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TRANSITIONAL JUSTICE IN TAIWAN: CHANGES AND CHALLENGES

Nien-Chung Chang-Liao* and Yu-Jie Chen**

Abstract: Taiwan's experience with transitional justice over the past three decades suggests that dealing with historical injustice is a dynamic and fluid process that is fundamentally shaped and constrained by the balance of power and socio-political reality in a particular transitional society. This Article provides a contextualized legal-political analysis of the evolution of Taiwan's transitional justice regime, with special attention to its limits and challenges. Since Taiwan's democratization began, the transitional justice project developed by the former authoritarian Chinese Nationalist Party (Kuomintang, KMT) has been rather disproportionately focused on restorative over retributive mechanisms, with the main emphasis placed on reparations and apology and little consideration of truth recovery and individual accountability. But since the Democratic Progressive Party began to control the government and legislature in 2016, its new transitional justice initiatives have introduced significant changes, including, among others, investigating the KMT's "illicit party assets" and removing authoritarian symbols such as Chiang Kai-shek's statues, eliciting various contentions and contestations along the way. In our view, Taiwan is now confronted with profound challenges in developing a holistic, thoughtful transitional justice regime: fierce partisan politics that could interrupt progress at any time, conflation of transitional justice and identity politics, pending legal complications and a general distrust of the judiciary, and limited public engagement in transitional justice issues. Whether Taiwan can continue to thrive depends on how it grapples with these challenges in pursuit of justice and reconciliation that will strengthen and sustain tomorrow's democratic Taiwan.

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I. INTRODUCTION

The publication of Ernest Caldwell's article in the *Washington International Law Journal*¹ turned academic attention to the transitional justice regime of Taiwan which, like many countries in Asia, suffered through long-lasting colonialism and authoritarian rule. It has nevertheless transformed into a vibrant democracy thanks to decades of the opposition's persevering efforts to push democratization. Yet, despite the impressive progress in democratic transition, Taiwan's experience of transitional justice has been under-analyzed and under-appreciated in the English-speaking world. Caldwell's article, therefore, is a much-needed contribution that helps fill a

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¹ Ernest Caldwell, *Transitional Justice Legislation in Taiwan Before and During the Tsai Administration*, 27 WASH. INT'L L.J. 449 (2018).

lamentable gap in the scholarship and public discussion in East Asia and beyond.

Caldwell examines the transitional justice processes in the Republic of China on Taiwan (Taiwan) in two phases after democratization: one from 1987 to 2016, when the former authoritarian Chinese Nationalist Party (KMT or Kuomintang) controlled the presidency (1987-2000) as well as the legislature (1987-2016); and the other from 2016 to present, when the oppositional Democratic Progressive Party (DPP) controlled both the presidency and the legislature. Caldwell argues that the “local post-democratization conditions”—the fact that the KMT continued to hold political power after lifting martial law in 1987—has greatly reduced the transitional justice regime to only measures of reparations and limited acknowledgment of past injustice, without any effort to pursue individual accountability and criminal liability.²

This Article builds on and extends Caldwell’s study by providing a distinctive legal-political analysis of the evolution of transitional justice in Taiwan. In particular, we examine Taiwan’s challenges in developing a holistic, constructive transitional justice regime due to the extensive scope and scale of the historical injustice, the fierce partisan politics that could interrupt progress at any time, and the lukewarm public support for new initiatives, among others. The Article proceeds as follows. Part II lays the groundwork by examining the concept of transitional justice as well as a wide range of relevant mechanisms and different approaches under the framework of transitional justice. Part III calls attention to the broad scope of Taiwan’s transitional justice issues, offering an overview of the government oppression and atrocities that took place in the two periods before Taiwan’s democratization, i.e., the Japanese colonial rule (1895-1945) and the Kuomintang’s authoritarian rule (1945-1987). Part IV discusses democratic Taiwan’s efforts to pursue transitional justice and their limits. Finally, Part V evaluates the challenges that confront today’s Taiwan in developing an integrated transitional justice regime.

II. TRANSITIONAL JUSTICE: CONCEPT, MECHANISMS, AND APPROACHES

The term transitional justice first came into use in the mid-1980s, as waves of political change and democratic transition swept through Latin America, Central and Eastern Europe, and Africa. The concept evolved as

² *Id.* at 480.

scholars sought to understand the conditions for justice after atrocity. As Alexander Boraine succinctly summarizes, transitional justice is “a convenient way of describing the search for a just society in the wake of undemocratic, often oppressive and even violent systems” that offers “a deeper, richer, and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation.”³ In his view, accountability, truth recovery, reconciliation, institutional reform, and reparations are the pillars that support a holistic approach to transitional justice.⁴ Similarly, in a 2004 report, the United Nations (UN) defined transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation.”⁵

In this framework, there are a panoply of mechanisms associated with transitional justice, including judicial and non-judicial mechanisms, such as truth-seeking, individual prosecutions, reparations, institutional reform, archives, memorialization, vetting, and dismissals.⁶ Despite the expansion of the concept of transitional justice to include a wider range of mechanisms, the principal objectives of transitional justice remain seeking truth and justice, offering redress for victims, and preventing similar tragedies from recurring.⁷

Under this concept, two philosophies can be distinguished, namely, a “retributive” approach versus a “restorative” approach. Both approaches agree on public accountability for past abuses, but they differ over the mechanisms used in the pursuit of transitional justice. To put it simply, the retributive approach emphasizes measures of vetting and lustration to block perpetrators from power and criminal prosecution to punish them in domestic or international courts. It underlines the need to end impunity in the transitional

³ Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT’L AFF. 17, 18 (2006).

⁴ *Id.* at 19–25.

⁵ U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc S/2004/616 (Aug. 23, 2004).

⁶ See, e.g., David Mendeloff, *Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?*, 6 INT’L STUD. REV. 355, 357 (2004); Geoff Dancy, *Choice and Consequence in Strategies of Transitional Justice*, in *THE HANDBOOK ON THE POLITICAL ECONOMY OF WAR* 397, 397–98 (Christopher J. Coyne & Rachel L. Mathers eds., 2011).

⁷ These main objectives of transitional justice are concisely listed in the Special Rapporteur mandated by the UN Human Rights Council for transitional justice issues. See *Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSION, <https://www.ohchr.org/en/issues/truthjusticereparation/pages/index.aspx> (last visited Jan. 15, 2019).

society.⁸ The purposes of transitional justice, in this view, are to pursue accountability, rebuild the rule of law, and deter human rights violations from occurring in the future. The restorative approach, on the other hand, aims to help victims recover from past brutality through measures of reparations, memorialization, and truth commissions. Much of the literature in this vein cautions about the consequences of a punitive approach for peace and reconciliation and prioritizes the objectives of providing redress for victims and repairing social connections that have been damaged by past conflicts.⁹

This conceptual contrast is helpful in understanding the evolution of Taiwan's transitional justice. The main mechanisms of transitional justice in Taiwan after democratization have been largely apologies, memorials, victim reparations, and, to some extent, institutional reforms, which follow the lines of a restorative approach.¹⁰ Such a path is a feature of the island's peaceful transition to democracy. The lack of retributive measures in this process, however, has been criticized as a "transition without justice."¹¹ Academic and policy discussions increasingly focus on whether retributive elements that seek accountability and end immunity should be added to Taiwan's transitional justice project in pursuit of a holistic approach.¹²

⁸ See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2539 (1991); Neil J. Kriz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127 (1996); Juan E. Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255 (1997); Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939 (2010).

⁹ See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5 (2003); Mendeloff, *supra* note 6; Tricia D. Olsen, et al., *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUM. RTS. Q. 980 (2010); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2011).

¹⁰ See *infra* Part III.

¹¹ Naiteh Wu, *Transition without Justice, or Justice without History: Transitional Justice in Taiwan*, 1 TAIWAN J. OF DEMOCRACY 77 (2005).

¹² See, e.g., Jun-Hong Chen (陳俊宏), *Jianshi Taiwan de Zhuangxing Zhengyi zhi Lu* (檢視台灣的轉型正義之路) [*Taiwan's Path Towards Transitional Justice*], 71 XINSHIJI ZHIKU LUNTAN (新世紀智庫論壇) [NEW CENTURY THINK TANK FORUM] 18, 20–22 (2015); *Zhuanxing Zhengyi de Zhengzhi yu Falü Zhexue Luntan—Jiahazhe de Guoqu yu Xianzaishi* (轉型正義的政治與法律哲學論壇—加害者的過去與現在式) [*Forum Discussion: Political and Legal Philosophy of Transitional Justice—The Past and Present of the Perpetrators*], 59 ZHENGZHI YU SHEHUI ZHEXUE LUNTAN (政治與社會哲學論壇) [SOCIETAS: A JOURNAL FOR PHILOSOPHICAL STUDY OF PUBLIC AFFAIRS] 153, 168–73, 182–90, 193–96 (2016); Jonathan Chin, *Transitional Justice Forum Says Remove Statutory Limitations on Prosecution*, TAIPEI TIMES (Apr. 19, 2016), www.taipeitimes.com/News/taiwan/archives/2016/04/19/2003644308.

III. HISTORICAL INJUSTICE BEFORE TAIWAN'S DEMOCRATIZATION

Taiwan was a Japanese colony from 1895 to 1945 and came under the administration of the Republic of China (ROC) government in 1945 after Japan surrendered in the Second World War. Both regimes sought to achieve their nation-building agendas on the island, often through coercive policies that muffled dissenting voices and repressed different identities.¹³

A. *Japanese Colonial Period (1895-1945)*

Taiwan and its outlying Penghu islands (Pescadores) were ceded to Japan in the 1895 Treaty of Shimonoseki by the Chinese Qing Dynasty after the Qing lost the First Sino-Japanese war.¹⁴ Although the gentry and general public in Taiwan organized armed resistance to Japanese encroachment and even declared the establishment of a short-lived “Republic of Taiwan,” the result was about 14,000 Taiwanese deaths and a completion of Japanese occupation by the end of October 1895.¹⁵ Nevertheless, resistance against the colonial authorities continued, including the Tapani Incident in 1915 and the Wushe Incident in 1930, which were both large-scale rebellions attempted by the Han Taiwanese and the island’s aboriginal people, respectively.¹⁶

Despite decades of local resistance in Taiwan, Japan was determined to turn the island into a model colony in Asia by means of both modernization and economic exploitation.¹⁷ During the first two decades of Japanese rule, the Taiwanese were subject to a number of harsh discriminatory policies of the colonial government. Native languages were banned, intensive police networks (*baojia* system) were implemented, and capital punishment became rampant.¹⁸ More than 5,000 Taiwanese were executed in the first decade of

¹³ See generally Yun-han Chu & Jih-wen Lin, *Political Development in 20th-Century Taiwan: State-Building, Regime Transformation and the Construction of National Identity*, 165 CHINA Q. 102 (2001); Barak Kushner, *Nationality and Nostalgia: The Manipulation of Memory in Japan, Taiwan, and China since 1990*, 29 INT’L HIST. REV. 793 (2007).

¹⁴ Harry J. Lamley, *Taiwan Under Japanese Rule, 1895-1945: The Vicissitudes of Colonialism*, in TAIWAN: A NEW HISTORY 201, 203 (Murray A. Rubinstein ed., 2007); Wan-Yao Chou, *Taiwan Under Japanese Rule (1895-1945)*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY TAIWAN 22, 25–26 (Gunter Schubert ed., 2016).

¹⁵ *Id.*; see also J. BRUCE JACOBS, DEMOCRATIZING TAIWAN 26 (2012).

¹⁶ Chou, *supra* note 14, at 26–29.

¹⁷ Kushner, *supra* note 13, at 811 (stating that the Japanese colonial administration intended to reform Taiwan to be “the showcase for Japanese modernization throughout Asia”); see also Lamley, *supra* note 14, at 201, 209.

¹⁸ Chu & Lin, *supra* note 13, at 106.

Japanese rule, including those who committed only minor offenses. Those who survived suffered torture and forced labor.¹⁹ In addition, Taiwanese were excluded from the government and had no right to serve in the military.²⁰ As armed struggles against the colonial government became increasingly futile, the anti-government movements gradually shifted to the pursuit of self-determination and more political autonomy.²¹

Beginning in the early 1920s, the colonial government began to employ assimilation policies that aimed to introduce Japanese institutions and regulations into Taiwan.²² The Taiwanese were required to learn to be Japanese subjects and were given more political space, such as having the eligibility to be elected or appointed to local councils.²³ They were also granted the opportunity of pursuing university studies in Japan.²⁴

The start of the Second Sino-Japanese War in 1937 further intensified Japan's efforts of assimilation and "Japanization" of the island (*kominka*, literally, "to make [the Taiwanese] the Emperor's people").²⁵ The Taiwanese were educated as subjects of the Japanese emperor and were mobilized to join the Imperial Japanese Army and Navy. More than 200,000 Taiwanese, out of a total population of 6.5 million, were conscripted into Japan's war against China and later against the Allied forces in the Pacific War, and approximately 30,000 of them died in that service.²⁶ Furthermore, much like women from the rest of Japan's newly conquered Empire, notably Korea and parts of China, between 1,200 to 2,000 Taiwanese women were forced to work as sex slaves (known as "comfort women") for the Japanese military during the Second World War.²⁷ It was thus not surprising that after Japan announced its surrender in 1945, the arrival of 30,000 Nationalist troops in Taipei was greeted by crowds enthusiastic about the prospect of joining China.²⁸

¹⁹ Lamley, *supra* note 14, at 241.

²⁰ *Id.*

²¹ Chu & Lin, *supra* note 13, at 106–07.

²² Chou, *supra* note 14, at 29–30.

²³ Chu & Lin, *supra* note 13, at 109.

²⁴ Chou, *supra* note 14, at 29–30.

²⁵ Chu & Lin, *supra* note 13, at 110.

²⁶ Victor Louzon, *From Japanese Soldiers to Chinese Rebels: Colonial Hegemony, War Experience, and Spontaneous Remobilization During the 1947 Taiwanese Rebellion*, 77 J. ASIAN STUD. 161, 164 (2017).

²⁷ See generally YOSHIKI YOSHIMI, *COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II* (2000).

²⁸ SHEENA CHESTNUT GREITENS, *DICTATORS AND THEIR SECRET POLICE: COERCIVE INSTITUTIONS AND STATE VIOLENCE* 184 (2016).

B. *The Kuomintang Government (1945-1987)*

Taiwan's fate was once again changed by a war. After Japan surrendered in 1945, the victorious Allied forces placed Taiwan under the military administration of the ROC,²⁹ which had succeeded the Imperial Chinese Government in 1912 and which had been under the control of Generalissimo Chiang Kai-shek's KMT since 1927. The ROC promptly integrated Taiwan into its national government system. Meanwhile, the Chinese continent was engulfed in a civil war between Chiang Kai-shek's KMT and Mao Zedong's Communist forces.

Although many Taiwanese had opposed Japanese rule and welcomed Taiwan's return to China, they were viewed by those on the mainland as lacking loyalty to the ROC as well as being ideologically tainted by decades of Japanese rule.³⁰ Native Taiwanese (*benshengren*, "people of this province [of Taiwan]") were barred from political participation, while Mainland Chinese who settled in Taiwan shortly before the KMT's 1949 retreat to the island (*waishengren*, "people from other provinces") monopolized key power positions in Taiwanese society.³¹ In addition, the newly installed Chinese administration's corruption and incompetence brought the island to the verge of economic collapse, posing a stark contrast to the relative stability of Japanese rule in the eyes of many Taiwanese.³² The initial jubilation of "returning to the motherland" on the island soon gave way to a sobering mood of disillusionment and dissatisfaction.³³

The distinction between the so-called *benshengren* and *waishengren* is important in understanding Taiwan's history and political divide.³⁴ After Chiang Kai-shek's troops arrived in Taiwan in 1945, tensions began to rise between local *benshengren* and their newly-arrived *waishengren* rulers. Conflict along this divide finally exploded on February 28, 1947 to become

²⁹ For studies of Taiwan's political situation in the early days of the ROC rule, see TSE-HAN LAI, RAMON MYERS & WOU WEI, *A TRAGIC BEGINNING: THE TAIWAN UPRISING OF FEBRUARY 28, 1947* (1991); Steven Phillips, *Between Assimilation and Independence: Taiwanese Political Aspirations Under Nationalist Chinese Rule, 1945-1948*, in *TAIWAN: A NEW HISTORY* 275 (Murray A. Rubinstein ed., 2007).

³⁰ Chu & Lin, *supra* note 13, at 112; Cheng-feng Shih & Mumin Chen, *Taiwanese Identity and the Memories of 2-28: A Case for Political Reconciliation*, 34 *ASIAN PERSP.* 85, 91 (2010).

³¹ See Shih & Chen, *supra* note 30, at 88-98.

³² Chu & Lin, *supra* note 13, at 112; Shih & Chen, *supra* note 30, at 91.

³³ *Id.*

³⁴ For a discussion of how these identities have been developed, see Shih & Chen, *supra* note 30, at 88-90.

an island-wide popular uprising against the Chinese provincial administration. The resistance was brutally suppressed by reinforcing troops from the mainland.³⁵ In this notorious “2-28 Incident,” an estimated 18,000 to 28,000 Taiwanese were killed, including many of the island’s intellectuals and social elites who had demanded political reforms.³⁶

Two years after the 2-28 massacre, the Nationalist government, after losing the mainland in the civil war with the Chinese Communist Party, retreated to Taiwan along with hundreds of thousands of *waishengren* troops and refugees.³⁷ Chiang made Taiwan his last bastion for resisting the People’s Republic of China established by Mao Zedong on the mainland and imposed on the island what would become the world’s longest-prevailing martial law decree (1949-1987).

During the lengthy martial law rule, political rights and civil liberties were severely restricted. The KMT government employed criminal charges and court-martials as the main tools to suppress any political dissidents, including both *benshengren* and *waishengren*.³⁸ Alongside these tactics, under vaguely-worded sedition laws, including Article 100 of the Criminal Code, any non-violent opposition to the regime could be interpreted as a threat to the state and therefore severely punished.³⁹ An official report estimated that, during this period, approximately 29,000 political trials took place and

³⁵ For detailed accounts on the 2-28 Incident, see LAI ET AL., *supra* note 29, at 99–167; STEVEN E. PHILLIPS, *BETWEEN ASSIMILATION AND INDEPENDENCE: THE TAIWANESE ENCOUNTER NATIONALIST CHINA, 1945-1950* (2003).

³⁶ These numbers were based on a multi-volume report release by the Executive Yuan in 1993, although the actual numbers killed remain unknown and disputed. The official report was later published as a book. XINZHENGYUAN YANJIU ERERBA SHIJIAN XIAOZU (行政院研究二二八事件小組) [TASK FORCE OF THE EXECUTIVE YUAN ON THE 2-28 INCIDENT], ‘ERERBA SHIJIAN’ YANJIU BAOGAO (「二二八事件」研究報告) [RESEARCH REPORT OF THE 2-28 INCIDENT] (1994).

³⁷ Stéphane Corcuff, *Taiwan’s “Mainlanders,” New Taiwanese?*, in *MEMORIES OF THE FUTURE: NATIONAL IDENTITY ISSUES AND THE SEARCH FOR A NEW TAIWAN* 163, 164 (Stephane Corcuff ed., 2002).

³⁸ Wu, *supra* note 11.

³⁹ Chun-hung Chen & Han-hui Chung, *Unfinished Democracy: Transitional Justice in Taiwan*, in 4 *STUDIA Z POLITYKI PUBLICZNEJ (PUBLIC POLICY STUDIES)* 13, 32, 24 (2016) (“Article 100, paragraph 1 states: the one who intended and began to implement damage to the state, usurpation of the land or change of the country’s constitution by illegal means, subversion of the government, could be sentenced to seven years’ imprisonment, and the first colluder would be sentenced to life imprisonment. The second paragraph: the one who prepares or conspires to commit the previously mentioned crimes could be sentenced to imprisonment, at least six months to five years. It means that not only could the conspirators be punished, and the idea of ‘begin to implement’ was not only limited to the use of violent and coercive methods, but also the common crime of insurrection could be committed on grounds of the ideological level.”).

resulted in 3,000 to 4,000 executions.⁴⁰ Among them, at least one-third were *waishengren*, who comprised only fifteen percent of the population.⁴¹ This suggested that both *benshengren* and *waishengren* were victims of state atrocities during this period, which is now commonly referred to as the White Terror.

The latter half of the 1970s again saw rising political activism, but the appetite of the new dictator, Chiang Ching-kuo (Chiang Kai-shek's son), for liberalism proved to be limited. His government infamously quashed protesters in what culminated in the "Kaohsiung Incident," where police and protesters clashed in a rally held by opposition activists to recognize International Human Rights Day on December 10, 1979.⁴² Members of the dissident magazine *Formosa (Meilidao)* implicated in the protest were convicted on charges of subversion.⁴³ Prior to the trial, the mother of Lin Yi-hsiung, one of the *Meilidao* defendants, contacted Amnesty International to enlist international support for activists.⁴⁴ She and Lin's twin daughters were murdered immediately thereafter while Lin and seven other primary defendants were sentenced to long prison terms ranging from twelve years to life.⁴⁵ The Kaohsiung Incident, however, did not inhibit the expansion of opposition forces (*Dangwai*, literally "outside the Party, i.e., KMT") in the 1980s.⁴⁶ Finally, in 1986, democratic activists from *Dangwai* founded the DPP. This time, Chiang Ching-kuo did not crack down on the organizers. In light of mounting domestic and international pressures to democratize Taiwan, in 1987, the KMT government lifted the world's longest term of martial law, which opened up the processes of democratization and later of transitional justice.

⁴⁰ TING-CHAO WEI (魏廷朝), TAWAIN RENQUAN BAOGAO SHU 1945-1995 (台灣人權報告書一九四九-一九九五) [REPORT ON HUMAN RIGHTS IN TAIWAN, 1945-1995] (1997).

⁴¹ GREITENS, *supra* note 28, at 183–84.

⁴² For the Kaohsiung Incident, see JOHN KAPLAN, THE COURT-MARTIAL OF THE KAOHSIUNG DEFENDANTS (1981); DENNY ROY, TAIWAN: A POLITICAL HISTORY 167–69 (2002).

⁴³ ROY, *supra* note 42, at 168–69.

⁴⁴ *Id.* at 169.

⁴⁵ KAPLAN, *supra* note 42, at 46.

⁴⁶ For the formation and organization of domestic opposition in Taiwan following the Kaohsiung Incident, see XIAO-FENG LI (李筱峰), TAWAIN MINZHU YUNDONG SISHI NIAN (台灣民主運動四十年) [FORTY YEARS OF TAIWAN'S DEMOCRATIC MOVEMENT] (1987).

IV. THE DEVELOPMENT OF TRANSITIONAL JUSTICE IN TAIWAN

Taiwan's democratic regime has drawn on a limited number of transitional justice mechanisms, including apology, reparations, memorialization and, to a lesser extent, legal reforms and truth recovery. This process, as Caldwell and other scholars rightly point out, is marked by a lack of retributive measures of prosecution and lustration due to the fact that the former authoritarian party, the KMT, remained in power for a long time after democratization began.⁴⁷

Moreover, the focal point of Taiwan's transitional justice has so far been the 2-28 massacre, less so the White Terror period, and least of all the human rights abuses during Japanese colonial rule. In our view, this uneven development that targets KMT abuses (with meager regard for Japanese colonial atrocities) can be attributed to several factors. First, the introduction of free and competitive elections during democratization meant that Taiwanese party politics would be aligned more closely with the *benshengren* constituency (the majority of the population) and their interests. Therefore, the 2-28 massacre—the watershed tragedy early in the KMT's rule that targeted *benshengren* elites and divided *benshengren* and *waishengren* for generations to come—has become the center of attention; other issues, especially those concerning Japanese colonial abuses, were more or less crowded out. Second, for the KMT to gain legitimacy and the trust of the voting public, it adopted the responsiveness required of a party in a democratic system and attempted to address its past wrongs, albeit in a very measured and limited way. Instituting mostly restorative transitional justice measures, such as monetary reparations, apologies and memorials, and acknowledging responsibility to the extent that its political power would not be undermined appeared to be a logical pathway for the KMT. Third, while Japan's governance was indeed discriminatory and exploitative, it may have appeared relatively less punitive to the public when compared to the KMT's cruel terror.⁴⁸ This accounts for a constituency in Taiwan that is more sympathetic to Japan's colonial period than to the KMT's rule.⁴⁹ Last but not least, the

⁴⁷ Caldwell, *supra* note 1; Wu, *supra* note 11; Jau-Yuan Hwang, *Transitional Justice in Postwar Taiwan*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY TAIWAN 169, 171 (Gunter Schubert ed., 2016) (“Taiwan's effort in pursuit of transitional justice has focused mainly and mostly on victim reparations, less on truth-finding and institutional reforms, and least on wrongdoers' liabilities.”); Chen, *supra* note 12, at 20.

⁴⁸ Chu and Lin, *supra* note 13, at 111–12.

⁴⁹ Shogo Suzuki, *The Competition to Attain Justice for Past Wrongs: The "Comfort Women" Issue in Taiwan*, 84 PAC. AFF. 223, 233–34 (2011).

passage of time has added to the difficulty of pursuing accountability for abuses dating back to Japanese rule.

A. *Taiwan's Transitional Justice Regime until 2016*

Despite intense partisan political feelings, there was scant popular demand for a transition of power or transitional justice right after democratization. The KMT's eventual defeat in the presidential election in 2000 also did not result in public clamor for retribution. Furthermore, the KMT was able to return to power through the ballot box from 2008 to 2016.⁵⁰ Advocates of a more holistic approach towards transitional justice measures in Taiwan, thus, faced grave difficulties in building broad-based social support for their cause. Only in 2016 when the KMT lost both presidential and parliamentary elections to the DPP was more deliberation given to transitional justice, including retributive measures, in the new government and legislature.

The very beginning of Taiwan's transitional justice project was made possible in the 1990s, when President Lee Teng-hui, who assumed the KMT leadership after Chiang Ching-kuo's death in 1988 and is a *benshengren* himself, pursued a policy of apology, memorials, and compensation and, to some extent, truth-seeking. Under Lee's stewardship, an official committee on the 2-28 Incident was set up in 1990 under the Executive Yuan and later published its findings in an investigative report in 1992.⁵¹ In the same year, Lee issued an official apology for the 2-28 Incident and announced February 28 a national holiday.⁵² In 1995, Taiwan's legislature, the Legislative Yuan, passed the "February 28 Incident Disposition and Compensation Act" [二二八事件處理及補償條例] (2-28 Act).⁵³ The aim of this Act, according to

⁵⁰ Although the KMT lost the presidential election in 2000, it still enjoyed a majority in the Legislative Yuan until 2016. The KMT candidate, Ma Ying-jeou, won a landslide victory in the 2008 presidential election.

⁵¹ See Task Force of the Executive Yuan on the 2-28 Incident, *supra* note 36.

⁵² Nicholas D. Kristof, *Taipei Journal; The Horror of 2-28: Taiwan Rips Open the Past*, N.Y. TIMES (Apr. 3, 1992), <https://www.nytimes.com/1992/04/03/world/taipei-journal-the-horror-of-2-28-taiwan-rips-open-the-past.html>.

⁵³ The wording "buchang" (補償) in the Act was later replaced by "peichang" (賠償) to reflect the nature of the compensation. Caldwell, *supra* note 1, at 468 ("With very little media attention or legislative debate, the amendment changed the term to "peichang" (賠償), which denotes a form of compensation for a harm resulting from an illegal act."). Ererba Shijian Chuli ji Peichang Tiaoli (二二八事件處理及賠償條例) [The February 28th Incident Disposition and Compensation Act] (promulgated by the Legislative Yuan, effective Apr. 7, 1995, last amended Jan. 17, 2018) (Taiwan).

Article 1, was “to enhance public understanding of the incident, to heal the wounds of history, and to promote racial integration.”⁵⁴

B. *Apology and Memorials*

Following the 1995 2-28 Act, Taiwan’s successive presidents, either from the KMT or the DPP, continued to issue an annual apology for the 2-28 Incident on behalf of the government. Some memorials and human rights museums were established for this purpose, including the 2-28 Memorial Park in central Taipei. By appealing to healing and forgiveness, President Lee defused a ticking time bomb of *benshengren-waishengren* conflict in Taiwanese society that had surfaced with the island’s democratization and subsequent political competition.⁵⁵ In 1996, President Lee won a landslide victory in Taiwan’s first presidential election (despite fierce competition from other candidates and China’s missile threats prior to the election).⁵⁶ As Steve Tsang observes, the success of Lee Teng-huei’s transitional justice initiative was aided by his concept of “New Taiwanese” that would give all citizens of the ROC—including both *waishengren* and *benshengren*—a new identity to share.⁵⁷ This new Taiwanese identity stood in vivid contrast with that of the People’s Republic of China, which was separated not only by the Taiwan Strait, but also by the growing divergence between the two different political systems.⁵⁸

The 2-28 massacre was not the only historical memory to come to light in the wake of Taiwan’s democratization. The extensive, long-standing White Terror, while receiving less attention than the shocking 2-28 tragedy, gradually entered the public discourse. While the 2-28 Incident came to symbolize KMT political repression and the victimization of the Taiwanese *benshengren*, the victims of the White Terror were *waishengren* as well as

⁵⁴ Later in 2014, two additional goals were added to Article 1, namely “to carry out the education of history,” and “to clarify attribution of responsibility.”

⁵⁵ Chu & Lin, *supra* note 13, at 122 (Lee “helped construct a new foundation for the legitimacy of the ROC state structure without violent internal polarization and external military intervention”).

⁵⁶ Aiming at influencing Taiwan’s first presidential election in 1996, China conducted a series of missile tests and military exercises near the island’s coast from July 1995 to March 1996. For a detailed account, see JOHN W. GARVER, *FACE OFF: CHINA, THE UNITED STATES, AND TAIWAN’S DEMOCRATIZATION* (1997).

⁵⁷ Steve Tsang, *Democratisation in a Chinese Community: Lessons from Taiwan*, in *TAIWAN IN THE 21ST CENTURY: ASPECTS AND LIMITATIONS OF A DEVELOPMENT MODEL* 177, 186 (Robert Ash & J. Megan Greene eds., 2007); see also Shih & Chen, *supra* note 30, at 101 (“While retaining the Chinese cultural identity, Lee upheld Taiwanese political identity.”).

⁵⁸ Tsang, *supra* note 57, at 186.

benshengren. In particular, much of the state violence was concentrated among the KMT's own officials, police, intelligence and military personnel.⁵⁹ Yet, compared to the 2-28 Incident, the White Terror has received far less official commemoration and, thus, lower political priority in the process of transitional justice in Taiwan. Only in 2008 was the first monument to the White Terror victims commissioned by the government. A few years later, two notorious former military prisons for political dissidents (on Green Island and in Jingmei, New Taipei City) were transformed into Human Rights Memorial Parks to register human rights abuses during the White Terror.⁶⁰

C. Compensation

A framework of reparations was put in place to compensate victims of the authoritarian rule and their families.⁶¹ For the 2-28 massacre, the 2-28 Memorial Foundation [二二八事件紀念基金會] was established by the government in 1995 to provide monetary compensation capped at a maximum of US \$180,000 per person.⁶² As of the end of its operation in 2014, the 2-28 Memorial Foundation had received a total of 2,278 applications and had compensated 9,883 individuals in payouts amounting to US \$239 million.⁶³

Victims of the White Terror and their heirs received reparations in accordance with the 1995 Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law [戒嚴時期人民受損權利回復條例] (Martial Law Recovery Act)⁶⁴ and the 1998 Compensation Act for Wrongful Trials on Charges of Sedition and Espionage during the Martial Law Period [戒嚴時期不當叛亂暨匪諜審判案件補償條例] (Wrongful Trials Compensation Act).⁶⁵ The Foundation for Compensation for Wrongful Trials on Charges of Sedition and Espionage during the Martial Law Period [戒嚴時期不當叛亂暨匪諜審判案件補償基金會] was created in

⁵⁹ GREITENS, *supra* note 28, at 195–96.

⁶⁰ Hwang, *supra* note 47, at 176.

⁶¹ For a discussion of the various measures of reparations, see Caldwell, *supra* note 1, at 426–27.

⁶² Hwang, *supra* note 47, at 174.

⁶³ *Id.*

⁶⁴ Jieyan Shiqi Renmin Shousun Quanli Huifu Tiaoli (戒嚴時期人民受損權利回復條例) [The Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law] (promulgated by the Legislative Yuan, effective Jan. 28, 1995, last amended Feb. 2, 2000) (Taiwan).

⁶⁵ Jieyan Shiqi Budang Panluan ji Feidie Shenpan Anjian Buchang Tiaoli (戒嚴時期不當叛亂暨匪諜審判案件補償條例) [The Compensation Act for Wrongful Trials on Charges of Sedition and Espionage during the Martial Law Period] (promulgated by the Legislative Yuan, effective June 17, 1998, last amended Dec. 18, 2006) (Taiwan).

accordance with the 1998 Wrongful Trials Compensation Act. By the end of its operation, the Foundation had accepted a total of 10,066 applications and provided monetary compensation totaling roughly US \$660 million.⁶⁶ It should be noted that, despite this compensation scheme, there remains a problem of providing full redress to people who had property confiscated in court-martial proceedings.⁶⁷

Despite the above efforts, many victims did not get their names cleared until almost three decades later.⁶⁸ Article 9 of the National Security Act [國家安全法],⁶⁹ which was passed on the eve of the lifting of martial law, prohibited civilians from appealing their convictions by court-martials to the higher courts. The constitutionality of Article 9 was upheld by the Grand Justices in Interpretation No. 272 in 1991 for the sake of maintaining “the stability of the courts’ final decisions and the social order.”⁷⁰ Consequently, the right to challenge the legality of military trials against civilians during the White Terror period was severely restricted.⁷¹

D. Reforms

Pressure from Taiwanese society and the DPP prompted the KMT government to institute some legal reforms. For example, in May 1992, the Legislative Yuan, in response to mass protests, amended Article 100 of the Criminal Code to include freedom of speech protections.⁷² With this amendment, non-violent advocacy of Taiwanese independence was no longer illegal. More than ten persons charged with advocating Taiwanese independence in the previous year were released.⁷³ A month later, the Second

⁶⁶ Hwang, *supra* note 47, at 174.

⁶⁷ Chen, *supra* note 12, at 24 (noting that according to the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law, only those who have received an acquittal are entitled to demand the return of confiscated property; however, since Article 9 of the National Security Act prohibits civilians from appealing their convictions by court-martials to the higher courts, many victims have not been allowed to obtain acquittal).

⁶⁸ See *infra* note 110 and the accompanying text.

⁶⁹ Guojia Anquan Fa (國家安全法) [National Security Act] (promulgated by the Legislative Yuan, effective July 15, 1987, last amended Aug. 21, 2013) (Taiwan).

⁷⁰ Sifayuan Dafaguan (司法院大法官) [Grand Justices], Interpretation No. 272 (Jan. 18, 1991), available at https://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=272.

⁷¹ Caldwell, *supra* note 1, at 460–62.

⁷² Winston Hsiao, *The Development of Human Rights in the Republic of China on Taiwan: Ramifications of Recent Democratic Reforms and Problems of Enforcement*, 5 PAC. RIM L. & POL'Y J. 161, 181 (1995).

⁷³ JACOBS, *supra* note 15, at 83–84.

Personnel Office under the Ministry of Justice, which was in charge of a “loyalty” check on all governmental employees, was dismantled.⁷⁴ In July of the same year, the government dissolved the Taiwan Garrison Command, which was once the most feared security agency of the authoritarian era.⁷⁵

E. Lack of Individual Accountability

Despite these measures, however, there has been little progress in pursuing legal recourse against those who should be held responsible for the abuses.⁷⁶ The 2-28 Act, the Martial Law Recovery Act, and the Wrongful Trials Compensation Act, while acknowledging the loss and harm inflicted on the victims, do not address the responsibility of the perpetrators. For example, although the 2-28 Act acknowledges the need for fact-finding about the incident (Article 3), the language shies away from criminal liability and individual accountability.⁷⁷ Nor has any single individual or government agency been officially named as a wrongdoer for the White Terror era.

In 2006, the DPP government, without the support of the KMT-dominated legislature, identified Chiang Kai-shek as the primary culprit of the 2-28 Incident, leading to the renaming of the Chiang Kai-shek International Airport as the Taoyuan International Airport, and the Chiang Kai-shek Memorial Hall as the National Taiwan Democratic Memorial Hall.⁷⁸ Despite this, Chiang’s responsibility for the 2-28 massacre has never been officially acknowledged.⁷⁹ In 2008, when the KMT returned to power, the National Taiwan Democracy Memorial Hall was renamed the Chiang Kai-shek Memorial Hall.⁸⁰

Scholars Chun-hung Chen and Han-hui Chung note that as a result of avoiding discussion of official and personal responsibility, “many institutional inflictors or cooperators of the system continued to be in key positions in the government after democratization, which resulted in the prevalence of

⁷⁴ *Id.*

⁷⁵ *Id.* at 84.

⁷⁶ Caldwell, *supra* note 1, at 466.

⁷⁷ *Id.* at 464 (noting that the language of the 2-28 Act “shelters individual members of the KMT from criminal or civil liability or even official acknowledgment of their participation”).

⁷⁸ See Christian Schafferer, *Consolidation of Democracy and Historical Legacies: A Case Study of Taiwan*, 9 J. CONTEMP. E. ASIA 25–27 (2010).

⁷⁹ Hwang, *supra* note 47, at 176.

⁸⁰ Flora Wang, *Chiang Kai-shek Plaque to Return to Memorial Hall*, *TAIPEI TIMES* (Jan. 22, 2009), <http://www.taipeitimes.com/News/taiwan/archives/2009/01/22/2003434392>.

impunity.”⁸¹ However, in recent years, civic groups and scholars have succeeded in blocking a few nominations of Constitutional Court justices on the grounds that their work had facilitated the authoritarian government’s persecution of democracy activists.⁸² Yet these protests against controversial nominations are sporadic. Some, therefore, advocate for a lustration law in Taiwan to ensure those in important government positions played no role in past authoritarian abuse.⁸³

In summary, until 2016, the practice of transitional justice measures in Taiwan maintained a restorative focus without retributive elements. Many victims have appeared dissatisfied with the apologies and compensation offered by the government, and advocates of a holistic approach towards transitional justice are unconvinced that the country has truly come to terms with its past.⁸⁴ From their perspective, justice and reconciliation cannot be genuinely achieved without the introduction of retributive measures such as prosecution and lustration, which they argue are important for the fulfillment of the rule of law and accountability.

F. Taiwan’s Transitional Justice Regime Since 2016

In 2016, nearly three decades after Taiwan’s democratization, transitional justice gained new prominence in Taiwan’s political discourse as the DPP won both the presidential and parliamentary election for the first time. When President Tsai Ing-wen assumed office, she vowed to enhance transitional justice efforts and to set up a Truth and Reconciliation Commission inside the presidential office⁸⁵ for the pursuit of “true social reconciliation.”⁸⁶ Since 2016, there have been several novel initiatives,

⁸¹ Chen & Chung, *supra* note 39, at 32.

⁸² See, e.g., Hsiang Cheng-chen & Jonathan Chin, *Judicial Yuan Nominee Denies White Terror Roles*, TAIPEI TIMES (July 20, 2016), www.taipeitimes.com/News/taiwan/archives/2016/07/20/2003651410; *Justice Ministry Slammed for Recommending Martial Law-era Military Prosecutor*, FORMOSA NEWS (Mar. 13, 2015), <https://englishnews.ftv.com.tw/Read.aspx?sno=F97590F139A8DCC138D7AE6749663BB0>.

⁸³ See, e.g., *Forum Discussion: Political and Legal Philosophy of Transitional Justice—The Past and Present of the Perpetrators*, *supra* note 12.

⁸⁴ *Id.*

⁸⁵ As of January 2019, such a Commission had yet to be established. On the potential of a truth and reconciliation policy as a geopolitical strategy, see Ian Rowen & Jamie Rowen, *Taiwan’s Truth and Reconciliation Committee: The Geopolitics of Transitional Justice in a Contested State*, 11 INT’L J. TRANSITIONAL JUSTICE 92 (2017).

⁸⁶ Ing-wen Tsai, President, Republic of China, Inaugural Address of ROC 14th-Term President Tsai Ing-wen (May 20, 2016) (transcript available at <https://english.president.gov.tw/News/4893>).

including new transitional justice legislation and institutions, as well as innovative efforts to promote indigenous justice.

On August 1, 2016, President Tsai issued Taiwan's first-ever official apology to the indigenous peoples for "four centuries of pain and mistreatment" imposed on them.⁸⁷ She acknowledged that the aboriginal people—whom she described as "Taiwan's original owners"—had suffered under the island's successive rulers: the Dutch colonizers, the Koxinga Kingdom, the Qing Empire, Colonial Japan, and finally the post-war ROC regime.⁸⁸ She declared the establishment of an Indigenous Historical Justice and Transitional Justice Committee [原住民族歷史正義與轉型正義委員會] (Indigenous Justice Committee)⁸⁹ inside the presidential office to promote the equality and welfare of indigenous people. The Indigenous Justice Committee has set up subcommittees on five themes: land, culture, language, history, and reconciliation. Major initiatives include publishing fact-finding reports on indigenous lands, cultures, languages and history; reviewing conflicts between current legislation and indigenous peoples' traditions and customs; preserving indigenous languages and promoting indigenous education; and recommending measures of reconciliation, reparations, or compensation.⁹⁰ The Indigenous Justice Committee has elicited a government pledge to remove the 100,000 barrels of nuclear waste that have been stored on Orchid Island where the Yami people reside, a major problem that Taiwanese aboriginal communities have protested for decades.⁹¹ The Indigenous Justice Committee has also facilitated a series of negotiations on possibly closing a controversial mine in the Truku indigenous lands.⁹² Progress, however, has been extremely slow.⁹³

⁸⁷ Ing-wen Tsai, President, Republic of China, President Tsai Apologizes to Indigenous Peoples on Behalf of Government (Aug. 1, 2016) (transcript available at <https://english.president.gov.tw/NEWS/4950>).

⁸⁸ *Id.*

⁸⁹ PRESIDENTIAL OFFICE INDIGENOUS HISTORICAL JUSTICE AND TRANSITIONAL JUSTICE COMMITTEE, <https://indigenous-justice.president.gov.tw/EN>.

⁹⁰ *Id.*

⁹¹ Nick Aspinwall, *Taiwan's Indigenous Are Still Seeking Justice On The Democratic Side Of The Taiwan Strait*, SUPCHINA (Feb. 13, 2019), <https://supchina.com/2019/02/13/taiwans-indigenous-are-still-seeking-justice/>.

⁹² Jeffrey Warner, *Asia Cement: Following Rules or Pit Mining Human Rights?*, THENEWSLENS (Dec. 6, 2017), <https://international.thenewslens.com/article/84693>.

⁹³ The government has not been able to find a location to transfer nuclear waste from Orchid Island, and the mine in the Truku indigenous lands has not been closed as of this writing. Matthew Strong, *Taiwan Still Unable to Find US Company Willing to Take Radioactive Waste*, TAIWAN NEWS (July 3, 2018), <https://www.taiwannews.com.tw/en/news/3472965>; Matthew Strong, *Taiwan to Complete Repackaging of*

Among the new transitional justice policies, more controversial is the initiative to recover assets acquired by the KMT during its authoritarian period, some of which were later transferred to private organizations during democratization. In July 2016, the DPP-dominated Legislative Yuan swiftly passed the Act Governing the Handling of Ill-Gotten Assets by Political Parties and Their Affiliate Organizations [政黨及其附隨組織不當取得財產處理條例]⁹⁴ (Illicit Assets Act), under which an “Ill-Gotten Party Assets Settlement Committee” [不當黨產處理委員會] was created to determine what assets should be returned to the government or the original owners.⁹⁵ The Ill-Gotten Party Assets Settlement Committee is organized under the Executive Yuan, and its members (11–13 people) are selected by the Premier.

As of December 2018, the Committee had frozen assets worth billions of dollars of private companies and non-governmental organizations that were determined to be KMT affiliates, including the Central Investment Company, Hsinyutai Co, Chinese Women’s League, and China Youth Corps.⁹⁶ These groups have filed ongoing lawsuits challenging the Committee’s action. Moreover, the constitutionality of the Illicit Assets Act has also been questioned. In 2018, the Control Yuan, whose members were mostly nominated by the previous KMT president, filed a petition with the Constitutional Court, arguing that many provisions of the Illicit Assets Act should be deemed unconstitutional for violating the principles of due process, rule of law, legal certainty, and the constitutional protection of property rights, among others.⁹⁷ The Constitutional Court subsequently dismissed the Control Yuan’s petition on procedural grounds that the Control Yuan had no legal

Orchid Island Nuclear Waste in 2020, TAIWAN NEWS (Oct. 13, 2018), <https://www.taiwannews.com.tw/en/news/3551729>.

⁹⁴ Zhengdang ji Qi Fusui Zuzhi Budang Qude Caichang Chuli Tiaoli (政黨及其附隨組織不當取得財產處理條例) [The Act Governing the Handling of Ill-Gotten Assets by Political Parties and Their Affiliate Organizations] (promulgated by the Legislative Yuan, effective Aug. 10, 2016) (Taiwan).

⁹⁵ *Id.* art. 2.

⁹⁶ *Benhui yi Zhuihui Caichang Gaikuang* (本會已追回財產概況) [Summary of the Returned Assets], BUDANG DANGCHAN CHULI WEIYUANHUI (不當黨產處理委員會) [ILL-GOTTEN PARTY ASSETS SETTLEMENT COMMITTEE] (Dec. 18, 2018), <https://www.cipas.gov.tw/news/232>; Chen Wei-han, *Women’s League Declared KMT Affiliate*, TAIPEI TIMES (Feb. 2, 2018), www.taipeitimes.com/News/front/archives/2018/02/02/2003686871; *China Youth Corps Determined to be KMT-Affiliated, All Assets Frozen*, TAIWAN NEWS (Aug. 7, 2018), <https://www.taiwannews.com.tw/en/news/3501385>.

⁹⁷ Chen Wei-han, *Control Yuan Queries Party Assets Law*, TAIPEI TIMES (Mar. 29, 2017), www.taipeitimes.com/News/front/archives/2017/03/29/2003667669. For a detailed account of the Control Yuan’s investigation of the Illicit Assets Act, see Jiancha Yuan (監察院) [Control Yuan], Diaocha Baogao (調查報告) [Investigation Report], JIANCHAYUAN (監察院) [CONTROL YUAN] (Mar. 30, 2017), <https://www.cy.gov.tw/sp.asp?xdURL=/di/RSS/detail.asp&ctNode=871&mp=1&no=5130>.

standing in such a case.⁹⁸ However, two more constitutional petitions have now been filed by trial court judges handling related cases.⁹⁹ It remains to be seen whether the Court will decide on those petitions. These legal challenges, which are serious and debatable, suggest that the prospect of carrying out the Illicit Assets Act is far from certain.

In December 2017, the Legislative Yuan passed the Act on the Promotion of Transitional Justice” [促進轉型正義條例]¹⁰⁰ (Transitional Justice Act), a general, comprehensive framework that covers a wide range of initiatives with four primary goals:¹⁰¹ (1) opening political archives; (2) removing authoritarian symbols and preserving sites where injustices were committed; (3) redressing judicial wrongs, restoring historical truth, and promoting social reconciliation; and (4) settling and utilizing ill-gotten party assets. A Commission to Promote Transitional Justice [促進轉型正義委員會] (Transitional Justice Commission) was established under the Executive Yuan. Its mandate is to address all the transitional justice issues, except for the work of indigenous transitional justice, which is handled by the Indigenous Justice Committee. The nine members of the Transitional Justice

⁹⁸ *Justices Dismiss Control Yuan Request*, TAIPEI TIMES (Oct. 8, 2018), <https://www.taipeitimes.com/News/taiwan/archives/2018/10/08/2003701956>. For the Constitutional Court’s reasoning, see Dafaguan Shuji Chu (大法官書記處) [Secretariat of Taiwan’s Grand Justices], Sifayuan Dafaguan Di 1482 Ci Huiyi Bushouli Jueyi Di Si An Jianchayuan Shengqing’an Bushouli Jueyi Zhaiyao (司法院大法官第 1482 次會議不受理決議第四案監察院聲請案不受理決議摘要) [Summary of the Decision of Dismissing the Control Yuan’s Petition in Meeting no. 1482 of the Grand Justices], Sifayuan Daifaguan (司法院大法官) [Grand Justices, Judicial Yuan] (Oct. 5, 2018), https://www.judicial.gov.tw/constitutionalcourt/p10_02.asp?id=373658.

⁹⁹ Zuigao Xingzheng Fayuan jiu 107 Nniandu Caizi Di 1150 Hao Budang Dangchan Chuli Weiyuanhui yu Guomindang, Zhongyang Touzi Gufenyouxian Gongsi, Xinyutai Gufenyouxian Gongsi Jian Zhengdang ji Qi Fusui Zuzhi Budang Qude Caichan Chuli Tiaoli (Tingzhi Susong Chengxu) Shijian Xinwengao (最高行政法院就 107 年度裁字第 1150 號不當黨產處理委員會與國民黨、中央投資股份有限公司、欣裕台股份有限公司間政黨及其附隨組織不當取得財產處理條例(停止訴訟程序)事件新聞稿) [Supreme Administrative Court’s Press Release on the Matter of 107 Cai 1150 under the Act Governing the Handling of Ill-Gotten Assets by Political Parties and Their Affiliate Organizations—Ill-Gotten Party Assets Settlement Committee v. Kuomintang, Central Investment Company and Hsinyutai Co], (effective Aug. 2, 2018), jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=355762.

¹⁰⁰ Cujin Zhuanxing Zhengyi Tiaoli (促進轉型正義條例) [the Act on the Promotion of Transitional Justice] (promulgated by the Legislative Yuan, effective Dec. 27, 2017) (Taiwan); Wang Jiyou (王己由), *Fulianhui Rendeng Fusui Zuzhi Faguan Shengqing Shixian* (婦聯會認定附隨組織法官聲請釋憲) [Judge Petitions to the Constitution Court in the Case of the Chinese Women’s League Determined to be a KMT Affiliate Organization], ZHONGGUO SHIBAO (中國時報) [CHINA TIMES] (Mar. 7, 2019), <https://www.chinatimes.com/realtimenews/20190307003807-260402>.

¹⁰¹ Cujin Zhuanxing Zhengyi Tiaoli (促進轉型正義條例) [The Act on the Promotion of Transitional Justice] (promulgated by the Legislative Yuan, effective Dec. 27, 2017) (Taiwan).

Commission are nominated by the Premier and approved by the Legislative Yuan.¹⁰²

A few months into operation, however, the credibility of the Transitional Justice Commission was severely challenged by a scandal. The Commission's then vice-chairperson, Chang Tien-chin, privately revealed his intention to manipulate public opinion against the KMT's New Taipei City mayoral candidate, Hou You-yi, who had been a police chief during the authoritarian regime.¹⁰³ During that time, Hou had overseen the arrest of democracy activist Deng Nan-jung in an operation that ended with Deng's self-immolation. Chang immediately resigned after the recording of his remarks was exposed in the media.¹⁰⁴ While this episode has prompted some discussion on how to view individual responsibility for an authoritarian past, it has adversely impacted the Transitional Justice Commission's integrity and impartiality.

Also contentious are the Commission's proposals to remove authoritarian symbols from public spaces, most notably numerous statues of Chiang Kai-shek in schools and parks, and to remove his image from Taiwan's currency.¹⁰⁵ The proposals have met strong resistance from the KMT, which criticizes these measures as excessive and costly.¹⁰⁶

There are other developments that have faced less opposition from the KMT, which has primarily been concerned with fighting the implementation of the Illicit Assets Act and the government plan to remove Chiang Kai-shek's symbols. A draft of the Political Archives Act [政治檔案法], for example, is

¹⁰² *Id.* arts. 2, 8.

¹⁰³ Stacy Hsu, *Deputy Chairman Resigns from Transitional Justice*, TAIPEI TIMES (Sept. 13, 2018), <http://www.taipeitimes.com/News/front/archives/2018/09/13/2003700317>.

¹⁰⁴ The Executive Yuan later issued an investigative report on this incident. *Xinzhengyuan "liqing Cujin Zhuanxing Zhengyi Weiyuanhui 0824 Shijian" Zhuan'an Xiaozu Fabiao Baogao* (行政院「釐清促進轉型正義委員會 0824 事件」專案小組發表報告) [*The Task Force of the Executive Yuan Issues Its Report on the 0824 Incident Concerning the Transitional Justice Commission*], EXECUTIVE YUAN (Jan. 10, 2019), <https://www.ey.gov.tw/Page/9277F759E41CCD91/4b6a514e-89dd-4140-8eff-71a4ee4f282a>.

¹⁰⁵ *Cujinhui Bannian Renwu Jindu Baogao Jizhehui Xinwengao* (促轉會半年任務進度報告記者會新聞稿) [*Press Release of the Transitional Justice Commission on the Biannual Progress*], EXECUTIVE YUAN (Dec. 17, 2018), <https://www.tjc.gov.tw/news/91>.

¹⁰⁶ James X. Morris, *The Great Debate: Chiang Kai-shek's Role in 21st Century Taiwan*, THE DIPLOMAT (Oct. 29, 2018), <https://thediplomat.com/2018/10/the-great-debate-chiang-kai-sheks-role-in-21st-century-taiwan/>.

in the works and may soon be deliberated on by the Legislative Yuan.¹⁰⁷ Its purpose is to open more political case files from both the 2-28 massacre and the White Terror, including private documents.¹⁰⁸ Another development is the power granted to the Transitional Justice Commission, in accordance with Article 6, paragraph 3 of the Transitional Justice Act, to revoke verdicts for people who were unjustly convicted during the authoritarian era. As of December 2018, over 2,700 people had had their criminal convictions nullified, including indigenous victims.¹⁰⁹

While many new projects are underway, Taiwan, as mentioned, has largely refrained from examining abuses committed by Japan during the colonial era. The political parties in Taiwan, the KMT and the DPP, have generally glossed over episodes such as the Wushe Incident, as well as Japan's exploitive colonial policies toward the island. The 1990s did bring a cathartic outburst of Taiwanese memories of Japanese war atrocities, particularly about the "comfort women," which led to wide societal attention and a subsequent governmental demand for a Japanese apology.¹¹⁰ Since then, however, the salience of the "comfort women" issue has waned.¹¹¹ As Yinan He notes, "compared to the detailed documentation of the February 28 incident, Taiwanese textbooks typically mentioned the "comfort women" merely in passing."¹¹² As a result, the dark period under Japanese colonization has simply been swept under the rug for much of the time,¹¹³ and remains so in the current new transitional justice regime.

¹⁰⁷ *Xinzheng Yuanhui Tongguo "Zhengzhi Dang'an Tiaoli" Cao'an* (行政院會通過「政治檔案條例」草案) [*The Executive Yuan Passes the Draft Political Archives Act*], EXECUTIVE YUAN (May 17, 2018), <https://www.ey.gov.tw/Page/9277F759E41CCD91/52ece91f-ed38-4b14-adcc-1c42acbd69de>.

¹⁰⁸ *Id.*

¹⁰⁹ *Cujin Zhuanxing Zhengyi Weiyuanhui Chexiao Youzui Panjue Gonggao* (促進轉型正義委員會撤銷有罪判決公告) [*Announcement of the Transitional Justice Commission on Nullifying Convictions*], TRANSITIONAL JUSTICE COMMISSION (Oct. 5, 2018), <https://www.tjc.gov.tw/gazettes/60>; *Cujin Zhuanxing Zhengyi Weiyuanhui Chexiao Youzui Panjue Gonggao* (促進轉型正義委員會撤銷有罪判決公告) [*Announcement of the Transitional Justice Commission on Nullifying Convictions*], TRANSITIONAL JUSTICE COMMISSION (Dec. 7, 2018), <https://www.tjc.gov.tw/news/83>.

¹¹⁰ See generally Shogo Suzuki, *The Competition to Attain Justice for Past Wrongs: The "Comfort Women" Issue in Taiwan*, 84 PAC. AFF. 223 (2011).

¹¹¹ *Id.* at 227.

¹¹² Yinan He, *Identity Politics and Foreign Policy: Taiwan's Relations with China and Japan, 1895-2012*, 129 POL. SCI. Q. 469, 485 (2014).

¹¹³ A comparison can be made with South Korea. As a former Japanese colony, South Korea has made transitional justice efforts in addressing historical injustice not only during its own authoritarian past but also the periods of Japanese colonialism. Hun Joon Kim, *Transitional Justice in South Korea*, in TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 229 (Renée Jeffery & Hun Joon Kim eds., 2014).

V. CHALLENGES OF TRANSITIONAL JUSTICE IN TAIWAN

Many significant questions have been left unaddressed by Taiwan's still-evolving transitional justice regime. The problem of impunity remains unexamined.¹¹⁴ Whether to incorporate criminal accountability, vetting and lustration for those who contributed to the state oppression and violence during the authoritarian period, as some local scholars advocate, has not received the serious discussion it deserves. Even if it were to be thoroughly debated in a public forum, the possibility of reaching a consensus on the necessity and scope of retributive measures is low in the foreseeable future. The current government and legislature also show no interest in establishing a truth and reconciliation commission, as President Tsai promised in her inaugural address.

More profoundly, in our view, Taiwan's transitional justice is being confronted with a variety of social and political challenges. First, the process of transitional justice in Taiwan has been greatly affected by the partisan conflicts between the KMT and the DPP and their different views on the island's authoritarian past.¹¹⁵ Take, for example, the current DPP's project to have the KMT return illicit assets. While the DPP claims that such a measure is aimed at fulfilling transitional justice and leveling the political field for fair democratic competition, it is viewed by the KMT to be the DPP's political agenda to directly challenge the KMT's ultimate legitimacy and power base. The KMT harshly criticizes the Illicit Assets Act as "an evil law that is illegal, unconstitutional and anti-democratic, one that is aimed at establishing a 'one-party dictatorship.'" ¹¹⁶ This kind of narrative appears to stigmatize transitional justice by reducing it to nothing but political ploys to make one's enemy suffer. Indeed, Taiwan's transitional justice, as noted by Jau-Yuan Hwang, is "often portrayed as a power game between the DPP (or Pan-Green Camp) and KMT (or Pan-Blue Camp), instead of a justice struggle for the good of democracy and Taiwan in its entirety."¹¹⁷ How to implement more vigorous transitional justice mechanisms in Taiwan without having their integrity and credibility undermined by a political agenda remains a

¹¹⁴ Chen & Chung, *supra* note 39, at 32.

¹¹⁵ See Vladimir Stolojan, *Transitional Justice and Collective Memory in Taiwan*, 2 CHINA PERSP. 27 (2017).

¹¹⁶ *Parties Have Opposite Reactions to Party Assets Law*, FOCUS TAIWAN (July 25, 2016), <https://focustaiwan.tw/news/aip/201607250033.aspx>.

¹¹⁷ Hwang, *supra* note 47, at 179.

formidable task.¹¹⁸ All political actors have a responsibility to resist the temptation of scoring political points and to see transitional justice as a shared goal, but, in Taiwan's fierce partisan politics, it is challenging to uphold this ideal. In this political environment, any robust new measures are unlikely to be sustained, as a change of government can disrupt progress at any time.

Relatedly, Taiwan's transitional justice is deeply intertwined with identity politics. The demands for justice for the 2-28 Incident—which represented conflicts between *waishengren* and *benshengren*—have long been linked with the issue of Taiwanese identity and even the pursuit of independence from China.¹¹⁹ This conflation of transitional justice and identity politics may derail the pursuit of real justice and reconciliation. Identity questions in Taiwan, much like ethnic issues in other countries, often are issues on which compromise is extremely difficult. This raises the question of how effective transitional justice mechanisms can be to alleviate Taiwan's identity conflicts in the pursuit of social reconciliation.

Second, needless to say, transitional justice should be engaged in ways that respect the rule of law and human rights. The many lawsuits pending in the courts regarding illicit party assets, as well as the questions of the constitutionality of the Illicit Assets Act, if not resolved impartially and in a timely fashion, may threaten this core principle of transitional justice. While one would hope that the judiciary could prove to be an impartial, trusted voice on these contested political-legal issues, Taiwan's courts, which were under party-state control during the authoritarian era, today are still confronted with public distrust despite their overall impressive progress into a professional, autonomous judiciary.¹²⁰ How to develop a transitional justice regime that

¹¹⁸ Caldwell, *supra* note 1, at 482–83 (“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 dominate political party.”); see also Jeremy Olivier, *Justice Delayed or Justice Denied? A Comparison of Transitional Justice Approaches in Taiwan and South Korea* (2017) (M.A. thesis, National Chengchi University).

¹¹⁹ Stolojan, *supra* note 115, at 28, 30; see also Shih & Chen, *supra* note 30.

¹²⁰ For an analysis of a lack of public confidence in Taiwan's judiciary, see Margaret K. Lewis, *Who Shall Judge? Taiwan's Exploration of Lay Participation in Criminal Trials Human Rights Performance of Taiwan*, in *TAIWAN AND INTERNATIONAL HUMAN RIGHTS: A STORY OF TRANSFORMATION* (Jerome A. Cohen, et al. eds., 2018) (“High-profile incidents like the bribery conviction in 2011 of several judges, and perceived lenient sentencing of a convicted pedophile, undercut the already shaky public support. A public survey conducted by the Judicial Yuan in 2015 found that 71.6% of respondents reported not understanding the legal system (12.5% answered “totally unfamiliar” and 59.1% as “unfamiliar”). Only 22% agreed with the statement that “most judges can decide cases independently” and 38.5% agreed that “judges usually will try to impose appropriate sentences.” A majority of respondents cited the media as the source of their negative perception, as compared with negative personal experiences or those of a friend/relative.”).

assures public confidence in the integrity of the rule of law in Taiwan is another difficult question.

Third, the public has so far displayed only a lukewarm interest in the project of transitional justice despite the ongoing developments and the persistent advocacy and educational efforts of a few civil society groups.¹²¹ According to a survey in June 2016, in which people ranked their top three issues of concern for the new government to address, only 13.9% ranked transitional justice among those top priorities, compared to 73.5% in support of improving the economy, 56.5% for addressing food safety and 37.9% for conducting pension and financial reforms.¹²² As the transitional justice regime further develops and inevitably encounters more controversial issues, without considerable social discussion and consensus, there will be increasing contention and confusion. An important task ahead is to engage the general public—young and older generations alike—to consider and deliberate why Taiwan should continue on its path towards transitional justice and how it should do so. Only when the transitional justice project has gained wide social support can it sustain and strengthen a democracy that thrives on justice and reconciliation.

VI. CONCLUSION

Dealing with historical injustice is a dynamic and fluid process that is fundamentally shaped and constrained by the balance of power and socio-political reality in a particular transitional society. Taiwan's experience is a case in point. This Article provides a contextualized legal-political analysis of the evolution of transitional justice in Taiwan. We consider the extensive government oppression and atrocities that took place in the two periods before Taiwan's democratization—the Japanese colonial rule and the Kuomintang's authoritarian rule—and provide an updated analysis of Taiwan's past and current initiatives to pursue transitional justice, as well as their constraints.

¹²¹ See, e.g., Taiwan Minjian Zhenxiang yu Hejie Cujin Hui (台灣民間真相與和解促進會) [Taiwan Association for Truth and Reconciliation], <https://taiwantrc.org>; TAIWAN MINJIAN ZHENXIANG YU HEJIE CUJIN HUI (台灣民間真相與和解促進會) [TAIWAN ASSOCIATION FOR TRUTH AND RECONCILIATION], JIYI YU YIWANG DE DOUZHEN: TAIWAN ZHUANXING ZHENGYI JIEDUAN BAOGAO (記憶與遺忘的鬥爭：臺灣轉型正義階段報告) [THE STRUGGLE BETWEEN REMEMBERING AND FORGETTING: REPORT OF TRANSITIONAL JUSTICE IN TAIWAN] (2015).

¹²² Taiwan Zhibiao Mindiao (台灣指標民調) [Taiwan Indicators Survey Research], "Taiwan Minxin Dongtai Diaocha, Xinzhengfu Gaige yu Zeren" Mindiao Xinwengao (「台灣民心動態調查、新政府改革與責任」民調新聞稿) [Press Release: Survey of "Taiwan's Public Opinion on the New Government's Reform and Responsibility"], TAIWAN INDICATORS SURVEY RESEARCH (June 30, 2016), <https://www.tisr.com.tw/?p=6936>.

We further note the uneven development of Taiwan's transitional justice regime in two aspects. It is mainly oriented towards restorative mechanisms of transitional justice with little consideration for individual accountability and no democratic deliberation of potential problems of impunity. The emphasis of the transitional justice efforts so far has been placed mainly on the 2-28 massacre, less on the White Terror period, and least of all on the human right abuses during Japanese rule, leaving Japan's colonial injustice largely unaddressed.

Taiwan must grapple with many challenges in developing a holistic, thoughtful approach towards transitional justice in the current social and political contexts. These challenges include heated partisan conflicts and the KMT's resistance and discourse that stigmatize the project of transitional justice. There is also a conflation of transitional justice and identity politics that prevents the transitional justice regime from developing autonomously. The many pending legal complications and a general distrust of the judiciary further underscore the difficulty of upholding the rule of law in quest of justice. We also caution about the lukewarm public support Taiwan's transitional justice initiatives has garnered so far. The lack of wider public engagement bodes ill for further development of a holistic transitional justice regime. Through this Article, we hope, along with Caldwell's article, to stimulate further scholarship on—and public consideration for—this crucial challenge to today's democratic Taiwan.

