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TRANSITIONAL JUSTICE LEGISLATION IN TAIWAN BEFORE AND DURING THE TSAI ADMINISTRATION

Ernest Caldwell†

Abstract: The Republic of China on Taiwan (“Taiwan”) successfully and peacefully transitioned from authoritarian, one-party rule into a constitutional democracy in the early 1990s. However, due to the island’s complex international status and fraught relationship with China, as well as a rather conservative government approach to post-authoritarian discourse on past human rights violations, there has been relatively little scholarly interest in Anglophone academia on Taiwanese transitional justice issues. This Article seeks to deepen our understanding of East Asian transitional justice by examining the influence of post-democratization local conditions on the scope and language of transitional justice legislation during two phases of Taiwan’s legislative history. The first period runs from the initial steps towards democratization in 1987 until 2016. During this time the Chinese Nationalist Party, which governed the former authoritarian regime, continued to dominate the Taiwanese government, and, in particular, retained its majority in the Legislative Yuan. The second period runs from January 2016 to the present. During this second period, the Democratic Progressive Party managed to secure both the presidency and a legislative majority.

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I. INTRODUCTION

This Article seeks to deepen our understanding of East Asian transitional justice by examining the influence of post-democratization local conditions on the scope and language of transitional justice legislation in Taiwan. To date, scholarly studies in the field of transitional justice cover a wide range of geographical jurisdictions, historical periods, and theoretical debates, as well as various forms of conflict and modes of post-conflict resolution. The results of numerous case studies elaborating on European, Latin American, Middle Eastern, and African experiences have further served to refine and advance the field of transitional justice. Until recently, however, few Anglophone publications have given much attention to contemporary

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1 See, e.g., Ruti G. Teitel, Transitional Justice Genealogy, 16 HARV. HUM. RTS. J. 69 (2003); Thomas Obel Hansen, The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field, in TRANSITIONAL JUSTICE THEORIES 105 (Susanne Buckley-Zistel et al. eds., 2014).
transitional justice issues and practices in East Asian jurisdictions (e.g., China, Hong Kong, Taiwan, South Korea, and Japan).  

Individuals and groups within many of these countries experienced various levels of abuse during long periods of colonial and/or authoritarian rule. As some of these countries transitioned into democracies, their governments and citizenry were often forced to confront the grievous human rights violations of the past. The countries’ attempts to address these violations often drew upon lessons learned from transitional justice experiences of Europe, Africa, and Latin America, yet in the end their aims and practices were frequently tailored to localized contexts. As is often the case, the local social, political, and economic conditions of democratic transition either facilitated or constrained the availability of specific pathways to justice, as well as the very conceptualization of post-transition justice.  

The Republic of China on Taiwan (“Taiwan”) successfully and peacefully transitioned from authoritarian one-party rule into a constitutional democracy in the early 1990s. However, due to the island’s complex international status and fraught relationship with China, as well as a rather conservative government approach to post-authoritarian discourse on past human rights violations, there has been relatively little scholarly interest in Anglophone academia on Taiwanese transitional justice issues. 

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2 With the exception of studies on Japanese war crimes during World War II, there are few publications providing coverage of contemporary East Asian experiences with transitional justice. See, e.g., TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC (Renée Jeffery & Hun Joon Kim eds., 2014); INHERITED RESPONSIBILITY AND HISTORICAL RECONCILIATION IN EAST ASIA (Jun-Hyeok Kwak & Melissa Nobles eds., 2013).  

3 See Leigh A. Payne & Kathryn Sikkink, Transitional Justice in the Asia-Pacific: Comparative and Theoretical Perspectives, in TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC, supra note 2, at 33.  

4 For examples of the issues related to translating international norms and expectations into local contexts, see generally LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE (Rosalind Shaw et al. eds., 2010); TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE (Alexander Laban Hinton ed., 2010); LIA KENT, THE DYNAMICS OF TRANSITIONAL JUSTICE: INTERNATIONAL MODELS AND LOCAL REALITIES IN EAST TIMOR (2012).  

This dearth of analysis is unfortunate, because the study of Taiwan offers important insights into the impact of localized post-transition political dynamics on governmental responses to past human rights abuses. In most post-transitional societies, for example, it is common for the former ruling party to dissolve or experience a significant loss of political power. Likewise, the primary actors of the party tend to experience some form of sanction for their actions, such as lustration, vetting, and often criminal prosecution. In Taiwan, however, the authoritarian Chinese Nationalist Party (Kuomintang, 國民黨, “KMT”) directed the process of democratization beginning in 1987. It also maintained its control over the presidency from 1992 until 2000 as well as the democratically elected legislature from 1992 until 2016. Furthermore, due to the significant reduction of state violence during the waning years of martial law and the tremendous economic growth of Taiwan under KMT stewardship, when the island transitioned to democracy there was an initial ambivalence within major portions of the population towards “punishing” the KMT through transitional justice mechanisms.

This Article examines the influence of post-democratization local conditions on the scope and language of transitional justice legislation during two phases of Taiwan’s legislative history. The first period ran from the initial steps towards democratization in 1987, up until 2016. During this time, the KMT continued to dominate the Taiwanese government, and retained its majority in the country’s unicameral legislature, known as the Legislative Yuan (立法院). The second period ran from January 2016 to the present. During this second period, the Democratic Progressive Party (民進黨, “DPP”) managed to secure both the presidency and a legislative majority.

During the first era, the former authoritarian KMT retained a majority voice in the elected legislature and dictated Taiwan’s pathway to transitional justice. The KMT was thus able to limit any legislation requiring accountability or the possibility of prosecution for past abuses occurring

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8 See Wu, supra note 5, at 93 (“[T]he remote moment of repression combined with the fresh memory of satisfactory economic performance have largely decreased the demand for transitional justice.”).
during the forty years in which the party held absolute power. Unable to fully ignore calls for confronting past abuses, the KMT-dominated legislature passed three pieces of transitional-justice legislation during this period that provided limited reparations and restoration of honor to a narrow category of victims.

During the second period, the DPP succeeded in winning not only the presidency, but more importantly, it won an elected majority in the legislature for the first time in Taiwan’s history. Victory in the legislature allowed the current DPP government to actively pursue transitional justice legislation with minimal concern over interference from the KMT. Furthermore, the election leading up to 2016 reinvigorated transitional justice discourse in Taiwan. Since the rise of the DPP, there have been numerous legislative bills related to transitional justice submitted by various groups, including the KMT.9

Part II of this Article provides a brief overview of the historical events giving rise to the need for transitional justice in Taiwan. Part III examines the language and scope of transitional justice legislation passed by the KMT-dominated legislature against the backdrop of the process of democratization. Part IV examines the reinvigoration of transitional justice discourse during the presidential and legislative campaigning for the 2016 elections, as well as its influence on the scope and language of legislative bill proposals made by the DPP after the party’s electoral victories. Part V concludes by considering the future of transitional justice legislation in Taiwan.

II. TAIWANESE SOURCES OF INJUSTICE

Scholars typically categorize Taiwan’s sources of historical injustice within three distinct periods.10 The first period began in 1895 when, shortly after suffering a humiliating defeat in the Sino-Japanese War, the imperial government of Qing China (清, 1644–1911) was forced to sign the Treaty of Shimonoseki (下關條約, April 17, 1895) with Japan. As one of the conditions of the treaty, the Chinese government ceded control over the island of Taiwan

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10 Hwang, supra note 5, at 169–70.
to the Japanese Empire.\textsuperscript{11} Taiwan would not return to Chinese rule until the end of World War II in 1945.

Under fifty years of Japanese colonial rule, the local Taiwanese population benefited greatly from improvements to agriculture, medicine, and sanitation, increased education and literacy levels (in Japanese), and heretofore unknown levels of bureaucratic efficiency and legal modernization.\textsuperscript{12} But during this time, the local population also suffered from a variety of political, civil, and economic abuses, such as a lack of representation in the Japanese Diet, media censorship, restrictive government monopolies, and land expropriation.\textsuperscript{13}

The colonial period of Taiwan has been well documented in the fields of history and literary studies. However, transitional and historical justice theories and mechanisms are rarely applied to the study of the island’s history prior to its retrocession to the Republic of China in 1945.\textsuperscript{14} This governmental—and even scholarly—“disinterest” in the Japanese colonial period is particularly problematic when confronting the treatment of Taiwan’s aboriginal population and the Japanese expropriation of aboriginal lands.\textsuperscript{15} As a result, many of the century-old transitional and historical justice issues of Taiwan’s indigenous communities remain unresolved.\textsuperscript{16}

\textsuperscript{11} Treaty of Shimonoseki, Apr. 17, 1895, arts. 3, 4, Japan-China, 181 CONSOL. T.S. 217.


\textsuperscript{13} See generally HUI-YU CAROLINE TS’AI, TAIWAN IN JAPAN’S EMPIRE-BUILDING: AN INSTITUTIONAL APPROACH TO COLONIAL ENGINEERING (2009).

\textsuperscript{14} The main Anglophone studies of human rights and transitional justice all explicitly leave out consideration of Taiwan’s colonial period. See Wu, supra note 5, at 84–85; Daniel Bowman, Righting the Wrongs of the Past?: The Human Rights Policies of Chen Shui-bian and Ma Ying-jeou, in TAIWAN SINCE MARTIAL LAW: SOCIETY, CULTURE, POLITICS, ECONOMY 485 (David Blundell ed., 2012); Hwang, supra note 5, at 169.

\textsuperscript{15} See, e.g., Scott Simon, Making Natives: Japan and the Creation of Indigenous Formosa, in JAPANESE TAIWAN: COLONIAL RULE AND ITS CONTESTED LEGACY 75 (Andrew D. Morris ed., 2015); Lee Ming-cheng (李明政), Yuan zhu min she hui sheng huo fa zhan yu zhuan xing zheng yi (原住民社會生活發展與轉型正義) [Transitional Justice and the Development of Taiwanese Indigenous Peoples’ Social Life], 6 TAIWAN YUAN ZHU MIN ZU YAN JIU XUE BAO (台灣原住民族學報) [J. TAIWAN INDIGENOUS STUD. ASS’N] 97 (2016).

\textsuperscript{16} See generally JOLAN HSIEH, COLLECTIVE RIGHTS OF INDIGENOUS PEOPLES: IDENTITY-BASED MOVEMENT OF PLAIN INDIGENOUS IN TAIWAN (2006); Hsieh Jolan & Wu Ming-chi (謝若蘭 & 吳明季), Zhuan xing zheng yi de si kao yu shi jian (轉型正義的思考與實踐) [Perspectives on Taiwanese Indigenous Peoples’ Transitional Justice], 6 TAIWAN YUAN ZHU MIN ZU YAN JIU XUE BAO (台灣原住民族學報) [J. TAIWAN INDIGENOUS STUD. ASS’N] 1 (2016).
Most studies of transitional justice in Taiwan begin with the second historical period, covering the return of the island to Chinese control at the end of World War II. More specifically, transitional justice discourse in post-democratization Taiwan focuses rather myopically on the policies and actions of the KMT during the authoritarian period. This is at the expense of a more comprehensive approach to historical justice that would seek to address wrongs spanning two types of regimes—and for which there were numerous, often overlapping victims.

Given the length of the Japanese colonial period and the many positive contributions the Japanese administration made to Taiwanese society, Taiwan’s return to a KMT-led government by the Republic of China created a great deal of uncertainty and a crisis of identity among Taiwan’s population. Similarly, there was uncertainty and mistrust among the mainland Chinese citizenry who had just endured several brutal years of war with Japan. Furthermore, the draining of Taiwan’s resources back to the mainland to assist the KMT’s war against the communist forces of Mao Zedong (毛澤東), the existence of unfair government monopolies, and the poor local administration led to mounting tensions between the local Taiwanese population and the newly arrived mainland population of soldiers, policemen, and bureaucrats.

Tensions reached a climax on February 27, 1947, when a Taiwanese woman illegally selling cigarettes suffered abuse at the hands of the government’s Tobacco Monopoly inspectors. Taiwanese citizens present at the incident threatened the inspectors, one of whom shot and killed a citizen. The following day, the local Taiwanese population stormed the police headquarters and riots and protests broke out island-wide.

17 See, e.g., Hwang, supra note 5, at 169; Agnes Schick-Chen, Coming to Terms with the Past on Both Sides of the Taiwan Strait: Historical and Political Context, in JUSTICE RESTORED?: BETWEEN REHABILITATION AND RECONCILIATION IN CHINA AND TAIWAN, supra note 5, at 9; SYLVIA LI-CHUN LIN, REPRESENTING ATROCITY IN TAIWAN: THE 2/28 INCIDENT AND WHITE TERROR IN FICTION AND FILM (2007).
19 Id.
21 Id. at 102–03.
22 Id. at 103.
23 Id. at 105–06.
government responded by dispatching soldiers from the mainland to quell the populace.24

Over the next few months, the mainland soldiers and police forces assaulted, imprisoned, and killed thousands of Taiwanese.25 The exact numbers of Taiwanese killed during the months following the initial event remains unknown. According to the report by the Taiwan Provincial Garrison Command issued shortly after the event, 398 people were killed, 72 were still missing, and 2131 were injured; however, subsequent reports give figures ranging from 5000 to 28,000 deaths.26 The 228 Incident (二二八事件), as it is now known, lasted for only a few months, but the scale of abuses suffered by the Taiwanese people remains a painful source of social division between the mainlanders (those ethnic Chinese arriving from the Chinese mainland after 1945) and Taiwanese even today.27

By 1948, the KMT was losing the civil war on the mainland to the communist forces of Mao Zedong. President Chiang Kai-shek (蔣介石), along with the Republic of China legislature, promulgated the Temporary Provisions Effective During the Period of Communist Rebellion (“Temporary Provisions”),28 which instituted a state of emergency, gave the president extraordinary powers, and suspended the vast majority of civil and political rights enshrined within the 1947 Constitution of the Republic of China (“ROC Constitution”). Soon after, however, the KMT government fled the mainland, establishing a “government in exile” on Taiwan with the intent of reclaiming the mainland in the future.

Over the next forty years, martial law and Temporary Provisions were renewed indefinitely, thus providing legitimacy and legality to the KMT’s authoritarian rule over the island. This became popularly known as the White Terror period (bai se kong bu, 白色恐怖, 1949–1987) and represents the third

24 Id. at 104–09.
25 Id. at 141–67.
26 By 2005, the 228 Memorial Foundation issued compensations for 681 deaths, 177 disappearances, and 1294 imprisonments. See Wu, supra note 5, at 90.
28 Dongyuan Kanluan Shiqi Linshi Tiaokuan (動員戡亂時期臨時條款) [Temporary Provisions Effective during the Period of Communist Rebellion], FAWUBU FAGUI ZILIAOKU (1948) (repealed 1991), http://law.moj.gov.tw/LawClass/LawAll.aspx?PCod...
historical era in which state-sanctioned human rights abuses were inflicted upon the population of Taiwan.\textsuperscript{29} However, unlike the 228 Incident, the victims during this period were not limited to Taiwanese and indigenous peoples, but included thousands of mainlanders suspected of spying or being communist sympathizers. Under the auspice of martial law, numerous minor criminal offenses were re-categorized as “political” offenses.\textsuperscript{30} This allowed the KMT to actively and legally employ courts-martial to try outspoken civilians critical of the KMT’s rule and limit their options for appeal. Martial law further allowed the KMT government to amass great wealth through expropriation of private lands and the development of government monopolies at the expense of local businesses.\textsuperscript{31} Although no official report on the White Terror period has ever been commissioned, scholarly estimates from surveys of extant and declassified case records indicate that 140,000 civilians were tried in courts-martial between 1949 and 1987, resulting in tens of thousands of imprisonments, thousands of cases of property confiscation, and roughly 3000 to 4000 executions.\textsuperscript{32}

The national government in Taiwan, particularly in the initial two decades of democratic rule, took a very conservative stance towards creation and application of transitional justice mechanisms via the formal legislative process despite the numerous human rights abuses evident from Taiwan’s past. This is partially a result of the KMT’s continued dominance in Taiwan’s newly minted democratic political landscape. Despite the three transfers of executive power between the KMT and DPP since democratization was initiated, there still exists an underlying public dissatisfaction with the formal legislative responses of the national government.

The remainder of this Article compares the scope and language of transitional justice legislation passed by the KMT-dominated legislature from 1987 to 2016 to the legislative bills introduced by the DPP in the early months of the DPP-dominated legislature beginning in 2016.

\textsuperscript{29} See generally SU RUI-CHIANG (蘇瑞鐙), BAISE KONGBU ZAI TAIWAN: ZHANHOU TAIWAN ZHENGZHI ANJIAN ZHI CHUZHI (白色恐怖在台灣:戰後台灣政治案件之處置) [WHITE TERROR IN TAIWAN: POSTWAR POLITICAL PLACEMENT IN TAIWAN] (2014).
\textsuperscript{30} See Ming-min Peng, Political Offences in Taiwan: Laws and Problems, 47 CHINA Q. 471, 476 (1971).
\textsuperscript{32} Hwang, supra note 5, at 170.
III. THE FIRST WAVE: TRANSITIONAL JUSTICE UNDER THE KMT-DOMINATED LEGISLATURE

A. Democratization and KMT Attempts to Rectify (and Dodge) Its Past Wrongs

Despite Taiwan’s economic success and improved standard of living in the 1980s, the KMT government found that after nearly forty years of one-party rule, its domestic support had begun to wane and intraparty factionalism increasingly threatened party unity.\(^{33}\) The legitimacy and political dominance of the authoritarian KMT were further eroded by the results of limited elections at the national and local levels, which showed increased political gains by members of the fledgling “opposition,” known collectively as dangwai (黨外, literally meaning “outside a political party”).\(^{34}\) More importantly, the KMT’s international support became evermore tenuous. Countries like the United States, which formally recognized the People’s Republic of China but continued to both politically and economically support the de facto existence of the “free” Republic of China government in Taiwan, found it increasingly difficult to justify continued support of a one-party authoritarian government masquerading as a democracy.\(^{35}\)

For these and other reasons, President Chiang Ching-kuo (蔣經國), the son of Chiang Kai-shek, established a basic plan for lifting martial law and transforming Taiwan into a constitutional democracy. He died in 1988, however, and the task of refining and implementing these plans while simultaneously protecting the assets and ensuring the continued existence of the KMT throughout the process of democratization fell to then-Vice President Lee Teng-hui (李登輝).

As Taiwan’s first native-born president, Lee was often able to mediate concerns of the KMT and the local Taiwanese population during the


transitional process. Under his leadership, martial law was formally lifted in 1987, and the infamous Temporary Provisions were abolished in 1991. The removal of these restrictive laws and policies opened the door for greater public participation, allowed for the formation of new political parties, and loosened restrictions on the media. Furthermore, an interpretation of the continued constitutionality of the Temporary Provisions by the Constitutional Court required all officials originally elected in 1947 and 1948 on the mainland to retire, and a subsequent series of constitutional amendments paved the way for the first round of full elections to be held since 1948.

Through these political and constitutional changes, Taiwan’s government peacefully transitioned from a one-party authoritarian state to a constitutional democracy. Yet the specter of the past was never far behind, and the KMT faced the necessity of winning free elections via an electorate that it had oppressed for nearly forty years.

B. Party Protectionism and the National Security Act of 1987

As democratization and free elections loomed on the horizon, the KMT increasingly considered the political, as well as legal, implications of the human rights abuses perpetrated by its government during the previous forty years. Prior to lifting martial law in 1987, the government carried out two attempts to insulate the KMT from the potential negative effects of its authoritarian past. First, the KMT issued an amnesty to 237 political prisoners, and second, the KMT introduced legislation that severely limited the ability of civilians to appeal convictions originating in the courts-martial.

37 The process of lifting martial law began with Chiang Ching-kuo, but was implemented by Lee. See id. at 55.
40 Although the process was relatively peaceful, it was not necessarily smooth. Protests, charges of continued corruption, etc. haunted Taiwan’s democratic transition. Some even argue that due to the continued political dominance of the KMT after the transition, Taiwan has yet to fully transition. See, e.g., Peter R. Moody, Jr., Some Problems in Taiwan’s Democratic Consolidation, in ASSESSING THE LEE TUNG-HUI LEGACY IN TAIWAN’S POLITICS: DEMOCRATIC CONSOLIDATION AND EXTERNAL RELATIONS, supra note 36, at 27; Kharis Templeman et al., Taiwan’s Democracy Under Chen Shui-bian, in TAIWAN’S DEMOCRACY CHALLENGED: THE CHEN SHUI-BIAN YEARS 1 (Yun-han Chu et al. eds., 2016).
The first action occurred on July 14, 1987, when the Ministry of Defense announced a partial amnesty (reduction of sentences and/or restoration of rights) for 237 political prisoners in response to the negative public opinion resulting from the KMT’s use of military courts to sentence political opponents to lengthy prison sentences, life imprisonment, or death. Critics of this amnesty, however, quickly pointed out its limitations. Under existing laws, individuals convicted of sedition or other political offenses were barred from holding public office and from many other professions such as civil servants, lawyers, and medical doctors. Thus, although they could now vote in elections, many of the former authoritarian regime’s most ardent opponents were excluded for life from holding government posts as a result of their previous convictions.

The 237 individuals covered under the “token” partial amnesty represent only a few of the tens of thousands of civilians tried for political reasons in military courts and subsequently imprisoned or executed during the White Terror period. For those remaining victims, the all-important Article 10 of the Martial Law Act would go into effect once martial law was lifted. Under the ROC Constitution, only active-duty military personnel may be tried in a military court; however, Articles 8 and 9 of the Martial Law Act provide a list of offenses for which civilians may be tried by courts-martial during times of emergency. Article 10 of this same act was originally designed as a legal safeguard for the restoration of individual rights once the government suspended the state of emergency. Specifically, Article 10 provided that civilians sentenced for crimes or currently undergoing investigation or trial via military courts were entitled to request a retrial or reconsideration by civilian courts once martial law was lifted.

The second action the KMT took arose from its fear of the potential volume of citizen accusations and appeals. Thus, on the eve of the repeal of martial law, the KMT-dominated legislature passed the 1987 National

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42 *Id.*
44 MINGUO XIANFA [CONSTITUTION], art. 9 (1947) (Taiwan).
45 Martial Law Act arts. 8, 9.
46 *Id.* art. 10 (“Upon the day following the repeal of martial law, all sentences made under Article 8 and Article 9 [of this law], may be appealed in accordance with the law” (第八條第九條之判決，均得依解嚴之翌日起，依法上訴)).
Security Act (國家安全法).\textsuperscript{47} This act provided, inter alia, an article designed to limit appeals by civilians sentenced in courts-martial during the authoritarian period. Due to its importance, I have translated the entirety of Article 9 below.

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<tr>
<td>第九條:</td>
<td>Article 9:</td>
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<td>戒嚴時期戒嚴地域內，經軍事審判機關審判之非現役軍人刑事案件，於解嚴後依左列規定辦理：</td>
<td>Once martial law is repealed, criminal cases of civilians tried by courts-martial during the period of martial law shall be handled as follows:</td>
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<td>一、軍事審判程序尚未終結者，偵查中案件移送該管檢察官偵查，審判中案件移送該管法院審判。</td>
<td>9(1) Those [individuals] whose military trial proceedings have not concluded: cases under investigation are to be transferred to civil prosecutors for investigation and cases at trial are to be transferred to civilian courts for trial.</td>
</tr>
<tr>
<td>二、刑事裁判已確定者，不得向該管法院上訴或抗告。但有再審或非常上訴之原因者，得依法聲請再審或非常上訴。</td>
<td>9(2) Those [individuals] whose criminal sentences have already been decided may not appeal or complain to civil courts. However, those with grounds for retrial or extraordinary appeal may in accordance to the law petition for retrial or extraordinary appeal.</td>
</tr>
<tr>
<td>三、刑事裁判尚未執行或在執行中者，移送該管檢察官指揮執行。</td>
<td>9(3) Those [individuals] whose criminal sentences have not begun or who are currently serving their sentences are to be transferred to and administered by civilian prosecutors.</td>
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The implications of this article for Taiwan’s post-transition engagement with human rights abuses were, and still are, tremendous. First, paragraphs 1 and 3 transfer control of civilian investigations, trials, and prisoners to civil jurisdiction. Though fewer than in previous decades, by the mid-1980s there were still numerous civilians imprisoned and awaiting trial in military courts for political crimes.\(^{48}\) The transfer of such cases to civilian courts was an initial step to demilitarize society.

However, more problematic was the fact that paragraph 2 of the National Security Act nullified Article 10 of the original Martial Law Act, which explicitly provided an automatic right of appeal for any and all convictions of non-military persons under courts-martial during times of emergency. Thus, paragraph 2 of Article 9 in the National Security Act effectively precluded civilians who were tried for political offenses under martial law or their families from appealing their convictions to civil courts. By passing this law, the KMT not only insulated itself from potential retribution and legal accountability, but also severely restricted the right of tens of thousands of citizens to question the legality of military trials conducted against civilians during the White Terror period.

The constitutionality of the National Security Act’s Article 9 was immediately questioned by three civilians who had previously been convicted for political offenses by military courts.\(^{49}\) Their request for a constitutional interpretation went all the way to the Constitutional Court in 1987.\(^{50}\) The Court, staffed by KMT appointees, sided with the government and confirmed the constitutionality of the legislation.\(^{51}\) The Court held, inter alia, that due to the lengthy period of martial law,\(^{52}\) the inaccessibility of documents related to individual case reports resulting from the long lapse of time,\(^{53}\) and the need to retain the stability and consistency of the judicial process,\(^{54}\) the reinvestigation

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\(^{50}\) *Id.*

\(^{51}\) For the Chinese-language version of the judgment, see Sifa Yuan (司法院) [Judicial Yuan], *Sifa Yuan Shi Zi 272 Hao Jieshi* (司法院釋字 272號解釋) [Explanation of Interpretation 272 of the Judicial Yuan], 129 FAWUBU FAGUI ZILIAOKU (法務部公報) [MINISTRY JUST. GAZETTE] 100 (1991).

\(^{52}\) *Id.* at 100.

\(^{53}\) *Id.*

\(^{54}\) *Id.*
and retrial of all such cases were simply beyond the capacity of civilian courts.\textsuperscript{55}

Thus, by arguing for consistency and stability, the Court recused itself from involvement in early efforts to promote transitional justice in Taiwan. Furthermore, by not questioning the legality of the acts or judgments called into question by the case, the Court tacitly validated and legitimized the human rights abuses perpetrated by KMT officials during the martial law period in Interpretation No. 272. Although the post-transition KMT-dominated legislature would later pass three transitional justice acts in the 1990s, the passage of the National Security Act and its judicial support clearly set the restrictive tone for transitional justice discourse and practice during the early years of post-authoritarian Taiwan.\textsuperscript{56}

C. The Conservative Language of Transitional Justice Legislation Under the KMT

Although the KMT initially feared retribution from the populace, the party continued to win democratic elections. The KMT, therefore, controlled both the legislature (1987–2016) and the presidency (1987–2000). By extension, therefore, the KMT controlled the official government position on transitional justice matters during the initial two decades of democracy in Taiwan.

During this time, the KMT-dominated legislature introduced three important (but limited) pieces of legislation related to transitional justice. The conservative language and narrow scope of these laws highlight the constraints placed on transitional justice mechanisms by local post-transition political conditions. It was in these conditions that the former authoritarian party retained much of its political power. Although the limitations of these initial measures drew much criticism from the victims of the White Terror period and left a feeling of the incompleteness of transitional justice in Taiwan, there was little that could be done in terms of formal legislative approaches to transitional justice while the KMT held its dominance in the legislature. This section analyzes the limitations of the KMT promulgated laws in chronological order of their passage.

\textsuperscript{55} Id.

\textsuperscript{56} Hwang, supra note 5, at 171.
The first piece of post-transition legislation specifically aimed at past abuses was the 1995 Act Governing the Recovery of Damage of Individual Rights During the Period of Martial Rule (“1995 Recovery Act”). This Act specifically covers individual cases occurring during the period between May 20, 1949 and July 14, 1987 in which the defendants were either charged but found not guilty in courts-martial or were found guilty but can subsequently prove their confessions were coerced. In addition to monetary reparations for those who can prove their trials were carried out improperly, the Act further provides for the full restoration of individual rights, allowing affected persons to hold civil office or re-enter professional fields such as medicine, law, and education. Though this Act provides some quantum of reparation for the abuses of the past, its language necessarily constrains the applicable cases to those occurring during the period of 1949–1987, thereby excluding the victims of the 228 Incident. Furthermore, while some confessions may be proven to have been coerced and their subsequent verdicts determined to be unjust, the language of the Act establishes this as an administrative failing, not an illegal or immoral act. Nowhere in the Act is the legality of the courts-martial system utilized against civilians during martial law ever questioned. And finally, the Act is silent on the question of fact-finding for the purpose of assigning responsibility and accountability for the incidents occurring during the White Terror period.

The second major piece of transitional justice legislation was the 1995 February 28 Incident Disposition and Compensation Act (“228 Compensation Act”). For nearly forty years, the KMT had suppressed discussion of the 228 Incident; yet with democratization and the re-establishment of civil freedoms of speech and press, the KMT found itself unable to escape the influence of this event. Unlike the “legal” use of courts-martial and suppression of individual rights under martial rule, the KMT government

58 Id. art 1.
59 Id. art 6.
60 Id. art 3.
61 Hwang, supra note 5, at 172.
63 Wang & Ku, supra note 5, at 10–11.
brutality against the Taiwanese population in the aftermath of the 228 Incident lacked any legal basis.

The memory of the event continued to be a heavily contentious issue, dividing the population between those living in Taiwan prior to the 1945 retrocession and those arriving from the mainland after the retrocession. This Act, therefore, was specifically aimed at the victims of the 228 Incident, and one can argue that this piece of legislation was part of President Lee Tung-hui’s ongoing attempt to close the identity gap among Taiwan’s population. This is reflected in the initial article of the Act that provides the rationale for the legislation, which is “to cause citizens to understand the facts of the incident, to heal historical wounds, and to promote ethnic unity and harmony.” Such a statement is tantamount to an acknowledgment of the individual and social harm inflicted by the incident, yet its efficacy is again limited by the carefully crafted language which does not offer any identification of those individuals actually responsible for its occurrence. Here, again, the language of the legislation shelters individual members of the KMT from criminal or civil liability or even official acknowledgment of their participation.

To promote transitional justice, the Act provides for the establishment of a schedule of reparation payments, a system to provide the restitution of honor for victims or the descendants of those killed, wounded, tortured, detained, or imprisoned, and compensation for individuals or their families who had property damaged or confiscated during the period of state-sanctioned violence. Unlike the previous piece of legislation, however, which focused primarily on reparations, the 228 Compensation Act provides for the establishment of additional formal transitional justice mechanisms.

Article 3, for example, establishes the 228 Incident Memorial Foundation (“Foundation”), which is to be governed by a selection of scholars, civil activists, and victims of the incident (or their descendants). Individual

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65 The February 28 Incident Disposition and Compensation Act art. 1 (“使國民瞭解事件真相，撫平歷史傷痛，促進族群融和”).

66 Id. art. 7.

67 Id. art. 6.
applications for reparations and restitution of honor are submitted directly to the Foundation, which in turn investigates each claim and administers financial reparations. Furthermore, the Foundation promotes truth-finding through research exercises, and provides educational awareness of the incident via events and publications. Article 4 of the Act provides an additional measure of commemorative transitional justice by confirming the annual date of February 28 as a national holiday, Peace Memorial Day (和平紀念日).

Like the previous piece of legislation, however, the 228 Compensation Act is limited in actually providing justice to victims. The very title of the Act created controversy. This is because it uses the term bu chang (補償) for “compensation,” which in Taiwanese administrative law implies a form of compensation for harms resulting out of a legitimate process or procedure. This word choice reflects the continued stance of the KMT-dominated legislature that the “wrongness” of the abuses was linked to individualized cases of administrative failings of an otherwise legal and legitimate system.

Relatedly, the KMT’s enduring platform of the legality of its governance methods during the 228 Incident is also evident in the fierce legislative debates over the inclusion of the phrase “the government should apologize to all citizens.” In the end, however, inclusion of the phrase was voted down. The KMT could have viewed the possible inclusion of such an explicit statement in a piece of legislation as an admission of wrongdoing. This could undermine its continued stance over the legitimacy of its government prior to and during the martial law period. Thus, while the 228 Compensation Act clearly differs from the 1995 Recovery Act by providing reparations, establishing a foundation tasked with specific transitional justice goals, and assigning February 28 as a national holiday, the language of both Acts precludes ascribing any liability or blame to the KMT or any individual associated with the authoritarian government.

The final major piece of transitional justice legislation passed by the KMT-dominated legislature was the 1998 Compensation Act for Improper Trials on Charges of Sedition and Espionage During the Martial Law Period

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68 Id. arts. 6, 7.
69 Id. art. 11.
70 Wang & Ku, supra note 5, at 12–13.
71 Id. at 12.
This Act was the direct result of public dissatisfaction with the KMT government and legislature’s lack of efforts to properly address the abuses occurring during the White Terror period. However, despite the public pressure for more comprehensive transitional justice legislation, the 1998 Compensation Act follows the KMT’s trend of legislatively compensatory acts while precluding any inquiries over the legitimacy of KMT rule or assigning any liability to specific individuals.

Like the 228 Compensation Act, this Act establishes another memorial foundation comprised of scholars, civilians, judges, and government representatives. The foundation is tasked with administering the applications, investigations of claims, and payments to victims or their families. The legislation is quite limited in its scope, as it only covers individuals tried and convicted of sedition (pan luan, 叛亂) or espionage (fei die, 匪諜) during the martial law period. This limitation is further evidenced by a preclusion of individuals who have already received any form of compensation via the 228 Compensation Act or who have received some measure of compensation via the administrative appeal system for wrongful conviction. The same article also bars any individual whose conviction could be upheld after reconsideration from compensation.

All three pieces of transitional justice legislation represent the KMT’s attempts to formally address its past wrongs primarily through legislating reparations to victims. However, due to its continued control of the legislature, the KMT directly controlled transitional legislation and was able to further insulate itself from any official liability for past abuses during its authoritarian rule.

Each law contains a similar set of limitations. First, the scope of each law is temporally limited with explicit language confining the applicability of each law’s provisions to a specific period of time. All three are limited to the period of KMT rule following the retrocession in 1945. As such, harms and
losses that occurred during the Japanese colonial period are not considered or applicable. This precludes numerous claims from Taiwan’s indigenous communities.

Second, the primary focus of all three laws is on reparations as a means of reconciliation. The 228 Compensation Act and 1995 Recovery Act both commemorate forms of transitional justice by establishing memorial foundations and promoting educational events occurring during KMT rule; however, the function of such acts is to understand the events and assist the victims without consideration of responsibility.

This relates to the third restriction, which is a limitation on ascertaining the “truth.” Unlike many transitional societies, the KMT never established a truth and reconciliation committee to determine the sources of and responsibility for abuse. To do so would call into question the legitimacy of state-sanctioned violence during the authoritarian period. Thus, not a single individual has been prosecuted for acts committed during the period from 1945 to 1987. Instead, each law acknowledges the loss and/or harm inflicted on the civilian populace. Thus, while the transitional justice legislation passed by the KMT did provide financial benefits to many of those who had suffered under KMT oppression, the language was crafted in such a way as to elude consideration of the accountability or criminal liability of the perpetrators.


The early years of democratic rule in Taiwan saw many positive changes; yet lurking in the background was the ever-present specter of the past and a palpable public dissatisfaction with the state of KMT-dominated transitional justice practice. In 2000, the KMT’s dominance was tested when the DPP candidate Chen Shui-bian (陳水扁) won the presidential election and was re-elected by a razor-thin margin in 2004. However, despite the DPP’s success in gaining the presidency, the party was never able to eclipse the KMT coalition majority (known as the “Pan-Blue” coalition) within the legislature. As a result, Chen Shui-bian’s two terms in office were fraught with persistent policy gridlock between the DPP-held executive and KMT-

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77 Jemima Garcia-Godos, Reparations, in AN INTRODUCTION TO TRANSITIONAL JUSTICE, supra note 7, at 177, 182–85.
78 Shiow-duan Hawang, Executive-Legislative Relations Under Divided Government, in TAIWAN’S DEMOCRACY CHALLENGED: THE CHEN SHUI-BIAN YEARS, supra note 40, at 123.
held legislature, with the latter opposing nearly all government proposals requiring legislative approval.  

There were, however, some small legislative victories for the DPP-led attempt at transitional justice. First, in 2007, an amendment altered the title of the 228 Compensation Act. As mentioned previously, the former title utilized the term *bu chang* for “compensation,” indicating an administrative compensation for harm resulting from a *legal* act. With very little media attention or legislative debate, the amendment changed the term to *pei chang* (賠償), which denotes a form of compensation for a harm resulting from an *illegal* act. This subtle shift in title implies that the acts perpetrated under the guise of government-sanctioned legality were in fact illegal acts for which the government at the time should be held responsible. Unfortunately, Chen had little power or influence over the judiciary and other government offices, and this change in title and its significance went unnoticed.

Second, in 2003 and 2007, the Constitutional Court issued two interpretations concerning the constitutionality of victim-category exclusions enshrined in Taiwan’s existing transitional justice legislation. In 2003, the Court issued Interpretation No. 567, which held that, despite the extraordinary circumstances of martial law, the military courts’ continued use of rehabilitative labor for civilians after the completion of their prison sentences during this period violated Article 8 of the ROC Constitution. Furthermore, the original implementation of the 1995 Recovery Act in conjunction with the 1987 National Security Act prevented such individuals from receiving compensation. This ruling expanded the scope of the 1995 Recovery Act and implicitly labeled the KMT government’s use of indefinite rehabilitation detention during the martial law period as unconstitutional. In 2007, the Court issued Interpretation No. 624, which held that precluding civilians wrongfully convicted in military courts from receiving compensation was unconstitutional. The original wording of the 1987 National Security Act

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80 Legislative Yuan, *Ererba shijian chuli ji peichang tiaoli de san du* (二二八事件處理及賠償條例的三讀) [Third Reading of the February 28 Incident Disposition and Compensation Act], LIFA YUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Mar. 21, 2007, at 88, 93.


only provided paid compensation for those who were detained but could prove themselves innocent, and this proof was limited to those who had not carried out their sentence. Additionally, the wording of the 1995 Recovery Act further precluded individuals convicted in courts-martial who had completed their sentences from equal reparation payments. Therefore, the Court ordered such cases to be reconsidered.

Both rulings greatly expanded the scope of victim claimants under the three pieces of transitional justice legislation. But, like the lawmakers in the KMT-dominated legislature, the Court stopped short of making an explicit statement about the responsibility or liability of any individual person or group for the wrongs committed under KMT rule.

Lastly, as Chen Shui-bian neared the end of his final term in office, he called for a national referendum on transitional justice in an attempt to push a legislative agenda that would deal with KMT party assets. These assets were a key reason for the KMT’s continued political resilience after democratization. During the martial law period, the KMT government utilized dubious forms of confiscation of personal wealth and property from political opponents, procured large swaths of land via land grabs, and established numerous state-owned (i.e., KMT-owned) enterprises protected by government monopolies.83 As a result, over its forty years in power, the KMT amassed an enormous portfolio of assets, including cash reserves, rental properties, and corporations.84 The KMT’s ability to shield these assets during the transition period allowed the party to retain a great deal of political influence. No other political party (the first new party being allowed to form in 1988) could compete with the KMT’s wealth.85

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83 TIEN, supra note 34, at 86–87.
84 Some have argued that the KMT assets are worth roughly NT$150 billion. The KMT’s own government financial disclosures provide net worth estimates of NT$33.1 billion in 2005 and NT$25.6 billion in 2013. For an analysis of the political arguments over the KMT assets, see DAFYDD FELL, PARTY POLITICS IN TAIWAN: PARTY CHANGE AND THE DEMOCRATIC EVOLUTION OF TAIWAN, 1991–2004, at 77–78 (2005). For analysis of the KMT’s own disclosures, see Jeang Bang-wen (蔣邦文), Yi di er ci zhengdang lun ti wei li, xi lun Taiwan zhuangxing zhengyi de shijian (以第二次政黨輪替為例,析論台灣轉型正義的實踐) [An Analysis of the Practice of Transitional Justice in Taiwan Using the Second Ruling Party Alternation as a Case Example], 7 TAIPEI HAIYANG JISHU XUEYUAN XUEBAO (台北海洋技術學院學報) [J. TAIPEI C. MAR. TECH.] 2 at 90, 100 (2016).
85 Bang-wen, supra note 84, at 106 (citing official reports indicating that in 2013 the KMT held an estimated NT$25.6 billion in assets, while its primary competitor the DPP held an estimated NT$478.72 million in assets).
The source of this political wealth was a contentious issue among the population, which believed the assets should be returned to those who lost them during the martial law period, or to their families. In 2000, Chen Shui-bian attempted to push through a legislative bill that would force the KMT to return all assets gained illicitly during the martial law period. However, this bill did not have a chance given the continued KMT control over the legislature.86 Towards the end of his final year in office, in an effort to frame the upcoming presidential election campaign around the issues of transitional justice and KMT party assets, and to instigate a renewed drive for further transitional justice legislation, Chen called for a public referendum. The language of Chen’s referendum question was posed as follows:

<table>
<thead>
<tr>
<th>Original</th>
<th>English Translation</th>
</tr>
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<tbody>
<tr>
<td>你是否同意依下列原則制定「政黨不當取得財產處理條例」，將中國國民黨黨產還給全民：</td>
<td>Do you agree that the following principles should be adhered to when legislating an</td>
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<td></td>
<td>Administration of Illicitly Acquired Assets of Political Parties Act for the purpose of</td>
</tr>
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<td></td>
<td>returning to the people the party assets of the Kuomintang?</td>
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<td></td>
<td>The properties of the Kuomintang and its affiliate organizations—including party dues,</td>
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<td></td>
<td>political donations, and public electoral subsidies—should all be presumed illicitly</td>
</tr>
<tr>
<td></td>
<td>acquired and ought to be returned to the people. That which has already been liquidated,</td>
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<td></td>
<td>the [KMT] ought to compensate at market value.</td>
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</tbody>
</table>

Like Chen’s other attempts to further transitional justice practice in Taiwan, the referendum was thwarted, but this time not directly by the KMT. Instead, the referendum was defeated by low voter turnout—only 26.34% of

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86 Kuo Cheng-tian (郭承天), *Taiwan zhuan xing yanzhi yanjiu de zhuanxing* (台灣轉型正義研究的轉型) [Research in Transition on Taiwan’s Transitional Justice], 12 *TAIWAN ZHENGZHI XUE KAN* (台灣政治學刊) [TAIWANESE POL. SCI. REV.] 3, 6 (2008).
registered voters participated. This fell well below the 50% threshold required by the Referendum Act, and thus nullified the results.

Despite its failure, the language of the referendum represents an explicit attempt by the DPP government to directly associate the KMT with illegal activities during the martial law period. The referendum question does not discuss the physical harms inflicted on individuals under the KMT regime, but it does address the property and financial harms inflicted on the Taiwanese populace from which the KMT continued to benefit. Although the referendum results were nullified, of the 4,550,881 individuals who voted, 91.46% agreed with the proposal. This demonstrates a continuing public consciousness among a significant part of society that directly links the “incompleteness” of Taiwan’s transitional justice to the financial assets of the KMT, and, more specifically, the illegal means through which the KMT amassed such a fortune during the martial law period.

Despite their attempts, Chen Shui-bian and the DPP could do little to legislate further transitional justice in Taiwan. Public frustration with the DPP government’s inability to govern with the KMT-dominated legislature, and allegations against Chen for corruption, as well as later convictions of Chen and his family on those charges, led to a significant drop in the public’s opinion of the party.

With the election of KMT candidate Ma Ying-jeou (馬英九) to the presidency in 2008 and 2012, the Taiwanese government and legislature reverted to full KMT control. During Ma’s two terms in office, very little was accomplished in the way of formal transitional justice legislation. Yet many of the KMT government policies—particularly those related to increased

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88 Gongmin Toupiao Fa (公民投票法) [Referendum Act], art. 30, FAWUBU FAGUI ZILIAOKU (2003) (amended 2009), http://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?PCode=D0020050 (requiring more than 50% of the voting population to participate, and more than 50% of those votes for a referendum to pass).
89 Press Release, Central Election Committee, supra note 87.
economic relations with China—provoked a great deal of public outrage.\textsuperscript{91} Eventually, the KMT found itself with extremely low opinion polls and dwindling popular support. As a result, the combined presidential and legislative elections of 2016 provided hope that the DPP could not only win the presidency back, but also finally break nearly seventy years of KMT dominance over the legislature.\textsuperscript{92}

IV. A SECOND WAVE OF TRANSITIONAL JUSTICE LEGISLATION: THE DPP LEGISLATURE

A. The 2016 Elections and Revisiting Transitional Justice

In the heated campaign leading up to the 2016 presidential and legislative elections, the specter of past abuses at the hands of the KMT government and public dissatisfaction with the scope of extant transitional justice legislation became prime topics of debate. The discourse often focused on two specific issues: the continued lack of accountability for the events that occurred during the White Terror period and the failure of previous governments to adequately confront the KMT over its financial assets acquired during the martial law period.\textsuperscript{93}

The campaign pledges of the DPP legislative candidates, and especially the presidential candidate, Tsai Ing-wen (蔡英文), promised to deal with these two issues via specific transitional justice legislation. For example, Tsai’s presidential campaign platform rested on “five pillars of reform,” of which the fourth was specifically dedicated to transitional justice.\textsuperscript{94} Tsai’s approach to transitional justice as political discourse focused on the KMT’s lack of accountability over its historical role in perpetrating abuses during the martial

\textsuperscript{91} See generally John Fuh-sheng Hsieh, Taiwan in 2014: A Besieged President amid Political Turmoil, 55 ASIAN SURV. 142 (2015).


law period, as well as the methods by which the KMT gained its vast financial assets.

This approach is reflected in three key elements of her published transitional justice political platform. The first element offered a measure of acknowledgement of the suffering Taiwan’s indigenous communities had endured not only at the hands of the Republic of China government, but also at the hands of Japanese colonialists. Tsai promised that, if elected, she would “offer an official apology to Aborigines on behalf of the government,” an act quite similar to the one made by former president Lee Tung-hui to victims of the 228 Incident. Second, Tsai pledged that, if elected, her government would “bravely face the past,” for:

We will not neglect errors because they are in the past. Likewise, because past rulers used national violence to hurt and bully the citizens, we have the historical wounds of [the] 228 [Massacre] and the White Terror. We can forgive, but we cannot forget. We must face up to it, and we cannot allow this history to be tampered with.96

The third element specifically promised to deal with the illicitly gained assets of the KMT, which Tsai opines “is the greatest defect in Taiwanese democracy,” primarily because it “prevents fair competition between parties.”97

Each of these campaign pledges reflects the significant legislative gaps in Taiwan’s transitional justice experience. As already noted, these gaps existed primarily due to the KMT’s ability to hold a legislative majority after democratization, and thereby insulate its members and assets from any potential legislative drafts attempting to ascribe individual accountability or threatening to investigate and seize the party’s financial assets. Mindful of Chen Shui-bian’s past ineffectiveness at legislating transitional justice via a KMT-dominated legislature, Tsai ended her platform’s discussion of transitional justice with the qualifying statement that a positive future required not just the presidency, but also required “progressive forces” to “win a legislative majority.”98

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95 Id.
96 Id.
97 Id.
98 Id.
That is exactly what happened for Tsai and the DPP. Tsai Ing-wen took the presidency with 56.1% of the vote, easily outdistancing her opponents—KMT candidate Eric Chu (朱立倫) received 31% and People’s First Party candidate James Soong (宋楚瑜) received 12.8%. More importantly, however, the DPP won a legislative majority for the first time in Taiwan’s democratic history. The 2016 legislative election results saw the DPP increase their seats from 40 to 68 (with 57 needed for a majority in the 113 seat Legislative Yuan), while the KMT representation nearly halved from 64 seats to only 35 seats. This allows the DPP to initiate and pass legislation without the need for direct negotiations with the KMT in order to obtain the required majority votes to pass a bill. For transitional justice in Taiwan, the election meant that for the first time any aspect of Taiwan’s authoritarian past had a fair chance of legislative consideration and the KMT would be unable to stop any legislative bill reaching the floor for a final reading.

In her inaugural speech, President Tsai reiterated the importance of transitional justice for Taiwan as a society to move forward. She stated that “the goal of transitional justice is to pursue true social reconciliation, so that all Taiwanese can take to heart the mistakes of that era.” Throughout the speech, the scope of transitional justice was clearly expanded to reflect society’s palpable discontent with the limited scope and time frame of the KMT legislation. The goals laid out by Tsai’s inaugural address focused on investigation and truth-finding as key mechanisms for social reconciliation, and also diverged from previous practice by specifically highlighting the transitional and historical justice issues of Taiwan’s indigenous communities. With control over the legislature, presidency, and executive, the DPP legislators wasted little time in submitting two pieces of legislation in an attempt to fulfill some of Tsai’s campaign promises during the much anticipated “first 100 days.”

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101 Tsai Ing-wen, President, Republic of China (Taiwan), Inaugural Address (May 20, 2016), translated in Inaugural Address of ROC 14th-Term President Tsai Ing-wen, OFF. PRESIDENT REPUBLIC CHINA (TAIWAN) (May 20, 2016), http://english.president.gov.tw/NEWS/4893.
102 Id.
103 Taiwan has a semi-presidential system in which the popularly elected president selects a prime minister who is responsible for the executive branch of government. JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 57–71 (2016).
B. Re-Legislating Transitional Justice: DPP Legislative Efforts

1. Political Party Assets and Affiliates

Although the DPP caucus proposed two transitional justice bills to the legislature, the first to pass, and possibly the most contentious, was the 2016 Act Governing the Handling of Illicit Assets of Political Parties and Their Affiliates (“2016 Illicit Assets Act”). Reflecting both Tsai’s desire to create a level playing field for all of Taiwan’s political parties and the public’s continued disapproval of the wealth of the KMT, the 2016 Illicit Assets Act specifically targets party assets acquired from 1945 to 1987—the years in which the KMT held an authoritarian monopoly on political power and the formation of other political parties was illegal. Furthermore, because the KMT did not hold all of its assets in name, but utilized several affiliate institutions and organizations to both acquire and manage assets, the original bill was broadened to include “affiliates” (fusui zuzhi, 附随組織). The legislative sessions in which the bill was debated were fraught with high tempers, as the KMT, unable to stop the bill’s eventual passage with its minority, attempted to use all available procedural maneuvers to stall the bill’s passage. It further attempted to sway public opinion against the bill through a media campaign that labeled the 2016 Illicit Assets Act as the beginnings of an era of “Green Terror” (lüse kongbu, 綠色恐怖), with green being the color traditionally associated with the DPP. These attempts, however, failed, and the bill passed its third reading in an extraordinary legislative session on July 25, 2016.

The 2016 Illicit Assets Act is comprised of thirty-four individual articles organized in five chapters. The Act clearly outlines its transitional justice objectives. The initial article defines the purpose of the Act as “to investigate and deal with those party assets and the assets of affiliates illicitly obtained; establish an equal and fair competitive environment for all political

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104 Zhengdang Qi Qi Fu Sui Zuzhi Budang Qude Caichan Chuli Tiail (政黨及其附隨組織不當取得財產處理條例) [Act Governing the Handling of Ill-gotten Properties by Political Parties and Their Affiliate Organizations], FAWUBU FAGUI ZILIAOKU (2016), http://law.moj.gov.tw/LawClass/LawAll.aspx?PCod=0030286.
parties; institute a fully-fledged democracy; and further the implementation of transitional justice.”

To accomplish this, the Act calls for the establishment of a committee under the Executive comprised of eleven to thirteen individuals selected by the Prime Minister and serving four-year terms. To ensure fairness in proceedings, membership drawn from those with party affiliations may not exceed one third of the total for any single party. The Act also restricts any member of the committee who is also a member of a political party from engaging in any party meetings or events while serving as a committee member.

The Illicit Assets Committee meets once per month and is tasked with investigating and compiling information on alleged illicit assets, as well as seizing and, if possible, reinstating such properties to their original owner. To do this, the Act provides the Committee with broad powers such as directly requesting information from political parties and government offices, sending representatives to political party headquarters and government offices to obtain documentation, and sending written requests for interviews with individuals. In addition to these powers, the Committee can also issue fines to political parties or their affiliates if they are found to be obstructing an investigation or attempting to liquidate assets under investigation.

Related to this, the Act requires political parties and their affiliates that were active during the period of 1945–1987 to issue full reports of all assets clearly stating the asset value, asset origins (with evidence), date of acquisition, and evidence of means of transfer. Furthermore, the Act prohibits political parties from liquidating any assets under investigation without approval of the Illicit Assets Committee.

Since its formation under the leadership of Wellington Koo (Koo Lihshuang, 顧立雄), the Illicit Assets Committee has actively pursued the KMT’s vast financial resources. The Committee has frozen nearly all of the KMT’s

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107 Act Governing the Handling of Ill-gotten Properties by Political Parties and Their Affiliate Organizations art 1 ("為調査及處理政黨，附隨組織及其受託管理人不當取得之財產，建立政黨公平競爭環境，健全民主政治，以落實轉型正義").

108 Id. arts. 2, 18.
109 Id. art. 18.
110 Id. art. 20.
111 Id. art. 2.
112 Id. art. 10.
113 Id. art. 8.
114 Id. art. 9.
bank accounts, making it difficult for the KMT to pay its employee salaries, and has also begun the process of investigating the political party’s vast property empire.\(^\text{115}\) It is still too early to measure the extent to which the Committee’s activities will contribute to the public’s sense of transitional justice; however, since its formation, the Committee has endeavored to fulfill Tsai’s pledge of dismantling the KMT’s vast financial resources to create a more equitable and competitive environment for multi-party democratic elections.

2. The Promotion of Transitional Justice Bill

In addition to the Illicit Assets Act, the DPP caucus also submitted a Promotion of Transitional Justice Bill ("Transitional Justice Bill")\(^\text{116}\) specifically targeting the knowledge gap of victims, abusers, and perpetrators during the White Terror period.\(^\text{117}\) However, much to the disappointment of many involved, after the passage of the 2016 Illicit Assets Act, the Transitional Justice Bill stalled in the Legislative Yuan.\(^\text{118}\) Transitional justice is merely one issue currently confronting the DPP government, and other legislative bills related to the economy, environment, and increasingly hostile cross-strait relations have taken priority.\(^\text{119}\)

Recently, Tsai reiterated her hopes that the bill would pass; however, efforts in the Executive Yuan appeared to indicate that the fate of this bill was

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\(^{116}\) This bill passed its third reading in the Legislative Yuan on December 5, 2017. I am extremely grateful to the Washington International Law Journal editorial team for allowing me to update this section of the Article very late into the editing process to include some initial comments on this most recent piece of transitional justice legislation.

\(^{117}\) At the time of writing, this act has not yet been formally promulgated by the Office of the President. As such, I rely on the “unofficial” bill version available on the Legislative Yuan’s website. See Bill Report, Min Jin Dang Dangtuan (民進黨黨團) [DPP Caucus], Cujin Zhuanxing Zhengyi Tiaoli Caoan (促進轉型正義條例草案) [Promotion of Transitional Justice Bill] (Mar. 30, 2016), http://lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/09/01/07/LCEWA01_090107_00045.pdf.


uncertain.\textsuperscript{120} As early as her inaugural speech, Tsai exhibited some skepticism over the future of the bill, and later announced that she intended to establish a truth and reconciliation committee within the president’s office.\textsuperscript{121} Relatedly, Tsai pledged to establish a commission to produce the first ever comprehensive account of the White Terror period.\textsuperscript{122} Yet, without supporting legislative authority, it would be difficult to speculate how effective presidential committees could be at locating and obtaining documentation related to the abuses that occurred under martial law.\textsuperscript{123} Despite the stalling of the Transitional Justice Bill in the legislature, President Tsai seemed adamant to complete her campaign and inaugural speech pledges to fill the “gaps” in Taiwan’s transitional justice experience.

To the surprise of this author and many others, very late in Taiwan’s 2017 fall legislative session, the DPP managed to push the Transitional Justice Bill through its third and final reading.\textsuperscript{124} The newly passed 2017 Promotion of Transitional Justice Act functions much the same as the 2016 Illicit Assets Act. The Act covers the period from August 15, 1945 to November 6, 1992.\textsuperscript{125} The Act provides for the establishment of a truth commission under the Executive Yuan, consisting of nine individuals selected by the Prime Minister and confirmed by the Legislative Yuan.\textsuperscript{126} This article also sets limits on the number of committee members from any single political party and sets a quota for gender representation.\textsuperscript{127} Furthermore, all members of the committee are


\textsuperscript{121} Rowen & Rowen, supra note 5, at 1–3.


\textsuperscript{123} Bowman, supra note 14 (noting that much of Chen Shui-bian’s efforts to establish human rights and transitional justice mechanisms under the office of the president or the Executive Yuan were ineffective overall and easily dismantled when Ma Ying-jeou took the presidency).

\textsuperscript{124} Su Longqi (蘇龍麒), Li Yuan San Du Xingzhengyuan She Cu Zhuanhui Chuli Zhuanxing Zhengyi (立院三讀行政院設促轉會處理轉型正義) [Third Reading in the Legislative Yuan: The Executive Yuan to Establish a Promotion of Transitional Justice Committee to Manage Transitional Justice], CNA NEWS (Dec. 5, 2017, 9:10 PM), http://m.cna.com.tw/news/firstnews/201712055006.aspx.

\textsuperscript{125} Bill Report, DPP Caucus, supra note 117, art. 3.

\textsuperscript{126} Id. art. 8.

\textsuperscript{127} Id. (“However, among the total committee members, there shall be no more than 3 members from the same political party and there shall be no fewer than 3 members of both genders.” (但全體委員中,同一政黨之人數不得逾三人;同一性別之人數不得少於三人)).
forbidden from participating in any political party activities while they are serving their terms.\textsuperscript{128}

The committee possesses a range of mandates and powers to collect from individuals, political parties, and government offices all available documentation relating to abuses occurring during the White Terror period.\textsuperscript{129} The committee is also empowered to fine individuals, political parties, and government officials for obstructing investigations or destroying related files or other relevant documentation.\textsuperscript{130} At first blush, this Act seems to address some of the crucial “gaps” in knowledge about the events and abuses occurring during the White Terror period. Yet unlike any previous transitional justice legislation, this Act also contains provisions allowing the committee to assign responsibility for acts committed during the White Terror period and provides a measure of punitive accountability for individuals.

In perhaps the most striking example of the Act’s powers, it provides the committee with the authority to remove symbols of the authoritarian period. The committee is authorized to remove numerous statues of Chiang Kai-shek and Chiang Ching-kuo, and is permitted to rename a large number of public sites, schools, and universities named after these figures.\textsuperscript{131} Moving quickly after the bill’s passage, Minister of Education Pan Wen-chung (潘文忠) stated that he would meet with schools in Taiwan that are named after Chiang Kai-shek to discuss how the Transitional Justice Act requires them to remove the name.\textsuperscript{132} This is perhaps the most direct attempt to place blame on those public figures involved in the abuses under KMT rule.

Additionally, the committee is empowered to revisit and retry cases from the White Terror period. The committee is further authorized to provide various sanctions for those individuals who were complicit in perpetrating miscarriages of justice.\textsuperscript{133} Such measures focus on a form of procedural justice and administrative accountability of judicial and military personnel for improper trials of civilians during the authoritarian period. They do not,

\begin{itemize}
  \item \textsuperscript{128} Id. art. 12.
  \item \textsuperscript{129} Id. art. 3.
  \item \textsuperscript{130} Id. art. 16.
  \item \textsuperscript{131} Id. art. 5.
  \item \textsuperscript{133} Bill Report, DPP Caucus, \textit{supra} note 117, art. 6.
\end{itemize}
however, extend to specific criminal trials of individuals. Regardless, the 2017 Promotion of Transitional Justice Act has greatly increased the scope of transitional justice within Taiwan. How it will function in practice remains to be seen.

The KMT has always been critical of the DPP version of the Transitional Justice Bill, and had even supplied its own version. After decades of limiting the legislative scope of transitional justice, it is now the KMT that criticizes the language and scope of transitional justice legislation produced by the DPP. For example, KMT Chairman Wu Den-yih (吳敦義) voiced criticism of the temporal scope of the bill for only focusing on the period in which the KMT ruled Taiwan to the exclusion of the colonial periods of the Japanese, Dutch, and Spanish. Such narrowness once again leaves unresolved many issues related to transitional justice claims of Taiwan’s Austronesian peoples. Furthermore, the KMT is critical of the constitutionality of the Transitional Justice Committee’s mandate that combines both executive and judicial powers. It seems likely that the KMT will soon attempt to petition the Constitutional Court to interpret the constitutionality of the Transitional Justice Act. At this point, however, the Transitional Justice Act exists and will be a key part of Taiwan’s future progress towards social reconciliation.

V. REMAINING “GAPS” IN TAIWAN’S TRANSITIONAL JUSTICE

There are clear differences in the scope and language of the KMT-era versus the DPP-era transitional justice legislation. Because the KMT retained an elected majority in the legislature, it could directly control the official stance on transitional justice. The former authoritarian party’s transitional justice legislation, therefore, emphasized reparations and limited acknowledgement, while precluding any consideration of criminal liability, individual accountability, or the necessity of amnesty. The very fact that the KMT remained in power for so long after the democratic transition provided an unofficial amnesty to those who had perpetrated abuses during the authoritarian period. Once the DPP won a legislative majority after twenty years of KMT dominance, for the first time the scope of transitional justice

134 See supra note 9 and accompanying text.
136 Id.
137 Id.
legislation was unbound. Therefore, the DPP legislation attempts to fill the “gaps” of accountability, knowledge, and finances, with specific legislative language.

Yet not everyone is happy with the DPP’s transitional justice legislative agenda. Like the KMT legislation, the DPP’s bills also contain language that limits the applicability of transitional justice measures. Both the 2016 Illicit Assets Act and the Transitional Justice Act are temporally constrained to the period when the KMT ruled. This excludes consideration of the transitional justice needs of those who suffered abuse and loss under Japanese colonialism (1895–1945), or even prior to the Japanese occupation.

This excluded period is particularly troubling for Taiwan’s indigenous communities. As the Japanese attempted to pacify the “savage aborigines,” many of these communities lost vast amounts of their land and fell victim to massacres at the hands of the Japanese. Although Tsai Ing-wen fulfilled her pledge to formally apologize to the indigenous communities on behalf of the national government, the primary legislative proposals for transitional justice submitted by the DPP do not explicitly mention the issues and claims of Taiwan’s indigenous communities.

As a result, numerous bills have been submitted to the Legislative Yuan explicitly dealing with “aboriginal transitional justice” (yuanzhumin zhuanxing zhengyi, 原住民轉型正義) or “aboriginal historical justice” (yuanzhumin lishi zhengyi, 原住民歷史正義). Most submissions seek full or partial restoration of aboriginal lands expropriated via Japanese colonialism or KMT coercion. Additionally, many bills request a measure of historical justice. Similar to the issues with truth-seeking, there are many tribes which the Taiwanese government does not specifically recognize as “aboriginal” or as a distinct tribe, thus their cultural and political representation remains

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138 For a general overview of Japanese practices of dealing with indigenous Taiwanese, see Paul D. Barclay, Outcasts of Empire: Japan’s Rule on Taiwan’s “Savage Border,” 1874–1945 (2018).


140 For an up-to-date listing of the current bills submitted to the Legislative Yuan for consideration, see https://lis.ly.gov.tw/lylgmeet/lmeetc/km?$$APIINTMEET!!XX%28KI%3D法案%20OR%20KI%3D預決算%20OR%20KI%3D施政質詢%20OR%20KI%3D國是論壇%20OR%20KI%3D臨時提案%20OR%20KI%3D黨團協商%20OR%20KI%3D其他%29%20OR%20AND%29%20OR%29%20原住民%29.
limited.\textsuperscript{141} Many of the bills, therefore, request research and official clarification of the complexity of the indigenous tribes of Taiwan. In partial response to this, Tsai recently established the Presidential Indigenous Historical Justice and Transitional Justice Committee (Yuanzhu minzu lishi zhengyi yu zhuanxing zhengyi wei yuan hui, 原住民族歷史正義與轉型正義委員會) tasked with managing many of these issues.\textsuperscript{142} The DPP must ensure that transitional justice is all-encompassing, otherwise its legislation runs the risk of being categorized as myopic, much like the previous legislation of the KMT.

VI. CONCLUSION

This Article has demonstrated how the local, post-transition conditions of individual locales impact the scope and timeline of transitional justice. Taiwan represents a fascinating example. Its experience of transitional justice has been extremely slow to develop and quite conservative. Furthermore, it has been viewed with varying levels of ambivalence by the government and populace. One important factor influencing Taiwan’s transitional justice experience has been the political resilience of the KMT, the former authoritarian party.

Yet with the transition of political power and control of the legislature to the DPP, the modes of engagement and the priorities of “transitional justice” are again constrained by various factors. The pursuit of the KMT assets bill could be argued as important for its influence on the democratic functioning of Taiwan’s government and electoral system. Yet, after it passed, the political drive for the Transitional Justice Act waned. It took an extraordinary effort to get the Transitional Justice Act through its final reading, and the DPP should be commended for that success. However, questions remain as to how well this committee will function; how it will utilize its considerable range of powers; and whether the public will view its work as contributing to national healing and reconciliation, or alternatively as deepening lingering ethnic and social tensions. The recent activities of the Illicit Assets Committee raise the question of whether the DPP transitional justice is actually about confronting


the past and healing old wounds or is simply a case of revenge against a long dominating political party.\footnote{Chen Wei-han, supra note 115; Yang Chun-hui & Jonathan Chin, \textit{KMT Workers Protest Freeze of Assets}, TAIPEI TIMES (Oct. 14, 2016), http://www.taipeitimes.com/News/taiwan/archives/2016/10/14/2003657131.} The DPP government and legislature are still in their early days. How transitional justice advances during the remaining years of Tsai’s presidency remains to be seen. In order to be successful, however, the government will need to ensure that its methods bring about the desired reconciliation rather than further bifurcation of society, and it will need to ensure that its transitional justice policies are inclusive of all groups, especially the indigenous communities that have traditionally been marginalized.