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WHITHER CONVERGING NARRATIVES OF JUSTICE IN TRANSITION? TRANSITIONAL JUSTICE AND JUDICIAL REFORM IN TAIWAN¹

Agnes S. Schick-Chen²

Abstract: Referring to Taiwan's recent transitional justice legislation as a first tentative step towards the possibility of judicial solutions for problems of injustice dating from the authoritarian era, this paper elaborates chances and difficulties of introducing the judiciary to the ongoing processes of coming to terms with the past in Taiwan. It intends to argue that apart from the specific circumstances of Taiwan's transition to democracy after the lifting of martial law in 1987, the avoidance of a judicial approach to transitional justice was both caused by and the reason for a deficit in narratives of judicial justice. Together with the judiciary's reluctance to communicate with society and to confront the sensitive aspects of their professional history, a lack in stories of the judge dispensing justice to those in need of it is identified as a precondition disqualifying the courts as potential agents of transitional justice. At the same time, the exclusion of the courts from the agenda of redressing the wrongs of the past is understood as having deprived the members of the judiciary of an opportunity to identify and be identified as those restoring justice to society. On a second level of investigation, the implied need for a consolidation of the image and self-understanding of judges and procurators, is shown to link the agenda of transitional justice to the one of judicial reform. The text departs from the assumption of a complementarity of the two agendas, in the sense that becoming actively engaged in the handling of transitional justice may further distinguish the courts as legal platforms of communication and provide a neutral space for a non-politicized negotiation of the politically sensitive issues of Taiwan's past and present. A shared narrative of "justice in transition," both in the sense of justice as a parameter of transition and the notion of justice itself undergoing transition, is proposed as a foundation and prerequisite of an integrated and mutually beneficial approach to transitional justice and judicial reform in Taiwan.

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I. INTRODUCTION

When Tsai Ing-wen was inaugurated as president of the Republic of China on Taiwan in May 2016, she named coming to terms with the unresolved problems of Taiwan's authoritarian past and reforming Taiwan's judicial system as two of the main tasks lying ahead for the new presidency.³

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² Associate Professor, Department of East Asian Studies, University of Vienna. The author wishes to thank Prof. Chen Hwei-hsin, Chengchi University, Prof. Chiang Yu-lin, Chengchi University, Prof. Hsu Cheng-Hsien, Chengchi University, Dr. Lin Tsung-Hsien, Taiwan Legal Aid Foundation, and Dr. Chen Chun-hung, National Human Rights Museum, for their readiness to discuss the questions addressed in this paper from their respective perspectives.

³ See *Full Text of President Tsai's Inaugural Address*, FOCUS TAIWAN (May 20, 2016), <http://focustaiwan.tw/news/aip/201605200008.aspx> (translated from the original Mandarin).

Hers was the first inaugural address to proclaim both transitional justice and judicial reform as missions to be accomplished during the upcoming presidential term. Introducing them in the same part of her speech further implied that they would be addressed as two aspects of the overall agenda of “social fairness and justice”⁴ based on a common understanding of justice as an underlying principle and final goal of processes of change that had been started in the wake of democratization and were still awaiting completion after three decades. In both cases, the efforts made over this period showed some positive results, but failed to reach a point of success where those in charge could have proclaimed “mission accomplished” and closed the records. In the following, this text intends to argue that one of the reasons for not reaching a degree of satisfaction in dealing with the questions of coming to terms with the past and reforming the judiciary in Taiwan is that the respective approaches have not been integrated either on the discourse or the implementation level.⁵

In regard to judicial reform the importance of an independent judiciary as “a bulwark of political democracy and social justice[,] . . . a protector of social order and defender of the people’s rights,”⁶ a guarantor of the rule of law and human rights,⁷ and a “force for justice safeguarding the interests of the people”⁸ had already been highlighted by President Tsai’s predecessors Chen Shui-bian (2000-2004, 2004-2008) and Ma Ying-jeou (2008-2012, 2012-2016), when they began their respective presidential terms. In 2012, Ma Ying-jeou pointed to related accomplishments of his first presidency,

⁴ *Id.*

⁵ With respect to international developments in this field, the De Greiff Prevention Report to the UN in 2015 states that in spite of, the above mentioned, inclusion of judicial measures in international conceptualizations and practices, “justice sector reform has been relatively overlooked as a form of institutional reform contributing to transitional justice.” Rhodri Williams, *Judges as Peacebuilders: How Justice Sector Reform Can Support Prevention in Transitional Settings* 18 (Mar. 2018) (Discussion Paper, International Legal Assistance Consortium) (available online at <http://www.ilacnet.org/wp-content/uploads/2018/04/ILAC-Judges-as-Peacebuilders-11.44.54.pdf>) (citing Pablo de Greiff (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence), *Rep. of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, U.N. Doc. A/HRC/30/42 (Sept. 7, 2015)).

⁶ Chen Shui-Bian, “*Taiwan Stands Up: Presidential Inauguration Address*,” May 20, 2000, USC US-CHINA INSTITUTE (May 20, 2000), <https://china.usc.edu/chen-shui-bian-%E2%80%9Ctaiwan-stands-presidential-inauguration-address%E2%80%9D-may-20-2000> (translated from the original Mandarin).

⁷ See Ma Ying-Jeou, “*Inaugural Address*,” May 20, 2008, USC US-CHINA INSTITUTE (May 20, 2008), <https://china.usc.edu/ma-ying-jeou-%E2%80%9Cinaugural-address%E2%80%9D-may-20-2008> (translated from the original Mandarin).

⁸ *Full Text of President Ma Ying-jeou's Inaugural Address*, FOCUS TAIWAN (May 20, 2012), <http://focustaiwan.tw/news/aip/201205200002.aspx> (translated from the original Mandarin).

including a new Judges Law (Faguanfa 法官法)⁹ that was supposed to answer to the critical view of judicial work of the public by making judges more accountable. He emphasized a need for judicial reform that would “accord with the direction in which [Taiwanese] society [was] moving.”¹⁰ Four years later, Tsai Ing-wen went a step further by stressing that the judicial system needed to respond to the needs of the people and that judicial reform should be an inclusive process encouraging not only involvement from legal professionals, but also public participation at large contributing in the reform process.¹¹ She called for reforms to proceed in this new direction, claiming that judicial justice was an issue people in Taiwan were really concerned about, as they still felt alienated from the judiciary.¹²

The necessity of a new approach was also emphasized with regard to the unresolved problems left over from Taiwan’s authoritarian past,¹³ a topic that had not been named as explicitly as part of the policy agenda by the other democratically elected presidents of the Republic of China on Taiwan.¹⁴ When Chen Shui-bian, the candidate of the Democratic Progressive Party (DPP),¹⁵ became president in 2000, ending the Kuomintang (KMT) or Nationalist Party’s decade-long dominance of Taiwan’s politics,¹⁶ he stated that incidents and periods of political oppression in times of one-party rule had not been “historical representations of subjugation by ethnic groups, but

⁹ Faguanfa (法官法) [Judges Act] (2011), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0030243> (English version from Laws & Regulations Database of the Republic of China).

¹⁰ *Full Text of President Ma Ying-Jeou's Inaugural Address*, *supra* note 8.

¹¹ *Full Text of President Tsai's Inaugural Address*, *supra* note 3.

¹² *Id.*

¹³ The period of authoritarian rule lasted from 1945 when Taiwan was returned to the Republic of China, then ruled by Chiang Kai-shek’s Nationalist Party and displaced from the Chinese mainland by the Chinese Communist Party in 1949, to the year 1987 when martial law that had been in place for four decades was finally lifted and the “Temporary Provisions effective during the Period of Communist Rebellion” abrogated in 1991. For an overview of Taiwan political system and its historical foundations including the martial law era, see DAFYDD FELL, *GOVERNMENT AND POLITICS IN TAIWAN* (2012). For a concise overview of Taiwan’s political history of the 20th century including Japanese colonialization (1895-1945) see Chu Yun-Han & Lin Jih-Wen, *Political Development in 20th Century Taiwan: State Building, Regime Transformation and the Construction of National Identity*, in *TAIWAN IN THE TWENTIETH CENTURY: A RETROSPECTIVE VIEW* 102–29 (Richard Louis Edmonds & Steven Goldstein eds., 2001).

¹⁴ Including Lee Teng-hui (1996-2000) as the first ROC president to be elected by direct popular vote in 1996. SHELLEY RIGGER, *POLITICS IN TAIWAN: VOTING FOR DEMOCRACY* 148–77 (1999).

¹⁵ SHELLEY RIGGER, *FROM OPPOSITION TO POWER: TAIWAN’S DEMOCRATIC PROGRESSIVE PARTY* (2001).

¹⁶ Larry Diamond, *Anatomy of an Electoral Earthquake: How the KMT Lost and the DPP Won the 2000 Presidential Election*, in *TAIWAN’S PRESIDENTIAL POLITICS: DEMOCRATIZATION AND CROSS-STRAIT RELATIONS IN THE 21ST CENTURY* 48–87 (Muthiah Alagappa ed., 2001).

rather abuse of power by a government.”¹⁷ He made it clear that in the past, members of all ethnic groups, including aborigines and mainlanders¹⁸ had been victimized by authoritarian rule. However, he did not indicate any substantial measures to be taken in order to mitigate or remedy the dire consequences of the politically motivated injustices of that period. In 2016, when President Tsai Ing-wen came to power after eight more years of KMT government under Ma Ying-jeou, she not only mentioned the challenges this negative legacy of the past was still posing to Taiwan’s politics and society, but also spoke about the ways how to resolve them. She announced her plans to establish a Truth and Reconciliation Commission (Cujin zhuanxing zhengyi weiyuanhui 促進轉型爭議委員會) within the Presidential Office¹⁹ with the goal of raising awareness of the wrongs committed in past eras. In her inauguration speech, she explained that in order to move forward, people in Taiwan needed to face the past together, and claimed that history should no longer divide Taiwan. She stressed that the goal of true social reconciliation could only be reached and wounds be healed by a comprehensive investigation of facts and a clarification of responsibilities.²⁰

With this she heralded a controversial policy shift,²¹ as up to this point, political thinking and social discussions on how to deal with the many cases of rights violations during the authoritarian era had not taken the possibility of a judicial approach, though foreseen by international conceptualizations of transitional justice,²² into account with reference to legal constraints and

¹⁷ Chen Shui-bian, [FULL TEXT OF INAUGURAL SPEECH] *Paving the Way for a Sustainable Taiwan*, *TAIPEI TIMES* (May 21, 2004), <http://www.taipeitimes.com/News/editorials/archives/2004/05/21/2003156372> (translated from the original Mandarin).

¹⁸ Those who had followed the KMT to Taiwan from the Chinese mainland after its defeat by the Communist Party of China in 1949.

¹⁹ This Commission has since been established under the Executive Yuan. *See generally*, TRANSITIONAL JUSTICE COMMISSION, <https://www.tjc.gov.tw/about> (last visited May 12, 2018). *See also* Ian Rowen & Jamie Rowen, *Taiwan’s Truth and Reconciliation Committee: The Geopolitics of Transitional Justice in a Contested State*, 11 INT’L J. TRANSITIONAL JUST. 92 (2017).

²⁰ *Full Text of President Tsai’s Inaugural Address*, *supra* note 3.

²¹ David Green & Morley J. Weston, *President Tsai’s Transitional Justice Act Opens Old Wounds and New*, *THE NEWSLENS* (Dec. 10, 2017), <https://international.thenewslens.com/article/85159>.

²² The United Nations defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation” and names “both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations” as its main components. U.N., GUIDANCE NOTE OF THE SECRETARY GENERAL: UNITED NATIONS APPROACH TO TRANSITIONAL JUSTICE (Mar. 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf. Other sources often quoted in international transitional justice literature are the International Center for Transitional Justice,

social considerations. For a long time, a focus on retributive justice was deemed detrimental to processes of social reconsolidation, leading to an “initial ambivalence within major proportions of the populace towards ‘punishing’ the KMT through transitional justice mechanisms.”²³ On the politico-legal level, limitations on the right to appeal against pre-1987 court-martial verdicts provided by the State Security Act (Guojia anquan fa 國家安全法)²⁴ and confirmed by a Grand Justices Interpretation (No. 272) in 1991²⁵ were considered the main obstacle to a judicial reassessment of unjust cases from the authoritarian area. This step was taken as a consequence of the special circumstances under which transition from authoritarian rule to democracy took place in Taiwan with the KMT as the former authoritarian ruler staying on in power throughout the process of democratization—which it had initiated itself for the sake of continued legitimization.²⁶ Faced with a newly legitimized political opposition, i.e., the DPP that could be expected to bring up the responsibilities of former single-party rule in upcoming elections, the KMT took this far-reaching step in order to “insulate itself from potential retribution and legal accountability.”²⁷

This precautionary legislative measure not only blocked a legal investigation of past wrongs committed under a martial law regime prolonged over forty years in the name of defending the state against the dangers of communism and separatism. It also enabled those who had been in charge or at least agents of former miscarriages of justice to brush aside this problematic part of their biographies. This included judicial personnel who had been involved in military trials of civilians or criminal procedure under the spell of martial law legislation and had continued to serve as judges and prosecutors in the post-1987 era. In this way, the judiciary was not forced to face their individual or collective memory of a time in which constitutional rights were suspended and judicial independence limited by a close relationship to political leadership. As a consequence, the question of how to deal with this

What is Transitional Justice?, INT’L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/about/transitional-justice> (last visited Jan. 7, 2019), and the introduction in RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 3–9 (2000).

²³ Ernest Caldwell, *Transitional Justice Legislation in Taiwan Before and During the Tsai Administration*, 27 WASH. INT’L L.J. 449 (2018).

²⁴ Caldwell, *supra* note 23, at 462–63.

²⁵ Hwang Jau-Yuan, *Transitional Justice in Post-War Taiwan*, in *ROUTLEDGE HANDBOOK OF CONTEMPORARY TAIWAN* 169, 171 (Gunter Schubert ed., 2016).

²⁶ *Id.* at 451; CHUN-HUNG & CHUNG HAN-HUI, *UNFINISHED DEMOCRACY: TRANSITIONAL JUSTICE IN TAIWAN* 14, 24 (2016). For concise information on KMT history, see PETER MOODY, *POLITICAL CHANGE ON TAIWAN: A STUDY OF RULING PARTY ADAPTABILITY* (1992).

²⁷ Caldwell, *supra* note 23, at 463.

legacy of professional history did not form part of a process of rethinking the judiciary and its role in state and society as one of the prerequisites of reforms initiated by parts of the judiciary in the middle and taken up by the government at the end of the 1990s.²⁸ In the absence of a sincere confrontation and thorough preoccupation with a history of judicial injustice, a reconfiguration of a narrative of the judiciary as representatives of legal justice has been difficult to achieve. In consideration of a process of reforming the judicial system deprived of an opportunity to reflect on the idea of judicial justice and injustice, and of a process of coming to terms with the past deprived of a politically neutral legal space to raise, investigate, and answer the highly sensitive questions of past injustice, the research presented in this text departs from the assumption that this lack of connectivity between Taiwan's transitional justice and judicial reform has been detrimental to the development of both. It argues that the two agendas need to be linked by introducing the judiciary as an agent of transitional justice and transitional justice as a component of the judiciary's professional identity. It intends to show that this link can only be established and complementarity achieved on the basis of a shared understanding of "justice in transition"²⁹ by people involved in the respective processes. Accordingly, an actors-centered approach is introduced to research topics that generally focus on the institutional structures and dynamics underlying and targeted by respective policies and policy changes. In order to explain how a way to think and talk about "justice" is incorporated in and has an impact on the implementation of the respective policy (changes), the text departs from the theoretical concept of narrative identity pointing to narratives as the foundation of social and self-identification, and the resulting image of the "self" translating into roles assumed by and attributed to an individual and/or collective.³⁰ Seen from this theoretical perspective, a lack in social- and self-identification of judges and procurators with the narrative of justice underlying the processes of coming to terms with the past, makes it difficult to perceive themselves and to be perceived as potential agents of transitional justice. On the other hand, their exclusion and distancing themselves from the processes of dealing with past injustice and righting the wrongs of the past, limits the chances of retelling

²⁸ Wang Chin-shou, *The Movement Strategy in Taiwan's Judicial Independence Reform*, 3 J. CURRENT CHINESE AFF. 125, 138 (2010).

²⁹ Referring to first, justice as an element and parameter of transition, and second, the notion of justice itself undergoing a transitional process.

³⁰ Margaret Somers, *The Narrative Constitution of Identity*, 23 THEORY & SOC'Y 605 (1994).

the story of Taiwanese judges in a way conducive to the endeavor of reforming themselves and their image and position in society.

Therefore, a convergence of narratives towards a commonly understood and accepted story of “justice in transition” is proposed as a prerequisite of an integrated and mutually beneficial approach to transitional justice and judicial reform in Taiwan.

To begin, this article exemplifies the lack of a judicial approach within Taiwan’s progress towards transitional justice by giving a short overview of measures taken in its attempt of coming to terms with the past. The next subsection exposes a general lack of stories about judges as personifications of justice as a narrative deficit hampering judicial reform and impeding the imagination and identification of judges as agents of transitional justice. In a next step, the scarcity of narrative contributions from members of the judiciary to a (hi-)story of judges in times of political domination of the judicial system and political oppression of society, is identified as another reason for the socially and self-perceived distance between judges and transitional justice. Finally, in the concluding part of the text, the latest developments in the implementation of Taiwan’s new transitional justice legislation discussed in Ernest Caldwell’s paper, are taken into consideration as first steps towards breaking with the taboos excluding and separating the judiciary from notions of both historical and present-day justice underlying the processes of transitional justice and judicial reform.

II. THE UNFINISHED TASK OF COMING TO TERMS WITH THE PAST: LACKING THE NARRATIVITY OF A JUDICIAL APPROACH TO TRANSITIONAL JUSTICE

The focal point of both social memory and politics of memory in Taiwan since the lifting of martial law in 1987, has been the first violent confrontation between the KMT-government and greater parts of Taiwan’s population in 1947 known under the name of February 28 Uprising, or 2-28 Incident.³¹ In more recent research and policy, the focus of attention has been

³¹ In 1945, Taiwan was returned to Chinese rule after half a century of Japanese colonialization. The difficult circumstances of ongoing civil war between the KMT and the Chinese Communist Party on the Chinese mainland, economic mismanagement by the newly established provincial government, and a predisposition of mistrust held against the Taiwanese as former Japanese colonial subjects on the side of the KMT government, led to tensions that erupted on the occasion of the shooting of a Taiwanese defending an illegal cigarette vendor from harassment by the Monopoly Bureau. Violent protest by the enraged population was answered by security and military forces, resulting in arrests and executions made possible by martial law legislation. DENNY ROY, *TAIWAN: A POLITICAL HISTORY* 67–75 (2003).

extended to the period of political repression following the 2-28 Incident and perpetuated by upholding the status of martial law shielding the KMT's one-party rule against political dissent. Widely known as "White Terror," the persecution of anybody suspected of communist affiliation or an advocacy of Taiwanese independence was going along with other forms of political and cultural domination and only seemingly obliterated by economic development in the second half of the martial law era.³² When the many injustices of politically motivated persecution and suppression that had been a strict taboo during this period finally became an unavoidable topic in post-martial law Taiwan, the difficult task of finally addressing questions and problems related to this highly sensitive issue fell to Lee Teng-hui—the new ROC president and KMT chairman, i.e., the highest level of executive power. Due to pressure from a newly legitimized political opposition and the fact that the memories of 2-28 could finally be taken up in public discourse after decades of censorship and taboos, establishing an official version of what had happened in the early years and decades of KMT's single-party rule of Taiwan, there grew a pressing need in the early nineteen nineties for the executive to face this issue head on. Lee Teng-hui entrusted a commission established under the Executive Yuan with an investigation of the February 28 Incident. The report, released in 1992, made information regarding this event publicly available for the first time, including details about the background and eruption of the uprising, the government's harsh crack-down and handling of the crisis expanding into its aftermath, as well as estimates of the numbers of victims.³³ The official disclosure of these facts can be seen as the first acknowledgement of error on the part of the KMT and was accompanied by related speeches by the President as well as an address by the Premier to victims' family members who were attending a memorial concert and to delegates during a session of the Legislative Council.³⁴

Shortly after, the legislature became an actor in its own right of Taiwan's coming to terms with the past policy through the formulation of a legal framework designed to deal with the damage done during times of state repression. In January 1995, the legislature passed the Act Governing the Recovery of Damages of Individual Rights during the Martial Law Period (Jieyan shiqi renmin shoujuan quanli huifu tiaoli 戒嚴時期人民受損權利回

³² *Id.* at 76–104. For concise information on 2-28 and White Terror, see Hwang, *supra* note 25, at 169–70.

³³ C. L. Chiu, *The Uprising of 28 February 1947 on Taiwan: The Official 1992 Investigation Report*, 7 CHINA INFO. 1, 1–19 (1993).

³⁴ *Id.* at 16.

復條例), which provided civil servants and licensed professionals the possibility to restore their rights to carry on with their former occupations and to receive compensation under certain conditions.³⁵ Although this piece of legislation was disputed due to its limitations in terms of reach and impact,³⁶ the 2-28 Disposition and Compensation Act (Er-er-ba shijian chuli ji buchang tiaoli 二二八事件處理及補償條例),³⁷ also passed in 1995, was heralded as the first significant attempt at redressing the uprising treated both as the beginning and acme of injustice brought about by authoritarian single party rule and dictatorship. In 1998, the possibility to apply for compensation was extended to include victims from the entire White Terror period by the Improper Verdicts on Sedition and Communist Espionage Cases during the Martial Law Period Compensation Act (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).³⁸ The implementation of both the 2-28 and White Terror compensation regulations, i.e., the investigation and decisions on individual cases of applicants, as well as the appropriation and handling of compensation payments and restitution of honor, were assigned to entities set up under the Executive Council.³⁹ By June 2014, the 2-28 Memorial Foundation (Er-er-ba shijian jinian jijinhui, 二二八事件紀念基金會) received 2,278 applications resulting in 9,983 individuals, including victims or victims' family members, being compensated; 8,030 out of 10,066 applicants received compensation by the Improper Verdicts on Sedition and Communist Espionage Cases during the Martial Law Period Compensation Foundation (Jieyan shiqi budang panluan ji feidie shenpan anjian buchang jijinhui 戒嚴時期不當叛亂暨匪諜審判案件補償基金會).⁴⁰ Similar to when the first official report was released regarding 2-28, restorative action by the higher executive level accompanied the legislative measures. These measures included renewed government apologies to 2-28 and White Terror victims by President Lee Teng-hui and his successors, the erecting of 2-28 memorials all over Taiwan, the renaming of a park in central Taipei, declaring February 28 a national

³⁵ Jieyan Shiqi Renmin Shoujuan Quanli Huifu Tiaoli (英譯法規內容) [Act Governing the Recovery of Damages of Individual Rights During the Martial Law Period] (promulgated by the Executive Yuan, 1995, amended 2000), Fawubu Quanguo Fagui Ziliaoku (法務部全國法規資料庫) [Laws & Regulations Database of the Republic of China].

³⁶ Hwang, *supra* note 25, at 171–72.

³⁷ *Id.*

³⁸ *Id.*

³⁹ For an overview of the branches of the Taiwan RoC government see its official homepage. *Government Agencies*, TAIWAN.GOV, <https://www.taiwan.gov.tw/3866.php> (last visited May 20, 2019).

⁴⁰ Hwang, *supra* note 25, at 174.

holiday, the opening of an 2-28 museum, converting former prisons into Human Rights Museums,⁴¹ and funding academic research and exchange in the field of transitional justice,⁴² the latter mostly taking place during Chen Shui-bian's two consecutive presidential terms.⁴³ In a situation in which a legal re-investigation of unjust cases of the authoritarian era was not possible due to politico-legal obstacles pointed out in the introductory part of this text, the DPP presidency made two noteworthy attempts to redress the wrongs of the past and name those responsible for them. The first was a second investigation of 2-28 under the heading of "Research Report on the Responsibility of the 2-28 Massacre" (Er-er-ba shijian zeren guishu yanjiu baogao 二二八事件責任歸屬報告),⁴⁴ which was released in 2006. The second, which occurred in 2004, was the presidential restitution of honor to 2-28 and White Terror victims.⁴⁵

The judiciary which under different circumstances would have been expected to contribute to establishing responsibilities of perpetrators and rehabilitate victims, only came into play in the form of two Grand Justices Interpretations in 2003 (No. 567)⁴⁶ and 2007 (No. 624),⁴⁷ which clarified statements on the unconstitutionality of the extension of political imprisonment by enforced labor and the denial of compensation to victims without a right to appeal according to the State Security Act.⁴⁸ The exceptional but unsuccessful attempts to reopen supposedly politically motivated murder cases of the White Terror period,⁴⁹ added to the criticism of

⁴¹ WU NAIDE ET AL., *THE ROAD TO HUMAN RIGHTS: A REVIEW OF TAIWAN'S DEMOCRATIC HUMAN RIGHTS* 148–56 (1st ed. 2008).

⁴² See generally JIEYAN SHIQI ZHENGZHI ANJIAN ZHI FALÜ YU LISHI TANTAO (戒嚴時期政治案件之法律與歷史探討) [POLITICAL CASES DURING THE PERIOD OF IMPOSITION OF MARTIAL LAW: A LEGAL AND HISTORICAL EXAMINATION] (Er Zixiu (兒子修) ed., 2001).

⁴³ Chen Cuilian (陳翠蓮), *Zhuanxing Zhengyi er-er-ba: Minjindang zhengfu de er-er-ba pingfan jiyao* (轉型正義 二二八: 民進黨政府的二二八平反紀要) [*Transformational Justice 2-28: The DPP's 2-28*], in RENQUAN ZHI LU XINBAN: TAIWAN MINZHU RENQUAN HUIGU (人權之路 新版: 臺灣民主人權回顧) [THE WAY OF HUMAN RIGHTS: LOOKING BACK AT DEMOCRACY AND HUMAN RIGHTS IN TAIWAN] 190–93 (2008).

⁴⁴ MEMORIAL FOUNDATION OF 228, ER-ER-BA SHIJIAN ZEREN GUISHU YANJIU BAOGAO (二二八事件責任歸屬報告) [RESEARCH REPORT ON THE RESPONSIBILITY OF THE 2-28 MASSACRE] (2006), <http://nccur.lib.nccu.edu.tw/handle/114.119/43380>.

⁴⁵ Hwang, *supra* note 25, at 175.

⁴⁶ Sifayuan Dafaguan (司法院大法官) [Grand Justices], Interpretation No. 567 (Oct. 24, 2003), available at <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=567>.

⁴⁷ Sifayuan Dafaguan (司法院大法官) [Grand Justices], Interpretation No. 624 (Apr. 25, 2007), available at <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=624>.

⁴⁸ Caldwell, *supra* note 23, at 472.

⁴⁹ The 2009 Report of the High Prosecutors Office of the Ministry of Justice, ROC, on the reinvestigation of the murder cases of the family of Lin Yi-hsiung and Carnegie Mellon Assistant Professor

an obvious discrimination of victims and protection of perpetrators. The tone of this criticism was set by Wu Nai-te when he spoke of Taiwan as “a case with ten thousand victims and not a single perpetrator.”⁵⁰

The enactment of the Act on Promoting Transitional Justice (Cujin zhuanxing zhengyi tiaoli 促進轉型正義條例)⁵¹ by the first Legislative Yuan with a DPP majority in December 2017,⁵² can be viewed as a step over the threshold into a new phase in Taiwan’s process of coming to terms with its past. Article 6 of the Act on Promoting Transitional Justice made, for the first time, re-investigation and re-evaluation of the politically motivated trials, unjust verdicts, and undeserved sentences that occurred during the court-martial of the authoritarian era possible. The Transitional Justice Committee, an institution established at the executive level, was empowered to reopen cases and revoke rulings that had once been considered “untouchable” according to Paragraph 2 Article 9 of the State Security Act.⁵³ Interestingly, although the institutional and personal unity of prosecutorial and adjudication powers—as well as the resultant danger of a misuse of power—by the Commission set up under the DPP presidency was criticized by the media,⁵⁴ the fact that, in theory, prosecutorial and adjudicative powers should be reserved to the members of the judiciary in a rule of law country did not seem to cause irritation. A decade-long exclusion of the judiciary from the transitional justice agenda, apparently had made its participation in the process of coming to terms with past injustice a negligible option.

Chen Wen-cheng of the early 1980s, that did not result in new trials, can be accessed at: *Gaojianshu gongbu Lin zhai an, Chen Wen-cheng ming'anchongqi diaocha tiecha jieguo* (高檢署公布林宅血案 陳文成命案重啟調查偵察結果) [*Results of an investigation into the murder cases of the Lin family and Chen Wen-cheng reinvestigated by the High Prosecutors Office*], TAIWAN MINJIAN ZHENXIANG YU HEJIE CUJINHUI (台灣民間真相與和解促進會) [TAIWAN ASSOCIATION FOR TRUTH AND RECONCILIATION] (July 30, 2009), <http://www.tph.moj.gov.tw/public/Attachment/9101910301925.pdf>. See also Bruce Jacobs, *Murder Probe Reveals Nothing New*, TAIPEI TIMES (Sept. 13, 2009), <http://www.taipeitimes.com/News/editorials/archives/2009/09/13/2003453451/2>.

⁵⁰ The tone of this criticism was set by Wu when he spoke of Taiwan as “a case with ten thousand victims and not a single perpetrator.” Wu Naiteh, *Transition Without Justice, or Justice Without History*, 1 TAIWAN J. DEMOCRACY 77 (2005).

⁵¹ Cujin Zhuanxing Zhengyi Tiaolo (促進轉型正義條例) [Act on Promoting Transitional Justice] (Dec. 27, 2017).

⁵² Caldwell, *supra* note 23, at 478.

⁵³ Guojia anquan fa (國家安全法) [State Security Act], art. 9, para. 2.

⁵⁴ Wu Ching-chin (吳景欽), *Transitional Justice Vaguely Defined*, TAIPEI TIMES (Dec. 15, 2017), www.taipeitimes.com/News/editorials/archives/2017/12/15/2003683981.

III. THE UNFINISHED TASK OF REFORMING THE JUDICIAL SYSTEM: RECONFIGURING THE NARRATIVITY OF AGENTS OF JUDICIAL JUSTICE

Article 6 of the Transitional Justice Act provides for special tribunals to be set up by the High Courts as an avenue for cases dismissed by the Transitional Justice Committee⁵⁵ to file appeals. In so doing, it, for the first time, designates the judiciary as a possible addressee for those seeking justice in a case dating back to the martial law period. However, in order for its members to adopt to and be accepted in this new role, the narrative underlying the self-understanding and social image of Taiwan's judges needs to be compatible with the narrative underlying the processes of coming to terms with the past in Taiwan, as pointed out in the introductory section.⁵⁶ In a situation in which the members of the judiciary would be expected to play an active role in reassessing and correcting the wrongs of the past, a narrative of legal justice as a good to be delivered to the whole of society against all kind of obstacles, including political ones, would be needed as a source of self-identification for judges and procurators to engage themselves in the practice of transitional justice. At the same time, the populace would need stories of judges and procurators dispensing justice to those in dire need of it, in order to identify and trust the judiciary with the implementation of transitional justice. Communication and cooperation in this politically and socially sensitive context would only be possible and effective if linked to a common sense of justice as the common final goal to be achieved in the related judicial processes.⁵⁷

In spite of the judiciary's reputation having evolved from "the last line of defense of the state"⁵⁸ and "judges not being ordinary public servants"⁵⁹ to "the force for justice safeguarding the interests of the people"⁶⁰ or even "the

⁵⁵ TRANSITIONAL JUSTICE COMMISSION, <https://www.tjc.gov.tw/> (last visited May 30, 2019).

⁵⁶ According to the concept of narrative identity identified as theoretical foundation in the introduction, this assertion is based on the assumption that a person or group makes sense of him/her/themselves, the context surrounding him/her/themselves, and his/her/their own position and role within this context with the help of narratives they have about themselves and others have about them. Somers, *supra* note 30, at 615.

⁵⁷ For an outline of the historical development of a "sense of judicial justice (sifa zhengyi guan 司法正義觀)" in Taiwan since the 19th century, see WANG TAISHENG (王泰升), QU FAYUAN XIANGGAO: RIZHI TAIWAN SIFA ZHENGYIGUAN DE ZHUANXING (去法院相告 日治台灣司法正義觀的轉型) [GO TO COURT: THE TRANSFORMATION OF "JUDICIAL CONSCIOUSNESS" IN TAIWAN UNDER JAPANESE RULE] 1-4 (2017).

⁵⁸ Xu Xielin (許樹林), *Sifaren de juese* (司法人的角色) [*The Role of the Members of the Judiciary*], in FALÜREN DE SHEHUI JUESE (法律人的社會角色) 27-36 (1989).

⁵⁹ *Id.*

⁶⁰ Ma Ying-jeou, *supra* note 7.

last line of defense for justice itself,”⁶¹ the general perception of the judge/procurator in Taiwanese society is not necessarily one of a personification of justice. Therefore, plans for reforming the judiciary need to depart from the awareness that “the general sentiment is that the judicial system is not close to the people, and is not trusted by them,”⁶² as well as from the realization that the “judiciary must be independent, but absolutely must not be an island unto itself, and cannot act in a manner that defies the common-sense expectations of the public for a just judiciary.”⁶³

Popular sayings in which the social imaginary of the judiciary finds expression support the contention that the image of the institution is strongly connected to the judge as a person. The name of the upright and wise Judge Bao⁶⁴ is still referred to in daily language to express hope for a humane approach to adjudication. The symbolism of a historical and fictional figure based on the pre-modern tradition of the imperial judge-official, has been criticized for being incompatible with the principles of a rule of law and separation of powers.⁶⁵ However, it has not lost its appeal as an unofficial “title” for those associated with justice within the politico-legal system.⁶⁶ On the other side of the spectrum, the media has coined the term “dinosaur judge” (konglong faguan 恐龍法官)⁶⁷ which has become frequently used in the context of judgements deemed out of touch with a present day society⁶⁸ that

⁶¹ Tsai Ing-wen, *supra* note 20.

⁶² *Id.*

⁶³ Ma Ying-jeou, *supra* note 7.

⁶⁴ In Chinese: Bao Gong 包公, Bao Zheng 包拯, or Bao Qingtian 包青天; for a short introduction on Judge Bao, see WILT LUKAS IDEMA, JUDGE BAO AND THE RULE OF LAW ix–xxxiv (2009); see also JEFFREY C. KINKLEY, CHINESE JUSTICE, THE FICTION 21–100 (2000).

⁶⁵ Zheng Wenlong (鄭文龍), *Qiantan dianshi falii jiemu* (淺談電視法律節目) [*Talking About Law-Related Programs in Television*], SIFA GAIGE ZAZHI (司改雜誌第) [SIZHI MAGAZINE] (Feb. 14, 1999), <https://digital.jrf.org.tw/articles/374>.

⁶⁶ GE YONGGUANG (葛永光), HANWEI ZHENGYI DE LILIANG: DANGDAI BAO QINGTIAN (捍衛正義的力量：當代包青天) [PROTECTING THE POWER OF JUSTICE: CONTEMPORARY BAO QINGTIAN] (2018); KUNSHAN TANG (湯坤山) & XU HUIQIN (徐慧琴), YANG RISONG CHUANQI: XIANDAI BAO QINGTIAN, FAYIJIE DE JIAOFU (楊日松傳奇 現代包青天, 法醫界的教父) [THE LEGENDARY YANG RISING: MODERN BAO QINGTIAN AND GODFATHER OF FORENSICS] (2012).

⁶⁷ Ye Junrong (葉俊榮), *Konglong Faguan Yu Konglong Faxue* (恐龍法官與恐龍法學) [*Dinosaur Judges and Dinosaur Jurisprudence*], 164 TAIWAN FAXUE (臺灣法學雜誌) [TAIWAN L. J.] 41 (2010).

⁶⁸ The term was coined in connection with a case of child abuse in which the sentence was deemed much too lenient by great parts of society. See YANG ZHIJIE (楊智傑) & QIAN SHIJIE (錢世傑), FALÜREN DE DI-YI BEN SHU (法律人的第一本書) [THE FIRST BOOK OF LAWYER] 152–53 (5th ed. 2015). Aggression against children in general is seen as a field in which a lack of empathy by judges is deemed a sign of being a “dinosaur judge” or a “fajiang 法匠 (pettifogger).” See, e.g., Chen Zhixian, *Quefan Jiabao Tonglixin Faguan Lun Konglong* (缺乏家暴同理心 法官淪恐龍) [*Lacking Empathy in Cases of Domestic Violence*

adheres to the ideals of democracy, rule of law, and human rights. If looking for representations of the profession in media, literature, film, and other cultural outlets, one becomes aware of the fact that there are not many stories of the Taiwanese judge told beyond the mythical figure of Bao Gong rooted in premodern Chinese legal culture and accounts of scandalous adjudication.⁶⁹ This deficit of a narrative foundation of judicial identity has only been tentatively addressed by the respective institutions through initiatives like the Prize for Legal Literature organized by the Taipei Bar Association and publications of the Judicial Yuan named in the following section.⁷⁰

The saying “judge without words” (faguan buyu 法官不語) was originally used to describe that it was taboo for a judge to communicate with members of society outside the courtroom procedure.⁷¹ This tradition, rooted in an intent of self-insulation against nepotism or bribery and treated as an unwritten law both by former and many of today’s senior judges,⁷² has made it impossible for society to perceive judges as people or to even imagine their inner worlds.⁷³ In this sense, nowadays the “judge without words” has become an expression of the lack in permeability and transparency between the judicial and social sphere.

The need to break with the tradition of non-communication between the judiciary and society and to bridge the gap between the worlds of the former

Making the Judge No More than a Dinosaur, CHINA TIMES (Jan. 28, 2019), <http://www.chinatimes.com/newspapers/20190128000602-260106?chdtv>.

⁶⁹ Liu Liyuan (劉麗媛), *Xunzhao Falü De Mianmao* (尋找法律的面貌) [*In Search of the Face of Law*], 317 LÜSHI ZAZHI 41 (2006).

⁷⁰ Liao Zhaozhi (廖招治), *Taiwan Bentu Falü Wenxue Zuopin Pingxi* (臺灣本土法律文學作品評析) [A Critical Analysis of Law-Related Literary Works in Taiwan*] (unpublished Master thesis) (on file at Taizhong: 中興大學 Chung Hsing University).

⁷¹ Chen Zhixiang (陳志祥), Tian Jinyi (田金益) & Chen Zhiming (陳智明), *Fading zhuyi wei ji xia zhi yongyu chengdan: Chen Zhixiang Jilong difang fayuan tingzhang zhuanfang* (法定主義 危機下之勇於承擔) [*Doing One’s Job Without Hesitation in the Crisis of Legal Positivism: An Interview with Chen Zhixiang, Presiding Judge of Keelung District Court*], 348 TAIWAN FAXUE (臺灣法學雜誌) [TAIWAN L. J.] 33, 35–36 (2018).

⁷² LI XIANGZHU (李相助) & FAN LIDA (范立達), *XIANSHENG SHUOFA–YIWEI ZISHEN FAGUAN DE HUIYILU* (先聲說法 一位資深法官的回憶錄) [SPEAKING OUT FOR OTHERS TO HEAR] 97–98 (2013); LIN MENGHUANG (林孟皇), *ZHAOHUI FAGUAN SHILUO DE SHENPAN LINGHUN* (找回法官失落的審判靈魂) [GETTING BACK THE JUDGE’S LOST SPIRIT OF JUDGMENT] 282–85 (2013).

⁷³ In CHEN HSIN-HSING, *Cultures of Visibility and the Shape of Social Controversies in the Global High-Tech Electronics Industry*, in ROUTLEDGE HANDBOOK OF SCIENCE, TECHNOLOGY AND SOCIETY 124, 130 (Daniel Lee Kleinman & Kelly Moore eds., 2014), Hsin-Hsing names the “mechanical character” of Taiwan’s civil law system and its “machine-like” trial procedure as opposed to concentration, immediacy and orality of the common-law trial as another factor “producing invisibility.” He also claims the social world of law is opaque and hard to understand by the lay public in Taiwan. *Id.* at 125.

with the latter, was one of the reasons for the establishment of the Judicial Reform Foundation (Sifa gaige jijinhui 司法改革基金會)⁷⁴ as part of a judicial reform movement initiated by parts of the judiciary in the mid-1990s.⁷⁵ One of its aims was to make judicial procedure and decisions accessible and comprehensible by a broader public. In order to make even those made at the highest level of the judicial system, and therefore of the highest relevance to its development, a topic to be discussed by an interested public readership, the Foundation published a book series titled, “Give an explanation, Grand justice” (Dafaguan, gei ge shuofa 大法官給個說法).⁷⁶ This title highlighted an expectation that the judicial agent would become a politico-legal player having an impact on socio-political developments as well on the process of democratization and rule of law consolidation;⁷⁷ to not only act on behalf of, but in conjunction with the people.

The need to proceed on a narrative level to make the issue of reforming the judiciary relevant to broader parts of society, has also resulted in the publication of accounts of unjust cases that have marred Taiwanese society and kept Taiwanese courts busy for years or even decades (e.g., Caituan faren minjian sifa gaige jijinhui).⁷⁸ These efforts, aimed at displaying the shortcomings of the judicial system in order to raise awareness of the necessity of change, actually work to reinforce the existing narrative of judicial injustice rather than make a positive contribution to the image of the judiciary as a last line of defense for justice. In addition to the negative image conveyed, the way in which the experience of criminal justice is portrayed in reportage (literature), essayistic writings, and documentary films,⁷⁹ exposes the malfunctions of the system and the institutions, but does not provide an insight

⁷⁴ SIFA GAIGE JIJINHUI (司法改革基金會) [JUDICIAL REFORM FOUNDATION], <https://www.jrf.org.tw/about> (Chinese), <https://english.jrf.org.tw/> (English) (last visited May 30, 2019).

⁷⁵ LIN MENGHUANG, *supra* note 72, at 369; *see also* Wang Chin-shou, *The Movement Strategy in Taiwan's Judicial Independence Reform*, 3 J. CURRENT CHINESE AFF. 125, 138 (2010).

⁷⁶ The first volume was published in 2003; the series contains 4 volumes to date. MINJIAN SIFA GAIGE JIJINHUI (民間司法改革基金會) [JUDICIAL REFORM FOUNDATION], DAFAGUAN, GEI GE SHUOFA (大法官, 給個說法) [GRAND JUSTICES, GIVE US AN EXPLANATION] (2003).

⁷⁷ Lin Chien-Chih, *The Judicialization of Politics in Taiwan*, 3 ASIAN J. L. & SOC. 299, 301–02 (2016).

⁷⁸ CAITUAN FAREN MINJIAN SIFA GAIGE JIJINHUI (財團法人民間司法改革基金會) [JUDICIAL REFORM FOUNDATION], ZHENGYI DE YINYING: DUI TAIWAN SIFA ZUI SHENCHEN DE KONGSU (正義的陰影對台灣司法最深沉的控訴) [THE DARK SIDE OF JUSTICE: SERIOUS CHARGES AGAINST TAIWAN'S JUDICIARY] (2002).

⁷⁹ JIANG YUANQING (江源慶) LIULANG FATING 30 NIAN! TAIWAN SANMING LAOREN DE ZHENSHI GUSHI (流浪法庭30年! 臺灣三名老人的真實故事) [A 30 YEARS ODYSSEY OF THE COURTS! THE TRUE STORY OF THREE ELDERLY TAIWANESE] 205–07 (2008); CHANG CHUAN-FEN (張娟芬), WUCAI QINGCHUN (無彩青春) [YOUTH WITHOUT COLORS] (2013).

into the perspective of judges and procurators as pivotal actors. Of the few accounts treating the judge as the story's protagonist including their attitudes and behaviors, even fewer introduce him/her as someone doing the right thing in the sense of a personification of a just judiciary.

The lack in representations of judges and procurators is aggravated by the fact that members of the judiciary themselves speaking about their personal opinion on, or even feelings about, the issues they encounter in practicing their profession to those outside of their professional circles is an uncommon occurrence in Taiwan.⁸⁰ In consistency with this reluctance to address the personal aspects of judicial work, the person of the judge and procurator has not been given much attention in professional and academic discourses for most of Taiwan's modern legal history.⁸¹ Revisions of the Judges Law (Faguanfa 法官法)⁸² in 2011, the Code of Conduct for Judges (Faguan lunli guifan 法官倫理規範),⁸³ and the inclusion of related contents in judges' and procurators' examinations⁸⁴ indicate an increased focus on the attitudes and individual behavior of judges, based on professional ethics in addition to legal principles. However, whether this legislative adaptation alone will be able to provide the foundations for a new self-understanding of those working in the legal field⁸⁵ and to replace the notion of "an unjust judiciary" (sifa bu gong 司法不公) with a social narrative of "judicial justice" (sifa bugong 司法公正),⁸⁶ is still under debate in academic circles. In books titled "Getting back the judge's lost spirit of judgment"⁸⁷ or "Men and women of the law (falüren 法律人), why do you not fight for your honor?,"⁸⁸ judges

⁸⁰ In his foreword to the memoirs of Li Xiangzhu, Fan Lida states that to his understanding, Li was the first judge in Taiwan to "stand up and let the public know what goes through his mind in the process of adjudication." LI XIANGZHU (李相助) & FAN LIDA (范立達) XIANSHENG SHUOFA—YIWEI ZISHEN FAGUAN DE HUIYILU (先聲說法 一位資深法官的回憶錄) [SPEAKING OUT FOR OTHERS TO HEAR] 21 (2013).

⁸¹ Wu Rongyi (吳榮義), *Preface*, in SIFA GAIGE DE GUANJIAN YITI (司法改革的關鍵議題) [KEY ISSUES OF JUDICIAL REFORM] 4–5 (Li Mingjun (李明峻) & Lin Yongsheng (林雍昇) eds., 2012).

⁸² Faguanfa (法官法) [Revisions of the Judges Law].

⁸³ Faguan lunli guifan (法官倫理規範) [Code of Conduct for Judges] (2012).

⁸⁴ Chiang Yu-Lin (江玉林), *Taiwan falü lunli guifan fansi – cong "sifa bu gong" yu "sifa gongzheng" tanqi* (臺灣法律倫理規範反思 – 從 "司法不公" 與 "司法公正" 談起) [*Reflections on the Taiwan Legal Ethics Norms: On the Concepts of "Judicial Justice and Injustice"*], 7 SHIXIN FAXUE 39 (2013).

⁸⁵ Su Po Kao (高思博), *Falü lunli zuowei juese lunli?* (法律倫理做為角色倫理) [*Legal Ethics as Role Morality?*], 7 SHIXIN FAXUE 67 (2013).

⁸⁶ Chiang Yu-Lin, *supra* note 84.

⁸⁷ LIN MENGHUANG, *supra* note 72.

⁸⁸ CHEN CHANGWEN (陳長文) & LUO ZHIQIANG (羅智強), *FALÜREN, NI WEI SHENMO BU ZHENGQI? FALÜ LUNLI YU LIXIANG DE CHONGJIAN* (法律人, 你為甚麼不爭氣) [MEN AND WOMEN OF THE LAW, WHY DO YOU NOT FIGHT FOR YOUR HONOR? RECONSTRUCTING LEGAL ETHICS AND IDEALS] (2006).

and other legal professionals are considering the value of a narrative foundation of their agency in the process of re-evaluating and re-conceptualizing judicial justice.

IV. THE UNFINISHED TASK OF JUDICIAL TRANSITIONAL JUSTICE: CONFRONTING AND OVERCOMING THE NARRATIVITY OF JUDICIAL INJUSTICE

One of the reasons for the difficulty in telling a new story of the Taiwanese judiciary as a source of self-identification in a new socio-political context is the unanswered question of how to deal with its historical foundation. The reluctance of the judiciary to face, reflect, and comment on the negative aspects of their professional history challenges the delineation of a new image and identity of the judiciary.⁸⁹

In the traditional Taiwanese cultural context, the principle of seniority is held high as one of the main elements of professional traditions. One of the problems encountered in telling the personal accounts of judges and the stories of justice that are necessary to provide a template for narrative (self-)identification, is that the life-stories and careers of those revered as the “honorable generation of elders” are rooted in a period that has been criticized for its limitations of judicial independence and a lack of social trust in the judicial institutions.⁹⁰ The difficulty in accommodating both the function of a role model and the acknowledgment of negative aspects of their earlier personal and professional experience is hinted at in the prefaces of the first volume of a series of oral history interviews with the senior generations of Taiwanese judges, which was funded and published by the Judicial Yuan.⁹¹ As a representative of the generation that was part of both the authoritarian system and its democratization, the former Grand Justice and Judicial Yuan President Weng Yuesheng 翁岳生 voices his hope that, contrary to the earlier

⁸⁹ LI MINGJUN (李明峻) & LIN YONGSHENG (林雍昇), *SIFA GAIGE DE GUANJIAN YITI (司法改革的關鍵議題)* [KEY ISSUES OF JUDICIAL REFORM] (2012).

⁹⁰ Chang Tao-Chou, *A Model or a Symbol? Criminal IP Judicial Reforms in Taiwan under U.S. Special 301* (2013) (dissertation, University of Washington) (on file with the University of Washington Library); BERNHARD KAO, *TAIWAN IN THE 21ST CENTURY: ASPECTS AND LIMITATIONS OF A DEVELOPMENT MODEL* 194–212 (Robert Ash & J. Megan Green eds., 2007) (In an overview of Taiwan’s legal development before and after democratization, Bernard Kao points out that in contrast to cases deemed politically relevant and therefore influenced by the KMT government, “in ordinary civil and criminal cases, the courts functioned normally”).

⁹¹ SIFA YUAN SIFA XINZHENGTING (司法院司法行政廳), *1 TAIWAN FAJIE QISU KOSHU LISHI; DI-YI JI (臺灣法界耆宿 口述歷史第一輯)* [ORAL HISTORY OF THE ELDERLY OF TAIWAN’S LEGAL SPHERE] (2004).

experiences of judges as “lonely fighters,” the judiciary today will join forces with “people from all walks of life” in the course of judicial reform.⁹² Whereas the need to overcome former attitudes is clearly expressed in this statement, his later indications that looking back at the history of the judicial system and its transformation might be a source of inspiration and introspection for a new generation of judges and procurators point to the elder generation’s experience as both a deterrent and exemplary reference.⁹³ In a second foreword, legal historian, project coordinator and editor, Wang Taisheng 王泰升 also attributes great value to the memories of experienced professionals as a means of orientation for a younger generation of judges and a broader readership.⁹⁴ At the same time, he speaks of the need for readers from both in- and outside the judicial world to read between the lines at certain points of the interview transcripts conceding that much of the information on relevant issues like the judiciary’s embeddedness in a one-party system and questions of professional ethics might not be provided in a direct and easily understandable manner.⁹⁵ In saying so, he seems to point to the reality that Taiwan’s iconic men and women of the law may have reservations to providing their own versions or interpretations of their role during the period of martial law.

Another attempt by the Judicial Yuan to propagate judicial history, in this case by making archival materials and summaries of the historical development of Taiwanese courts at different levels available to an interested readership, is the publication of “A Collection of Stories from the History of the Courts.”⁹⁶ In its subtitle, the book promises to tell “marvelous court stories adhering emotions and memories of the judiciary.”⁹⁷ However, what is actually offered to its readers is merely the presentation of facts and figures of institutional histories accompanied by pictures of court buildings, court rooms, and judicial persona. Without conveying the individual perspective of judges and prosecutors, i.e., a cognitive and emotional evaluation of what happened

⁹² Weng Yuesheng, *Preface*, in SIFA YUAN SANSHISHI(司法院參事室), FAYUAN DE GUSHI NINGJU SIFA JIYI YU QINGGAN DE JINGCAI GUSHI (法院的故事: 凝聚司法記憶與情感的精采故事) [A COLLECTION OF STORIES FROM THE HISTORY OF THE COURTS: MARVELOUS COURT STORIES ADHERING EMOTIONS AND MEMORIES OF THE JUDICIARY] (2014).

⁹³ [ORAL HISTORY OF THE ELDERS OF TAIWAN’S LEGAL SPHERE], *supra* note 91.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ SIFA YUAN SANSHISHI(司法院參事室), FAYUAN DE GUSHI NINGJU SIFA JIYI YU QINGGAN DE JINGCAI GUSHI (法院的故事: 凝聚司法記憶與情感的精采故事) [A COLLECTION OF STORIES FROM THE HISTORY OF THE COURTS: MARVELOUS COURT STORIES ADHERING EMOTIONS AND MEMORIES OF THE JUDICIARY] (2014).

⁹⁷ *Id.*

in and to the institution by its members, this, and similar works cannot lead to a deeper understanding of their experiences pre-1991. Clearly lacking a narrative quality, they do not function as points of self-/identification and therefore, are incapable of countervailing the ongoing alienation of society on the one, and the historical aloofness of the younger generations of judges on the other hand. They do not result in the creation of a complementary narrative to the already existing one derived from literary and media representations, as well as academic research focusing on the aspects of rights violations and a narrativity of victimization with regard to the “political cases” (zhengzhi anjian 政治案件) of the martial law era.⁹⁸ This imbalance of narrative representation becomes visible, among others, in historian Su Ruijiang’s 蘇瑞鏘 book “White Terror in Taiwan: The Handling of Political Cases in Post-War Taiwan” detailing the court martial system of Taiwan’s authoritarian era.⁹⁹ In a subchapter on research material, she lists more than fifty biographies, autobiographies, and autobiographical novels of people or families victimized by political persecution. In the end of the chapter, this impressive number of sources on victims’ memory finally appears in stark contrast with the author’s listing of only nine names of persons whose memories of being employed in the security apparatus and in charge of the handling of political cases during the martial law era have been made available in published form.¹⁰⁰

Within this limited memory scape lacking a response by those held responsible for past injustice, the consolidation of the image of the judiciary as a safeguard of justice intended by judicial reform, is overshadowed by the stories of its members acting as dependents or aids of a repressive government and as representatives of a political rather than a legal system deserving the denomination of rule of law. That the narrativity of this negative historical legacy is an inherent aspect of social perceptions and discourses of the judiciary in 21st century Taiwan, became apparent when Lin Huihuang 林輝煌, president of the Judges Academy (Sifaguan xueyuan 司法官學院), was

⁹⁸ CAI QINGYAN (蔡清彥) & CHEN ZHILONG (陳志龍) ET AL., TAIWAN RENQUAN YU ZHENGZHI SHIJIAN XUESHU YANTAOHUI (臺灣人權與政治事件學術研討會) [ACADEMIC CONFERENCE ON HUMAN RIGHTS AND POLITICAL INCIDENTS IN TAIWAN] (2006); ER ZIXIU (兒子修), JIEYAN SHIQI ZHENGZHI ANJIAN ZHI FALÜ YU LISHI TANTAO (戒嚴時期政治案件之法律與歷史探討) [POLITICAL CASES DURING THE PERIOD OF IMPOSITION OF MARTIAL LAW: A LEGAL AND HISTORICAL EXAMINATION] (2001).

⁹⁹ SU RUIQIANG (蘇瑞鏘), BAISE KONGBU ZAI TAIWAN: ZHANHOU TAIWAN ZHENGZHI ANJIAN ZHI CHUZHUI (白色恐怖在臺灣 戰後台灣政治案件之處置) [WHITE TERROR IN TAIWAN: THE HANDLING OF POLITICAL CASES IN POST-WAR TAIWAN] (2014).

¹⁰⁰ *Id.*

nominated as candidate for the position of Grand Judge at Taiwan's constitutional court in 2015.¹⁰¹ He was criticized for his former involvement in the prosecution of prominent dissident activists of the Dangwai 黨外 (outside of the party) movement¹⁰² in the 1979 Kaohsiung/Formosa (Gaoxiong/Meilidao shijian 高雄/美麗島事件)¹⁰³ military trial; his nomination was therefore felt as a provocation by many in Taiwan, especially in view of repeated apologies to 2-28 and White Terror victims during Ma Ying-jeou's (KMT) presidency.¹⁰⁴ Lin Huihuang's attempts to excuse himself for having been just a little subordinate without much discretion did not appease the negative feelings provoked by its nomination.¹⁰⁵ In a text titled "The Transitional Justice Assignment for Taiwan's Judiciary,"¹⁰⁶ Lin Menghuang points to the need for a perpetrators' acknowledgement and explanation of the wrongs he or she is held responsible for, in order for today's society to overcome a sense of injustice and subscribe to the values of democracy and human rights.¹⁰⁷ He quotes Ye Hongling 葉虹靈, a representative of the Taiwan Association for Truth and Reconciliation (Minjian zhenxiang yu hejie cujinhui 民間真相與和解促進會), who summarizes society's desire to hear those held responsible for former injustices speaking out, admitting to, and reflecting on their past wrongdoings as follows: "If we could only see those military judges telling society what role they played in the perpetrator system of those times, and whether they had a problem with it"¹⁰⁸

V. CONCLUSION

The above exploration of discursive and perceptive elements and developments has confirmed the relevance of a narrativity of "justice in transition" as a common foundation of Taiwan's judicial reform and transitional justice. Recent research and writing on transitional justice and

¹⁰¹ LIN MENGHUANG (林孟皇), ZHUANXING ZHENGYI YU SIFA GAIGE (轉型正義逾司法改革) [TRANSITIONAL JUSTICE AND JUDICIAL REFORM] 291–92 (2015).

¹⁰² For a personal account of the trial by one of the group with a juridical background, see YAO JIAWEN (姚嘉文), JINGMEI DA SHENPAN – MEILIDAO JUNFA SHENPAN XIEZHEN (景美大審判 美麗島軍法審判寫真) (2003).

¹⁰³ This name was derived from the opposition "Formosa Magazine," which was one of the main initiators of a demonstration on Human Rights Day 1979 in the southern city of Kaohsiung.

¹⁰⁴ LIN MENGHUANG, *supra* note 72, at 313.

¹⁰⁵ LIN MENGHUANG, *supra* note 101.

¹⁰⁶ LIN MENGHUANG, *supra* note 72, at 313–31.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 328.

judicial reform in Taiwan displays certain teleological parallels and intersections that point to the complementarity of the two agendas and the potential of an integrated approach. It does imply that reduced narrativity of the judiciary as an agent of judicial justice—caused, at least in part, by a reluctance to make individual experience and interpretation of professional history part of the professional identity—as well as limited communication by the judiciary with the outside world, i.e., society, may disqualify members of the judiciary as actors in the process of coming to terms with past injustice.

On the contrary, becoming actively engaged in the handling of transitional justice, i.e., an issue that is socially relevant and politically sensitive, would further distinguish the courts as legal platforms for communication and negotiation of both historical and present-day problems. This involvement would hold the potential of contravening the narratives of the “judge without words” (*faguan buyu*) and enhance the image of judicial independence in the sense of a judicial system acting in the name of rule of law and not politics. Addressing and acknowledging the role of judges and prosecutors in the “unjust political case[s]” (*yuan’an, zhengzhi anjian*) of the authoritarian era in the course of the latter’s revision and redress, could help to replace the narratives of an “unlawful” and “unjust judiciary” (*sifa bu fa, sifa bugong*) by a renewed narrative of the judge as a representative of “judicial justice” (*sifa gongzheng*). “Giving explanations” (*shuofa*) on a legal basis for the problems of the past that could not be resolved by political means or civil society efforts alone, might reinvigorate a narrative of the legal institutions as being the “last line of defense for justice” and the rule of law as an indispensable component of both democratic and socio-cultural consolidation. And finally, in an extension of established transitional justice practice, giving priority to an acknowledging and explanatory, approach might contribute to the creation of a common narrative of what happened in the past that people of different political and social backgrounds might be able to agree and build their future communal life upon.

The idea of social consolidation and reconciliation stemming from acknowledgement and explanation achieved through legal procedure, appears to have been incorporated in Taiwan’s recent transitional justice legislation, as well as the presumption that the judicial system might benefit from an involvement of courts and judges in the process of correcting past injustice in order to promote its image of guarantor of justice. In fact, Article 6 of the Act on Improving and Promoting Transitional Justice, among others, provides for the possibility to retry cases rejected by the Truth and Reconciliation

Commission at specialized tribunals established by the High Court and its branches (Gaodeng fayuan ji qi fenyuan sheli zhi zhuanxing 高等法院及其分院設立之專庭)¹⁰⁹ and thereby finally introduces the judiciary as a potential agent of transitional justice. The significance of this step both in relation to the aims of both coming to terms with the past and promoting judicial justice is expressed in the legal text and the guidelines for its implementation: “Criminal cases from the authoritarian period in which prosecution or adjudication had contravened free and democratic constitutional order or violated the principle of fair trial need to be re-examined, as this would mean to heal [former] unlawfulness of the judiciary, highlight [today’s] judicial justice, provide guidance in rule of law and human rights education and further social reconciliation. . . . The healing of [former] unlawfulness of the judiciary mentioned above, should consist of the methods of identifying perpetrators and holding them responsible, compensate victims and their dependents for infringements on their reputation and rights, thereby reestablishing and manifesting the historical truth of the incidents of judicial unlawfulness.”¹¹⁰

A successful implementation of this re-orientation of Taiwan’s transitional justice legislation as also discussed in Caldwell’s 2018 text will depend—in addition to the development of political conditions—on further theoretical contextualization and positioning based on an understanding of “reconstructive justice” with a reconstitution of civic trust in state constitutions being one of the main aims of transitional justice.¹¹¹ It would also require departing from “a growing consensus that social learning [in the context of reconciliation] also requires the establishment of a mutually acceptable—or at least mutually tolerable—‘truth’ about what actually transpired during past violence in order to counter any myths or biased

¹⁰⁹ Cujin Zhuanxing Zhengyi Tiaolo (促進轉型正義條例) [Act on Promoting Transitional Justice] (Dec. 27, 2017).

¹¹⁰ *Id.* Commentary on draft regulations regarding the handling of cases provided for in Art. 6 of the Act on promoting transitional justice by the courts. FAYUAN BANLI CUJIN ZHUANXING ZHENGYI TIAOLI DI-LIU TIAO JIUJI AINJIAN SHENLI BANFA CAO’AN ZONG SHUOMING (法院辦理促進轉型正義 條例第六條救濟案件 審理辦法草案總說明) [GENERAL DESCRIPTION OF THE DRAFT MEASURES FOR THE RELIEF CASES OF THE SIXTH ARTICLE OF THE COURT] (2018), <https://www.judicial.gov.tw/jw9706/pdf/20180914-1918-d1>.

¹¹¹ Paul Seils, *Restoring Civic Confidence Through Transitional Justice*, in *THE ROLE OF COURTS IN TRANSITIONAL JUSTICE: VOICES FROM LATIN AMERICA AND SPAIN* 265 (Jessica Almquist & Carlos Espósito eds., 2012). Seils refers to a situation in which “the norms and institutions protecting fundamental values have been so radically attacked (and substantially defeated) that a particular kind of effort is required to restore the trust necessary to make those norms and institutions efficient again,” as “there is an element of recognition or expectation on the part of the public with regard to criminal justice” and the institutions of justice “represent the frontline in the defence of fundamental norms and values.” *Id.* at 264–79.

memories that may have developed between former antagonists.”¹¹² Finally, the degree to which all parties involved, including the members of the judiciary, will identify with these concepts, and therefore, be identified as agents of transitional justice will be decisive in the realization of an integrative approach to transitional justice and judicial reform in Taiwan.

¹¹² NEVIN T. AIKEN, *IDENTITY, RECONCILIATION AND TRANSITIONAL JUSTICE: OVERCOMING INTRACTABILITY IN DIVIDED SOCIETIES* 5 (2013). Aiken addresses this as a prerequisite to “socioemotional learning,” a sub-category of social learning, referring to “efforts centered on reducing grievances, anger and negative beliefs between groups tied to past violence, aiming at both ‘justice’ and ‘truth.’”

