

Economics, Law, and Institutions in Asia Pacific

Jerome A. Cohen · William P. Alford  
Chang-fa Lo *Editors*

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# Taiwan and International Human Rights

A Story of Transformation

 Springer

# **Economics, Law, and Institutions in Asia Pacific**

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Chang-fa Lo  
Editors

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# Preface

In January 2017, one of the editors of this book, Jerome A. Cohen, delivered a public speech at National Taiwan University College of Law after he had served as a member of the international group of experts invited by the government of Taiwan to review its implementation of international human rights covenants. In his speech, he mentioned that based on his personal experience and his participation in the review, Taiwan has much to share with people in other parts of the world about its experiences in transforming itself from historically having had an authoritarian legal and political structure into what is now a vibrantly democratic society.

Spurred by this, we decided to put together a book to tell the story of Taiwan's performance in various fields of human rights from various perspectives. We are pleased that local and international scholars and other experts, many with a long history of writing about human rights, readily accepted our invitation to participate in this volume. They were enthusiastic about the opportunity to elaborate from a theoretical and/or practical vantage point areas of human rights protection with which they are familiar. In addition to the introductory chapter coauthored by the editors of this book, we have collected 37 chapters from authors representing a broad range of perspectives and topics, with some authors finding many developments to laud, while others instead emphasize the need for improvement.

Readers will find that there have been events, governmental decisions, and judicial decisions positively or adversely affecting human rights protection. Different views exist as to the proper way of achieving higher standards of protection. But one thing that is shared by all of the authors is that human rights treaties have played a key role in the case of Taiwan. There is a broad consensus among the authors in this volume that in the case of Taiwan, these treaties have contributed importantly to facilitating the transition from an authoritarian regime to a real democracy, even as Taiwan remains outside the "jurisdiction" of these treaties. We hope that this book will provide a useful example for the discourse of human rights protection in developing countries, for the discussion of practical and legal issues raised by human rights treaties, and for demonstrating how such treaties can help States Parties as well as nonparties to promote human rights.

The editors wish to thank the following institutes for their role in helping make this book possible:

- Asian Center for WTO and International Health Law and Policy, National Taiwan University College of Law
- Institutum Iurisprudentiae, Academia Sinica
- East Asian Legal Studies, Harvard Law School
- US-Asia Law Institute, New York University School of Law

We would also like to take this opportunity to thank Prof. Tzu-Yi Lin (Director of the Institutum Iurisprudentiae) for coordinating the resources, Prof. Chien-Chih Lin for his valuable role in editing several chapters, and many other members of the Institute for contributing to their chapters.

We would particularly like to thank Prof. Wen-Chen Chang for providing excellent ideas, especially in the initial stage of the editing process. We are grateful to all contributors for making efforts to contribute their chapters to enrich the volume.

Our extremely talented assistants Mao-wei Lo, Yi-tzu Chen and Hui-Heng Hong have taken the lead in coordinating a team of skilled assistants to help edit the book. The team members include Cheng-Kai Wang, Yun-Hsin (Cindy) Chen, Sheng-Chan Chen, Po-hsiang Liao, Jia-Jhen Liao, Ming-Hsi Chu, Arthur Wong, Ambra Minoli, Chia-Ying Chien, Angelique Saw, and Chi-Hsuan Liu. And we wish to acknowledge the superb editorial contribution of Nancy Hearst, librarian of the Fairbank Collection of the H.C. Fung Library at Harvard. Thank you very much for your excellent work!

New York, USA  
 Cambridge, USA  
 Taipei, Taiwan  
 July 2018

Jerome A. Cohen  
 William P. Alford  
 Chang-fa Lo

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## About the Editors

**Jerome A. Cohen** has been professor at NYU School of Law since 1990, Faculty Director of its U.S.-Asia Law Institute, and a leading American expert on Chinese law and government. A pioneer in the field, Prof. Cohen began studying and teaching about China's legal system in the early 1960s, and from 1964 to 1979 he introduced the teaching of Asian law into the curriculum of Harvard Law School, where he served as Jeremiah Smith Professor, Associate Dean, and Director of East Asian Legal Studies. In addition to his responsibilities at NYU, Prof. Cohen served for several years as C. V. Starr Senior Fellow and Director of Asia Studies at the Council on Foreign Relations, where he currently is an Adjunct Senior Fellow. He retired from the partnership of Paul, Weiss, Rifkind, Wharton & Garrison LLP at the end of 2000 after 20 years of law practice focused on China. In his law practice, Prof. Cohen represented many companies and individuals in contract negotiations as well as in dispute resolution in China. Professor Cohen has published several books on Chinese law, including *The Criminal Process in the People's Republic of China, 1949–63* (Harvard University Press, 1968), *People's China and International Law* (with Hungdah Chiu, Princeton University Press, 1974), *Contract Laws of the People's Republic of China* (with Yvonne Y. F. Chan and Ho Yuk Ming, Longman Group, 1988), and *Challenge to China: How Taiwan Abolished Its Version of Re-Education Through Labor* (with Margaret K. Lewis, Berkshire Publishing, 2013). In addition, he has published hundreds of scholarly articles on various topics as well as a book, *China Today*, coauthored with his wife, Joan Lebold Cohen, and a regular series of journalistic opinion pieces for various newspapers. Today, Prof. Cohen continues his research and writing on Asian law, specifically focusing on legal institutions, criminal justice reform, dispute resolution, human rights, and the role of international law relating to China and Taiwan.

**William P. Alford** is Jerome A. and Joan L. Cohen Professor of East Asian Legal Studies at Harvard Law School where he also serves as Vice-Dean for the Graduate Program and International Legal Studies, Director of East Asian Legal Studies, and Chair of the Harvard Law School Project on Disability. A scholar of Chinese law and society, his books include *To Steal a Book is an Elegant Offense: Intellectual*

*Property Law in Chinese Civilization* (Stanford 1995); *Raising the Bar: The Emerging Legal Profession in East Asia* (Harvard 2007), 残疾人法律保障機制研究 (A Study of Legal Mechanisms to Protect Persons with Disabilities) (Huaxia 2008, with Wang Liming and Ma Yu'er, in Chinese), and *Prospects for the Professions in China* (Routledge 2011, with William Kirby and Kenneth Winston). In addition, he has published dozens of articles concerning China, law and international affairs. Professor Alford's work has been recognized with an honorary doctorate from the University of Geneva in 2010 and honorary professorships at Renmin University of China and Zhejiang University. He is also the recipient of the inaugural O'Melveny & Myers Centennial Award, the Kluwer China Prize, an Abe (Japan) Fellowship, the Harvard Law School Alumni Association Award, an award from Special Olympics International recognizing his work on behalf of persons with intellectual disabilities, and several other fellowships and honors. He is a graduate of Amherst College (B.A.), the University of Cambridge (LL.B.), Yale University (M.A. in History and M.A. in Chinese Studies), and Harvard Law School (J.D.).

**Chang-fa Lo** has been Justice of the Constitutional Court of the ROC (Taiwan) since October 2011. Prior to his current judicial position, he was the Chair Professor and Lifetime Distinguished Professor at National Taiwan University (NTU); Dean of NTU College of Law; Founding Director of Asian Center for the WTO and International Health Law and Policy of NTU College of Law (ACWH); Founding Director of the Center for Ethics, Law and Society in Biomedicine and Technology of NTU; Commissioner of Taiwan's Fair Trade Commission; Commissioner of Taiwan's International Trade Commission; and legal advisor for Taiwan's GATT/WTO accession negotiations. In his capacity as Director of ACWH, Prof. Lo launched two English journals, namely, the *Asian Journal of WTO and International Health Law and Policy* (AJWH, an SSCI listed journal) and the *Contemporary Asia Arbitration Journal* (CAA) in 2006 and 2008, respectively. During his tenure as Dean of NTU College of Law, he also launched the English journal, the *NTU Law Review*. He was appointed by the WTO as a panelist for DS332 Brazil—Measures Affecting Imports of Retreaded Tyre in 2006, DS468 Ukraine—Definitive Safeguard Measures on Certain Passenger Cars in 2014, and a member of the Permanent Group of Experts under the SCM Agreement of WTO in 2008. He has also been Chairman of the Asia WTO Research Network (AWRN) since 2013. Prior to his teaching career, he practiced law in Taipei. He received his S.J.D. degree from Harvard University Law School in 1989. He is the author of 13 books (including *Treaty Interpretation under the Vienna Convention on the Law of Treaties—A New Round of Codification* published by Springer) and the editor of seven books (including this one), and he has authored more than 100 journal papers and book chapters. He was granted the “National Professorship Award” by the Ministry of Education and the “Outstanding Scholarship Chair Professorship Award” by the Foundation for Advancement of Outstanding Scholarship.

**Part I**  
**Introduction**

# Chapter 1

## Introduction—An Overview



Jerome A. Cohen, William P. Alford and Chang-fa Lo

### 1 The Story Begins with the Lifting of Martial Law in 1987

Taiwan has gone through a number of important stages in its modern history. From the 17th century until 1895, Taiwan was under the governance of China's Ch'ing Dynasty before being ceded to Japan in the Treaty of Shimonoseki concluding the Sino-Japanese War (1894–1895). During the long period of Ch'ing rule and the subsequent half-century of Japanese colonialism, the concept and practice of rule of law as we know it today basically did not exist, although Japanese rule did introduce some Western legal notions that had recently been imported into Japan. In 1945, following World War II, China, through the Republic of China (ROC) or the Nationalist Kuomintang or KMT government, resumed governance on Taiwan, and in 1949, after the defeat of the Nationalist forces on the Mainland by the Chinese Communist Party, the Nationalist central government moved to Taiwan, making Taipei its capital. For four decades on Taiwan, the Nationalist government imposed martial law, "freezing" the application of many important rights and freedoms that had been guaranteed in the ROC Constitution of 1947. It was not until 1987 that the

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government abrogated martial law, finally allowing the people of Taiwan the autonomy needed to develop a democratic society and build a constitutional democracy able to protect their rights and freedoms.

Through visits to the island during the martial-law era, Jerome A. Cohen witnessed various aspects of the repression imposed by the Nationalists under the rule of President Chiang Kai-shek and his successors. In his chapter “Taiwan’s Political-Legal Progress: Memories of the KMT Dictatorship,” he illustrates Taiwan’s human rights history through personal experience, beginning with his first visit in 1961 and including a few depressing but exciting and ultimately hopeful events that marked the long transition from Nationalist repression to constitutional democracy. This chapter concludes with a brief reference to Professor Cohen’s service in both 2013 and 2017 as a member of the independent International Review Committees of Experts convened by successive contemporary Taiwan governments to evaluate progress in promoting the island’s human rights transformation.

## **2 Human Rights Transition from Broader Perspectives**

Part II of this volume focuses on Taiwan’s human rights transition from historical, comparative and other perspectives. In the first chapter, Nigel Li examines “Asian Values, Confucian Tradition and Human Rights,” explaining that when the Republic of China’s first Constitution went into effect in 1947, it was still very much a nation of Confucian heritage without any recognized tradition of constitutionalism. He then reviews the obstacles that stood in the way of promoting constitutionalism when it was first transplanted to the distinctive soil of Taiwan. The chapter also examines how respect for constitutionalism gradually evolved and took root on the island in a setting in which the government was regarded as the ruler and was customarily understood as the people’s parent. The fundamental notions of the rule of law, human rights, an independent judiciary, separation of powers, equality of individuals, and constitutionalism were all largely considered novel concepts.

Brad R. Roth explains in his chapter, “Human Rights and Transitional Justice: Taiwan’s Adoption of the ICCPR and the Redress of 2/28 and Martial-Law-Era Injustices,” the requirement in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,” which shall be “determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State,” and enforced by “the competent authorities.” He argues that Taiwan’s adoption of the ICCPR raises issues about appropriate redress for injustices associated with the authoritarian period of KMT rule, including most prominently the atrocities committed in the aftermath of the 28 February 1947 uprising. According to Mr. Roth, coming to terms with the past is an indispensable component of the consolidation of



a political order predicated on the irreducible dignity of the human person. This human rights obligation can be fulfilled, he believes, even when too much time has passed for criminal prosecutions to be undertaken, and even when the political party associated with the perpetrators retains a substantial political role.

Chun Hung Chen and Hung-Ying Yeh explain in their chapter, “The Battlefield of Transitional Justice in Taiwan: A Relational View,” how Taiwan tackled the issue of transitional justice with a dynamic approach. When assessing the progress of transitional justice, instead of taking an exclusive top-down or bottom-up perspective, the authors argue that it is important to grasp the interactive nature of the relationship between state and society. That is to say, any transitional justice mechanisms that are implemented are the outcomes of interactions between government and grassroots actors. This chapter outlines achievements to date and discusses the structural factors that have shaped the present situation. The establishment of the National Human Rights Museum and the dispute over the nominations of Constitutional Court justices are taken as examples of the interactive nature of policy and institutional design. This chapter ends by demonstrating the implications of Taiwan’s case for scholarship and practice.

Cheng-Yi Huang observes in his chapter “Frozen Trials: Political Victims and Their Quest for Justice” that, before the lifting of martial law in 1987, the Legislative Yuan passed the National Security Act prohibiting civilian cases tried by court martial from being appealed to the ordinary courts. The Constitutional Court affirmed this legislation in its notorious J.Y. Interpretation No. 272 in 1991, indicating that this was a very exceptional case, since the imposition of martial law had been maintained for some four decades. In its view, stability of the legal system came first and the court had to defer to the Legislative Yuan’s decision. Later, a special statute authorized the government to reimburse the victims or their family members without overruling the original judgments. The government then dealt with 10,062 cases and issued monetary compensation amounting to over 19.6 billion New Taiwan Dollars. However, the victims and their family members still continued to wait for rectified court judgments. This quest for justice after the start of Taiwan’s democratic transition was delayed for thirty years. It was only in December 2017 that the Legislative Yuan passed new legislation in a further effort to confirm the value of transitional justice. In order to facilitate assessment of the progress thus far made, this chapter lays out the legal structure of the martial-law period and then reviews post-authoritarian governments’ efforts to compensate victims. The chapter concludes with an innovative analysis of the critical shortcomings and potential benefits of Taiwan’s model of transitional justice.

Chien-Chih Lin explains in his chapter “Towards an Analytical Framework of Constitutionalism in East Asia: The Case of Taiwan” that recent years have witnessed the reemergence of discussions on Confucian constitutionalism, communitarian constitutionalism, and Asian values. The author argues that, on the one hand, constitutionalism in East Asia is inevitably a blend of liberal constitutionalism and Confucian constitutionalism—that the differences between democracies and dictatorships in this

regard in this region are often a matter of degree, not of kind. On the other hand, he claims, human rights are better protected in Taiwan than in most other Asian jurisdictions because human rights progress has taken place concomitantly with the decline of Confucianism on the island. From this perspective, he contends that it is plausible to say that Taiwan has become the only democracy in Greater China precisely because it has discarded Confucianism and Asian values, which, he suggests, served as a veneer of legitimacy for autocrats to justify dictatorship.

### **3 Institutional Setting and Voluntary Compliance with Human Rights Treaties**

In Part II of this book, the discussions focus on two broad matters—the future institutional arrangements for human rights protection in Taiwan and the unique voluntary implementation of international human rights treaties by Taiwan’s government.

Mab Huang raises a very important question in his chapter “A National Human Rights Commission for Taiwan?”: why have sixteen years not been enough for the government to create a national human rights commission (NHRI) in Taiwan? It is puzzling to the author that, in light of the great strides Taiwan has been making in the promotion and protection of human rights over the past thirty-some years, and the current President’s pledge that she will actively promote judicial reform and transitional justice, a NHRI based on the Paris Principles is nowhere in sight. He discusses the attitude and thinking of the political elite concerning a NHRI and how the bureaucracy has performed in the rapidly changing situation. He also comments that, through the years, several prominent human rights activists have been recruited into government service but then they quickly moved away from their previous views and supported instead government policies. This change of mind, he maintains, has been deeply demoralizing to their former colleagues in the NGO world, and has made for mistrust of the government.

Fort Fu-Te Liao addresses in his chapter “Establishing a National Human Rights Institution—Taiwan in Global Trends” a similar issue and explains that the United Nations has been promoting the establishment of independent NHRIs for several decades, with the Paris Principles as the relevant international standard. He discusses Taiwan’s preparatory works in establishing a NHRI in line with global trends. His analysis focuses on three main issues—historical development, models, and accreditation results. It examines both global trends and Taiwanese endeavors. Professor Liao maintains that only two NHRI models—an independent human rights commission or a human rights ombudsman, the models most widely adopted—are proposed for Taiwan. He suggests that elements such as time, region and model are not key factors in accreditation.

Ernest Caldwell also deals with the national human rights institution issue in his chapter “The Control Yuan and Human Rights in Taiwan: Towards the Development of a National Human Rights Institution?” His approach is different from that in the preceding chapter, although he agrees that, despite decades of debate, Taiwan has never established a NHRI that complies with international human rights norms. At present, in his view, Taiwan confronts three viable options: the creation of an independent NHRI, the establishment of a national commission under the Office of the President, or reform of the Control Yuan into a NHRI. Here he focuses on the latter option. Specifically, he considers the historical relationship between the Control Yuan and human rights in Taiwan, and further considers the socio-legal, as well as constitutional, implications of reforming this branch of government into a NHRI that complies with international human rights norms.

Jacques deLisle addresses Taiwan’s unique situation in implementing international human rights norms in his chapter “‘All the World’s a Stage’: Taiwan’s Human Rights Performance and Playing to International Norms.” He observes that Taiwan’s engagement with the international regime for human rights has been exceptional for reasons related to its unusual status in the world. Taiwan’s precarious status has provided distinctive reasons to emphasize international human rights norms, including some of their more formal manifestations. In the 1980s and early 1990s, the improvement in Taiwan’s human rights record became vital to maintaining U.S. support. In the late 1990s and 2000s, Taiwan’s commitment to human rights norms and values continued to be an essential element in the island’s efforts to preserve security and international stature. During the past decade, Taiwan has deepened its engagement with the UN-centered human rights regime, stressing compliance with that regime as if it were a member state, adopting domestic legislation to mirror the principal human rights covenants, and undertaking reports that parallel the requirements for States Parties to the major human rights conventions. Although this approach has benefited Taiwan’s reputation internationally, as well as the lives of its citizens, Taiwan’s human rights engagement strategy faces new and difficult challenges: internationally, the benefits of a relatively strong human rights record may be waning; domestically, discourse about human rights is turning to more intractable or controversial problems, including issues that resonate with economic, social and cultural dimensions of human rights, and issues of transitional justice.

Yu-Jie Chen also addresses the unique status of Taiwan in accepting the human rights treaties in her chapter “Isolated but Not Oblivious: Taiwan’s Acceptance of the Two Major Human Rights Covenants.” She observes that, despite Taiwan’s isolation from the United Nations, in 2009 it still ratified the two major UN human rights covenants—the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This development is a milestone in Taiwan’s engagement with international human rights law. Although the government’s attempt to deposit the instruments of ratification with the United Nations was rejected, it has committed itself to following the covenants by granting them the status of domestic legislation and instituting mechanisms to implement them. The efforts by Taiwan as a non-UN member state to adopt the two major human rights

covenants are a shot in the arm for the international human rights system. This chapter examines how a state shut out of the UN human rights regime nevertheless became a strong supporter of the regime. With special attention to the relevant domestic advocacy campaigns and political discussions, this chapter seeks to identify the driving forces behind Taiwan's ratification.

Wen-Chen Chang discusses the issues of implementing human rights treaties in her chapter "Taiwan's Human Rights Implementation Acts: A Model for Successful Incorporation?" She explains that although Taiwan has been barred from accession to any human rights conventions, beginning in 2009 it has passed Implementation Acts in order to incorporate into domestic law fundamental rights and freedoms enshrined in the international human rights conventions. These Implementation Acts provide binding domestic legal effect for the rights enshrined in those human rights conventions. The Implementation Acts even oblige the government to issue state reports based on the requirements of those human rights conventions and to create a system of review of government implementation by independent international experts with prior experience serving on similar international panels. This chapter analyzes this innovative implementation mechanism and discusses its particular functions, challenges and difficulties in the context of Taiwan's unique international situation. It also addresses whether this model of an Implementation Act may be suitable for human rights incorporation and enforcement beyond Taiwan.

Yean-Sen Teng, in his chapter "The Problems with the Incorporation of International Human Rights Law in Taiwan," raises questions arising from internalizing international human rights law into the domestic legal system in with the Taiwan. His first question concerns the capacity to conclude international treaties and the legal effect of the government's unilateral acts in the context of international law. His second question deals with the status and effect of the international human rights treaties in the domestic legal order of Taiwan. Third is the question concerning the method of incorporating international human rights treaties by enacting implementing legislation designed especially to create the binding force of a treaty within the jurisdiction of Taiwan. His fourth question relates to the practice applied by the courts or in constitutional interpretations regarding the specific rights and freedoms prescribed in the human rights treaties. This chapter elucidates the legal implications of these questions and the related problems in an effort to offer possible solutions for the judiciary to consider as judges attempt to enforce the rights and fundamental freedoms involved.

Chang-fa Lo, in his chapter "The Approach of Introducing International Human Rights Treaties into the Interpretation of Constitutional Provisions in Taiwan," addresses a more specific issue concerning the introduction of international human rights norms into constitutional interpretations. He emphasizes the desirability and importance of ensuring a living constitution for the Republic of China by incorporating international human rights treaties and practices into the decisions made by the Constitutional Court. He suggests resort to the fundamental interpretation method of relying on textual interpretations to look for appropriate ordinary meanings of the constitutional text. But the "ordinary meaning" should not be the "ordinary meaning" at the time when the Constitution was adopted. Instead, it

should be the “ordinary meaning” at the time when a provision is interpreted. The meaning should evolve by taking into consideration the subsequent development of international human rights treaties and practices. This approach is more in line with the duty entrusted by the Constitution to the Court to “interpret the Constitution” and also in line with the need to make sure that constitutional provisions will not become obsolete.

Yen-tu Su offers a unique discussion of the simulation of the Constitutional Court in his chapter “Rights Advocacy Through Simulation: The Genius of the Constitutional Court Simulation in Taiwan,” drawing upon his experience in participating in a simulation case. He observes that the Constitutional Court Simulation (CCS) has received much attention and interest from the Constitutional Court as well as from the general public in recent years by tackling such salient issues as same-sex marriage, the death penalty, and transitional justice. He analyzes and assesses the workings of the CCS as a moot court education program, a shadow constitutional court, a deliberative forum, and a new approach to rights advocacy in Taiwan. Although the success of the CCS as a rights advocate would make it more difficult for the CCS to project itself as an impartial shadow court, the CCS enterprise attests to the ingenuity and enthusiasm of those who fight for liberal, progressive causes in civil society in Taiwan.

Song-Lih Huang and Yibee Huang look into the NGO aspect of Taiwan’s human rights performance in their chapter “The Role of NGOs in Monitoring the Implementation of Human Rights Treaty Obligations.” They observe that the ratification of the ICCPR and ICESCR through implementation legislation in 2009 has created a new model of operation for human rights NGOs. They are now able to engage with the government on human rights issues on a scale unprecedented in Taiwan’s modern history. This chapter identifies three stages in the development of this model: (1) the influence of NGOs, although limited in number, on high officials during President Chen Shui-bian’s two terms from 2000 to 2008; (2) the influence of core NGOs, particularly those participating in Covenants Watch, in shaping the format of state reports and their reviews; and (3) the involvement of a much larger number of NGOs and individuals in the review and follow-up processes. The chapter also identifies the limitations of this operation in reviewing state reports, especially when facing the institutional deficiencies of the government and in providing adequate training of civil servants, teachers, police, and judges.

To conclude Part III of this book, Manfred Nowak reflects on his personal experience in participating in the two international human rights reviews to date in his chapter “Personal Reflections on the Taiwan Human Rights Review Process.” He relates how he was requested by the government of Taiwan to lead a group of highly distinguished international human rights experts entrusted with the task of reviewing Taiwan’s compliance with the rights enshrined in the ICESCR and the ICCPR. The chapter contains reflections by the author on the review proceedings in 2013 and 2017. Particular emphasis is placed on the need to abolish the death penalty.

## 4 Protection of Civil and Political Rights

Part IV of this book discusses the protection of civil and political rights in Taiwan. Ming-Sung Kuo and Hui-Wen Chen discuss perhaps the most difficult issue—the death penalty—in their chapter “Killing in Your Name: Pathology of Judicial Paternalism and the Mutation of the ‘Most Serious Crimes’ Requirement in Taiwan.” Their focus is on the legal issues arising from Article 6 of the ICCPR. They explain that although Article 6 falls short of banning the death penalty outright, it provides substantive and procedural requirements aimed at limiting the imposition of the death penalty before its abolition. Among them is the restriction of the death penalty to only the “most serious crimes.” Drawing on the case law of Taiwan’s Supreme Court, this chapter aims to shed socio-legal light on the role that the “most serious crimes” requirement has played in judicial rulings concerning the death penalty since the ICCPR became enforceable in Taiwan on 10 December, 2009. It argues that, in its translation into Taiwanese judicial practice, the “most serious crimes” requirement has been read together with the domestic legal provision requiring that individualized aggravating and mitigating circumstances be taken into account under the rubric of rehabilitability, and that this deviates from the jurisprudence of the UN human rights bodies. Under the “judge-civilizer” tradition prevalent in the Taiwanese judiciary, the idea of rehabilitability has gradually transformed judicial deliberation on whether to impose the death penalty into a valuation of the worth of the defendant’s life, with a focus on the issue whether the defendant is an incorrigible offender. With its absorption into the individualizing idea of rehabilitability, the “most serious crimes” requirement of the ICCPR has thus become part of the pathology of judicial paternalism, suggesting a mutation of international human rights ideals in Taiwan.

Rong-Geng Li addresses the issue of the death penalty from a different perspective in his chapter “A Silent Reform of the Death Penalty in Taiwan (R.O.C).” He notes the tension that exists between the general public, on the one hand, and most NGOs and scholars, on the other, on this issue. Without any revision of the statutes, he points out, Taiwan’s Supreme Court has added several substantive and procedural requirements for any conviction and sentence of the death penalty. In addition, the Ministry of Justice has established two special organizations to review death penalty cases. Due to these practical developments, the author maintains, the threshold of the burden of proof in death penalty cases has been substantially raised. Thus, the author concludes, it is fair to say that the death penalty has been reformed, even though legislators are extremely unlikely to abolish it in the foreseeable future, and this reform is necessary and appropriate so as to reduce the possibility of wrongful execution.

Frederick Chao-Chun Lin examines personal liberty protection issues in his chapter “A Core Case for Judicial Review—Protecting Personal Liberty in Taiwan.” In his view, Taiwan has made good progress in protecting personal liberty in the last three decades. One way to demonstrate this significant development is to use this experience to test some prominent academic theories, and the author believes that

Professor Jeremy Waldron's most recent attack on judicial review provides a valuable chance to demonstrate Taiwan's progress. This chapter therefore uses Taiwan's experience of protecting personal liberty to counter Professor Waldron's three major criticisms of judicial review. First, the author contends that Taiwan's experience shows that the text of a constitutional bill of rights does indeed strengthen the protection of rights. Secondly, Taiwan's case also reveals that it is in the cooperation between judicial review and the Legislative Yuan that rights are more fully able to be protected. Finally, it is suggested that Taiwan's lessons from protecting personal liberty prove that Professor Waldron's definition of the tyranny of the majority may be incomplete and even wrong.

Hui-chieh Su, in her chapter "From Suppression to Real Freedom of Expression in the Open and Plural Society of Taiwan—The Constitutional Court's Role in This Progress," discusses freedom of expression in Taiwan. She notes that freedom of expression in Taiwan was suppressed for 38 years prior to 1987. Yet, driven by an active civil society in the 1990s, the Taiwanese Constitutional Court has come to play a major role in deciding both classical and transformative freedom of speech disputes. However, she criticizes the Constitutional Court's reliance on American theories, since the Court often appears insensitive not only to a future of innovative communication technologies but also to the country's authoritarian past. She believes that although in an open and pluralistic society with an authoritarian past the Court has generally become more cautious, in its latest interpretations it nevertheless has created the most stringent scrutiny standards for prior restrictions of speech.

Jeffrey C. F. Li addresses the issues of freedom of movement in his chapter "Freedom of Movement in Taiwan—A Local Development to Meet International Standards." He explains that, under Article 12 of the ICCPR, freedom of movement includes at least three distinct rights, namely the right to enter one's own country, the right to leave any country, and the right to liberty of movement within the territory of a state. In Taiwan, the three rights are all covered by the Constitution and have been expanded by the Constitutional Court. The author introduces the concept of freedom of migration as it exists in Article 10 of the Constitution and how it corresponds to the freedom of movement under international treaties. He also discusses how the Constitutional Court has developed freedom of movement based on Article 22 of the Constitution.

Chih-hsing Ho discusses privacy issues in a comparative way in her chapter "Configuring of the Notion of Privacy as a Fundamental Right in Taiwan—A Comparative Study of International Treaties and EU Rules." She observes that, under the influence of new communications technologies, the traditional notion of the right to privacy has experienced a paradigm shift from a right to be left alone to respect for individual autonomy concerning the control of one's personal information. At the end of 2013, the United Nations General Assembly adopted Resolution 68/167 to address concerns about the potentially detrimental impact of electronic surveillance on human rights and liberal society. In the European Union, modernization of Data Protection Convention 108, as well as the recently enacted General Data Protection Regulation (GDPR), signal the kind of essential steps that

should be taken to strengthen individuals' rights and autonomy with respect to data protection in the digital age. Thus, this chapter locates the development of the rights to privacy and personal data protection in Taiwan within the broader context of international and comparative analysis. The author also illustrates how the notion of privacy has been configured as a fundamental right in Taiwan, and explores the challenges arising from advances in information technology to privacy protection given Taiwan's legal and regulatory frameworks.

Margaret K. Lewis introduces the proposed transformation of Taiwan's criminal trial system in her chapter "Who Shall Judge? Taiwan's Exploration of Lay Participation in Criminal Trials." The ICCPR provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" but it does not dictate the composition of the tribunal. Lewis explains that international human rights law does not demand lay participation in criminal trials. But in recent years, Taiwan has tussled with the extent to which public access to observing trials should be transformed into direct public participation in the outcome of those trials. To date, however, the role that lay people will serve in the adjudication process remains contested on the island. As Taiwan moves towards formulating a specific plan for lay participation, Lewis questions whether proponents of lay participation are expecting too much of the proposed reforms and encourages greater focus on how lay participation might impact the rights of the accused.

## **5 Protection of Economic, Social and Cultural Rights**

Part V of the book identifies a small number of areas in the broad group of rights covered by the ICESCR and examines the performance of Taiwan in these areas.

Chuan-Feng Wu discusses important right to health issues in his chapter "The Right to Health in Taiwan: Implications and Challenges." His observation is that although the right to health has been recognized as a fundamental right for everyone in Taiwan and universal National Health Insurance has been established to protect accessibility to healthcare, the right to health is still not comprehensively guaranteed because it is not explicitly stipulated in either the judicial or policy-making processes. This failure undermines the intrinsic values of the right to health and the importance of the individual's legal entitlements to health necessities, and it excuses the government's non-compliance with human rights obligations. In order to explore the implications and challenges of the realization of the right to health in Taiwan, he assesses Taiwan's commitment to the right to health from legal and public health perspectives through an analysis of constitutional and other domestic laws, health inequality, and the distribution of the underlying conditions of health. The notions of "accountability" and "participation" in regard to "social determinants of health" are also considered as important factors in the assessment.

Chun-Yuan Lin observes in his chapter, "The Evolution of Environmental Rights in Taiwan," that, in the last two decades, democratization has raised the rights consciousness of Taiwanese society and mobilized mass environmental



movements and substantial legislation. In addition, the process of globalization has not only drawn Taiwan's attention to international environmental issues but also has pushed Taiwan to comply with international human rights standards. Yet, in spite of the growth in human rights consciousness, people in Taiwan still have limited understanding of their "environmental rights." The question of how to understand and conceptualize environmental rights within Taiwan's development is crucial for future generations. This chapter defines environmental rights as a collection of rights that provide legal protection against environmental problems. The author argues that environmental rights in Taiwan have evolved alongside political, social and economic development. During the process of democratization, massive enactment of, and progress on, environmental law has provided a legal basis for environmental claims and has transformed them into legal rights.

Wen-Chen Shih addresses a more specific environmental rights issue in her chapter "Human Rights and Climate Finance—How Does the Normative Framework Affect Taiwan?" She explains that climate change might affect certain specific human rights, such as right to life, right to adequate food, right to water, right to health, right to adequate housing, and right to self-determination. Climate change might also affect specific groups, in particular women, children, and indigenous peoples. However, it might be difficult for an individual to hold a particular state responsible for harm caused by climate change. A human rights-based approach to climate finance can help ensure that climate-financed activities comply with existing human rights obligations and principles. It is also desirable to establish institutional safeguard systems that prevent social and environmental harm and maximize participation, transparency, accountability, equity and rights protections. This chapter focuses on how the emerging normative human rights and climate finance framework will affect, and has already affected, Taiwan's climate finance, both in terms of the island's national climate finance and in terms of its foreign aid policy.

Ching-Fu Lin deals with important right to food issues in his chapter "Constitutional and Legal Dimensions of the Right to Food in Taiwan: The Long March toward Normative Internalization and Realization." He indicates that Taiwan has encountered various challenges in its efforts to normatively internalize and realize this right. Taiwan has incorporated numerous key elements of international human rights law into its domestic legal system through a myriad of approaches. But he argues that the manner in which Taiwan has opted to interact with international human rights law raises more questions than it answers. This chapter reviews the development of the right to food in the context of international human rights law and highlights the key elements constituting the current form and substance of this right. It further assesses the many faces of the right to food in Taiwan, from constitutional to legislative to executive practices, and identifies various challenges faced by the country in realizing the right to food. Noting the lack of rights-based discourse in constitutional and legal settings in Taiwan due to numerous underlying issues, this chapter proposes a framework law approach to address the normative challenges and to create an enabling environment for the progressive realization of the right to food.

People know that tobacco products are hazardous. But not many people in the local community look into the issue from a human rights perspective. This is what Tsai-Yu Lin discusses in her paper “Tobacco Investment and Human Rights: A Challenge for Taiwan’s ICESCR Implementation in Its Foreign Investment Policy.” She argues that the Taiwan government paid insufficient attention to its ICESCR obligations when it adopted an open permission policy for foreign tobacco industry investments in bilateral investment treaties. The Taiwan government has a duty to create conditions in which people can enjoy good health. The individuals’ right to health in the ICESCR can never be “fully” respected and be “adequately” protected in the context of tobacco business activities. Neither can the government live up to its ICESCR duties when it encourages tobacco investment through BITs. To bridge the gaping hole between these two regimes, the ICESCR norms might accelerate the reform of Taiwan’s tobacco investment policy and its bilateral investment treaty formulation. However, the success of these reforms ultimately depends on the willingness of Taiwan’s government to effectively implement the ICESCR for its people.

Su-Hua Lee deals with human rights-related intellectual property issues in her chapter “Human Rights and Intellectual Property Protection: Their Interplay in Taiwan.” She explains that the interplay between human rights and intellectual property has been at the center of important debates in recent decades and she argues that an over-protective IP system may be an obstacle in realizing human rights. If copyright is over-protected, it may guard the economic right of creative intellectual activity, but its enforcement might impede access to published works for persons with vision-related disabilities and lead to negative impacts on the right to information. In the public health field, without patents, existing medications and innovative pharmaceutical products which overcome diseases would not have been developed. Therefore, inadequate expansion and enforcement of IP protection might become a barrier to the accessibility and affordability of medications and adversely affect the implementation of the right to health. For this reason, the international community pursues a balance between human rights and IP protection. As a member of the international community, Taiwan closely follows new developments at the international level and introduces amendments of its IP laws accordingly. Regardless of Taiwan’s unique international status, it still manages to establish relevant mechanisms that are consistent with international norms in its domestic IP legal framework.

## **6 Protection of Specific/Vulnerable Groups**

There are certain groups of people who are disadvantaged in their economic and social positions and vulnerable in ensuring the proper protection of their rights. Part VI of the book identifies some potentially disadvantaged groups in Taiwan society and elaborates on the protection of their fundamental rights.

Chang-fa Lo addresses gender equality issues in his chapter “When Women’s Human Rights Encounter Tradition in Taiwan.” He explains that from time to time, when women’s right to equality encounters some deeply embedded tradition, there are still struggles in Taiwan society and in the constitutional process to fully implement that right. The 2015 Constitutional Court case of J.Y. Interpretation No. 728 involved a typical gender equality issue, i.e., women being traditionally and continuously prevented from becoming a member of or successor in “ancestor worship guilds/associations.” In this case, the protection of women’s human rights and the protection of a long-established tradition, as well as freedom of contract, had to be properly balanced. He argues that, in the course of judicial balancing, the right of women to equal protection should have been prioritized because of the seriousness and the systemic and structural nature of such discrimination. He believes that the Constitutional Court should have declared the relevant law unconstitutional. Because it failed to do so, he urges the Legislative Yuan to correct the discriminatory situation by requiring equal status for female offspring, at least for successions that occur after the new legislation goes into effect.

Hsiaowei Kuan discusses the most recent Constitutional Court case on same-sex marriage in her chapter “LGBT Rights in Taiwan—The Interaction Between Movements and the Law.” J.Y. Interpretation 748, issued on 24 May 2017 by the Constitutional Court regarding the constitutionality of the legal ban on same-sex marriages, was widely reported in other parts of the world. The Constitutional Court concluded that denying two persons of the same sex the right to marry violates both their right to equality and their right to marry. Although many factors such as Taiwan’s robust democracy, judicial activism, and commitment to constitutionalism may have contributed to this landmark judicial triumph, Professor Kuan writes that Taiwan’s vibrant LGBT communities paved the way for the progressive judicial and legislative atmosphere that finally led to this outcome. Because the constitutional and legal success in LGBT rights protection in Taiwan could not have been achieved without the long efforts by LGBT activism, this chapter explores the development of LGBT rights in Taiwan from the perspective of the interactions between LGBT rights movements and legislation. The discussion covers several important issues, such as destigmatization of same-sex sexual behavior, protection against discrimination based on sexual orientation and sexual identity in both education and employment, recognition of same-sex families, and articulation of the right to change legal gender identity. For these reasons, the author concludes, Taiwan deserves the attention of human rights observers.

Chih-Wei Tsai (Awi Mona) deals with the issues of indigenous rights in his chapter “National Apology and Reinvigoration of Indigenous Rights in Taiwan.” He explains the huge debate that has taken place about the protection of indigenous rights in the context of legal reform. One of his focal points concerns how and to what extent the state’s legal system and social transformation impact indigenous cultural development and needs. On 1 August 2016 President Tsai Ing-wen delivered a National Apology to Indigenous Peoples, which laid out a comprehensive scheme to provide historical and transitional justice for indigenous peoples. This chapter concentrates on the operation of law and legal pluralism amidst

indigenous diversity. By way of empirical research, it seeks to demonstrate the interaction between the state's legal system and local indigenous communities, including how and to what extent indigenous customary laws have been incorporated into and implemented by the legal system.

Amy Huey-Ling Shee addresses children's rights issues in her chapter "Local Images of Global Child Rights: CRC in Taiwan." She emphasizes that the UN Convention on the Rights of the Child (CRC) is a manifestation of global law regarding children's rights, with 198 states participating. She reviews how the CRC has been integrated into Taiwan law and social practice since its promulgation in 1989. She observes the differences made by the 2014 CRC Enforcement Act to promote child rights in Taiwan and examines how the global law principles of the CRC are being implemented in a Confucian society. The author concludes that the development of global law calls for a new methodology for comparative study, requiring joint efforts by cross-border interdisciplinary experts.

William P. Alford, Qiongyue Hu and Charles Wharton address the protection of persons with disability in their chapter "People Over Pandas: Taiwan's Engagement of International Human Rights Norms with Respect to Disability." They argue that the area of disabilities is an especially illuminating one through which to consider Taiwan's engagement of the international human rights norms to which it is unable formally to adhere. Taiwan's embrace of international human rights instruments and the role of civil society are particularly salient, given both a tradition of citizen activism on Taiwan and the fact that the United Nations Convention on the Rights of Persons with Disabilities (CRPD) calls for more citizen participation than any previous international human rights instrument. The authors further argue that the exclusion of Taiwan from international human rights agreements such as the CRPD has produced the ironic result of accentuating the importance of Taiwan's adherence to those agreements and to the international human rights norms they embody.

Nai-Yi Sun also addresses disability in her chapter "On the Road to Equal Enjoyment of Human Rights for Persons with Disabilities: The Development of Domestic Laws in Taiwan and Their Dialogue with the CRPD." In 2014, Taiwan incorporated the CRPD into domestic law. Sun describes the development of domestic laws relating to the rights of persons with disabilities in Taiwan while analyzing the continuing discrimination occurring behind the façade of legislative progress. She further compares the distinct concepts of equal enjoyment of human rights as embodied in domestic law and the CRPD. She explains that the Convention takes an innovative approach to the principle of equality and non-discrimination, and presents a powerful vision of substantive equality designed to transform current social structures, systems and conceptions. The CRPD provides guidance on the changes required in domestic legislation, policy and jurisprudence. It can be used to broaden the domestic legislative framework, which to date has focused primarily on socio-economic rights for people with disabilities and the unilateral dimension of governmental obligations. The goal, however, is to enable equal enjoyment of civil, political, social, economic and cultural rights with regard to both government and the private sector.

Yi-Li Lee focuses on non-citizens' rights in her chapter "Constitutional Dynamics of Judicial Discourse on the Rights of Non-citizens: The Case of Taiwan." The author finds that the Constitutional Court's relevant decisions reveal two significant features. First, the Court has increasingly taken an inclusive approach towards the civil rights of non-citizens, which has facilitated the subsequent development of regulations regarding migrants. Second, the Court and the individual justices actively use international human rights instruments to address the rights of non-citizens while Taiwan has been taking steps to integrate itself with the international human rights regime. However, the Court's decisions on social and political rights drew scholarly criticisms when it took a rather deferential approach in reviewing cases involving national security and the allocation of limited social resources. Since non-citizens are usually regarded as "discrete and insular minorities," the author argues that the Constitutional Court should consider engaging in stricter scrutiny of the legal restrictions on the social and political rights of non-citizens. In addition, in order to guarantee human rights for non-citizens, the Court will likely find it necessary to develop special criteria for reviewing disputes that pertain to their social and political rights.

The editors of this book hope that its coverage is comprehensive enough to give readers a well-rounded picture of Taiwan's human rights performance and that readers will find appealing the story of Taiwan's efforts to achieve high standards of human rights protection even though the jurisdiction is barred from joining international human rights conventions.

# Chapter 2

## Taiwan's Political-Legal Progress: Memories of the KMT Dictatorship



Jerome A. Cohen

**Abstract** This brief memoir illustrates Taiwan's modern human rights history in broad strokes through my own experiences. It begins with a first visit in 1961, when the island was suffering under the harsh Chiang Kai-shek dictatorship. It ends with my participation in the unique recent reviews of Taiwan's immense human rights progress by leading international specialists. Along the way, I was privileged to witness and take part in a few depressing but exciting and ultimately hopeful events that marked the long transition from KMT repression to constitutional democracy.

**Keywords** Annette Lu · Chiang Ching-kuo · Chiang Kai-shek  
Constitutional democracy · Dictatorship · Henry Liu · KMT · Ma Ying-jeou  
Peng Ming-min

Nothing could be more satisfying for me than to mark the thirtieth anniversary of Taiwan's termination of martial law by recording my own occasional witness to the harsh dictatorship that preceded the island's immense political-legal progress.

### 1 The First Visit

My first visit to Taiwan was in 1961, sixteen years after Chiang Kai-shek's forces had occupied the island following Japan's surrender ending World War II. The island's capital, Taipei, was still a dilapidated, demoralized place. Economic conditions were poor, social conditions not much better and the "White Terror" that Chiang's forces had long imposed on Taiwan continued unchallenged.

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