OF CRIMINAL PROCEDURE] art. 163 (Taiwan) [hereinafter CRIM. PROC. CODE].

<sup>12</sup> *Id.* art. 163, para. 2 (emphasis added).

<sup>13</sup> "The public prosecutor shall bear the burden of proof as to the facts of the crime charged against an accused, and shall indicate the method of proof." *Id.* art. 161, para. 1; "The accused may indicate methods of proof favorable to him against the facts charged." *Id.* art. 161-61.

<sup>14</sup> JUDICIAL YUAN (司法院), *Gai liang shih dang shih ren jin sing jhu yi* (改良式當事人進行主義) [*The Reformed Adversary System*], <http://www.judicial.gov.tw/work/work02/work02-01.asp> (last updated Apr. 2, 2004) [hereinafter *The Official Website of the Judicial Yuan about the Reformed Adversary System*] (emphasis added).

judges from slacking off and that it would involve judges in actively maintaining justice. In this sense, this new court system is believed to be better than the pure inquisitorial or adversarial system. Therefore, the new system was referred to as the “reformed” adversarial system.<sup>15</sup>

Whether Taiwan’s hybrid criminal court system really functions better than the typical inquisitorial or adversarial systems is, of course, a matter of judgment.<sup>16</sup> Those who advocate for the new system believe that the word “reformed” suggests expected improvement to the typical adversarial system. Generally speaking, Taiwan’s lawmakers are hesitant to embrace a judicial system where judges are passive observers and decide cases on the materials provided by the parties. The concern is that if the parties fail to present evidence, the court will not find the truth and justice cannot be achieved.<sup>17</sup>

Taiwan’s criminal court system grants judges great power and impact on trials, as it allows judges to actively investigate cases and discover evidence. This undermines the lawmakers’ original intention of “drawing a clear distinction between the duties of prosecutors and those of judges, in order to establish the impartial status of the court.”<sup>18</sup> The new court system further empowers the judges to select the criminal procedures to dispose of cases. In practice, this discretionary power over court procedures dictates later dispositions of cases. A deeper understanding of both the function of these court procedures and the role judges play in selecting the procedures provides an insight into why the public has placed such heavy blame on judges for almost all of the failures of the criminal justice system, and why lay participation is so strongly considered as a solution of Taiwan’s court reform to trial.

### *B. Criminal Procedures and Discretionary Power of Judges*

Taiwan’s CCP provides four different procedures for judges to try a criminal case. The procedures are: 1) regular trial procedure, 2) simplified trial procedure, 3) summary procedure without trial, and 4) bargaining procedure.<sup>19</sup> Although each procedure has its own scope of application

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<sup>15</sup> *Id.*

<sup>16</sup> For a more thorough treatment of the success and failure, theory and practice of Taiwan’s reform adversary system, see, e.g., Margaret K. Lewis, *Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT’L L. 651 (2009).

<sup>17</sup> *The Official Website of the Judicial Yuan about the Reformed Adversary System*, *supra* note 14.

<sup>18</sup> *Id.*

<sup>19</sup> CRIM. PROC. CODE arts. 273-1, 273-2, 449, 451-1.

provided by the CCP (as described below), for most criminal offenses, the judge has great discretion in selecting the procedure. For example, since regular trial procedure is the most time- and resource-consuming procedure, the judge has an incentive to select one of the other three procedures to handle a relatively minor case in order to save the court both time and resources.

### 1. Regular Trial Procedure

Among the four criminal procedures, regular trial procedure is the only one that is adversarial in the reformed adversarial system. If the presiding judge considers it necessary, regular trial procedure can be used to try any criminal case, regardless of its seriousness. For example, both murder and shoplifting can be tried using regular trial procedure, although the other three procedures can also be applied to the latter minor charge. In a trial of regular procedure, defendants enjoy all constitutional and legal protections. Among other things, defendants can confront and cross-examine witnesses, and hearsay rules also apply. As a result, the duration of a trial using the regular trial procedure is usually longer than a trial using the other three procedures.

### 2. Simplified Trial Procedure

The criminal court may adopt simplified trial procedure to try a case if the defendant has pled guilty and the charge has a potential punishment of less than three years imprisonment.<sup>20</sup> In simplified trial procedure, defendants willingly waive certain crucial legal protections, such as the ability to cross-examine witnesses.<sup>21</sup> The “simplified” feature of this proceeding is manifest in the court process of evidence investigation. For example, hearsay rules do not apply in this simplified procedure, unless judges deem them necessary.<sup>22</sup> This procedure frees judges from various restrictions on evidence and investigation. As a result, uncontroversial cases can be terminated quickly, which saves time and energy for the court and the litigants. However, judges can always decide to use regular instead of simplified procedure to try cases.<sup>23</sup>

### 3. Summary Procedure Without Trial

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<sup>20</sup> *Id.* art. 271-3, para. 1.

<sup>21</sup> *Id.* art. 273-2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* art. 273-1, paras. 1–2.

Minor cases, where offenders are generally subject to punishment other than serving time in prison, can be handled in summary procedure. This is a simpler approach than the simplified trial procedure. In summary procedure, there is no public trial or any proceedings occurring in the courtroom unless judges deem them necessary.<sup>24</sup> If a judge believes that a defendant is guilty after considering the defendant's confession and other evidence presented, the court can use the summary procedure to dispose of the case without officially initiating a trial. Once the decision is made, which usually occurs in a short period of time, the written court decision is sent to the defendant.<sup>25</sup>

While summary procedure is often initiated by a prosecutor's motion, judges are not restrained by the motion. In other words, judges can decide to dispose of the case with regular or simplified trial procedures, even after the prosecutor files a motion for summary procedure without trial.<sup>26</sup> Judges can also decide to use summary procedure to terminate a case, even when prosecutors do not request to apply summary procedure.<sup>27</sup> As long as the punishment in the end is probation, community service, or a fine, it is within the discretion of judges to use summary procedure.<sup>28</sup> Summary procedure has existed in the CCP since 1935, despite being amended several times.

#### 4. Bargaining Procedure

Bargaining procedure was implemented in 2004 and is the only procedure that cannot be initiated based on a judge's sole discretion.<sup>29</sup> Rather, the decision to use the procedure depends on whether the parties agree and if the prosecutor makes a motion to the court. When a defendant pleads guilty to a charge with a potential sentence of less than three years imprisonment and the defendant is willing to negotiate the range of sentence with prosecutors, the parties can begin negotiating.<sup>30</sup> However, unlike plea-bargaining in the United States, Australia, and other countries, the negotiations are limited to sentencing ranges and do not involve potential charges.<sup>31</sup>

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<sup>24</sup> *Id.* art. 449.

<sup>25</sup> CRIM. PROC. CODE art. 453, art. 455.

<sup>26</sup> *Id.* art. 449, para. 1.

<sup>27</sup> *Id.* art. 449, para. 2.

<sup>28</sup> *Id.* art. 449, para. 3.

<sup>29</sup> *Id.* art. 455-2.

<sup>30</sup> *Id.*

<sup>31</sup> Cf. Paul Marcus et al., *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147 (2016) (comparing plea bargaining processes in five common law countries and describing the roles of judges and prosecutors in each system).



Charges are never negotiable in Taiwan's criminal system. The agreement of sentence range, if made, must be limited to probation, less than two years imprisonment, or a fine.<sup>32</sup> After the agreement has been achieved, the case must be brought back to court for the judges' review.<sup>33</sup> During the negotiation process, Taiwan's prosecutors are not as powerful as American prosecutors.<sup>34</sup> In Taiwan's bargaining procedure, negotiable ranges are limited, and it is judges who will make the final decision.<sup>35</sup> If judges consider the agreement between the parties inappropriate, the court can reject the proposal and start another procedure to dispose of the case.<sup>36</sup> If the court approves the agreement, the defendant will be sentenced within the range according to their agreement.<sup>37</sup>

##### 5. Conflicting Aims and Expectations of Taiwan's Criminal Court System

In summary, along with other mechanisms, Taiwan's reformed adversarial system provides judges with substantial power over almost all aspects of criminal trials. Judges can make decisions, actively investigate evidence, and select procedures to try cases. Under these circumstances, it is natural that judges are expected to take a leading position in trials and also to take responsibility for all the legal and social effects of court decisions. Nonetheless, Taiwan's judges can barely meet this expectation.

There are two major interests that Taiwan's criminal court system aims to address, but unfortunately, they seem to inevitably conflict. First, the court system expects judges to maintain justice. In other words, when the parties fail to present crucial evidence related to justice maintenance, judges are obliged to assume the roles of interested parties in the reformed adversarial system.<sup>38</sup> At the same time, Taiwan's reformed adversarial system also wants "*the court [to] be deemed fair and impartial.*"<sup>39</sup> That is, Taiwan's court

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<sup>32</sup> CRIM. PROC. CODE art. 455-4, para. 2.

<sup>33</sup> *Id.* art. 455-2, para. 1.

<sup>34</sup> See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 101 (2016) (challenging the idea that judicial review should be limited to a marginal extent in the process of plea-bargaining).

<sup>35</sup> *Cf.* Marcus et al., *supra* note 31.

<sup>36</sup> CRIM. PROC. CODE art. 455-4, para. 1.

<sup>37</sup> *Cf.* Marcus et al., *supra* note 31.

<sup>38</sup> STRIER, *supra* note 10.

<sup>39</sup> *The Official Website of the Judicial Yuan about the Reformed Adversary System*, *supra* note 14 (emphasis added).

system expects its judges to play the impartial role of an indifferent umpire in addition to the role of an interested party that actively investigates. The two roles directly conflict.

Alongside these conflicting roles, litigants and society expect that judges, equipped with seemingly immense power, can always deliver a “satisfying” decision to the parties and the public.<sup>40</sup> However, this mission is impossible. As a result, the unreasonably designed court system paired with the unrealistic expectations of society puts Taiwan’s judges in a predicament. Consequently, the inability to meet these expectations resulted in dissatisfaction and disappointment with the judiciary in general, which, in turn, manifested in the people’s desire for court reform. This is discussed further in Part IV of this Article.

### III. TAIWAN’S NOT-FRAGMENTED CRIMINAL COURT SYSTEM

This section explores Taiwan’s criminal court in light of Feeley’s theory, identifies the Taiwanese court systems non-fragmented features (including its clear characteristics of centralization and bureaucracy), and discusses the mechanisms contributing to its lack of fragmentation. While the reformed adversarial system and other relevant mechanisms result in excessive expectation of Taiwan’s judges, these mechanisms also shape Taiwan’s criminal court system into a unique, not-fragmented system. This is in contrast to the fragmentation Feeley suggests is rooted in the American criminal justice system and reinforced by three theoretical bases: the adversary process, due process, and professionalism.<sup>41</sup> Although the American and the Taiwanese criminal courts possess the same theoretical bases, they are different.

#### A. *The Adversary Process*

In the ideal form of the adversarial system, two equally strong and resourceful advocates compete against each other, with the aim of winning the case and defeating the opponent. Through the active contest between adversaries, truth and the most satisfactory results are more likely to emerge.<sup>42</sup> Nevertheless, if parties fail to attack or counterattack, do not provide sufficient

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<sup>40</sup> For details, *see infra* Part IV.

<sup>41</sup> *See* FEELEY, *supra* note 1, at 11.

<sup>42</sup> JAMES R. ACKER & DAVID C. BRODY, CRIMINAL PROCEDURE: A CONTEMPORARY PERSPECTIVE 444 (2013); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 53 (2003).

evidence, or present unconvincing points, judges in the Anglo-American tradition will not assume the roles of adversaries and refrain from investigating facts.<sup>43</sup> Therefore, Feeley argues, distinct agencies in the American justice system lack a common goal to pursue. He further elaborates:

In the United States, there is no ministry of justice, no criminal justice czar, no one to see that everyone works together to pursue common objectives. Rather, there are distinct officers—police, prosecutors, defense attorneys, judges—drawn apart still further by the doctrine of the separation of powers and the theory of the adversary process.<sup>44</sup>

In contrast, both the law and court practices support the idea that the officers of Taiwan's criminal court—police, prosecutors, defense attorneys, and judges—apparently share common objectives. In Taiwan's reformed adversary system, these common objectives include discovering the truth, maintaining justice, and discovering facts that are critical to the interest of the accused. For *discovering the truth*, according to the CCP, judges *may ex officio* investigate evidence. For *maintaining justice* or *discovering facts critical to the interest of the accused*, judges *shall ex officio* investigate evidence.<sup>45</sup> In other words, judges are required by the law to actively participate in the investigation of evidence when the evidence is substantially related to justice or the interest of defendants. This special legal duty of judges demonstrates the emphasized objectives of justice maintenance and protection of defendants' rights in Taiwan's criminal procedure.

The judiciary is not the only institution required by the CCP to devote itself to these objectives. According to the CCP, the police, prosecutors, and even defense attorneys are also involved in the pursuit of justice or finding truth related to rights of defendants. As the CCP Article 2 provides:

(Paragraph 1) A public official who conducts proceedings in a criminal case shall give equal attention to circumstances both favorable and unfavorable to an accused.

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<sup>43</sup> See FEELEY, *supra* note 1, at 11–13; for a detailed discussion about the potential problems inherent in the adversary system, see Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

<sup>44</sup> See FEELEY, *supra* note 1, at 12–13.

<sup>45</sup> CRIM. PROC. CODE art. 163, para. 2.

(Paragraph 2) An accused may request the public official specified in the preceding paragraph to take necessary measures favorable to the accused.<sup>46</sup>

The police and prosecutors are so-called “public official[s]” in the above text of the CCP and are charged with the legal duty to take care of the interests of defendants.<sup>47</sup> The police and prosecutors are not only responsible for arresting suspects and prosecuting defendants, but also for seeking justice and discovering the truth, by giving attention to the circumstances potentially *favorable* to the defendant.<sup>48</sup>

On the other hand, Taiwan’s defense lawyers are required not only to work for the interest of defendants, but also for justice and public interest. While this duty of defense lawyers is not explicitly provided by the CCP,<sup>49</sup> court practices show that defense lawyers are expected to be an essential partner, along with judges, prosecutors, and all the other public officials involved, in pursuing justice and maximizing public interest. The restriction on defendants’ self-representation in some kinds of criminal trials is an example of how procedural rules are developed to support the goal of justice. As the CCP provides, there are six kinds of criminal cases where the defendant *must* be represented by a defense attorney. For example, there are cases where the minimum punishment for the charge is no less than three years imprisonment.<sup>50</sup> In many cases related to the limit of self-representation,

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<sup>46</sup> *Id.* art. 2.

<sup>47</sup> *Id.*

<sup>48</sup> In fact, in the American adversarial justice system, prosecutors similarly do not only expect to single-mindedly pursue conviction, but rather must seek justice. As the United States Supreme Court clearly pointed out: “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>49</sup> *Cf.* LU SHI FA (律師法) [ATTORNEY REGULATION ACT] art.1, para. 1–2 provides, “Attorneys take upon themselves the goals of *promoting social justice, protecting human rights*, and contributing to democratic government and the rule of law. Guided by these professional goals, with the spirit of self-regulation and self-governance attorneys should strive to faithfully execute their professional responsibilities, contribute to *the preservation of social order, and work towards the improvement of the legal system.*” (emphasis added).

<sup>50</sup> CRIM. PROC. CODE art. 31, para. 1 provides, “In cases where the minimum punishment is no less than three years imprisonment, where the High Court has jurisdiction over the first instance, or where the accused is unable to make a complete statement due to unsound mind, the presiding judge shall appoint a public defender or a lawyer to defend the accused if no defense attorney has been retained; in other cases, if no defense attorney has been retained by an accused with low income and a request for appointing one has been submitted, or if it is considered necessary, the same rule shall apply.”

Taiwan's Highest Court has repeatedly explained the meaning and function of Taiwan's criminal court:

[I]n these kinds of cases, the option for defendants to choose to be represented by a defense attorney or not is limited. [If the defendant does not hire a defense attorney,] [t]he state will assign one to the defendant, in order to carry through the defense. By the expertise of the defense attorneys, it can, first of all, enhance the defense of the defendant . . . urge judges and prosecutors to give attention to the circumstance favorable to the defendant, as provided by the CCP Article 2. Furthermore, it will fill the gap between the governmental power and the capability of the defendant, make sure that the parties are substantively equal, so as to . . . pursue the maximization of the judicial benefit.<sup>51</sup>

From the opinion expressed above, we can clearly see that defense attorneys are also deemed an integral component of Taiwan's criminal court system, which functions to maximize the public interest. Therefore, instead of being a fragmented system, Taiwan's criminal court system is theoretically and practically expected to be an integrated system where judges, prosecutors, defense attorneys, and other officials should collaborate with each other to achieve certain common objectives, including the finding of truth, the maintenance of justice, and the protection of defendants' rights.

### *B. Due Process*

Feeley also holds that the fear-of-authority nature of due process leads to separated functions, fragmented authority, and circumscribed power.<sup>52</sup> Hence, the power of the state is diminished by the insulation of the judiciary, meaning that the judiciary is presumably an independent branch of the government and is not affected by officials of the executive power. Many rules of criminal procedure are designed more to restrain officials than to accurately determine if the defendant committed the crime. Feeley also suggests that the formalism of American criminal procedure grants "vast discretion at each of several critical stages," which fosters plea-bargaining in practice and facilitates fragmentation.<sup>53</sup>

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<sup>51</sup> See, e.g., Tsui Kao Fa Yuen 103 Nien Du Tai Shang Tzu Ti 3150 Hao Pan Jue Jue (最高法院 103 年度台上字第 3150 號判決) [The Highest Court 2014 Tai Appeal No. 3150 Decision].

<sup>52</sup> See FEELEY, *supra* note 1, at 13–15.

<sup>53</sup> *Id.*

While due process is also one of the defining characteristics of Taiwan's Constitution and criminal procedure,<sup>54</sup> it does not appear to create fragmented authority or separate functions in Taiwan's criminal court system.<sup>55</sup> Although it is true that Taiwan's prosecutors, judges, defense attorneys, and other agencies involved in the court system have their own power to exercise and duties to fulfill, these agencies still collaborate to pursue common objectives, as analyzed in the last section. In this sense, Taiwan's criminal court is neither a fragmented system nor an interdependent system. Instead, it is a system where different agencies are legally and practically obligated to integrate into one.<sup>56</sup>

An example of this collaborative feature of Taiwan's criminal justice system is the restraint on prosecutors' discretion. The power and function of Taiwan's prosecutors are quite different from those of American prosecutors. American prosecutors, in Feeley's words, "have virtually unlimited and unreviewable discretion in setting charges and in deciding whether or not to prosecute at all."<sup>57</sup> In Professor Franklin E. Zimring's words, prosecutors are "the all-powerful 500-pound gorilla in criminal justice."<sup>58</sup> American prosecutors have almost exclusive authority regarding decisions about whether to file criminal charges, when charges should be brought, what charges to file, and whom the charges should be brought against. Most importantly, these prosecutorial decisions are not subject to judicial review.<sup>59</sup>

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<sup>54</sup> ZHONGHUA MINGUO XIANFA (中華民國憲法) [CONSTITUTION OF THE REPUBLIC OF CHINA] art. 8, para. 1 (2000) (Taiwan) provides, "Personal freedom shall be guaranteed to the people. Except in case of flagrante delicto as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ *in accordance with the procedure prescribed by law*. No person shall be tried or punished otherwise than by a law court *in accordance with the procedure prescribed by law*. Any arrest, detention, trial, or punishment which is *not in accordance with the procedure prescribed by law* may be resisted." (emphasis added).

<sup>55</sup> It is also noteworthy that due process is actually universal in almost all free nations. See RONALD J. ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 81 (3d ed. 2011) ("The idea of due process probably underlies the law of criminal procedure in all free societies.").

<sup>56</sup> Some scholars distinguish "an interdependent criminal justice system" from "a fragmented criminal justice non-system." See, e.g., DAVID W. NEUBAUER & HENRY F. FRADELLA, *AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 7–8 (2015). However, unlike the "interdependent system," in which different agencies are interdependent with, and interrelated to, each other to achieve their *individual* goals, Taiwan's agencies of the criminal court system work together towards certain *identical, common* goals.

<sup>57</sup> See FEELEY, *supra* note 1, at 14.

<sup>58</sup> Franklin E. Zimring, *False Premise of Gun Sentences*, CHICAGO SUN-TIMES, Oct. 16, 2013, [http://www.highbeam.com/doc/1N1-149791FB586BF7E8.html?refid=easy\\_hf](http://www.highbeam.com/doc/1N1-149791FB586BF7E8.html?refid=easy_hf).

<sup>59</sup> See ALLEN ET AL., *supra* note 55, at 961.

In contrast, Taiwan's prosecutors are required to make decisions (called "rulings") on cases assigned to them within a limited period of time.<sup>60</sup> According to the internal administrative rules granted by the Ministry of Justice, the due period for completing the investigation of a general criminal case is eight months, but for cases of "major criminal offenses," prosecutors have only four months to make rulings.<sup>61</sup> If prosecutors fail to close a case within the time limits, they will be urged, admonished, and even punished by the chief prosecutor or the Ministry of Justice.<sup>62</sup>

Furthermore, all of the prosecutorial rulings come with corresponding judicial review or prosecutorial supervision. For example, if the prosecutor chooses to prosecute a case, the case is then subject to the court's review. When the prosecutor decides not to prosecute a case, or to defer the prosecution, the complainants (usually victims or their family) can petition to the chief prosecutor of the higher level prosecutors' office for "reconsideration" of the original ruling. The chief prosecutor has the authority to set aside the original ruling and send the case back for further investigation or command the prosecutor to bring a charge.<sup>63</sup> If the chief prosecutor affirms the original ruling of deferred or non-prosecution, the complainant has the legal right to submit his or her case to a court for setting the case for trial.<sup>64</sup> Additionally, the court can eventually intervene to review the prosecutor's rulings of deferred or non-prosecution.

Similarly, the discretionary power possessed by American prosecutors over plea-bargaining is substantially limited for their counterparts in Taiwan. First, in Taiwan's bargaining procedure, charges are non-negotiable. The negotiation between parties can only involve sentences. Second, only relatively minor offenses are negotiable.<sup>65</sup> Those offenses that are subject to capital punishment, life imprisonment, or imprisonment for more than three

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<sup>60</sup> *Id.* at 1055. ("Generally, [American] law enforcement and prosecutors can investigate as long as necessary and bring criminal charges anytime, provided they don't run afoul of the applicable statute of limitations.")

<sup>61</sup> Guidelines, Ministry of Justice, Jian cha ji guan ban an qi xian ji fang zhi ji yan shi shi yao dian (檢察機關辦案期限及防止稽延實施要點) [Directions for Time Limits for Handling Cases and Prevention from Procrastination for the Prosecutors' Offices], art. 35, <http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=C0000001>. More serious crimes require less time because society worries more over serious offenses. Therefore, the Ministry of Justice asks prosecutors to deal with these cases more quickly.

<sup>62</sup> *Id.* arts. 40, 44, 45, 46.

<sup>63</sup> *Id.* art. 258.

<sup>64</sup> *Id.* arts. 258-1, 258-2, 258-3.

<sup>65</sup> *Id.* art. 455-2.

years are excluded from the bargaining procedure.<sup>66</sup> Most importantly, as in other procedures, judges play a crucial role in the bargaining procedure. Among the four criminal court procedures, bargaining procedure is the only one that the court cannot initiate by itself. The CCP authorizes the prosecutor to initiate the bargaining procedure.<sup>67</sup> However, before the parties can begin their negotiation, the bargaining procedure has to be approved by the court.<sup>68</sup> After the parties reach an agreement, the court is responsible for reviewing the agreement to determine whether anything “is obviously inappropriate or unfair” and whether the agreement is reached in accordance with law before making the final decision.<sup>69</sup> In this sense, it is still the court making the decision. The agreement between parties is merely a proposal submitted to the court for its consideration, and the negotiations never limit the discretion of the court.

As such, the two most fundamental powers of prosecutors in the American criminal justice system—the vast discretion in prosecution and the decision to drop or reduce charges in plea bargaining—are heavily restricted by Taiwan’s courts and the Ministry of Justice. Taiwan’s prosecutors are considered components of both a highly centralized prosecutorial system, in which the authority is the Ministry of Justice,<sup>70</sup> and of the criminal justice

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* art. 455-2, para. 1 (“Except for those who have committed an offense which is punishable for sentence of capital punishment, life imprisonment, sentence more than three years, or is adjudicated by the court of appeal as the court of first instance, once a case has been prosecuted by a prosecutor or applied for a summary judgment, after consulting with the victim’s opinion *the prosecutor may*, before the close of oral arguments in the court of first instance or before the summary judgment, *act on his/her own discretion or upon requests by the defendant, his/her agent or attorney, which has been approved by the court, to negotiate the following items outside the trial procedure . . .*”) (emphasis added).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* art. 455-4. (There are seven circumstances provided by art. 455-4, para. 1, under which the court “may not pronounce a bargaining judgement”:

“1. Where the agreement is withdrawn or where requests for bargaining is revoked pursuant Paragraph 2 of the preceding article;

2. Where the bargain was not made out of defendant’s free will;

3. *Where the bargaining agreement is obviously inappropriate or unfair;*

4. Where defendant’s offence may not be subject to a bargaining judgment pursuant to Paragraph 1 of Article 455-2;

5. Where facts established by the court are different from facts agreed in the bargaining process;

6. Where a defendant commits other counts of offense which were arose by the same act in trial with heavier punishments;

7. Where the court deems proper to pronounce punishment remitted, exemption from prosecution, or case dismissed.” (emphasis added).

<sup>70</sup> See Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625, 654–59 (2005) (discussing the problems of a decentralized American prosecutorial system and calling for a directive principle to guide the exercise of discretion by American prosecutors).



system, where the court substantially restrains the power of the prosecutor. In their daily practice, prosecutors have to carry out the policy goals of the Ministry of Justice and collaborate with the court to achieve the common objectives of the court system. Taiwan's prosecutors are more like a significant piece of the entire picture of the criminal justice system than like a fragmented authority.

### C. Professionalism

#### 1. Frequent Appellate Court Reviews

In Feeley's opinion, American courts are disorganized because they are dominated by professionalism, in which "professional norms foster independence of judgment and autonomy."<sup>71</sup> In addition, Feeley also argues that American criminal courts are only superficially organized into a hierarchical, bureaucratic-like structure. In fact, while appellate courts in the United States are able to supervise the quality of work in lower courts, this supervision is passive, expensive, and used infrequently.<sup>72</sup>

Taiwan's criminal court system has more frequent higher court supervision than the American system. First, both defendants and prosecutors have the right to appeal; the protection of double jeopardy in Taiwan does not prohibit the prosecutor from appealing a not-guilty decision.<sup>73</sup> That is, the appellate courts may take separate appeals from both the prosecutor and the defendant. In so doing, appellate courts have more chances to review the decisions of lower courts. Second, the right to appeal to the Highest Court for a second review is almost absolute. That is, other than some relatively minor offenses, such as offenses with a maximum punishment of no more than three years, all other criminal cases are allowed by law to be appealed to the Highest Court.<sup>74</sup> Therefore, decisions of district courts are not the only decisions that are reviewed. Decisions of High Courts are frequently reviewed and supervised by the Highest Court. Third, reversal rates for appeals are not low.<sup>75</sup> From 2010 to 2015, the reversal rates of district court decisions was

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<sup>71</sup> See FEELEY, *supra* note 1, at 15.

<sup>72</sup> *Id.*

<sup>73</sup> CRIM. PROC. CODE art. 344 ("A party who disagrees with the judgment of a lower court may appeal to the appellate court." Thus, both defendants and prosecutors can appeal to the appellate court).

<sup>74</sup> *Id.* arts. 375–76.

<sup>75</sup> *Cf. Just the Facts: U.S. Courts of Appeals*, U.S. CTS. (Dec. 20, 2016), [http://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals#\\_table2](http://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals#_table2) (from 2011–2015, the United States

27% on average, whereas the reversal rates of High Court decisions was 12%.<sup>76</sup> In summary, compared with the American criminal court system where prosecutors cannot appeal a not-guilty decision and usually only one-time appellate review from a higher court is allowed,<sup>77</sup> Taiwan's criminal court system is designed to permit higher chances of supervision from the higher courts. Thus, in Taiwan's system, while deference to professional judgment is still the norm, the professionalism is relatively restricted and subject to more supervision.

## 2. Pan Li and Jue Yi

In addition, Taiwan's legal precedents ("Pan li") and resolutions ("Jue yi") are mechanisms that contribute to the compromise of professionalism, as these limit the discretionary power of judges in deciding cases. Unlike in the common law system, court decisions on individual cases are not considered to be a source of law in Taiwan.<sup>78</sup> Nor does a previous court decision have legal effect in future cases. However, Taiwan's Pan li system has legal effect similar to precedent in the American system, but works in a more bureaucratic way.

In order to unify the legal opinions of courts, Taiwan's Highest Court holds judicial conferences to select past decisions of the Highest Court to become Pan li, namely "precedents of courts."<sup>79</sup> These judicial conferences are composed of the Highest Court judges, and are usually held ten to twenty times per year. Pan li does not include the entire text of past court decisions; instead, short paragraphs are included that refer to crucial legal principles excerpted from the original court decisions. In this way, Pan li can be applied to future court cases with distinct facts with similar legal principles.

Other than Pan li, the judicial conference also frequently makes Jue yi, which literally means the resolution of the judicial conference. Jue yi is a clear-cut answer to specific legal issues faced by courts. The lower courts

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Courts of Appeals reverse rates (appeals resulted in reversals of lower court decisions) for criminal cases were less than seven percent).

<sup>76</sup> See JUDICIAL YUAN (司法院), 司法統計年報 [JUDICIAL STATISTICS YEARBOOK] (2010–2015), <http://www.judicial.gov.tw/juds/goa/goa02.htm>.

<sup>77</sup> ALLEN ET AL., *supra* note 55, at 1565–66.

<sup>78</sup> WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 39–40 (4th ed. 2006).

<sup>79</sup> FA YUAN ZU ZHI FA (法院組織法) [COURT ORGANIZATION ACT] art. 57 (about the process of setting up or changing a Pan li).

may periodically have different legal opinions on the same issues, and they can submit their opinions or inquiries to the judicial conference of the Highest Court. In the judicial conference, all the opinions are listed for the reference of conference members, and the members decide by vote which opinion is more appropriate for solving the issue. Compared with Pan li, which is an excerpt of abstract legal principles from past court decisions, Jue yi is a more specific and concrete process targeting the practical issues currently before judges.

Both Pan li and Jue yi have a legal effect that is deemed equivalent to legal regulations.<sup>80</sup> By restricting the professional judgment of criminal courts, enhancing the consistency between court decisions, and creating a clearer standard for higher courts to review decisions of lower courts, Pan li and Jue yi have shaped Taiwan's criminal courts into an organization which has more apparent bureaucratic features than those of the American courts.

In summary, where Feeley concluded that the American criminal court has become fragmented "in its organization, its operations, and its goals," through its theoretical bases in the adversary process, due process, and professionalism, Taiwan's criminal justice system reveals a different structure.<sup>81</sup> However, when Taiwan's criminal justice system is viewed through the same three theoretical bases, a different structure emerges. Through the operation of the "reformed adversary system," Taiwan's criminal court emphasizes cooperation more than contest. Theoretically, the court, the prosecutor, and the defense attorney are aligned to seek several common objectives, such as maintenance of justice and discovery of the truth. Furthermore, despite the deference to professional judgment, the discretionary power of prosecutors is checked by the court, as well as by a highly centralized prosecutorial system in which the Ministry of Justice has the highest authority. Taiwan's criminal courts are also subject to more frequent appellate reviews and general instructional opinions like Pan li or Jue yi from the Highest Court. Hence, compared to its American counterpart, Taiwan's criminal court system is less fragmented and all of the agencies therein are set up to pursue certain

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<sup>80</sup> J.Y. Interpretation No. 374 (司法院大法官釋字第 374 號解釋) (Const. Ct. Mar. 17, 1995), [http://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=374](http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=374) ("Due to the fact that [Pan li and Jue yi] are made according to law (See Article 78 of the Law of Court Organization and Article 32 of the Regulations Governing the Operational Procedures of the [Highest] Court) and represent the legal opinions of the [Highest] Court, they shall be deemed equivalent to the regulations mentioned above if they are invoked by judges in judgments, and thus subject to review by this Council once the people make petition for interpretation.").

<sup>81</sup> See FEELEY, *supra* note 1, at 9.

common goals. In this sense, Taiwan's criminal courts seem to avoid the potential hindrance to court reform that results from the fragmented nature of the adversary system.<sup>82</sup>

Despite its lack of fragmentation, over the last two decades Taiwan's criminal court system has endured severe criticism and a crisis of confidence. Ironically, the problem of distrust that Taiwan's courts are facing quite possibly resulted from those mechanisms that contribute to Taiwan's not-fragmented court system. The next part of this Article will discuss the crisis of confidence, analyze the causes, and examine a proposed solution to the problem: lay participation.

#### IV. CRISIS OF CONFIDENCE AND COURT REFORM IN TAIWAN

##### A. "White Rose Movement"

Due to several judicial corruption scandals and a few widely criticized court decisions, Taiwan's criminal court system faces its most severe crisis of confidence since the reformed adversarial system was implemented in 2002.<sup>83</sup> In 2010, three senior High Court judges and one prosecutor were charged with corruption. The judges were accused of taking bribes to fix the outcome of a criminal case, where a former legislator was on trial for corruption.<sup>84</sup> Unfortunately, this scandal confirmed the long held rumors of corruption among Taiwan's judiciary and led to the resignations of both the president of the Judicial Yuan (Taiwan's highest authority) and the head of the High Court.<sup>85</sup> These scandals brought public outrage to a boiling point.

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<sup>82</sup> *Id.* at 31 ("First, the fragmentation and seeming inefficiencies of the courts are inherent in the very theory and structure of the adversary process and are not simply the result of aberration, overload, or inadequate personnel."); see also PAUL B. WICE, COURT REFORM AND JUDICIAL LEADERSHIP: JUDGE GEORGE NICOLA AND THE NEW JERSEY JUSTICE SYSTEM 18–20 (1995) ("The first problem grows out of the adversarial nature of the American legal system and has resulted in its highly fragmented structure.").

<sup>83</sup> Wendy Zeldin, *Global Legal Monitor Taiwan: Law on Removal of Judges Adopted, But Dinosaur Judges Might Not Become Extinct*, LAW LIBRARY OF CONGRESS: GLOBAL LEGAL MONITOR (July 6, 2011), <http://www.loc.gov/law/foreign-news/article/taiwan-law-on-removal-of-judges-adopted-but-dinosaur-judges-might-not-become-extinct/> ("The [Judges] Act's passage comes in the midst of public concern over a series of judgments that fell short of the expected outcomes and after a number of cases of judicial corruption, particularly in connection with High Court judges.").

<sup>84</sup> Cindy Sui, *Taiwan Judges on Corruption Charges*, BBC NEWS, Nov. 8, 2010, <http://www.bbc.com/news/world-asia-pacific-11711199> (three judges were sentenced to imprisonment of up to 20 years for corruption in 2013); see *Taiwan Judges Sentenced for Corruption*, TAIWAN NEWS, Oct. 17, 2013, <http://www.taiwannews.com.tw/en/news/2324367>.

<sup>85</sup> Ko Shu-ling, *Ma Accepts Lai In-jaw's Resignation*, TAIPEI TIMES, July 19, 2010, <http://www.taipeitimes.com/News/front/archives/2010/07/19/2003478271>.

Moreover, in 2010, several controversial court decisions on child sexual assault cases were profoundly criticized for excessive leniency. These cases include decisions made by every level of court, including the district courts, the High Courts, and the Highest Court.<sup>86</sup> For example, in a child rape case, the Highest Court found that the prosecutor failed to prove the accused had been “acting against the will” of the victim, who was a six-year-old girl.<sup>87</sup> In another case, the victim of a sexual molestation was a two-year-old boy. The offender was sentenced to nine months in prison, but ultimately did not serve any time in prison; his punishment was suspended and replaced with probation for two years.<sup>88</sup> In addition to the victims’ families, the public was outraged by these court decisions. The public and media harshly attacked the court for asking for proof of a six-year-old girl’s expression of unwillingness to have intercourse with an adult.<sup>89</sup> Taiwan’s judges were broadly criticized for living in an ivory tower and being out of touch with public concerns.<sup>90</sup>

The outrage of the public, resulting from both corruption scandals and controversial court decisions, led to social movements seeking judicial reform. More than 300,000 people signed a petition requesting to remove “unqualified” judges.<sup>91</sup> Mass dissatisfaction with criminal courts also sparked several large-scale demonstrations. Among them, the “White Rose Movement,” held on September 25, 2010, was the largest protest march in more than a decade. Fifteen thousand people participated in the protest march, asking for amendment of the law and removal of unqualified judges.<sup>92</sup>

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<sup>86</sup> See Xu Wei-qun, *Cong bai mei gui yun dong tan si fa gai ge* (從白玫瑰運動談司法改革) [Discussion on Judicial Reform from the Perspective of “White Rose Movement”], 15(4) TAIWAN B.J. 15 (2011) (discussing why the White Rose Movement could force the judiciary to reform).

<sup>87</sup> Zuigao Fayuan 99 Nien Du Tai Shang Tzu Ti 4894 Hao Pan Jue (最高法院 99 年度台上字第 4894 號判決) [The Highest Court 2010 Tai Appeal No. 4894 Decision]. A further analysis of this case and an introduction to the elements of rape in Taiwan’s Criminal Code can be found *infa* Section V.B.a.

<sup>88</sup> The case number is not disclosed to the public. See Xu, *supra* note 86.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Taiwan News Quick Take*, TAIPEI TIMES, Sept. 25, 2010, <http://www.taipetimes.com/News/taiwan/archives/2010/09/25/2003483723> (“After having collected more than 300,000 signatures, several organizations behind the “White Rose Movement” will stage a demonstration on Ketagalan Boulevard in front of the Presidential Office starting at 6pm tonight to voice their demands to the government. The White Rose Movement calls for the elimination of judges they consider unsuitable and for a revision to law to provide better protection against sexual assault for children and people with disabilities. The move was first initiated by Internet users who were upset about a court verdict last month that gave a man accused of molesting a six-year-old girl a three-year prison sentence, based on the explanation that the girl did not explicitly express objection.”).

<sup>92</sup> *Bao hu hai zi gan zou lan fa guan—bai mei gui yun dong kong su qing pan se lang* (保護孩子趕走爛法官—白玫瑰運動控訴輕判色狼) [Protect Children, Remove Unqualified Judges—“White Rose Movement” Accusing Court for Leniently Treating Satyrs], PING GUO RI BAO (蘋果日報) [APPLE DAILY],

People also started to lash out at judges, calling them “dinosaur judges.”<sup>93</sup> Allegedly, there are two reasons that judges were called “dinosaurs.” First, people criticized these judges for having antiquated thoughts from the time of the dinosaurs. Second, people analogized judges to dinosaurs, which have immense power but act slowly.<sup>94</sup> The public also started using another degrading title: “baby judges.” This term is used to refer to young, unqualified judges who lack the social experiences necessary to make a sympathetic and satisfying decision.<sup>95</sup>

The “White Rose Movement” profoundly contributed to the general consensus of society that Taiwan’s courts urgently needed reform.<sup>96</sup> In response, the judicial authority initiated multiple reforms for criminal procedures.<sup>97</sup> Nonetheless, these reforms, even when implemented, did not appear to solve the problem of public distrust. The figure below shows the serious crisis of confidence that Taiwan’s courts face.<sup>98</sup> The trend lines indicate that the majority of people in Taiwan do not trust judges and prosecutors, especially the former, and that this distrust is growing.

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Sept. 26, 2010, <http://www.appledaily.com.tw/appledaily/article/headline/20100926/32841220>.

<sup>93</sup> Liu Kong Zhong, *Ping heng le kong long yu bai mei gui* (平衡了恐龍與白玫瑰) [*Balance Between “Dinosaurs” and “White Rose”*], ZHONG GUO SHI BAO (中國時報) [CHINA TIMES], July 28, 2011.

<sup>94</sup> Ye Jun-rong, *Kong long fa guan yu kong long fa xue* (恐龍法官與恐龍法學) [*“Dinosaur” Judges and “Dinosaur” Jurisprudence*], 164 TAIWAN L.J., 41–43 (2010).

<sup>95</sup> Lin Meng-huang, *Fa guan jiao se fa guan xuan ren yu fa lü ren lun li—cong wa wa fa guan nai zui fa guan zhi yi sheng lang tan qi* (法官角色、法官選任與法律人倫理—從娃娃法官、奶嘴法官質疑聲浪談起) [*Role of Judges, Selection of Judges, and Legal Ethics—Discussion from the Inquiries about “Baby Judges” and “Pacifier Judges”*], 277 TAIWAN L.J. 27, 27–41 (2010).

<sup>96</sup> Xu, *supra* note 86.

<sup>97</sup> After the White Rose Movement, the CCP was amended ten times, and sixty-six articles were amended or added.

<sup>98</sup> 國立中正大學被害調查 [NATIONAL CHUNG CHENG UNIVERSITY CRIME RESEARCH CENTER, ANNUAL NATIONWIDE SURVEY ON VICTIMS AND EXTENT OF SATISFACTION ON GOVERNMENT PERFORMANCE, 2008–2015], <http://deptcrcc.ccu.edu.tw/examine/showExamineList> (last visited Apr. 15, 2017) [hereinafter NATIONAL CHUNG CHENG UNIVERSITY CRIME RESEARCH CENTER].

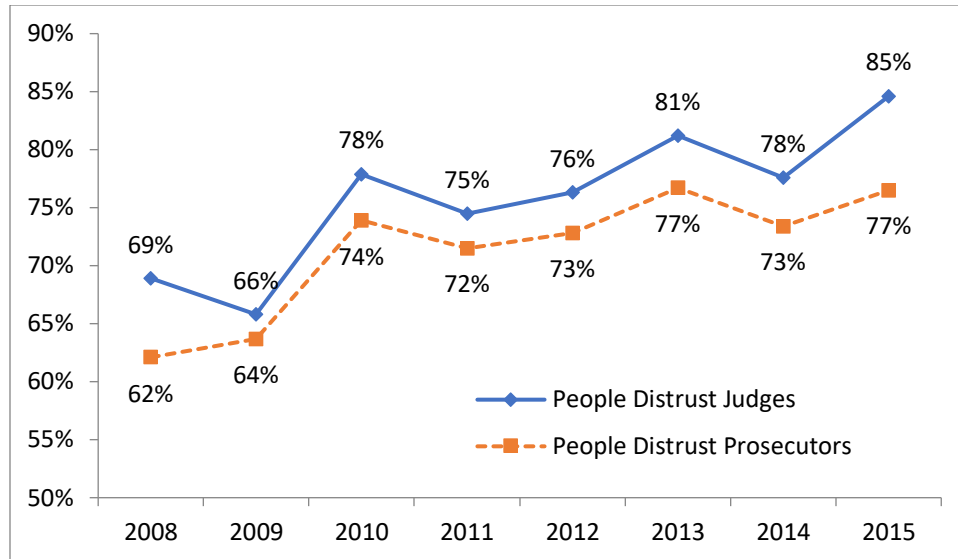


Figure I: Taiwan's People Distrust in Judges' Fairness<sup>99</sup>

Considering the fact that the efforts made by the judicial system were attempting to improve people's confidence in criminal courts, these results demonstrate that the efforts appear to have been made in vain. However, among all the reforms proposed, there is one major reform proposal which has never been passed into law, but has been vigorously and relentlessly supported by the judicial authority: lay participation.

#### B. Lay Participation Proposal of "Guan Shen Zhi"

According to the Judicial Yuan, lay participation is not foreign to Taiwan's legal tradition.<sup>100</sup> From 1987 to 2007, the Judicial Yuan drafted three versions of lay participation proposals, but none were successfully passed into law.<sup>101</sup> In January 2011, three months after the "White Rose Movement," the new president of the Judicial Yuan assumed office and immediately started promoting an innovative version of lay participation, "Guan shen zhi."

The "Guan shen zhi" is different from all the previous proposed versions of lay participation, which referred to either Germany or Japan, and

<sup>99</sup> *Id.*

<sup>100</sup> *Si fa yuan guo min can yu xing shi shen pan zhi tui dong ji xuan dao, guo min san yi zing shi shen pan wang zhan* (司法院國民參與刑事審判之推動及宣導, 國民參與刑事審判網站) [*The Promotion and Announcement of the Judicial Yuan for Lay Participation in Criminal Trials*], <http://www.judicial.gov.tw/LayParticipation/intro08.asp> (last visited Apr. 20, 2017) [hereinafter *Lay Participation in Criminal Trials*].

<sup>101</sup> *Id.*

can be considered a completely new innovation in lay participation.<sup>102</sup> “Guan shen zhi” literally means “a system where trials can be observed.”<sup>103</sup> According to the rules drafted and proposed by the Judicial Yuan in January 2012,<sup>104</sup> laymen are allowed to sit with judges through the trial, to ask questions about evidence investigation, and to express opinions while judges make decisions.<sup>105</sup> However, they are not lay “judges.” In “Guan shen zhi,” laymen are not allowed to *vote* on court decisions,<sup>106</sup> nor are professional judges limited by the opinions of laymen while making court decisions.<sup>107</sup> From the close timing of the social movement and the initiation of innovative reform, the intention of the judicial authority for pushing the “Guan shen zhi” is clear.

Taiwan’s Judicial Yuan had firmly upheld “Guan shen zhi” from 2011 to 2016. Despite the strong support from the authority, the innovation had not been passed into law. In November 2016, the president and vice president of the Judicial Yuan supporting “Guan shen zhi” stepped down. The new and current president of the Judicial Yuan declared that promotion of lay participation will be one of his major judicial reform objectives, but he will promote another type of lay participation, not “Guan shen zhi.”<sup>108</sup> At the same time, the president also said that the National Affairs Conference on Judicial Reform (“the Judicial Reform Conference” or “the Conference”) would

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<sup>102</sup> The Judicial Yuan officially translated the system of “Guan shen zhi” (觀審制) as the “Advisory Jury System.” See Proposal, Judicial Yuan (司法院), Statute on the Pilot Implementation of the Advisory Jury System in Trial (Draft), <http://www.judicial.gov.tw/LayParticipation/law.asp> (last visited Apr. 20, 2017) [hereinafter Taiwan’s “Guan shen zhi” Proposal of Judicial Yuan].

<sup>103</sup> Therefore, a scholar translated “Guan shen zhi” as “Lay Observer System.” See Yi- Lou, Establishing a Suitable Lay Participation System for the Taiwanese Criminal Justice System 201 (Nov. 2014) (unpublished S.J.D. dissertation, Indiana University Maurer School of Law) (on file with Indiana University Maurer School of Law Library system).

<sup>104</sup> Taiwan’s “Guan shen zhi” Proposal of Judicial Yuan, *supra* note 102.

<sup>105</sup> *Id.* arts. 8, 52, 56.

<sup>106</sup> For lay participation in Japan, see Setsuo Miyazawa, *Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives*, 42 INT’L J.L. CRIME & JUST. 71 (2014); for lay participation in South Korea, see Jae-Hyup Lee, *Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea*, 4 E. ASIA L. REV. 177 (2009).

<sup>107</sup> Taiwan’s “Guan shen zhi” Proposal of Judicial Yuan, *supra* note 102, art. 59, para. 1 (“The judges’ deliberation on the finding of facts, application of laws and the sentence to be imposed shall be decided by the majority and need not be bound by the Advisory Jurors’ opinions.”).

<sup>108</sup> Xu Zong-li (許宗力), 對司法改革與大法官再任問題的看法 [Thoughts on Judiciary Reforms and Problems With Serving As the Grand Justice Again], 新頭殼 [NEWTALK], Sept. 1, 2016, <http://newtalk.tw/news/view/2016-09-01/76838>.



decide the new system of lay participation. The Conference concluded in August 2017.<sup>109</sup>

### C. *National Affairs Conference on Judicial Reform*

The Conference, which was launched by Taiwan's President Tsai In-Wen in 2016,<sup>110</sup> targeted "building a judicial system belonging to people, responding to the expectations of the people, and being trusted by people."<sup>111</sup> The Conference was composed of five divisions and scheduled to discuss twenty-one comprehensive issues related to judicial reform.<sup>112</sup> The committee members include the president of the Judicial Yuan, a former justice of the Constitutional Court, the Minister of Justice, the head of Taiwan's Highest Court, judges, prosecutors, lawyers, NGO representatives, journalists, medical experts, writers, ex-convicts, a victim's family member, a correctional officer, and scholars in a range of topics, including law, economics, sociology, social work, philosophy, psychology, public health, and journalism.<sup>113</sup> According to the directions for the Conference, more than half of the 101 committee members are laymen, who are not involved with the legal profession.<sup>114</sup> It is clear from the diverse backgrounds and composition of its members that the Judicial Reform Conference intends to collect thoughts from both legal and non-legal perspectives so that the proposed reform will respond to the expectations of the people.<sup>115</sup> The consensus reached in the Conference will be passed on to Taiwan's government and the Judicial Yuan for reference when making future judicial policies. As for lay participation, the Conference has conducted several

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<sup>109</sup> ZONG TONG FU SI FA GAIGE GUO SHI HUI YI (總統府司法改革國是會議) [THE NAT'L AFFAIRS CONF. ON JUDICIAL REFORM, OFF. OF THE PRESIDENT], <https://justice.president.gov.tw/> (last visited Apr. 20, 2017) [hereinafter JUDICIAL REFORM CONFERENCE HOMEPAGE].

<sup>110</sup> *President Tsai Launches Judicial Reform in Taiwan*, TAIWAN TODAY, July 12, 2016, <http://taiwantoday.tw/news.php?unit=2,6,10,15,18&post=3923>.

<sup>111</sup> *About the National Affairs Conference on Judicial Reform*, *supra* note 7.

<sup>112</sup> *Zong tong fu si fa gaige guo shi hui yi chou bei yuan hui di si ci chou bei wei yuan hui yi* (「總統府司法改革國是會議籌備委員會」第四次籌備委員會議) [*The Fourth Preparation Committee for the Presidential National Affairs Conference on Judicial Reform*], OFFICIAL WEBSITE JUD. REFORM CONF., <https://justice.president.gov.tw/meeting/23> (last visited Apr. 20, 2017).

<sup>113</sup> 司改國是會議 分組委員名單曝光 [*The Member List of the Judicial Reform Conference*], 自由時報 [LIBERTY TIMES], Feb. 17, 2017, <http://news.ltn.com.tw/news/politics/breakingnews/1978579>.

<sup>114</sup> *Id.*

<sup>115</sup> *See About the National Affairs Conference on Judicial Reform*, *supra* note 7.

discussions about the versions possibly being adopted, but has not yet reached a consensus.<sup>116</sup>

## V. ANALYSIS: IS LAY PARTICIPATION THE REMEDY?

Lay participation is widely considered the definite court reform and is therefore worth preliminary analysis. In his book “*Court Reform on Trial: Why Simple Solutions Fail*,” Feeley delineates five stages of innovative court reform—*diagnosis*, *initiation*, *implementation*, *routinization*, and *evaluation*—and indicates each stage has its individual pitfalls.<sup>117</sup> Briefly, *diagnosis* (or *conception*) is the process of identifying problems and considering solutions. *Initiation* adds new functions or alters existing practices. *Implementation* translates abstract goals into practical practices. *Routinization* indicates how an innovation performs over a longer period and involves the persistent support from an institution for the innovation. *Evaluation* is the assessment of new programs, including the assessment of their experimental stages (*diagnosis*, *initiation*, and *implementation*) as well as the routine periods (*routinization*).<sup>118</sup> Borrowing this analytical structure, this section analyzes the first three stages of Taiwan’s lay participation proposal to probe into the nature of this innovation in court reform. Feeley also argues, “[f]ocusing on the shortcomings of a single practice without placing it in historical and functional context usually leads to gross distortion and exaggeration.”<sup>119</sup> To avoid gross distortion and exaggeration, and to further develop an understanding of lay participation as a recipe for success, this section analyzes this phenomenon in a historical and functional context.

### A. Analysis Based on Stages of Innovation

#### 1. Diagnosis

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<sup>116</sup> The manuscript of this Article was completed on May 4, 2017, and the last day for division discussion of the Conference was May 21, 2017. Thus, it is hard to tell if lay participation will become part of the Conference conclusions. See JUDICIAL REFORM CONFERENCE HOMEPAGE, *supra* note 109 (containing the conference schedule).

<sup>117</sup> See FEELEY, *supra* note 1, at 35–37.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at xiii.

*Diagnosis* is the first and most crucial step of innovation. As Feeley stated, *diagnosis* is “the process of identifying problems and considering solutions.”<sup>120</sup> Further, “[d]ifferent perspectives lead people to identify different problems and suggests different remedies.”<sup>121</sup> Incorrect or inaccurate diagnosis, therefore, may lead to misidentification of the nature of problems and produce flawed remedies for these problems. Taiwan’s court reforms may be an example of inaccurate diagnosis. Faced with the immense crisis of confidence in the courts, Taiwan’s judicial authority has tried many approaches to tackling the problem, but all its attempts from 2010 to 2016 failed to win back the public trust. As a result, the judicial reform launched in 2016 diagnosed the problem as the generalized disappointment with the judiciary as a whole.<sup>122</sup>

However, it is questionable whether this diagnosis is accurate or correct. For starters, this diagnosis is not clear enough to tell us why the disappointment has been so generalized and undiminished in the last seven years. The origin of the disappointment and distrust was the corruption scandal of judges and a few controversial court decisions, as discussed earlier. Nevertheless, even after the corrupt judges were sentenced, and the CCP was heavily amended—ten times in seven years—the situation has not improved. Instead, the annual nationwide survey of public opinions shows that the people appear to distrust Taiwan’s court system even more as time goes by.<sup>123</sup>

The simple diagnosis of “generalized disappointment with the judiciary,”<sup>124</sup> therefore, does not probe into the causes of the long-lasting problem of distrust in Taiwan. The authority has not further considered the mechanisms that keep enlarging the gap between the judiciary and the people after the “White Rose Movement.” Nor has the authority clarified if expectations of the people about what the court can do are reasonable. Instead, to resolve this generalized problem, the government and the judicial authority conceived of an equally generalized idea of “responding to

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<sup>120</sup> *Id.* at 35–36.

<sup>121</sup> *Id.* at 36.

<sup>122</sup> *Zong tong fu si fa gai ge guo shi hui yi chou bei wei yuan hui di yi ci chou bei wei yuan hui yi chou bei wei yuan fa yan jiyao* (「總統府司法改革國是會議籌備委員會」第一次籌備委員會籌備委員發言紀要) [*The First Preparation Committee for the Presidential National Affairs Conference on Judicial Reform*], OFFICIAL WEBSITE JUD. REFORM CONF., <https://justice.president.gov.tw/meeting/4> (last visited Apr. 10, 2017).

<sup>123</sup> See NATIONAL CHUNG CHENG UNIVERSITY CRIME RESEARCH CENTER, *supra* note 98, Figure I (“Taiwan’s People Distrust in Judges’ Fairness”).

<sup>124</sup> *The First Preparation Committee for the Presidential National Affairs Conference on Judicial Reform*, *supra* note 122.

expectations of the people.”<sup>125</sup> Nevertheless, responding to the expectations of the people is more appropriate as a political slogan, as opposed to as a method for taking actions to address specific problems. This unclear and non-directive policy goal cannot substantively contribute to court reform and will create inevitable conflicts between reform proposals, as this Article will discuss in Part VI.

It is also noteworthy that the new president of the Judicial Yuan seemed to change his opinions after Taiwan’s legislators approved his nomination. On September 1, 2016, before his nomination was confirmed, the then-presidential nominee addressed four major issues of court reform, the first of which was to “clarify the causes of the public distrust.”<sup>126</sup> At this time, the then-nominee stated that “the reason to launch the National Affairs Conference on Judicial Reform is that people distrust the judicial system. Therefore, we are thinking about how to tackle this problem. The preeminent issue is to clarify the causes of the public distrust of the judicial system.”<sup>127</sup>

Interestingly, on October 25, 2016, when the nomination was successfully confirmed, the statement of the president-to-be did not mention the need to “clarify the causes of the public distrust.” Instead, the president-to-be articulated six concrete reform proposals: insisting on the core values of the judiciary, promoting trials by specialized courts, reinforcing the functions of oral argument in court, preventing contradictory court decisions, reducing the workload of judges to a reasonable range, and establishing the institution of the Constitutional complaint.<sup>128</sup> The change in his opinions is intriguing. It could mean the president-to-be already “clarified the causes of public distrust” during his nomination process so that he could articulate the concrete proposals. On the other hand, it could also suggest that the diagnosis of problems was “skipped,” because rapid, clear, and definite solutions to the problems were expected of the new president.<sup>129</sup>

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<sup>125</sup> *About the National Affairs Conference on Judicial Reform*, *supra* note 7.

<sup>126</sup> *Guan Wu-yuan, Tan si gai li nian xu zong li tui dong san shen zhi jia qiang fa zhi jiao yu* (談司改理念 許宗力：推動參審制 加強法治教育) [*Talking About Judicial Reform Ideas, Nominee for President of the Judicial Yuan Xu Zong-li Expects to Promote Lay Participation and Improve Law-Related Education*], LIAN HE BAO (聯合報) [UNITED NEWS], Sept. 1, 2016, <https://money.udn.com/money/story/5641/1933179>.

<sup>127</sup> Xu Zong-li, *supra* note 108.

<sup>128</sup> Press Release, Xu Zong-li (許宗力), Yuan zhang de si fa gai ge zhu zhang yi (院長的司法改革主張 (一)) [*The View of The President of the Judicial Yuan on Judicial Reform, Part 1*], <http://www.judicial.gov.tw/headmaster/judReform001.asp> (last visited Apr. 15, 2017).

<sup>129</sup> *Id.* (statement of Xu Zong-li) (“I think, we don’t have much time for . . . an empty talk in the ivory tower.”); *see also* FEELEY, *supra* note 1, at 192 (“It is tempting for reformers to cut through complexities,

## 2. Initiation and Implementation

Feeley precisely describes the tension and conflicts between *initiation* and *implementation*: “a strategy that maximizes the likelihood of successful initiation—bold language, simplification, and expansive promises—is likely a strategy that undercuts implementation.”<sup>130</sup> He also argues, “[p]roponents of reform have little incentive to evaluate; they *know* their ideas are good. For many, success is defined by the ability to adopt, not implement, a new idea.”<sup>131</sup>

Taiwan’s Judicial Reform Conference seems to reinforce the tension between initiators and implementers. One of the defining characters of the Judicial Reform Conference is that half of the conference members are lay people, who are not involved with the legal profession. While it is a good idea to enroll outsiders to initiate the change,<sup>132</sup> it is also true that the difficulty in the stage of *implementation* is less perceivable to people unfamiliar with the practice of the system. A member of the Judicial Reform Conference who is also a law professor described the Conference as “making a hundred wishes,” referencing the disorder and fragmented issues discussed in the Conference.<sup>133</sup>

### B. Analysis Based on Historical and Functional Perspectives

Lay participation has been strongly supported by Taiwan’s judicial authority since 2011. It has never been successfully passed into law, but the Judicial Yuan stopped advocating for lay participation in different versions as a major court reform. From 2011 to 2016, the Judicial Yuan had relentlessly pushed the “Guan shen zhi” version of lay participation. Although the attempt failed, and the supportive president and vice president of the Judicial Yuan both stepped down, the successor still embraces the idea of lay participation. In the Judicial Reform Conference, committee members deemed lay participation as “the most important issue of all.”<sup>134</sup> It is also noteworthy that

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point out enemies, and offer bold strategies . . . But these very strategies that facilitate innovation undercut implementation.”).

<sup>130</sup> See FEELEY, *supra* note 1, at 36.

<sup>131</sup> *Id.* at 202 (emphasis added).

<sup>132</sup> *Id.* at 196–97.

<sup>133</sup> 司改放天燈，小心燎原難收拾 [Treating Judicial Reform as Flying Lanterns (Making Wishes Without Considering the Price) Can Be A Disaster], 聯合報 [UNITED NEWS], Apr. 17, 2017, <https://udn.com/news/story/7338/2407455>.

<sup>134</sup> Transcript, 第四分組第一次會議 [The First Division IV Judicial Reform Conference],

<http://justice.sayit.mysociety.org/%E7%B8%BD%E7%B5%B1%E5%BA%9C%E5%8F%B8%E6%B3%95%E6%94%B9%E9%9D%A9%E5%9C%8B%E6%98%AF%E6%9C%83%E8%AD%B0%E7%AC%>

the mainstream discussion about lay participation is not whether Taiwan's court trials should have lay participation, but which kind of lay participation is better for Taiwan. Lay participation has almost become a default reform.<sup>135</sup> Regarding the untiring support and promotion of Taiwan's government and the judicial authority for lay participation, an essential question to ask is: why is lay participation so attractive to legal reformers, especially the judicial authority? This inquiry can be explored in both historical and functional contexts.

### C. *Analysis in the Historical Context*

Historically speaking, the implementation of the reformed adversary system in 2002 is a remote but fundamental cause of the problem of public distrust, which leads to lay participation and other reform proposals. As mentioned in Part II, the reformed adversary system aimed to distinguish between the duties of judges and prosecutors.<sup>136</sup> In so doing, reformers expected to establish an image that judges are fair, impartial, and only responsible for making the final decision in cases using evidence presented by the parties. However, due to their reluctance to wholeheartedly embrace the passive role of judges, the lawmakers chose to keep the essence of the inquisitorial system within the new criminal court system. Thus, judges are still empowered to actively investigate evidence. The rule that judges shall *ex officio* investigate evidence related to justice maintenance and defendants' rights further reinforces judges' involvement and their decisive role in Taiwan's criminal courts.<sup>137</sup> If judges did not actively investigate evidence, and the evidence was considered to be related to justice maintenance or defendants' rights by the appellate court, lower court decisions would be reversed.<sup>138</sup> Few judges wish to run this risk. Yet there is no restriction or punishment provided by the CCP to prohibit judges from investigating "too

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AC%E5%9B%9B%E5%88%86%E7%B5%84/%E7%AC%AC%E5%9B%9B%E5%88%86%E7%B5%84%E7%AC%AC%E4%B8%80%E6%AC%A1%E6%9C%83%E8%AD%B0 [hereinafter Transcript].

<sup>135</sup> Video, 總統府司法改革國是會議第四分組第一次增開會議 [The First Division IV Judicial Reform Conference in the Presidential Palace], 中華民國律師公會全國聯合會、財團法人民間司法改革基金會 [National Federation of Lawyers Association of the R.O.C., Found. for Civil Justice Reform], OFFICIAL WEBSITE JUD. REFORM CONF., <https://justice.president.gov.tw/meeting/27> (last visited Apr. 20, 2017) (discussing whether "Taiwan should implement a jury trial system where all the facts are found by citizens or a system where judges and citizens decide the case together.").

<sup>136</sup> See generally *The Official Website of the Judicial Yuan about the Reformed Adversary System*, *supra* note 14; CRIM. PROC. CODE.

<sup>137</sup> For details, see *supra* Section II.A.

<sup>138</sup> *The Official Website of the Judicial Yuan about the Reformed Adversary System*, *supra* note 14; CRIM. PROC. CODE art. 256.

much” or from considering unimportant evidence. Therefore, lower court judges have incentive to investigate evidence that seems obviously trivial to prevent missing any points that a higher court may later deem important. In addition, many other mechanisms, such as discretionary power over criminal procedure selection, also contribute to the leading role of judges in court, as discussed in Part II. Overall, judges are greatly empowered by the reformed adversary system, as well as by other mechanisms in Taiwan’s criminal procedure, making judges the very incarnation of Taiwan’s justice system.

However, with great power comes even greater responsibility and expectations. The parties, along with society as a whole, naturally expect that judges with such immense power can make decisions that will satisfy everyone, but this is beyond the capacity of the court. For example, for the major child rape case resulting in the “White Rose Movement,” the public and media severely criticized the Highest Court decision, which asked the lower court to re-investigate “whether the offense was against the will of the six-year-old victim.”<sup>139</sup> However, while the public deemed this court decision ridiculous,<sup>140</sup> many legal scholars argued that this decision was legitimate.<sup>141</sup> Scholars argued this court decision was made correctly, following the fundamental principle of “*nullum crimen sine lege*,”<sup>142</sup> which requires that no person should face criminal punishment for doing things that were not criminalized by law. As the Criminal Code requires the offense of rape to be “against the will” of the victim,<sup>143</sup> this element must be investigated before the court makes a decision.<sup>144</sup> That is to say, despite the harsh criticism, the

<sup>139</sup> *Protect Children, Remove Unqualified Judges—“White Rose Movement” Accusing Court for Leniently Treating Satyrs*, *supra* note 92.

<sup>140</sup> *Id.*

<sup>141</sup> See, e.g., Lu Ying-jie (盧映潔), 「意不意願」很重要嗎?評高雄地方法院九十九年訴字第四二二號判決暨最高法院九十九年第七次刑庭決議 [*Does Willingness Matter? Comments on Kaohsiung District Court 2010 suzi No.422 Decision and the Highest Court 2010 the 7th Criminal Conference Jue Yi*], 186 月旦法學雜誌 [TAIWAN L. REV.] 164 (2010); Cai Sheng-wei (蔡聖偉), 論「對幼童性交罪」與「強制性交罪」的關係評最高法院九十九年第七次刑事庭決議 [*Discussion on the Relationship Between “Offense of Sexual Intercourse with Child” and “Offense of Rape” and Comments on the Highest Court 2010 the 7th Criminal Conference Jue Yi*], 8 裁判時報 [COURT CASE TIMES] 65 (2011); Li Jia-wen (李佳玫), 違反罪刑法定的正義 [*The Justice in Violation of the Principle of Nullum Crimen Sine Lege*], 160 台灣法學雜誌 [TAIWAN L.J.] 1 (2010).

<sup>142</sup> WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 875–77 (2012).

<sup>143</sup> 中華民國刑法 [CRIMINAL CODE OF THE REPUBLIC OF CHINA] art. 221, para. 1 (“A person who by threats, violence, intimidation, inducing hypnosis, or other means *against the will* of a male or female and who has sexual intercourse with such person shall be sentenced to imprisonment for not less than three years but not more than ten years.”) (emphasis added) (Taiwan).

<sup>144</sup> CRIM. PROC. CODE art. 301, para. 1 (“If it cannot be proved that an accused has committed an offense or if his act is not punishable, a judgment of ‘Not Guilty’ shall be pronounced.”)

decision of the Highest Court was legitimate. However, the members of the public who were outraged by the Highest Court decision did not accept this reasoning. As a result, in 2011, when Taiwan's president nominated one of the judges presiding over this case for the Justice of Taiwan's Constitutional Court, public opinion from the fallout of the case required the judge to give up her nomination.<sup>145</sup>

This example reveals the gap between the expectations of the people and restrictions on the criminal court as a legal institution. The functions of criminal courts are in fact restricted by social reality and numerous legal rules. Nevertheless, these restrictions are hard for Taiwan's people to perceive because judges seem to have omnipotent power to dictate criminal proceedings. This omnipotent image of judges is probably the last thing that the advocates of the reformed adversary system would like to see. However, in the historical context, it is clear how Taiwan's previous innovation of the reformed adversary system has contributed to this consequence. In a word, the criminal court is often expected to achieve goals beyond its capacity, and judges are deemed accountable for all flaws and failures of the criminal justice system. Under these circumstances, the public's dissatisfaction and distrust of courts and judges is inevitably reinforced. As a consequence, judges are blamed for falling short of expectations and become the target of court reform. In response to the public distrust of judges, lay participation appears to be a simple and intuitive approach to a change in judges' authority.

#### *D. Analysis in the Functional Context*

Functionally speaking, lay participation has most likely been attractive to the public because it seems like the most intuitive and simple solution to the crisis of confidence. According to the Judicial Yuan, the first reason for promoting the "Guan shen zhi" version of lay participation was that it could "increase the transparency of the judiciary and improve the trust of people in

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<sup>144</sup> *President under Fire after Nominating Controversial Judge for Constitutional Court*, FORMOSA NEWS, Apr. 1, 2011, <http://englishnews.ftv.com.tw/read.aspx?sno=5EDF8863357587C6E1D4318BAC920441>.

<sup>145</sup> *Id.*



courts.”<sup>146</sup> Taiwan’s judicial authority and advocates of lay participation generally believe that the deep-seated antipathy against judges is mainly because the public lacks a correct understanding of court functions in practice. If they can “add seats for people” in the courtroom, the advocates of lay participation believe it will improve the transparency and trust in the court and will facilitate a better understanding of the process.<sup>147</sup>

The intention of reformers explains why Taiwan’s judicial authority strongly promoted the “Guan shen zhi” as a system where lay people cannot vote for court decisions. Now that the problem of distrust is diagnosed by the judicial authority as a “lack of understanding of courts and judges,” the solution then can be as simple as making ordinary people sit in the court through the entire proceedings. A widely held belief of the advocates of the “Guan shen zhi” is that in so doing, even without being authorized to make decisions, ordinary people can learn how courts and judges function so that misunderstandings can be clarified. With an enhanced understanding of court proceedings, advocates expect that people will comprehend the meaning of trial, sympathize with court decisions, and recover their confidence in the judicial system.<sup>148</sup> Therefore, even though the former president of the Judicial Yuan failed to pass the “Guan shen zhi” version of lay participation into law, his current successor still expects other patterns of lay participation can help the judicial system win back the trust of people.<sup>149</sup>

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<sup>146</sup> The other two reasons were that “the diverse composition of courts can make court decisions close to the will of people” and “lay participation can work as a means of law-related education to improve the understanding of judicial system.” See *Lay Participation in Criminal Trials*, *supra* note 100.

<sup>147</sup> Lin Jun-yi (林俊益), *Ren min guan shen zhi zhi jian gou yi* (人民觀審制之建構 (一)) [*The Construction of Guan Shen Zhi, Chapter One*], 58 軍法專刊 [MARTIAL L. J.] 23 (2012).

<sup>148</sup> The diagnosis of problems and solutions thereof is based on an idea of “familiarity breeds respect,” the opposite to the familiar folk maxim “familiarity breeds contempt.” There are scholars advocating this idea and believing that the generally so-called “courtwatch” program can foster citizens’ support for the court system by involving citizens in court operations. See, e.g., Candace McCoy & Galma Jahic, *Familiarity Breeds Respect: Organizing and Studying a Courtwatch*, 27 JUST. SYS. J. 61 (2006); However, whether familiarity will breed respect or contempt in Taiwan is an empirical question. It is noteworthy that an empirical study of the public attitudes toward the judicial system in Taiwan in 2011 showed that people who had court experience had even lower trust than those who had not, which is against the assumption that “familiarity breeds respect.” See Huang Kuo-Chang et al. (黃國昌等), *Explaining Public Attitudes toward the Judicial System: The Case of Taiwan*, 1 台灣政治學看刊 [TAIWANESE POL. SCI. REV.] 21 (2017), available at <http://idv.sinica.edu.tw/kongpin/3.pdf>.

<sup>149</sup> Lin He-ming (林河名), *Xu zong li tan si gai ren min san shen ke tao lun* (許談司改：「人民參審可討論」) [*The Nominee for President of the Judicial Yuan Xu Zong-li Talking about Court Reform: A Consideration of Lay Participation*], LIAN HE BAO (聯合報) [UNITED NEWS], Sept. 2, 2016, <https://udn.com/news/story/9939/1935012>.

In addition, the failure of other efforts at regaining the trust of the people is another functional reason that the judicial authority has firmly upheld the idea of lay participation. From 2010 to 2016, except for successfully passing the proposed lay participation of “Guan shen zhi” into law, the judicial authority had tried everything it could to win back the public trust. As for the reform on criminal courts, the Code of Criminal Procedure had been amended ten times, changing 66 articles. The judicial reform also expanded to almost all areas of the judiciary, including reform of civil courts and administrative courts, establishment of the Judicial Evaluation Committee, a change in personnel system, implementation of the Code of Conduct for Judges, and so on.<sup>150</sup> These innovations, unfortunately, did not work to regain the confidence of people in the court system. Since 2010, nationwide surveys show more than 75% of people doubt the fairness and impartiality of judges in making decisions.<sup>151</sup> Indeed, in 2015, the nationwide survey showed that 85% of Taiwan’s people did not trust judges, a historically high number.<sup>152</sup> In 2016, another survey showed that judges were the least trusted profession in Taiwan.<sup>153</sup> In 2017, in a survey about the public impression on Taiwan’s officials, judges were again ranked the least trusted officials in Taiwan.<sup>154</sup> Given that so many other reforms didn’t re-establish the confidence in the court system, lay participation is perhaps the last option available to the judicial authority for regaining trust.

## VI. A FRAGMENTED GOAL OF COURT REFORM

### A. “Responding to Expectations of the People”

From the above analyses, it is clear that lay participation is not a goal in its own right of Taiwan’s court reform. Rather, lay participation is the

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<sup>150</sup> JUDICIAL YUAN (司法院), *Fa guan ren shi gai ge cheng xiao ping gu wei yuan hui* (法官人事改革成效評估委員會) [Judicial Evaluation Committee], <http://www.judicial.gov.tw/revolution/judReform10.asp> (last visited May 1, 2017) (introducing Taiwan’s judicial reform policies implemented from 2011–2016).

<sup>151</sup> NATIONAL CHUNG CHENG UNIVERSITY CRIME RESEARCH CENTER, *supra* note 98.

<sup>152</sup> *Id.*

<sup>153</sup> *Xiong Yi-xi, Bao gao xiao ying zong tong fa guan xin ren du diao che wei si fa gai ge bu neng deng* (報告小英總統：法官信任度吊車尾 司法改革不能等) [Report to President Tsai: Judges Are The Least Trusted Profession. Judicial Reform Can’t Wait], TIAN XIA ZA ZHI (天下雜誌) [COMMONWEALTH MAG.] (May 24, 2016), <http://www.cw.com.tw/article/article.action?id=5076477>.

<sup>154</sup> *Zhong Li-hua, Ren min gong pu hao gan du jing cha di yi fa guan jing pei mo zuo* (人民公僕好感度警察第一 法官敬陪末座) [As for Favorable Impression on Officials, Police Ranked Greatest and Judges Ranked Least], ZI YOU SHI BAO (自由時報) [LIBERTY TIMES], Apr. 24, 2017, <http://news.ltn.com.tw/news/politics/breakingnews/2045776>.

means to a particular objective: responding to the expectations of ordinary people. As articulated in the statement of the National Affairs Conference on Judicial Reform, the objectives of reform are building a judicial system belonging to the people, responding to the expectations of the people, and being trusted by the people.<sup>155</sup> If we read these objectives carefully, we may find that building a judicial system belonging to the people and being trusted by the people are regarded as the *achievements* of a successful reform, rather than as substantive *means* to reform. Conversely, responding to the expectations of the people is the basis for taking action. Responding to the expectations of the people seems to be a concrete goal for legal reform because the expectations of the people are concrete and some of them are seemingly achievable.

In many proposed or implemented court reforms in Taiwan, we can see that responding to the expectations of the people has been taken as the policy goal of Taiwan's court reform. For example, in the first meeting of the preparatory conference for launching the National Affairs Conference on Judicial Reform, Taiwan's President Tsai In-wen delivered an opening speech focusing on the expectations of the people:

I know that Taiwan's people have very high expectation of court reform. People expect that the judiciary can be more impartial. No "dinosaur judges." No "life or death depends on wealth." People also expect the judiciary can be more efficient, so that their normal life won't be affected by the lengthy proceedings.<sup>156</sup>

President Tsai's speech revealed the overall objective of Taiwan's ongoing court reform: responding to the expectations of the people. If responding to the expectations of the people is the core of reform, no wonder lay participation is considered "the most important of all" in the Judicial Reform Conference.<sup>157</sup> After all, lay participation itself is a device designed for incorporating the opinions of ordinary people in court decisions and increasing public trust in the judiciary.<sup>158</sup> That is, by incorporating the

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<sup>155</sup> See *About the National Affairs Conference on Judicial Reform*, *supra* note 7.

<sup>156</sup> See *The First Preparation Committee for the Presidential National Affairs Conference on Judicial Reform*, *supra* note 122.

<sup>157</sup> See Transcript, *supra* note 134.

<sup>158</sup> THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW 244–45 (Oxford Univ. Press ed., 2012). ("Professional judges and state prosecutors, on the other hand, regarded lay participation as justified mainly on the grounds that it reflects the principle of democracy and increased public trust in the administration of justice.").

opinions of lay people in particular cases, court decisions can be deemed, in a sense, the fulfillment of “responding to the expectations of the people.”

### *B. Pitfalls of the Fragmented Goal*

However, is responding to the expectations of the people an appropriate goal of Taiwan’s court reform? It may be quite doubtful. First of all, a policy goal has to be clear and directive; it must be clear enough that everyone involved in implementing it has the same understanding of what it is, and it must be able to direct all involved efforts towards that end. The idea of responding to the expectations of the people, however, is neither clear nor directive. A court system that can respond to the expectations of the people sounds very attractive, but it is almost impossible to define what expectations of the people means in this context. Each person has his or her own likes and dislikes. One person’s meat may be another person’s poison. In any legal contest, when a party wins the case, entirely or partly, the other party loses. Trials are, after all, a zero sum game. If responding to expectations is difficult to achieve in a single case, how can it be achieved in the far more complex context of society as a whole?

Some may argue that the public may share some common expectations, and the meaning of responding to the expectations of the people is simply to meet these common expectations.<sup>159</sup> Some expectations are general. For example, perhaps all people expect an impartial, fair, and speedy trial, a more transparent court, and a court that protects human rights. Nevertheless, even these common goals suffer from their lack of clear definition. Judges may believe they are fair and impartial, but at least one party (more often, both parties) feels otherwise. A court may spend three months finishing the trial of a complex case without unnecessary delay, but the victim and the public may still accuse the court of inertia. Responding to the expectations of the people is actually an abstract notion, which fails to provide a clear definition for what expectations are to be achieved.

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<sup>159</sup> Describing that the public may share common expectations of the judicial system and judicial reform, therefore, has to consider these common expectations. See, e.g., Brian L. Kennedy, *Taiwan’s Criminal-Justice System: Clash of Cultures*, TAIWAN TODAY, Apr. 1, 2003, <http://taiwantoday.tw/news.php?unit=4,29,31,45&post=4135> (“And the public’s expectation is that it is the judge’s duty to sort through the pile of scattered paperwork that constitutes the plaintiff’s case, attempt to make some sense of it, find the ‘truth,’ and write a lengthy judgment. Regardless of whether the public’s expectations are reasonable or not, they are the culturally accepted norm, and any reforms must take those expectations into account.”).

More importantly, expectations of individuals may conflict with each other. For example, a fair and impartial trial may require a complete and detailed investigation of evidence, which takes a lot of time to the detriment of having a speedy trial. A transparent court may be expected to provide as much information as possible to the public, which is at the expense of the privacy of the litigants. All of these values comprising various expectations of the people are important, but none of them is preeminent. When these values conflict with each other, the conflict leads to a compromise of some values, which can give the appearance that the court failed to meet its objective. That is why an appropriate policy goal of court reform must be directive, so that the values with potential conflicts may be decided on the basis of a higher policy objective.

Without a clearly-defined and directive policy objective, the ongoing Judicial Reform Conference may make the balance between crucial values worse, not better. For example, one of the six major issues that the current president of the Judicial Yuan emphasizes regarding court reform is to transform the court into one with greater specialization.<sup>160</sup> According to the president, courts should be specialized on topics, such as food safety, electronic information, environmental protection, architecture, medical treatment, and so on.<sup>161</sup> This reform may be achieved by means of training judges, establishing specialty courts, and introducing experts of diverse specialties into the court system. But how does this reform impact lay participation, which is “the most important of all” of the current court reforms?<sup>162</sup> A specialized court is helpful for solving cases more accurately and professionally, but it can also make the trial more complex and difficult to comprehend for lay judges. Given this conflict, which important value of reform should be comprised? The policy goal of Taiwan’s court reform, responding to the expectations of the people, cannot provide a solution to the value conflicts, because lay participation and more professional courts are both expectations of the people. The question at issue is not which value is more significant than the other, but instead, what policy goal of court reforms must be directive in order to guide a solution to these dilemmas? Unfortunately, responding to the expectations of the people is not up to this task.

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<sup>160</sup> Press Release, Xu Zong-li (許宗力), Yuan zhang de si fa gai ge zhu zhang er (院長的司法改革主張 (二)) [The View of the President of the Judicial Yuan on Judicial Reform, Part 2], <http://www.judicial.gov.tw/headmaster/judReform002.asp> (last visited Apr. 15, 2017).

<sup>161</sup> *Id.*

<sup>162</sup> See Transcript, *supra* note 134.

In summary, responding to the expectations of the people may be a good political slogan, but it is not a suitable policy goal for court reform. When applying a goal that is intrinsically fragmented, it will, at best, cause the effort to be made in vain. At worst, it will have a counterproductive result. All of these efforts towards the fragmented goal of responding to the expectations of the people may very possibly clash with each other and offset the important values of each other.

## VII. CONCLUSION: WHY DO SIMPLE SOLUTIONS FAIL?

Borrowing the subtitle of Feeley's masterpiece "*Court Reform on Trial: Why Simple Solutions Fail*," this section will sum up the thesis by recapping the nature of Taiwan's criminal court system and the feature of its current court reform. Distinct from the fragmented American criminal court, Taiwan's criminal court is a not-fragmented system. With hierarchical control in prosecutorial rulings and central administration of judicial decision-making, Taiwan's court system can be deemed a relatively centralized and bureaucratic organization. In this system, the role of judges is designed to be that of the leading character in resolving all disagreements between parties and conflicts of interest. At the same time, Taiwan's judges, prosecutors, and defense attorneys are obligated to pursue common objectives, including maintaining justice and discovering facts that are critical to the interest of the accused. Since Taiwan's criminal court system is not-fragmented, it seems to be able to avoid the pitfalls inherent in a fragmented justice system like the American system.

However, this not-fragmented court system has faced a serious crisis of confidence. The same mechanisms in criminal procedure that contribute to a not-fragmented court system also result in over-expectations of the people about what courts can do. Due to controversial court decisions and corruption scandals involving judges since 2010, more than 75% of Taiwanese people distrust judges since 2010.<sup>163</sup> After many failed attempts gain back trust, the government and the judicial authority eventually diagnosed the problem as generalized dissatisfaction and disappointment in the judiciary. The current president of Taiwan believes that responding to the expectations of the people is the recipe for success. To achieve this goal, the National Affairs

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<sup>163</sup> NATIONAL CHUNG CHENG UNIVERSITY CRIME RESEARCH CENTER, *supra* note 98.

Conference on Judicial Reform is taking place to discuss concrete policies and details.

Although the solution of responding to the expectations of the people appears to be simple and intuitive, the cause of distrust is inaccurately or incorrectly diagnosed, and the solution to distrust is intrinsically fragmented. Derived from its fragmented nature, the reform goal of responding to the expectations of the people is unclear, over generalized, and not directive. In Taiwan's not-fragmented court system, pursuing a fragmented goal in court reform will, at best, lead to efforts that are in vain; often, it may lead to a counterproductive result.

However, the above findings and perspectives of this Article must be interpreted with caution. By saying that the problem of public distrust was diagnosed inaccurately and the solution was constructed inappropriately, this Article does not mean to say that lay participation and other planned changes will inevitably fail. Instead, each planned change may work out in its own right. Nevertheless, it is exactly these planned changes that, if successful, may clash with each other, offset the effects of each other, and lead to a counterproductive result.