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WEITSENG CHEN*©

Twins of Opposites: Why China Will Not Follow Taiwan's Model of Rule of Law Transition Toward Democracy†

Facing similar political and economic conditions, both China and pre-democratic Taiwan have applied the same strategy to implement structural reforms, a model characterized by “the rule of law without democracy.” One fashionable opinion has been that the Model in China will follow its life cycle in Taiwan and eventually lead to democratization, after the progress in overall reforms. Although seasoned policymakers have often expressed this viewpoint, it has surprisingly not been scrutinized in detail by existing legal literature.

By comparing the critical juncture of Taiwan's total transition with that of China's, this Article refutes this convergence theory. First of all, the examination of the Model in Taiwan unveils prominent limits that have prevented the rule of law from taking root until years after democratization. Secondly, this Article identifies four factors that have transcended the limits of the Model in Taiwan, but they either do not exist, or have minor or opposite effects in China. These factors are (1) the fusion of the early transplanted legal system in mainland China and the Japanese colonial legacy of legal development in Taiwan; (2) an inward-looking nationalism that empowered the reformist wing of the legal profession and the general public; (3) competitive local elections as an alternative platform for enforcing laws and advancing constitutionalism; and (4) the pressure exerted by geopolitics and international economy placing constraints on the authoritarian state. The absence of these factors may result in a very different final outcome of the Model in China.

* Assistant Professor and Deputy Director of the Center for Asian Legal Studies, National University of Singapore (NUS) Faculty of Law. weitseng.chen@nus.edu.sg. The author has benefited from comments on earlier versions of this Article by Gary Bell, Mike Dowdle, John Haley, Andrew Halpin, Arif A. Jamal, Jedidiah Kroncke, Clark Lombardi, Erik Moberand, Gregory W. Noble, Dan Puchniak, Susan Rose-Ackerman, Victor V. Ramraj, Katherine Southwick, Mark Tushnet, Kevin Tan, Thio Li-ann, Arun Thiruvengadam, Frank Upham, Tay-Sheng Wang, and participants of the World Congress of Constitutional Law and the University of Washington Transpacific Comparative Constitutional Law Roundtable. The author is especially indebted to the anonymous reviewers of the *American Journal of Comparative Law* for providing insightful comments, and gratefully acknowledges the support of the NUS Center for Asian Legal Studies and AcRF Tier 1 grant (R-241-000-163-115).

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This Article concludes by challenging the theories about authoritarian legality, which generally depict authoritarian rules as transitional and presume a linear transition. Rather, this Article suggests that the nonlinear, context-dependent, and functionalist approach be adopted in order to understand trajectories of the rule of law development in transitional countries.

INTRODUCTION

A fashionable opinion that often appears in public discussions is that an inevitable trajectory of democratization will follow after a developing authoritarian state achieves a certain level of economic growth.¹ This reasoning is intuitive: economic growth will eventually give rise to a middle class that is more politically assertive, and will, in time, call for a greater degree of democratization. At an empirical level, serious political scientists have also put a great deal of effort into proving this thesis.² In forecasts of the democratic future of the People's Republic of China (PRC), one oft-mentioned precedent is Taiwan, which the Chinese Communist Party (CCP) has claimed sovereignty over, but which was ruled by the CCP's historical rival, the Nationalist Party or Kuomintang (KMT), after the end of the Chinese Civil War in 1949. Four decades of authoritarian rule by the KMT created one of East Asia's miracle economies, improved the rule of law, and resulted in Taiwan's democratization in the late 1980s. Many, including the Republican U.S. President George W. Bush and the former Secretary of State Hillary Clinton, have used the example of Taiwan to rebut the notion that democracy is unsuitable for China.³

In particular, the rule of law played a crucial role in Taiwan's long march toward democracy. The authoritarian KMT implemented legal reforms from the outset of its economic transition, while paying only lip service to democratic values by limiting such reforms to laws that were neutral to the regime. Up until the mid-1980s, Taiwan was considered an outlier of the modernization theory of democracy as its wealth and legal progress did not appear to change its level of

1. Scholars who argue that China will democratize have suggested various trajectories for China's democratization. See Larry Diamond, *The Coming Wave*, 23 J. DEMOCRACY 5 (2012); Andrew J. Nathan, *Authoritarian Impermanence*, 20 J. DEMOCRACY 37 (2009); Yun-han Chu, *Taiwan and China's Democratic Future*, in CHINA'S CHANGING POLITICAL LANDSCAPE: PROSPECTS FOR DEMOCRACY 302 (Cheng Li ed., 2008); BRUCE GILLEY, CHINA'S DEMOCRATIC FUTURE: HOW IT WILL HAPPEN AND WHERE IT WILL LEAD (2004).

2. See, e.g., CARLES BOIX, DEMOCRACY AND REDISTRIBUTION (2003); Seymour Martin Lipset, *On the General Conditions for Democracy*, in THE CHALLENGES OF THEORIES ON DEMOCRACY 1 (Stein Ugelvik Larsen ed., 2000); Adam Przeworski & Fernando Limongi, *Modernization: Theories and Facts*, 49 WORLD POL. 155 (1997).

3. Hillary Rodham Clinton, Sec'y of State, Remarks to the International Women's Leadership Forum (July 9, 2012), (transcript available at <https://2009-2017.state.gov/secretary/20092013clinton/rm/2012/07/194696.htm>). For President Bush's remarks, see *Be More Like Taiwan, Bush Urges Beijing*, THE GUARDIAN (Nov. 15, 2005), <https://www.theguardian.com/world/2005/nov/17/usa.china>.

authoritarianism.⁴ Not until surprisingly rapid democratization had taken place in the late 1980s did Taiwan become a convenient citation for the conventional wisdom that democracy goes hand in hand with development. The “Taiwan phenomena” presented much optimism for China’s democratic future because the CCP has also been actively engaged in legal reforms and both China and Taiwan share strikingly similar patterns of legal, political, and socioeconomic developments. But is this view of convergence correct?

The convergence theory seems to have been derived more from anecdotes than from a thorough examination. Some theoretical blind spots exist as well. For one, the relationship between the rule of law and democracy remains tenuous. While it can be asserted with much certainty that democracy begets, and also depends on, the rule of law, the reverse may not necessarily be true. While Taiwan demonstrates that the rule of law heralds and depends on liberal democracy, Singapore and Hong Kong are striking counterexamples. More examples of rule by law (if not the rule of law) without democracy can be found in history, such as the Soviet Union or Nazi Germany.⁵

Furthermore, whether and to what extent the rule of law may lead to democracy is far less studied than other socioeconomic determinants within studies of comparative democratization. In addition to law, the literature on democracy has unveiled multiple factors that may contribute to democratization, including the per capita income and wealth distribution,⁶ the middle class and the level of its dependence on the state,⁷ the cultural and religious composition of the population,⁸ media proliferation,⁹ the size of the country,¹⁰ the abundance of natural resources,¹¹ and certain institutional settings such as the electoral system.¹² In comparison, the correlation and causal relationship between law and democracy, as well as the mechanisms accounting for the connections, are underexplored and less certain.¹³

4. SHELLEY RIGGER, *POLITICS IN TAIWAN: VOTING FOR DEMOCRACY* 15 (1999).

5. Jacques deLisle, *Law and Democracy in China: A Complex Relationship*, in *DEMOCRATIZATION IN CHINA, KOREA, AND SOUTHEAST ASIA? LOCAL AND NATIONAL PERSPECTIVES* 126, 127 (Kate Xiao Zhou et al. eds., 2014).

6. Boix, *supra* note 2; Przeworski & Limongi, *supra* note 2.

7. Lipset, *supra* note 2; Andrew J. Nathan, *The Puzzle of the Chinese Middle Class*, 27 *J. DEMOCRACY* 5 (2016); Jie Chen & Chunlong Lu, *Democratization and the Middle Class in China*, 64 *POL. RES. Q.* 705 (2011).

8. Steven Fish, *Islam and Authoritarianism*, 55 *WORLD POL.* 4 (2002); Seymour Martin Lipset, *The Social Requisites of Democracy Revisited*, 59 *AM. SOCIOLOGY REV.* 1, 5 (1994).

9. JAN TEORELL, *DETERMINANTS OF DEMOCRATIZATION: EXPLAINING REGIME CHANGE IN THE WORLD 1972–2006*, at 5–6 (2010).

10. *Id.* at 50–52; Boix, *supra* note 2, at 41–44; ROBERT DAHL & EDWARD TUFTE, *SIZE AND DEMOCRACY* (1973).

11. THAD DUNNING, *CRUDE DEMOCRACY: NATIONAL RESOURCE WEALTH AND POLITICAL REGIMES* (2008); Michael Ross, *Does Oil Hinder Democracy?*, 53 *WORLD POL.* 325 (2001).

12. Ellen Lust, *Competitive Clientelism in the Middle East*, 20 *J. DEMOCRACY* 122 (2009); RIGGER, *supra* note 4.

13. deLisle, *supra* note 5, at 132, 136.

That said, while each of these democratization determinants alone is far from sufficient to trigger political transition, the rule of law seems to have become a much hope-inducing mechanism for change. This is mainly because many authoritarian rulers appear to be willing to embrace the rule of law for the sake of economic growth, despite what in their minds is probably the rule *by* law. The perception of a positive connection between law and democracy is widely shared among some influential thinkers within and outside China.¹⁴ China's recent turn against constitutionalism and the massive arrest of rights defense lawyers (*weiquan lüshi*) is also the manifestation of such beliefs (or perhaps fears) shared by the highest leaders in the party, albeit in an ironic way.¹⁵

Against this backdrop, one would reasonably expect that any reference to Taiwan as a means of predicting the development of China's rule of law and democratic future should be based on a thorough comparative assessment of the legal transitions on both sides. Unfortunately, such an assessment remains largely limited in the

14. This view is particularly common in China. For instance, Yu Keping, a close advisor to the former President Hu, claimed that the rule of law *will* lead to democracy in the end. Similarly, Deng Xiaoping emphasized the interdependence between the rule of law and democracy, stating that the rule of law is indispensable for facilitating and guarding democracy. What is also often discussed in the CCP propaganda is the tension and complicated relationship between the rule of law and democracy, which often leads to the conclusion that there is no universal trajectory of the rule of law and democracy development and China needs to figure out its own approach. See, e.g., DANIEL C. LYNCH, CHINA'S FUTURE: PRC ELITES DEBATE ECONOMICS, POLITICS, AND FOREIGN POLICY 68–118 (2015); Zhang Wenxian (张文显), *Deng Xiaoping Minzhu Fazhi Sixiang Yongfang Guangmang* (邓小平民主法治思想永放光芒) [*Deng Xiaoping's Theory of Democracy and the Rule of Law Shines Forever*], RENMIN WANG (人民网) [PEOPLE.CN] (Aug. 22, 2014), <http://dangshi.people.com.cn/n/2014/0822/c85037-25520727.html>; Wen Zebin (温泽彬), *Lun Minzhu yu Fazhi de Guanxi* (论民主与法治的关系) [*Discussion About the Relationship Between Democracy and the Rule of Law*], RENMIN WANG (人民网) [PEOPLE.CN] (Feb. 2, 2012), <http://theory.people.com.cn/GB/49150/49152/17000494.html>; Yu Keping, *Toward an Incremental Democracy and Governance: Chinese Theories and Assessment Criteria*, in DEMOCRACY AND THE RULE OF LAW IN CHINA 3, 22–26 (Yu Keping ed., 2010).

15. For example, commenting on the arrests of rights defense lawyers, an active CCP commentator suggested that these activist lawyers threw China's rule of law into disorder and would bring about another round of Color Revolutions in China with the assistance of Western forces. This publication was forwarded widely through the Weibo accounts of the Supreme People's Court, CCP Youth Corps, and the Ministry of Public Security. Here, the fear about a rising rights consciousness is demonstrated in the name of guarding a healthy relationship between the rule of law and democracy. See Lei Xiying (雷希颖), *Cong "Kaola" Fansheng dao Ren Quanniu Zhiqian: Dalu "Weiquan Lüshi" Shidai de Zhongjie?* (从“考拉”反省到任全牛致歉: 大陆“维权律师”时代的终结?) [*From Kaola's Introspection to Ren Quanniu's Apologies: The End of the Era of "Rights Defense Lawyers" in China?*], NANHUA ZAOBAO (南華早報) [S. CHINA MORNING POST] (Aug. 2, 2016), <http://www.nanzao.com/tc/opinion/155f34d9632b171/kao-la-fan-xing-ren-quan-niu-zhi-qian-da-lu-wei-quan-lv-shi-shi-dai-di-zhong-jie-;> Mo Zhai (墨翟), *Fangdu Yanse Geming, Beijing Shandong Chouwai Qingxu* (防堵顏色革命, 北京煽動仇外情緒) [*To Prevent Color Revolution, Beijing Promotes Sentiment Against Foreign Powers*], 60 DASHIJIAN (大事件) [THE EVENTS], Aug. 30, 2016.

literature to date.¹⁶ One may find such a gap surprising, considering the popularity of the Taiwan–China rhetoric and the constant call for such research by veteran Chinese legal scholars.¹⁷ This Article aims to fill that gap. It begins by examining the similarities between the two sides, which are the common contours of the convergence theory, and then scrutinizes some fundamental differences between the two sides in order to contest the convergence theory.

In opposition to the convergence theory, this Article argues that China is unlikely, despite the strikingly similarities between the two sides, to follow Taiwan’s trajectory of the rule of law transition that eventually facilitated the transformation of an authoritarian regime into a full-fledged democracy. Several key factors that were critical for the advancement of the rule of law in Taiwan and its subsequent democratization are absent in China or, even if they do exist, have a countervailing effect. Nonetheless, two qualifications should be made here: First, considering various determinants of democratization, this argument is limited to the interaction and relationship between law and democracy; second, it does not exclude the possibility of China’s democratization in the long term (although democratization could be of substantial length). After all, China’s dynamic, parallel, and uneven development across sectors and regions would render any definitive, long-term forecast incomplete and premature.

The rest of this Article is divided into five parts. Part I introduces the “rule of law without democracy” model (the Model) shared by Taiwan and China. Part II provides a brief overview of the legal and political transitions underlying the full life cycle of the Model in Taiwan. Part III moves on to examine the similarities between Taiwan and China in terms of the evolution of the Model. Part IV switches focus to their differences and identifies the key mechanisms that distinguish the transition in Taiwan from that in China, including: (1) a fusion between Taiwan’s fledging and transplanted civil law system and its Japanese colonial legacy; (2) an inward-looking nationalism that empowered the reformist wing of the legal profession in Taiwan; (3) wide and active local elections as an alternative platform for law enforcement; and (4) the pressure exerted by international politics and economy. In light of these similarities and differences, I conclude in

16. The scant literature utilizing a China–Taiwan comparison reflects a larger missing part in comparative law research. While studies of China’s legal system have greatly increased in recent years, this is not the case with other Asian jurisdictions. For example, with respect to the role of law in economic development, John Ohnesorge rightly points out that current theories strangely fail to pay serious attention to the role that law played in the leading economic development success stories in modern history (namely, the “miracle” economies of Japan, South Korea, and Taiwan). See John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT’L ECON. L. 219, 221 (2008).

17. See, e.g., Jerome Cohen, *Law in Political Transitions: Lessons from East Asia and the Road Ahead for China*, COUNCIL ON FOREIGN RELATIONS (2005), <https://www.cfr.org/report/law-political-transitions-lessons-east-asia-and-road-ahead-china>.

Part V by casting doubt on the convergence theory concerning China's democratic future.

I. THE RULE OF LAW WITHOUT DEMOCRACY MODEL

To frame the comparison between the legal reforms in China and pre-democratic Taiwan (1945–1996) over the course of fifty years, this Article generalizes their similarities using what shall be called the “rule of law without democracy” model. Faced with rapid socioeconomic transformation, both the KMT and the CCP needed to find an exit strategy to deal with the increasing demands for a greater degree of political freedom or they would become victims of their own success. As a result, both have embraced the idea of the rule of law and have implemented legal reforms under authoritarian rule. For the purpose of our analysis, this Article uses the term “rule of law” in a functional, descriptive sense, and does not intend to go any further in discussing a normative definition of the rule of law (i.e., the thin/thick conceptions of the rule of law, or the distinction between the rule of law and rule by law).¹⁸ Both authoritarian parties focus on certain functions of the rule of law that provide the legal certainty necessary for economic growth and improve the efficiency of bureaucratic systems as well as the monitoring of officials and party cadres. In this regard, “legalization” is a more precise term to describe the authoritarian rulers’ understanding of the law as an instrument used to institutionalize their political commitment to modernizing the state.

The Model helps to illustrate the complex interaction between legality and legitimacy under authoritarian regimes in general. As Part III discusses further, both authoritarian parties use legalization as a substitute for democracy. In this way, the Model serves the needs of an authoritarian regime for a performance-centric legitimacy buttressed by legal instrumentalism that protects and reallocates a subset of legal rights for the sake of economic development and better monitoring of the bureaucratic system. This form of legitimacy does not include “legality” in the sense of a normative commitment to enforcing all legal rights as a social and political goal in itself. It follows, therefore, that any breach of the law by the party-state could be justified if the breach demonstrably enhanced the state’s economic and social performance generally. In this sense, “legalization” has little to

18. There is a rich literature about the various approaches to conceptualizing the rule of law and to distinguishing the rule of law from the rule by law. As such, “legalization” is used sometimes in this Article to avoid any confusion or debate as to whether it is the “rule of law” or “rule by law” that existed during China’s and Taiwan’s legal reforms at the time. *See, e.g.*, MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT* 16–29 (2009); RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 63–67, 69–71 (2002). For a similar functionalist approach to discussing the rule of law, see, e.g., Frank K. Upham, *The Illusory Promise of the Rule of Law*, in *HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM* 279 (András Sajó ed., 2004).

do with the state's normative commitment to the rule of law. Rather, it serves to organize and thus prolong the party's hold on power because the maintenance of authoritarian regimes depends on more than just the unrestrained and arbitrary use of power.¹⁹ That said, this form of "legalization" does eventually foster a regime that grants the judiciary a certain latitude to resolve disputes and discipline wrongdoers, including governmental officials. It would, to some degree, gradually subject the state to law, albeit far from entirely.

The Model also posits an implicit social contract between the people and the party-state for a performance-centric legitimacy supported by legal instrumentalism that focuses on the protection and reallocation of certain legal rights that the regime considers necessary for economic growth and better governance.²⁰ Specifically, the Model is a combination of the people's perception of law and democracy, the reformists' approach to advancing reforms beyond the economic realm, as well as the strategies adopted by the individual party-states to strengthen authoritarian legitimacy.

To avoid over-generalization, this Article uses the term "Model" for the sake of convenience to refer to three major, common features of Taiwan and China where legal and political reforms are concerned²¹: (1) Conceptually, there exists the widely perceived notion that legality can replace democracy and take priority over reforms concerning political accountability. The parties make the best use of this notion to strengthen their legitimacy, regardless of whether they genuinely want to pursue democracy or merely to prolong their regime to the furthest extent possible. (2) Practically, functional substitutes for accountability and political competition have been created, tolerated, or both, by the two Leninist parties; in turn, they improve governance and justify authoritarianism. (3) Lastly, legal reforms nonetheless spill over into the political arena to a point where the party-states have to carefully manage and contain them, or Trojan horse effects will bring about the end of the authoritarian regime. Should this be the case, whether the Model will result in a democracy remains unknown: it could be a democracy, another authoritarian regime, or even a military state.²²

19. JASON BROWNLEE, *AUTHORITARIANISM IN AN AGE OF DEMOCRATIZATION* 202 (2007); Lust, *supra* note 12, at 122.

20. Legitimacy is the public acceptance of a political authority. Historically, there have been multiple sources of political legitimacy other than democracy or elections, such as those categorized by Max Weber's works (e.g., religion, tradition, and charisma of leaders). In China and pre-democratic Taiwan, the other component of legitimacy of both authoritarian regimes is nationalism. This Article further discusses the Model's relationship with nationalism in terms of legitimacy (see Part IV.B).

21. For avoidance of doubt, the Model is not intended for universal application, in particular other authoritarian states.

22. Historically, the breakdown of authoritarianism is not necessarily followed by a democratic transition. On the contrary, as Axel Hadenius and Jan Teorell have documented, from 1972 to 2003, 77% of transitions from authoritarian governments resulted in another authoritarian regime. See Axel Hadenius & Jan Teorell, *Pathways from Authoritarianism*, 18 *J. DEMOCRACY* 143, 152 (2007).

After all, the Model is only about the *absence* of democracy; the end of authoritarianism does not necessarily signal the *coming* of democracy.

It is important to stress the conceptual limit of the Model: the Model is merely transitional rather than conclusive, conveying no implication whatsoever that the Model will lead to an identical result in China, Taiwan, or elsewhere. Rather, the Model remains subject to varying dynamics and local conditions. This is in contrast with what Randall Peerenboom has proposed, i.e., the “East Asian Model” (EAM), which serves as an ideal type illustrating the sequencing of economic growth, legal reforms, democratization, and constitutionalism in Asia.²³ Peerenboom suggests that China tends to follow the EAM, although economic growth has not led to democracy in all economically successful countries.²⁴ However, the democratization literature has repeatedly demonstrated empirical flaws in any unilinear transitional theory about authoritarian regimes by unveiling the complex, diverse relationships among authoritarianism, democracy, and development.²⁵ Moreover, as the EAM was developed based mainly on the experiences of East Asian states, it is more of a purported factual claim than a full-fledged *model* with a predictive power.²⁶ In contrast, the next Part provides a sketch of the evolution of the Model in Taiwan, and later, in Part IV, I will argue why the Model in China would evolve differently down the road.

II. THE LIFE CYCLE OF THE MODEL IN TAIWAN

By way of background, several reasons account for the striking similarities between China and Taiwan, as characterized by the Model. Politically, both the CCP in China and the KMT in Taiwan are Leninist parties that view law as an instrument for pursuing economic growth, with legitimacy resting mainly on governmental performance empowered by law rather than constrained by law.²⁷ Some enlightened CCP leaders also drew lessons, both positive as well as negative, from the KMT’s experiences in Taiwan as to how to retain power for as

23. RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? 31–32, 79 (2007).

24. *Id.*

25. See the discussion in the Introduction and Part IV.E.

26. For a discussion with a similar doubt about the EAM, see Michael W. Dowdle & Mariana Mota Prado, *Dialogus de Beijing Consensus*, in THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED THE WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 15 (Weitseng Chen ed., 2016).

27. Another interesting component of the KMT’s legitimacy is its claim that the KMT represents the orthodox Chinese and the CCP “stole” the mainland from the KMT. This claim also justified the KMT’s minority rule over the majority of local Taiwanese people and its postponement of parliamentary elections. However, this component gradually lost its power during the democratization of Taiwan, and the dynamics of this process served as the key driver of Taiwan’s democratization, as discussed in Part IV.C. See also Chien-Chih Lin, *Constitutions and Courts in Chinese Authoritarian Regimes*, 14 INT’L J. CONST. L. 351 (2016).

long as possible during the transition.²⁸ Economically, both share similar institutional conditions, including a state–private sector alliance guiding the market, the monopolistic role of state-owned enterprises (SOEs), financial repression of private and small and medium-sized firms, informal but lively economic sectors,²⁹ and dependence on strategic industrial policies.³⁰ Culturally, the authoritarian political systems on both sides are rooted in imperial Chinese bureaucratic traditions and are to a large extent at odds with the practice of Western legal concepts such as constitutionalism.³¹ Finally, the legal systems of China and Taiwan both have roots in transplanted civil law systems and, naturally, Taiwan has been a rich source of inspiration and reference for China’s legislation and legal practice due to their common language and parallel legal frameworks.³²

Despite the long rivalry between the two sides, Taiwan has been exerting its influence on China’s judicial reforms on a massive scale largely unknown to academics. Empirical studies indicate that the most cited and influential legal scholar in China is, surprisingly, a Taiwanese private law scholar—former Chief Justice Tze-Chien

28. For example, it has been reported that President Xi Jinping discussed the regime’s survival in an internal meeting in 2014 by referring to the KMT. Nonetheless, the perception of Taiwan’s transitional experiences among the public in the PRC may change dramatically as it also reflects the changing cross-strait relationship. See Li Mengzhou (李孟洲), *Xi Jinping Zhitai, Shuzhi Guomindang Cangsang Shi* (习近平知台 熟知国民党沧桑事) [*Xi Jinping Knows Well About the Rise and Fall of the KMT*], *ZHONGGUO SHIBAO* (中國時報) [CHINA TIMES] (Feb. 7, 2014), <http://www.chinatimes.com/cn/newspapers/20140207001047-260310>; Yun-Han Chu, *China and the Taiwan Factor*, in *DEMOCRACY IN EAST ASIA: A NEW CENTURY 90, 90* (Larry Diamond et al. eds., 2013); Chien-min Chao & Yeau-tarn Lee, *Transition in a Party-State System: Taiwan as a Model for China’s Future Democratization*, in *THE CHINESE COMMUNIST PARTY IN REFORM 210* (Kield Erik Brodsgaard & Zheng Yongnian eds., 2006); BRUCE J. DICKSON, *DEMOCRATIZATION IN CHINA AND TAIWAN: THE ADAPTABILITY OF LENINIST PARTIES 2–5* (1997).

29. In both China and Taiwan, a large part of the private sector, consisting of small and medium-sized firms, were ignored by the government. However, the private sector significantly contributed to economic growth of each country thanks to shadow banking, strong entrepreneurship, and social networks. For Taiwan, see ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (2004); CHOU TIEN-CHEN (周添成), *QUANLI BIANCHUI DE ZHONGXIAO QIYE* (權力邊陲的中小企業) [SMALL AND MEDIUM-SIZED FIRMS ON THE PERIPHERY OF POWER] (1992). For China, see Yasheng Huang, *Debating China’s Economic Growth: The Beijing Consensus or the Washington Consensus*, 24 *ACAD. MGMT. PERSP.* 31, 33–35 (2010); KELLE S. TSAI, *BACK-ALLEY BANKING: PRIVATE ENTREPRENEURS IN CHINA* (2002).

30. Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 *STAN. L. REV.* 697 (2013); BARRY NAUGHTON, *THE CHINESE ECONOMY 90–96*, 100–07 (2007); WADE, *supra* note 29, at 70–71; Karl Fields, *KMT Inc.: Liberalization, Democratization, and the Future of Politics in Business*, in *POLITICAL BUSINESS IN EAST ASIA* 115, 119–20 (Edmund Terence Gomez ed., 2002).

31. See, e.g., ZHENG YONGNIAN, *THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR* (2010).

32. Some textbooks written by Taiwanese legal scholars have been widely used in China, as a way of Sinicizing transplanted legal institutions. See also Perry Keller, *Sources of Order in Chinese Law*, in *CHINESE LAW AND LEGAL THEORY* 738 (Perry Keller ed., 2001); Margaret K. Lewis, *Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 *VA. J. INT’L L.* 651, 722–23 (2009).

Wang,³³ who was invited to draft China's first Property Law (2006). Between 2008 and early 2016, during which the KMT regained the presidency after its first loss to the Democratic Progressive Party (DPP) in 2000, cross-strait exchanges between legal professionals reached a record high due to the less hostile political climate between Taiwan and China, as compared to the previous years under Taiwan's Chen Shui-Bian administration, which was considered to be pro-Taiwanese independence and anti-China. Every year between 2010 and 2013, for example, an average of 1,300 PRC legal professionals—including lawyers, scholars, and judges—visited Taiwan through various exchange programs.³⁴ Moreover, this large figure does not yet include legal professionals from Taiwan who have visited China. Furthermore, China's judicial reforms decided by the Third Plenum of the Eighteenth CCP Congress in 2013 also looked to Taiwan's judicial administration for reform ideas.³⁵ The TV program that currently has the highest viewing ratings on China's CCTV-4 channel is "Across the Strait," which features daily reports on electoral contests and democratic politics in Taiwan.³⁶ The phrase "Republican-era trend" (*minguofeng*), referring to the era of the KMT's rule in the mainland prior to 1949, has recently become a buzzword too, reflecting the surging public attention to Taiwan, including the development of its legal and political systems.³⁷

33. Wang specializes in private laws and his writings about tort, property, and contract have been leading textbooks for Chinese law students since the 1990s. In 2014, his books have been awarded by *Legal Weekly* as one of the "Ten Most Influential Law Books in China, 1978–2014." Ling Bin (凌斌), *Zhongguo Faxue Sanshinian: Xueke Duandaishi de Dingliang Yanjiu* (中国法学三十年: 学科断代史的定量研究) [A Quantitative Study on Chinese Legal Scholarship: 1978–2007], 8 KAIFANG SHIDAI (开放时代) [OPEN TIMES] 70 (2009); Gao Ming-Yun (高明勇), *Yingxiang Zhongguo de Shida Fazhi Tushu 1978–2014* (影响中国的十大法治图书 1978–2014) [Ten Most Influential Law Books in China, 1978–2014], FENGHUANG WANG (凤凰网) [PHOENIX MEDIA] (Dec. 1, 2004), http://news.ifeng.com/a/20141201/42614140_0.shtml.

34. The numbers are computed based on the published statistics accessible at the website of ZHONGHUAMINGUO XINGZHENGYUAN DALUSHIWU WEIYUANHUI (中華民國行政院大陸事務委員會) [MAINLAND AFFAIRS COUNCIL, REPUBLIC OF CHINA (TAIWAN)], https://www.mac.gov.tw/Content_List.aspx?n=08A702A6C5B2C6C0 (last visited Mar. 10, 2018).

35. This was disclosed at a conference held at the National University of Singapore in November 2013 by a key figure within the People's Supreme Court who was involved in law reform. One of the proposed reforms involves restructuring the adjudication committee of the People's Courts to reduce the impact of political and governmental interference and to raise adjudicatory standards.

36. *Haixialiang'an* (海峡两岸) [Across the Strait], CCTV, <http://tv.cctv.com/lm/hxla/> (last visited Mar. 10, 2018). Jacques deLisle also argues that the greatest impact of Taiwan's democracy and respect for human rights and rule of law is perhaps on Mainland China. Jacques deLisle, *Taiwan and Soft Power: Contending with China and Seeking Security*, in POLITICAL CHANGES IN TAIWAN UNDER MA YING-JEOU: PARTISAN CONFLICT, POLICY CHOICES, EXTERNAL CONSTRAINTS AND SECURITY CHALLENGES 265, 285 (Jean-Pierre Cabestan & Jacques deLisle eds., 2014).

37. This trend certainly will be closely watched in the near future following the KMT's loss of the 2016 presidential election. The DPP President Tsai Ing-Wen has so far demonstrated a moderate and practical position towards China. However, it remains unclear how much the CCP will restrain the cultural and academic exchange between the two sides, although tourism from the PRC, an economic leverage often used by the CCP, has declined significantly since Tsai was elected.

Significant differences nonetheless persisted. Politically, compared to the CCP, the KMT granted more political space to non-KMT political activists, many of whom were Taiwan-born Chinese who migrated to Taiwan over the course of 300 years since the seventeenth century and accounted for about 86% of Taiwan's population.³⁸ Notably, the KMT's awareness of its status as a minority émigré regime accounted for further political openness as well as the occasional political setback due to its insecurity.³⁹ Economically, the KMT gave the private sector room to grow, although many small and medium-sized firms had to cope with financial repression and acquired their capital through shadow banking.⁴⁰ In contrast, the CCP allowed private firms to be largely squeezed out by SOEs and foreign firms, as it relied on SOEs and foreign direct investment (FDI) to develop the economy.⁴¹ Part IV further discusses how these differences gave rise to different dynamics and formed variegated institutional settings which affected the trajectory of rule of law transition on both sides.

Against the backdrop of political and economic conditions on both sides, the rest of this Part briefly introduces the evolution of the Model in Taiwan, before commencing a detailed examination of the similarities and differences between Taiwan and China in Parts III and IV. Between 1945 and 1996, Taiwan witnessed a full life cycle of the Model.⁴² This life cycle can be divided into four periods: the birth of the Model (1945–1960), its heyday (1960–1980), the critical juncture for effecting changes (1980–1987), and the eclipse of the Model (1987–1996).⁴³

38. For a discussion of the social and cultural impact of this demographic feature, see Thomas B. Gold, *Taiwan Society at the Fin de Siècle*, in CONTEMPORARY TAIWAN 47 (David Shambaugh ed., 1998).

39. See, e.g., DAFYDD FELL, PARTY POLITICS IN TAIWAN (2005).

40. KARL FIELDS, ENTERPRISE AND THE STATE IN KOREA AND TAIWAN 149 (1995).

41. The squeezing effect took place mainly after the 1990s. See YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS 278–81 (2008). That said, Nicholas Lardy's recent studies show that China's private sector has been thriving because of the rapid privatization of SOEs, with the exception of the service sector (e.g., banking), over which the CCP probably finds it necessary to maintain tight control. This nonetheless explains the financial repression of private firms. More recently, it has been widely reported that the Xi administration's policy towards privatization is unclear, if not conflicting. Some top leaders advocate the expansion of the state sector, while others call for further privatization. See NICHOLAS LARDY, MARKETS OVER MAO: THE RISE OF PRIVATE BUSINESS IN CHINA (2014).

42. The year 1945 is the year when the KMT took over Taiwan, whereas 1996 is the year when Taiwan's first presidential election took place, which is generally viewed by scholars as the cutoff year for the completion of the process of democratization.

43. During the four periods, Taiwan developed from a low-income country with a GDP (nominal) per capita of \$145 USD in 1951 to a high-income country with a GDP (nominal) per capita of \$13,441 USD in 1996. The average growth rate adjusted for inflation was approximately 8–9% and remained roughly stable throughout the four periods.

A. *The Birth of the Model (1945–1960)*

Taking over control from Japan in 1945, the KMT declared martial law in Taiwan, and this formed the framework of the Model. The KMT's primary reason for imposing martial law was to mobilize and allocate resources within an economy dominated by SOEs, which had taken over assets formerly controlled by the Japanese colonial government and firms. The KMT also aimed to prepare Taiwan for potential military conflict with China.

Two laws served as the initial pillars of the Model, and both were enacted during the KMT's rule over the mainland and then brought to Taiwan intact. The first was the Act for Agriculture, Mining, Industry, and Commerce during the Extraordinary Period (1938), which gave the government wide-ranging authority to control resources and property through administrative orders. The scope of control covered almost all types of economic activity. The second was the National Mobilization Law (1942), which gave the government not only economic control but also rigid political control over freedom of speech, press, communication, and political assembly in spite of the fact that most of these rights had been guaranteed by the 1946 Constitution. The KMT froze those parts of the Constitution that did not serve its interests. These practices amounted to what David Landau has called "abusive constitutionalism."⁴⁴ Despite such a harsh policy, the population generally regarded the KMT and its rights-restrictive policies in the postwar period as legitimate, given the devastating postwar socioeconomic conditions, threats to national security, and subsequently impressive economic recovery.⁴⁵

During this period, the Model was institutionally bifurcated, and the line was drawn between the economic and political spheres. In respect of the economy, the KMT positioned the legal system such that it favored SOEs and private firms with close ties to the government, and implemented import substitution to industrialize the economy.⁴⁶ Furthermore, the KMT allowed immense latitude to its technocrats to carry out legal, economic, and administrative reforms despite embracing the principle of "the party leads the state" in policymaking.⁴⁷

44. David E. Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 196, 239–45 (2013).

45. Despite the general public's desire for social stability and economic growth, the social tensions between the KMT as a minority émigré regime and the local Taiwanese nonetheless existed. In 1947, for example, a massacre referred to as the "February 28 Incident" was perpetrated after the KMT takeover of Taiwan in late 1945. In the following decades, this conflict emerged as the most potent weapon that the opposition could embrace to uproot the KMT's rule. See Chao & Lee, *supra* note 28, at 213; WANG TAY-SHENG (王黍升), TAIWAN FALŪ XIANDAIHUA DE LICHEN (台灣法律現代化的歷程) [THE PROCESS OF LEGAL MODERNIZATION IN TAIWAN] 81–82 (2015).

46. FREDERIC C. DEYO, BENEATH THE MIRACLE: LABOR SUBORDINATION IN THE NEW ASIAN INDUSTRIALISM 19–20 (1989); Stephen Haggard & Tun-jen Cheng, *State Strategies and Foreign Capital in the Gang of Four*, in THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM 84 (Frederic C. Deyo ed., 1987).

47. See CHEN WEITSENG (陳維曾), FALŪ YU JINGJI QILI DE DIAO (法律與經濟奇蹟的締造) [LAW AND THE ECONOMIC MIRACLE] 52–62 (2000).

In respect of politics, however, the KMT tightly limited its citizens' right to privacy, right to vote, and freedom of speech, etc., in the name of promulgating rule of law reforms. One of the reasons for imposing such restrictions was that the KMT was commonly perceived as a party predominantly led by "mainlanders" (or "waishengren") who only accounted for 14% of the total population.⁴⁸ The KMT's policies that did not favor local Taiwanese were unlikely to receive popular support.

B. *The Heyday of the Model (1960–1980)*

The Model's heyday in Taiwan, which lasted for about twenty years, began with the promulgation of the Statute of Encouragement for Investment in 1960, which represented a shift in the KMT's ideology to a more market-oriented regulatory regime. The KMT came to realize that its restrictive regulatory regime had overly constrained the flexibility of governmental and market institutions, and hence began to streamline its bureaucracy and modernize market institutions in order to promote economic growth through industrialization. Still, the KMT possessed the power to circumvent existing restrictions by issuing administrative orders, creating special laws and ad hoc organizations, thereby strengthening its legal system to support Taiwan's impressive economic takeoff.

Depending on the exact period referred to during these twenty years, it is debatable whether the "rule of law" or mere "rule by law" had existed then; but what is certain was that there was "rule by many incoherent laws." As a result, the KMT government turned to foreign consultants, particularly those from U.S. aid agencies that were directly involved in the KMT's policymaking until the late 1960s.⁴⁹ The KMT's acceptance of U.S. advice reflected the international influence on Taiwan, including its legal system, which served as an instrument for improving state capacity and modernizing the economy. After all, the KMT's alliance with, or reliance on, the United States was critical in bolstering the party's competitive position vis-à-vis the CCP in China, economically, politically, and militarily. As a result, the Model was characterized by rapid legal transplantation during this period. This development paralleled the first wave of the law and development movement in Latin America, whose failure is well documented by academics⁵⁰ and stands in stark contrast to Taiwan's success.

48. "Mainlanders" refer to people retreating to Taiwan from Mainland China with the KMT after World War II.

49. For the role of the United States Agency for International Development (USAID) in Taiwan, see Wen Xing-Ying (文馨瑩), *Meiyuan yu Taiwan de Yilai Fazhan 1957–1965* (美援與台灣的依賴發展 1957–1965) [*The US Aid and Taiwan's Dependent Development: 1957–1965*] (Jan. 30, 1989) (unpublished M.A. thesis, National Taiwan University) (on file with author); WADE, *supra* note 29, at 82–84.

50. Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895 (2008); David Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062 (1974).

Unlike its disappointing record in Latin America, the United States Agency for International Development (USAID) did help the KMT modernize the Taiwanese legal system during this period.⁵¹ From time to time, USAID promised to increase financial aid if the KMT liberalized market regulations and stimulated the private sector.⁵² The KMT usually accepted USAID's advice, albeit not entirely, and also started to transplant U.S. common law regulations and institutions into its civil law regime, with the special aim of improving capital markets and the financial system.⁵³ Such transplants include the Chattels Mortgage Transaction Act (1963), the Securities Transaction Act (1968), and the 1966 amendment to the Company Law. In particular, the KMT pioneered the use of special economic zones (SEZs) to liberalize its commercial law regime and to conduct legal experiments on a manageable scale, thereby bypassing legal constraints and supporting the shift from import-oriented to export-oriented industrial policies.⁵⁴ China later borrowed this model and established four SEZs along its coastal provinces in the 1980s.⁵⁵ After all, Taiwan's legal system during this period still favored SOEs, the KMT's cronies, and KMT-controlled companies, and therefore resulted in inefficiency as well as injustice that in turn triggered calls not only for economic reforms but also for political reforms in the subsequent years.

C. *The Critical Juncture Between the Heyday and the Twilight of the Model (1980–1987)*

Despite its economic success, Taiwan saw a sharp increase in mass demonstrations after the late 1970s and throughout the short period between 1980 and 1987, and growing pressure was placed on the KMT to live up to its rule of law commitments. In December 1979, a massive pro-democracy protest resulted in the “Kaohsiung Incident” that was violently suppressed by riot police, followed by a mass arrest of political dissidents across the country. The trial of the arrested in early 1980 marked the beginning of this period, which unwittingly gave rise to a new generation of dissidents, many of whom were the wives of the arrested and defending lawyers involved in the trial.⁵⁶

51. East Asian experiences are generally absent from the literature on law and development movements. Scholars focus on the United States' failure in Latin America in the 1950s and 1960s, but leave out the generally successful stories in East Asia where the United States was also deeply engaged in local legal reforms. See also Ohnesorge, *supra* note 16; WANG, *supra* note 45, at 178–91.

52. See Wei-Chen Lee & I-min Chang, *US Aid and Taiwan*, 2 ASIAN REV. WORLD HIST. 47, 66 (2014).

53. Tsung-Fu Chen, *The Influence of American Law on Taiwan* (2004) (unpublished manuscript) (on file with author); Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century*, 11 PAC. RIM L. & POL'Y 531, 555 (2002).

54. Samuel P.S. Ho, *Industrialization in Taiwan*, 48 PAC. AFF. 27, 30–31 (1975).

55. WEIPING WU, *PIONEERING ECONOMIC REFORMS IN CHINA'S SPECIAL ECONOMIC ZONES* 106–13, 122–23 (1999).

56. SHELLEY RIGGER, *WHY TAIWAN MATTERS* 74 (2011).

During this short critical period of seven years, the reported frequencies of protests rose from 175 in 1983 to 1,172 in 1988, with the average size of protests increasing from 73 to 267 people.⁵⁷ All incidents of large-scale protests with over 5,000 participants prior to Taiwan's democratization took place during this period.⁵⁸ This rich repertoire of collective actions soon eased the KMT's tight control over civil society.⁵⁹ The KMT appeared to be trapped by its own successful implementation of the Model, having promoted the rule of law and rights consciousness to the point where they reached a tipping point from which structural changes emerged.

The growing middle class gave rise to a vibrant civil society, which in turn contributed to the rise in legal awareness among the population. The KMT's growth-oriented legal regime, however, lacked the capacity and credibility to channel the sudden increase in social tensions into existing dispute resolution systems. The judicial and political system failed to address the social problems that had accumulated over three decades of rapid economic growth.⁶⁰ Labor's rights, consumer protection, and environmental issues stimulated heated debates.⁶¹ Such debates were further fueled by conflicts over national identity, for political dissidents portrayed the KMT as a dominant minority from the mainland ruling the local Taiwanese citizenry in an unfair and discriminatory manner.⁶² Workers, peasants, dissidents, and liberal lawyers began citing laws frequently to question the KMT's discriminatory economic policies and rigid political control. As the nature of these issues mainly concerned resource allocation and income redistribution, the KMT lacked the resources to satisfy all claims.⁶³

The state suddenly became helpless in the face of various legal challenges before it came to realize that legality, as perceived by its

57. Chu, *supra* note 28, at 101–05; Hsin-Huang Michael Hsiao, *The Rise of Social Movements and Civil Protests*, in *POLITICAL CHANGE IN TAIWAN* 57 (Tun-Jen Cheng & Stephan Haggard eds., 1992).

58. Hsiao, *supra* note 57.

59. The subjects of these protests varied, including peasant rights, labor issues, eminent domain disputes, stock market investment loss, or rising real estate prices. The forms of protests were also diverse, including street demonstrations, hunger strikes, violent protests, and camping on the streets by homeless people.

60. See, e.g., Hung-Mao Tien & Yun-Han Chu, *Building Democracy in Taiwan*, in *CONTEMPORARY TAIWAN*, *supra* note 38, at 97.

61. See, e.g., Jiunn-Rong Yeh, *Institutional Capacity-Building Toward Sustainable Development*, 6 *DUKE J. COMP. & INT'L L.* 229 (1996); Sean Cooney, *The New Taiwan and Its Old Labour Law*, 18 *COMP. LAB. L.J.* 1 (1996); David W. Chen, *The Emergence of an Environmental Consciousness in Taiwan*, in *THE OTHER TAIWAN: 1945 TO THE PRESENT* 257 (Murray A. Rubinstein ed., 1994).

62. See sources cited *supra* note 45.

63. The KMT did respond to the outcry of social reforms by enacting more laws. For example, the Labor Employment Standard Law, enacted in 1984, provided for a minimum wage, maximum working hours, female workers' welfare, and retirement benefits. In 1982, the KMT also announced for the first time that consumer protection would be an important policy, leading to the promulgation of Consumer Protection Law in 1994. However, this approach for strengthening its legitimacy by symbolic legislation did not seem to work as well as before.

constituency, had become a crucial part of regime legitimacy. Worse, the KMT gradually lost its legitimacy on the international front after Richard Nixon's trip to Beijing, which led to the U.S. rapprochement with China in 1979.⁶⁴ The KMT administration was compelled to cut off diplomatic relations with nearly forty countries in the 1970s alone, and it lost its seat in the United Nations. This further fueled the call for reforms. The KMT's lip service to democracy through the Model unwittingly empowered reformists, while existing laws increased the reformists' bargaining power and legitimized their protests, which were once condemned for jeopardizing stability and economic growth.

D. *The Eclipse of the Model (1987–1996)*

In response to social and political crises, including the formation of the first opposition party, the DPP, in 1986,⁶⁵ the KMT was eventually compelled to democratize Taiwan by abolishing martial law in 1987. With various constraints on the Constitution lifted, the Model quickly fell apart, and political and legal reforms followed. This rapid process of democratization culminated in the first presidential election in 1996, and the KMT eventually lost to the opposition party in 2000, leading to the first-ever ruling party turnover in Taiwan.⁶⁶ During this period, Taiwan experienced, among others, the abolition of single-party dominance, the establishment of a freedom of the press, and the election of all members of the legislative body.

Most notably, the fall of the Model injected fresh dynamics into legal and constitutional reforms. The Constitution was amended several times between 1991 and 2005 to enhance accountability through free elections of the national legislative body (1991), direct election of the president (1996), reform of the parliamentary system (2000, 2005), electoral reforms (1991, 1999), local self-governance (1992), and restructuring of the central government (2000).⁶⁷ The Public Servants' Assets Declaration Act (1993) required full disclosure of

64. Jay Taylor's interviews with the KMT's key policymakers at the time unveil the anxiety within the KMT administration and the tensions between the government and political dissidents. See JAY TAYLOR, *THE GENERALISSIMO'S SON: CHIANG CHING-KUO AND THE REVOLUTIONS IN CHINA AND TAIWAN* 346–60 (2000).

65. Before the DPP was established, political dissidents had been active under the label of "dangwai" (literally, outside the party). These dissidents actively participated in local elections. Prior to democratization, dissidents could generally collect up to 40% of the vote share, but this 40% vote share could only gain 30% of the seats due to the KMT's deliberate design of the electoral system. See, e.g., Tun-jen Cheng & Gang Lin, *Competitive Elections and the Transformation of the Hegemonic Party: Experience in Taiwan and Recent Development in China*, in *POLITICAL CHANGE IN CHINA: COMPARISONS WITH TAIWAN* 161 (Bruce Gilley & Larry Diamond eds., 2008).

66. After that, Taiwan also completed the "two-turnover test" for democratization. Three ruling party turnovers have taken place in 2000, 2008, and 2016, respectively.

67. The high frequency of the constitutional amendments during this period is not uncontroversial, because each amendment reflected the outcomes of intense political contests, calculations, and negotiations at the time, and therefore lacked sufficient coherence.

savings, investments, and real estate held by all high-ranking governmental officials and their family members, including the president. To address transitional justice issues, the government also established the Compensation Foundation for Improper Verdicts on Sedition and Communist Espionage in 1999 and has compensated more than 10,000 political “criminals” and victims for approximately \$660 million USD (\$19.7 billion NT) as of 2014.⁶⁸ The eclipse of the Model also corrected the role of the state in the market. For example, the Fair Competition Law (1991) required the state to take on the role of a regulator as opposed to a market player. In the 1990s, the government also started to privatize state-owned banks and lifted restrictions on forming new private banks.

All in all, the trajectory of the Model in Taiwan depicts a complete roadmap, a seemingly ideal one, for a developmental authoritarian state to pursue economic growth first while delaying political reforms until the country becomes richer. This roadmap therefore provides the empirical foundation, wherein lies the optimistic convergence view.⁶⁹ The question is, To what extent can we really predict the future of this Model in China using the Model’s history in Taiwan?

III. THE MODEL’S PARALLEL TRAJECTORIES IN TAIWAN AND CHINA

At first glance, the Model seems to follow a very similar trajectory in Taiwan and China, focusing on economic, rather than civil and political, rights and on the bifurcated legal regime to improve the efficiency, rather than the accountability, of the government. The people’s demands for justice and political reforms were largely contained, while the majority placed order and stability ahead of fairness. That said, the Model, as this Article emphasized at the beginning, does not necessarily evolve toward a definitive outcome.

As such, this Part explores the similar trajectories on the two sides in question, paving the way for a discussion of their differences in Part IV. It focuses on three shared features of the evolution of the Model in Taiwan and in China: (1) legalization as an alternative to democracy; (2) functional substitutes for political accountability; and (3) Trojan horse effects and the authoritarian regime’s inherent insecurity.

A. *Legalization as an Alternative to Democracy*

According to the Model, “legalization” serves as a substitute for democracy and fulfills the authoritarian state’s need to increase

68. The operation of the Foundation ended in March 2014 according to its articles of association.

69. See, e.g., Randall Peerenboom & Weitseng Chen, *Development of Rule of Law, in* POLITICAL CHANGE IN CHINA: COMPARISONS WITH TAIWAN, *supra* note 65, at 135; PEERENBOOM, *supra* note 23.

performance-centric legitimacy. Functionally, legalization is mainly aimed at promoting economic development while introducing a certain degree of good governance into the bureaucratic system of the authoritarian state. Take the example of industrial policies for attracting FDI in both Taiwan and China. During economic takeoffs, foreign investors are the key players in the export-oriented economies of Taiwan and China.⁷⁰ Investors, in turn, require a legal framework which protects their rights within the framework of a predictable regulatory regime, a demand which is more about legalization than democracy. In response, the state fulfills the investors' demand for legal certainty through a legal system that meets the basic requirements of the rule of law, while reducing the demand for political reforms by offering, in their place, the protection of economic and social rights (rather than civil and political rights).⁷¹ The early development of corporate and contract laws in both Taiwan and China is evidence of the state's quick response.⁷² Subsequently, the growing middle class gradually demanded a greater degree of liberty; but it is mainly legalization, rather than political rights, that is high on its list of priorities.

Nonetheless, a theoretical skepticism needs to be addressed—Why are authoritarian rulers' commitments to law and a certain degree of constitutionalism credible? Mark Tushnet argues that instrumental and strategic accounts of constitutionalism generally fail, because the preferences of authoritarian politicians may change and rulers can always revoke their commitment depending on their strategic goals.⁷³ Given authoritarian politicians' changing preferences, the exit strategy used by the *targeted groups* (e.g., foreign investors), whom the authoritarian state tries to court by an instrumental commitment to law, may not work either. This is because any effective counterstrategy based on short-term goals presumes that the ruler's preference is stable, but in reality, the ruler's preference is far from stable.⁷⁴ In a similar vein, as Gretchen Helmke and Frances Rosenbluth articulated (in the context of authoritarian courts), “precisely because autocrats are especially well-suited to control the risks associated with judicial

70. In the case of China, the majority of foreign investors during the first two decades of the country's economic transition are in fact ethnic Chinese from Hong Kong, Taiwan, and Macau. Such exchanges also contributed to the growing influence of Taiwan on China's institutional reforms. See NAUGHTON, *supra* note 30.

71. See also Jacques deLisle, *Development Without Democratization? China, Law, and the East Asian Model*, in DEMOCRATIZATIONS: COMPARISONS, CONFRONTATIONS, AND CONTRASTS 197 (Jose V. Cipurut ed., 2008); Randall Peerenboom, *Middle Income Blues: The East Asian Model and Implications for Constitutional Development in China*, in BUILDING CONSTITUTIONALISM IN CHINA 77 (Stéphanie Balme & Michael W. Dowdle eds., 2009).

72. For China, see, e.g., Donald Clarke et al., *The Role of Law in China's Economic Development*, in CHINA'S GREAT ECONOMIC TRANSFORMATION 380 (Loren Brandt & Thomas G. Rawski eds., 2008). For Taiwan, see, e.g., CHEN, *supra* note 47.

73. Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 425, 445 (2015).

74. *Id.*

independence, we are left wondering just who is fooled by such tactics.⁷⁵ That said, this Article nonetheless argues that an instrumental commitment is not only theoretically possible but also empirically viable in the context of a rapidly growing economy, as evidenced in Taiwan and China.

In the face of a strategic commitment to law, the targeted groups can in fact benefit from such commitments by developing a short-term mentality to deal with long-term uncertainty, although not perfectly. Through sophisticated legal engineering, they may quickly reap the benefits made possible by such commitments (e.g., protection of private property) and exit (to another market, jurisdiction, or business project) before any risk materializes. Based on empirical research, I have demonstrated elsewhere that manufacturing companies in the Shanghai area generally shorten their payback period to avoid any potential financial loss as a result of governmental confiscation of their properties.⁷⁶ This can be achieved by multiple market-oriented approaches.

For example, firms that illegally acquired rural land would build simple, one-story plants, rather than solid, multistory buildings, to start their production as soon as possible. Similarly, real-estate developers may prefer low-rise mansions to high-rise condominiums, although the latter are more profitable. This is because developers need only to find a few, rather than several dozen, buyers before closing the project and moving on.⁷⁷ Such market practices can be further institutionalized in a legally savvy fashion. For example, if land acquired illegally is not transferable, investors may instead transfer the shares of the company that owns the land at issue, an approach made possible by the PRC Company Law.⁷⁸ Also, to limit any potential impact on their financials, some firms categorize their property rights in land simply as “expenses” rather than “assets” on the balance sheets.⁷⁹ In other words, they do not intend to hold the property rights committed by the government in the longer term. Briefly, even if the authoritarian rulers’ time horizon is unstable, investors may nevertheless be satisfied with a “good enough” commitment to law; these issues confronting

75. Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 358 (2009).

76. In some cases, the payback period was shortened from five years to one year. This means that investors would not suffer monetary loss as a result of governmental confiscation of their property after one year. See Weitseng Chen, *Arbitrage for Property Rights: How Foreign Investors Create Substitutes for Property Institutions in China*, 24 WASH. INT’L L.J. 47, 74–76 (2015).

77. *Id.*

78. *Id.*

79. *Id.*

the targeted groups and their counterstrategies are hardly unique to China,⁸⁰ but they are nevertheless context dependent.

This instrumental commitment to law, as opposed to a genuine, normative commitment, is second best as it remains subject to the will of the political leaders. It is the rulers' political guarantees, instead of some form of bottom-up, procedural accountability, that support such commitment. But this instrumental commitment is usually effective for the purpose of economic development, which is exactly what the Model aims to achieve. Such an instrumental commitment can be further strengthened if authoritarian politicians assure the targeted groups that a quick revocation of commitment would be detrimental to the regime as well. One way to do this is to align the interests of authoritarian politicians with the targeted groups. For instance, the literature in economic sociology and political science has documented how foreign investors and local party cadres jointly established thousands of fake village- and township-owned enterprises to reap the benefit of cheap rural land in China, which was controlled by local officials but remained underdeveloped due to a lack of capital and expertise.⁸¹ In the 1970s, the KMT in Taiwan also successfully convinced its private firms that the growth of the national economy fully depended on the privately controlled export industries and, therefore, that the politicians would not revoke their commitment to the laws that are relevant to these private businesses.

Even if a unitary or overlapping interest is absent or difficult to create, authoritarian politicians may resort to persuading the targeted groups that any damage caused by a commitment potentially turning harmful to the state at a later point would be so limited that the benefits of maintaining the commitment would outweigh the costs of tolerance. Politicians would therefore not revoke the commitment at issue, at least not immediately, so that the targeted groups would have sufficient time to exit. The cases in point, both in Taiwan and in China, are the designated special economic zones where various experiments of liberalization and legal reforms have been conducted. The zones themselves serve as firewalls to segregate any negative result of reforms from the nationwide economic and legal systems. Consequently, the state would not feel the urge to revoke any commitment that has subsequently turned out to be detrimental to the regime.

That said, the credibility of instrumental commitments to legal rights not directly related to economic development, such as freedom

80. For example, as Douglass North and Barry Weingast suggest in their studies of seventeenth-century England, the sovereign altered property rights for his or her own benefit. As a result, the strengthening of the government's commitment to honoring its agreements reduced its borrowing costs and, therefore, increased its ability to finance wars at unprecedented levels, thus playing a crucial role in defeating France. See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989).

81. See, e.g., Andrew G. Walder & Jean C. Oi, *Property Rights in the Chinese Economy*, in PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA 1, 7–10 (Andrew G. Walder & Jean C. Oi eds., 1999).

of expression, is more problematic. A “dual state” is likely to be created by authoritarian politicians.⁸² The rich, authoritarian rulers’ cronies, or cosmopolitans, for example, may be granted the freedom of association, expression, or travel, and therefore be ignorant of the conditions elsewhere in the nation, but this would not be the case with the less privileged, lay people, or people living in the provinces.⁸³ After all, as Part III.B demonstrates, the Model’s features with various dual-track arrangements were determined according to the targeted groups’ closeness to the party and/or importance to economic growth.

In addition, the Model’s focus on legalization suggests another key view as to how the state should lead the transition in terms of the sequencing into three sets of reforms about economic development, the rule of law, and democracy, without compromising social stability. A case in point is the political tutelage theory proposed by Dr. Sun Yat-Sen, the mentor of both Chiang Kai-Shek of the KMT and Mao Zedong of the CCP, recognized both in China and Taiwan as the architect of post-imperial modern China. The political tutelage theory depicts a party state-led transitional path toward Western-style democracy, with the aim of preventing the democracy from being captured by the rich. While many years ago Chairman Mao publicly praised the political tutelage theory as the best transition strategy,⁸⁴ Chiang Kai-Shek formally embraced this notion by accepting it as the KMT’s primary political ideology for nearly forty years, thus justifying freezing part of Taiwan’s Constitution until 1987. Sun’s highly regarded status as the founding father in Taiwan does not prevent his theory from being influential in China. In fact, Sun’s theory contributed to a heated debate in 2013 about whether China should dismiss the idea of constitutionalism, a debate ignited by the CCP’s propaganda newspaper and viewed by pundits as a strong signal from the party leaders to resist growing demands for constitutionalism.⁸⁵ This time, Sun’s theory and

82. See generally ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941). For discussions about the “dual state” concept in the context of South Africa and Singapore, see JENS MEIERHENRICH, *THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA (1652–2000)* (2008); Tushnet, *supra* note 73, at 438–40.

83. Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L L. 985, 997–98 (2009).

84. Mao Zedong (毛澤東), *Xin Minzhuzhuyi de Xianzheng* (新民主主义的宪政) [*New Democratic Constitutionalism*], in 2 MAOZEDONG XUANJI (毛澤東選集) [SELECTED WORKS OF MAO ZEDONG] 689 (expanded ed. 1990) (1966).

85. Patrick Boehler, *Chinese Scholar Challenges Party in Constitutional Debate*, S. CHINA MORNING POST (May 25, 2013), <http://www.scmp.com/news/china/article/1244953/chinese-scholar-challenges-party-constitutional-debate>; Yang Xiaojin (杨晓青), *Xianzheng yu Renmin Minzhu Zhidu zhi Bijiaoyanjiu* (宪政与人民民主制度之比较研究) [*Comparative Studies of Constitutionalism and People’s Democracy*], RENMIN WANG (人民网) [PEOPLE’S DAILY ONLINE] (May 22, 2013), <http://theory.people.com.cn/n/2013/0522/c40531-21566974.html>; Editorial, “*Xianzheng*” shi Douquanzi Fouding Zhongguo Fazhan zhi Lu (“宪政”是兜圈子否定中国发展之路) [*Constitutionalism Denies the Path of China’s Development*], HUANQIU SHIBAO (环球时报) [GLOB. TIMES] (May 22, 2013), <http://opinion.huanqiu.com/editorial/2013-05/3957200.html>.

his roadmap toward democracy were strongly advocated for by conservatives, with reference to Taiwan's incremental democratization.⁸⁶

The Model's gradualist approach by way of legalization as a substitute for democracy also adjusts the functions of the relevant legal institutions. For example, in their studies of East Asian constitutionalism, Jiunn-Rong Yeh and Wen-Chen Chang identified the different roles of judicial review in Taiwan, Japan, and Korea, compared with their counterpart in the United States: instead of siding clearly with judicial activism or passivism, courts in charge of judicial review in these jurisdictions have appeared to be *reactive* rather than *proactive*.⁸⁷ Following democratization, Taiwan's Constitutional Court has revived, and become active in, the practice of striking down unconstitutional laws.⁸⁸ But at the same time it also showed a great deal of caution in responding to social demands so as to prevent political backlash.⁸⁹ In general, the development of East Asian constitutionalism is characterized by continuity in the course of gradual evolutions and the absence of struggle for specific individual rights against dictatorships, such as those occurring at the time constitutionalism was founded in the United States.⁹⁰

After all, as evidenced in China, Taiwan, and elsewhere in East Asia, what is crucial for economic development is a political commitment to capitalism and an instrumental commitment to law, rather than genuine constitutionalism which protects fundamental rights.⁹¹ However, there is no doubt that there are limits to authoritarian legality. Legalization per se is unable to solve the procedural deficits of accountability that reject bottom-up participation in allocating

86. See, e.g., Kuo Shihyou (郭世佑), *Bainian Xianzheng de Renshiwuqu* (百年宪政的认识误区) [*Misunderstanding of a Hundred Yearlong Constitutionalism*], 5 YANHUANGCHUNQIU ZAZHI (炎黄春秋杂志) [YANHUANGCHUNQIU MAG.] (2013), <http://www.yhcqw.com/html/cqb/2013/59/89G7.html>. Further, Yu Keping, a close policy advisor to the former President Hu Jintao, proposed a similar roadmap. See Yu Keping, *Ideological Change and Incremental Democracy in Reform-Era China*, in CHINA'S CHANGING POLITICAL LANDSCAPE: PROSPECTS FOR DEMOCRACY 44 (Cheng Li ed., 2008).

87. The courts sometimes issued rather opaque and deliberately ambiguous decisions to protect themselves from potential political backlash. See Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism*, 59 AM. J. COMP. L. 805, 826–31 (2011). See also TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 154 (2003).

88. See, e.g., JEROME A. COHEN & MARGARET K. LEWIS, CHALLENGE TO CHINA: HOW TAIWAN ABOLISHED ITS VERSION OF RE-EDUCATION THROUGH LABOR (2013); GINSBURG, *supra* note 87.

89. Throughout the 1990s and 2000s, the Constitutional Court was loaded with politically sensitive cases. As a result, it faced political backlash from time to time as a result of the losing parties' retaliation in the form of, for instance, salary and operation budget cuts, and rejection of the Justices' overseas travel and legal research expenses. See Weitseng Chen & Jimmy C.S. Hsu, *Horizontal Accountability in a Polarized New Democracy: The Case of Post-democratization Taiwan*, 15 AUSTL. J. ASIAN L. 1 (2014).

90. Yeh & Chang, *supra* note 87, at 834. For a case study, see Margaret K. Lewis & Jerome A. Cohen, *How Taiwan's Constitutional Court Reined in Police Power: Lessons for the People's Republic of China*, 37 FORDHAM INT'L L.J. 863 (2014).

91. See, e.g., Ohnesorge, *supra* note 16, at 270–71; Frank Upham, *Chinese Property Rights and Property Theory*, 39 H.K.L.J. 611, 616 (2009); Yeh & Chang, *supra* note 87.

economic resources and legal rights, especially after the emergence of a middle class. The Model may reduce the demand for democracy in the short run, but only before a potential explosion of such demand takes place down the road. Notably, such an inherent tension also renders the party state constantly insecure rather than confident,⁹² regardless of its economic achievements, and fully aware that both its legitimacy and resilience need to be strengthened on borrowed time. This explains another shared phenomenon in China and Taiwan: the occasional setbacks of rule of law development, especially after the initial success of legal and economic reforms. All in all, the Model unsurprisingly demonstrates inherent practical limits not only on political accountability but also on the rule of law per se, which this Article will further discuss in Part III.D.

B. *Functional Substitutes for Political Accountability*

The Model needs to deal with an inherent paradox: to pursue growth, it consolidates state power and weakens institutions that constrain state power, such as judicial review, administrative litigation, and other forms of accountability. However, weak constraints on state power may invite regulatory and state capture and eventually cause the downfall of the state's economic growth machine. In response, both the KMT and CCP have resorted to various functional substitutes for accountability, with the aim of injecting more competition and checks-and-balances mechanisms into the party-state.⁹³ To illustrate the similarities between the KMT and CCP in this regard, this subsection focuses on two shared types of functional substitutes:⁹⁴ one regarding corruption control and the other regarding an institution designed to increase intra-party political competition—the youth corps.

For one, both the CCP and KMT rely more on internal party disciplinary organs than formal legal institutions to curb corruption and better monitor their bureaucratic systems. The emphasis on using party mechanisms in part reflects the Leninist tradition, which puts

92. For example, according to a scholar who met Xi Jinping, “[Xi’s] sense of peril goes deeper than recent leaders. He’s seen the Arab Spring and the crisis of power across the Middle East and northern Africa, and he’s discussed that several times, and he’s also seen the lessons from Soviet history.” See Chris Buckley, *Xi Jinping May Be “Core Leader” of China, but He’s Still Really Nervous*, N.Y. TIMES (Nov. 1, 2016), <http://www.nytimes.com/2016/11/02/world/asia/xi-jinping-core-leader-china.html>.

93. For a discussion about China, see Patricia M. Thornton, *The Advance of the Party: Transformation or Takeover of Urban Grassroots Society?*, 213 CHINA Q. 1 (2013); Jacques deLisle, *Law and the China Development Model*, in IN SEARCH OF CHINA’S DEVELOPMENT MODEL: BEYOND THE BEIJING CONSENSUS 147 (S. Philip Hsu et al. eds., 2011). In comparison, there is scant literature addressing this phenomenon thoroughly in the context of Taiwan’s rule of law transition.

94. Other types of functional substitutes for accountability have been recently studied by academics; for example, collective petitioning and the *Xinfang* (letters and visits) system. See, e.g., Jing Chen, *Who Participates in Collective Petitions in Rural China?*, 17 J. CHINESE POL. SCI. 251, 265 (2012); Carl Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT’L L. 103 (2006).

the party above the state. The status of being a party member trumps citizenship as well as loyalty to any profession, religion, or ethnicity. Party members' misbehavior therefore matters more to the party discipline than a violation of state laws, and therefore the party claims priority in punishing wrongdoers.⁹⁵

This party-centric approach also reflects pragmatic considerations regarding the role of a nascent judiciary. The paramount party has a better capacity than courts for investigating corruption. In this way, the party is also able to manage graft probes to the extent that the party's legitimacy remains unharmed. In China, the CCP's Central Discipline Inspection Commission (CDIC), the highest party disciplinary organ, employs around 1,000 people at the central level alone, with hundreds of thousands of regional inspectors at various party organizations across the country.⁹⁶ This explains the CDIC's capacity to investigate and discipline nearly 750,000 cadres as of 2015 since President Xi rose to power in 2012.⁹⁷ In comparison, the National Anti-Corruption Authority, the highest judicial institution in charge of investigating corruption, is an internal bureau under the Supreme People's Procuratorate and remains institutionally weak. Unsurprisingly, it has played a much lesser role in the current anti-corruption campaigns than party institutions.

Similarly, the KMT adopted a dual-track system to monitor its bureaucratic system, and gradually incorporated some part of it into the government structure. During the martial law era, the KMT established a highly centralized and comprehensive network of party cadre organs, commonly known as "Second Personnel Offices" at all levels of government in order to closely monitor its bureaucrats. The Offices were invested with enormous and unsupervised power, which had a chilling effect across the government. Furthermore, the KMT resorted to the "Control Yuan," an existing institution under Taiwan's Constitution, and made it a functional substitute for the judiciary on matters of anticorruption and administrative discipline that otherwise would be adjudicated through administrative litigation.

The statistics of the cases adjudicated by the Control Yuan reveal how this bifurcated system worked. The Control Yuan was initially part of the legislative branch under Taiwan's Constitution but was later transformed into a quasi-judicial institution.⁹⁸ While the KMT maintained a tight control over the courts, the Control Yuan was arguably

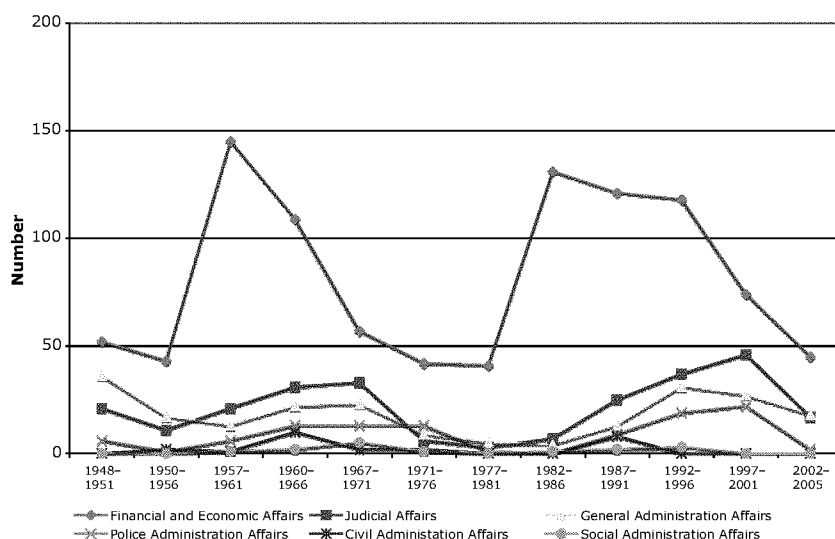
95. For China, see Hualing Fu, *China's Striking Anti-corruption Adventure: A Political Journey Towards the Rule of Law?*, in *THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED THE WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT*, *supra* note 26, at 249; For Taiwan, see DICKSON, *supra* note 28.

96. Xuezhong Guo, *Controlling Corruption in the Party*, 219 *CHINA Q.* 597, 603 (2014).

97. Hudson Lockett, *China Anti-corruption Campaign Backfires*, *FIN. TIMES* (Oct. 10, 2016), <https://www.ft.com/content/02f712b4-8ab8-11e6-8aa5-f79f5696c731>.

98. The importance of the Control Yuan has been significantly reduced as a result of the increase in the capacity and independence of the judiciary after the democratization.

FIGURE 1. THE DUAL-TRACK PATTERN OF IMPEACHMENT BY THE CONTROL YUAN 1948–2005.



Source: *Statistics on Impeachment*, JIANCHA YUAN (監察院) [THE CONTROL YUAN (TAIWAN)] (1948–2005). The original data is available on the website of the Control Yuan: <https://cybsbox.cy.gov.tw/statis/stmain.jsp?sys=100>.

the most independent organ of the state prior to Taiwan's democratization. It impeached public officials at all levels with a largely equal attitude and asserted its institutional interests in a manner beyond its original constitutional function.⁹⁹ Among the civil service officials impeached between 1948 and 2005, middle-ranking officials account for 45%, while higher- and lower-ranking officials account for 34% and 21%, respectively.¹⁰⁰ Nonetheless, the Control Yuan carefully carried out its mandate in line with the overarching idea of the Model, namely emphasizing economic efficiency. For instance, as shown in Figure 1 above, the Control Yuan focused more on wrongdoings regarding financial and economic matters than on other administrative matters.

The second example of functional substitutes for political accountability is the party youth corps used by both the CCP and KMT to boost political participation and competition missing in the Model. One shared characteristic of both Leninist parties is a dense network of party cells for recruiting and mobilizing youth, viewed as crucial to injecting dynamics into the centralized party structure. The KMT created the China Youth Corps in the mainland in the 1940s. After the

99. PETER R. MOODY JR., *POLITICAL CHANGE ON TAIWAN: A STUDY OF RULING PARTY ADAPTABILITY* 103 (1992).

100. The numbers are computed based on the published statistics accessible at JIANCHA YUAN (監察院) [THE CONTROL YUAN (TAIWAN)], <https://cybsbox.cy.gov.tw/statis/stmain.jsp?sys=100> (last visited Mar. 10, 2018).

civil war (1945–1950), seeing that the Communist victory was mainly due to the CCP's superior Leninist organizational power, Chiang Kai-Shek established the Youth Corps in Taiwan in 1952, mimicking the CCP's Communist Youth League.¹⁰¹ The KMT also created the Youth Commission to organize young party members specifically in election campaigns.¹⁰² The KMT's Youth Corps and Youth Commission networks existed in varying government, economic, educational, and social agencies and allowed the KMT not only to control the state apparatus but also to better respond to public demands and criticism. Most importantly, it helped the KMT to recruit young party cadres.¹⁰³

In China, the Communist Youth League has been long recognized as one of the three major party factions.¹⁰⁴ Prior to President Xi's takeover of power, the Youth League was arguably the most powerful faction, led by the former President Hu Jintao.¹⁰⁵ Similarly, the Youth Corp and Youth Commission in Taiwan ended up with having trained most young party officials and produced the next generation of KMT leaders. The Youth Corp soon became one of the major power centers within the KMT as well.¹⁰⁶ In fact, beneath the Leninist party form, the top party leaders on both sides are unable to organize the whole political arena, and no single force can fill the gap. As such, these functional substitutes for accountability have led to better-institutionalized political participation and intra-party competition.

C. Trojan Horse Effects and the Insecure Authoritarian State

In addition to legalization and various functional substitutes for political accountability, the CCP and the KMT share another similarity under the Model—Trojan horse effects, which render the authoritarian regime insecure. Trojan horse effects take place when further governance reforms are needed to make the initial rule of law reforms effective. For example, once the idea of an institutionalized system of contract law is adopted, effective courts and qualified legal professionals would be required to enforce contracts at the practical level; from this, it follows that some notion of judicial independence would have

101. The organization's full name is the National Salvation Anti-Communist Youth Corps.

102. Interestingly, Taiwan's current ruling party, the DPP, has also copied its rival, the KMT, and structured the party in a similarly Leninist fashion, including the Youth Development Department of the Party. See Hei-Yuan Chiu (瞿海源), *Minjindang Zuzhi de Wenti* (民進黨組織的問題) [*Issues of Democratic Progressive Party's Organizational Structure*], ZHONGYANG YANJIU YUAN XUESHU ZIXUN WANG (中央研究院學術資訊網) [ACADEMIA NETWORK OF HEI-YUAN CHIU] (Aug. 1, 2002), <http://www.ios.sinica.edu.tw/hyc/index.php?p=columnID&id=131>.

103. DICKSON, *supra* note 28, at 57–58.

104. The Communist Youth League clique, the Princlings, and the Shanghai clique are generally viewed as the three most powerful factions within the CCP.

105. Cheng Li, *One Party, Two Coalitions in China's Politics*, E. ASIA FORUM (Aug. 16, 2009), <http://www.easiaforum.org/2009/08/16/one-party-two-coalitions-in-chinas-politics/>.

106. Most of the current KMT leaders are from the Youth Corps.

to be accepted to ensure that courts are impartial and trustworthy. Down the line, higher quality of legal education would be considered necessary in order to train and produce better judges and lawyers, and subsequently, further rules would be adopted to develop unitary judicial interpretations. Such a chain reaction may eventually restrain the arbitrariness of state power, creating ripple effects throughout the political system.

Authoritarian rulers would certainly try to avoid any disruptive Trojan horse effects. As a matter of fact, the expectation of Trojan horse effects has served as an unspoken motivation behind foreign aid for rule of law initiatives in China and elsewhere.¹⁰⁷ That said, some reformist party leaders may welcome certain levels of Trojan horse effects to the extent that their powerbase is not undermined. For one, part of these constraining effects may be exactly what the top leaders hope to achieve via legal reform: to regulate the unruly bureaucracy and discipline overreaching local officials, whose wrongdoing will ultimately erode the regime's legitimacy and the popular support it enjoys. In this sense, when people adopt the language of *legal rights* in framing their grievances, it reflects not just "rights consciousness" but also "rules consciousness," which itself would become a secondary source of legitimacy.¹⁰⁸ Also, such effects might be helpful in that they allow reformists to bulldoze their way through obstacles and to carry out challenging reforms, just like what China's accession to the World Trade Organization did for then-Premier Zhu Rongji in helping him to "marketize" China's economy. That said, there is no clear-cut, predeterminable line between effects that would preserve the party's legitimacy and those that would eventually threaten it, and this is tricky. The KMT failed to contain the disruptiveness of the power of Trojan horse effects while the CCP has been far more cautious in its approach.

However, the exact mechanisms of the Trojan horse effect remain unclear, and some doubts about its ultimate impact on the regime also exist. Matthew Stephenson has suggested that the creation of an independent judiciary, the transformation of legal culture, and an increase in the public base of support for more reforms might serve as three major mechanisms behind Trojan horse effects.¹⁰⁹ However, the authoritarian state could paralyze these mechanisms by setting up firewalls between areas where legal reform is seen as desirable (e.g., commercial laws or arbitration concerning foreign businesses)

107. Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of US-Sponsored "Rule of Law" Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64 (2000).

108. See Jacques deLisle, *Security First? Patterns and Lessons from China's Use of Law to Address National Security Threats*, 4 J. NAT'L SEC. L. & POL'Y 397, 420–21 (2010); Elizabeth J. Perry, *Studying Chinese Politics: Farewell to Revolution?*, 57 CHINA J. 1, 21 (2007).

109. Stephenson, *supra* note 107.

and where it is considered suspect (e.g., administrative litigation or fully independent courts).¹¹⁰ Furthermore, the local context of political economy may easily drive these reforms in an unexpected direction. For example, examining the effects of U.S.-sponsored rule of law reforms in the Philippines, Indonesia, and India, Yves Dezalay and Bryant Garth demonstrated how the Ford Foundation's projects, which were intended to train local public interest lawyers committed to social justice, eventually turned into self-reinforcing mechanisms producing "brilliant young technicians for corporate law" in alliance with state oligarchs.¹¹¹ In short, the mechanisms and suspicions need to be carefully examined in their particular contexts.

To begin with, for an authoritarian regime, an unfulfilled promise would be more costly than the denial of a request, because breaking promises is harmful to the state's credibility while a denial simply represents the state's policy decision. Promises raise expectations and put the promisor in a defensive position, such that the regime's credibility is at stake; hence a promise is typically deferred rather than broken.¹¹² This rationale is evidenced by the Model, which promises but postpones democracy. Such a mindset leads to an inherent tension in the Model, as the authoritarian state would be constantly required to live up to its promises, especially after the legal reforms have taken root and incrementally changed the way people think about legality and legitimacy. As such, Trojan horse effects are inevitable and just a matter of scale, depending on the ways in which the state contains such effects.

Against this backdrop, the CCP and KMT have faced similar demands for a full-fledged version of democracy and the rule of law, and they have deployed similar counterstrategies too. Once they opened the door to rule of law reforms and paid lip service to democracy, it proved extremely difficult not to adopt more rules and institutions that would carry out the promised reforms, even partially. One case in point involves property rights. In 2004, China amended the Constitution to formally recognize the necessity of private property rights protection; as a result, eminent domain without fair compensation became more difficult to justify than before. This progress in turn laid the foundation for a new Property Law (2006) that defined various property rights and set up formalities and procedures for exercising such rights. As a result, the instrumentalism that had long dominated Chinese thinking about property rights has been gradually transformed into formalism. The state's power to take land, at least in theory, has been restrained by legal formality, and land seizures cannot be easily justified solely in the name of economic development.

110. *Id.* at 84.

111. Yves M. Dezalay & Bryant Garth, *Law, Class, and Imperialism* (Feb. 2008) (unpublished manuscript), <http://ssrn.com/abstract=1092161>.

112. Cheng & Lin, *supra* note 65, at 169.

As a result, the rapid increase in land disputes has exemplified the emerging Trojan horse effects.¹¹³

Notably, property disputes have also shaken political establishments and created new dynamics in politics. In 2011, a large-scale protest in Wukan, Guangdong Province, was triggered by land confiscations and ended up with unprecedented concessions made by the CCP, including a secret ballot through which 100 representatives were selected to oversee the village council. Residents of nearby towns, who closely followed the developments in Wukan, soon staged several other mass protests to replicate Wukan's approach to negotiating with the authorities.¹¹⁴ Examining the public discourse on the Wukan incident, Keith Hand showed that the continuing efforts of reform-minded citizens turned to constitutional arguments as a tool to build public pressure for reforms.¹¹⁵ Also, as documented by Hualing Fu, the rights defense movements (*weiquan yundong*) have been evolving into increasingly agenda-driven organisms,¹¹⁶ with active legal strategies being deployed to justify various claims based on property rights and other civil rights. This Article is well aware of the limitations of drawing conclusion from individual cases, but one can clearly observe a domino effect from the recognition of property rights, to increasing legal disputes regarding land seizures, to social unrest challenging the state's legitimacy, and eventually, to the implementation of certain political changes.¹¹⁷

Similar patterns existed widely in authoritarian Taiwan too. Worse, the KMT's firewall was eventually broken down. In the late 1960s, two decades after the Model was introduced, political dissidents started resorting to laws as a major means of challenging the KMT and mobilizing political supporters whose rights consciousness had grown in line with their wealth. Portrayed as a minority émigré regime unfairly, and now illegally, ruling the majority local Taiwanese population, the KMT appeared increasingly vulnerable in the face of the challenges posed by political dissidents. Lawyers began to cite legal texts to question the legality of state actions, and most of them

113. As of 2013, the number of mass protests involving more than 100 participants reached 100,000 every year, half of which are related to land taking. See Stanley Lubman, *Rebel Village's Failure Also China's*, CHINA REALTIME (Mar. 15, 2013), <http://blogs.wsj.com/chinarealttime/2013/03/15/failure-in-rebel-chinese-village-a-failure-for-beijing-too/>.

114. For example, the riots at Haimen city, Guangdong in 2011 and at Shangpu city, Guangdong in 2013. See Zhang Shujie & Vincent Kolo, *Guangdong Village Rebellion Revives the Spirit of Wukan*, THE CHINA WORKER FORUM (Mar. 4, 2013), <http://china-worker.info/en/2013/03/04/1151/>.

115. Keith Hand, *Constitutionalizing Wukan: The Value of the Constitution Outside the Courtroom*, 12 CHINA BRIEF 5 (2012), <https://jamestown.org/program/constitutionalizing-wukan-the-value-of-the-constitution-outside-the-courtroom/>.

116. Hualing Fu, *Challenging Authoritarianism Through Law*, 6 NAT'L TAIWAN U. L. REV. 339 (2011).

117. The existence of domino effects does not necessarily imply a definite direction for political changes down the road. The authoritarian state could respond to specific cases in a liberal way in order to defuse an imminent tension, but later opt for a more rigid policy to prevent any similar case from occurring in the first place.

were not among those referred to as “rights defense lawyers” (*weiquan lüshi*) as in China today, but commercial lawyers, the type of lawyers supposedly practicing within the state’s firewall that aimed to contain the Trojan horse effect. The best example is probably Taiwan’s former president Chen Shui-Bian, who was a successful maritime lawyer before joining the opposition. Eventually, it turned out to be difficult, if not outright impossible, for the KMT to justify either the rule of law without independent courts or democracy without free elections.

That said, the CCP and the KMT appear to have adopted a similar strategy to dissolve the inherent tension leading to the materialization of Trojan horse effects, although the scale of the CCP’s firewall (such as its Golden Shield Project that censors the Internet) is, in reality, much larger. Party officials on both sides have engaged in a competition with liberal reformists to redefine the key ideas often used in political discourse. This battle of ideas itself signals a change in political and legal culture, since both the state and reformists now have to frame their respective political claims in legal terms.¹¹⁸ On the one hand, liberal reformists are inclined to broaden the well-accepted notion of the rule of law to sustain a wider reform agenda, including not only the supremacy of law but also constitutionalism and the implementation of a system of checks and balances that are often associated with the notion of democracy. A thick version of the rule of law is invariably preferred: not just the rule of law, but the rule of good law. On the other hand, the state counteracts by redefining such concepts, too, and limiting the scope of legal reform to those identified as “regime-type-neutral.”

Moreover, the CCP has often suppressed movements promoting constitutionalism and proposed alternative concepts such as the Leninist notion of democratic centralism, which honors the promise of democracy through a narrowly designed public consultation procedure and delegitimizes any subsequent challenge to policies once decided by the party-state.¹¹⁹ The KMT also adopted the notion of democratic centralism as early as 1950. Such redefining exercises often produce party statements that sound absurd to outsiders but might make sense to the general public in both countries. For example, the KMT

118. This also demonstrates a reform strategy under the authoritarian regime—to carry forward legal reforms by making them politically correct. See Jiangyu Wang, *China: Legal Reform in an Emerging Socialist Market Economy*, in *LAW AND LEGAL INSTITUTIONS OF ASIA* 24, 56 (Ann Black & Gary Bell eds., 2011). Keith Hand further advocates a shift in focus from court-centric, individual legal actions to a collective political dimension of constitutional law. The constitutional discourse between the state and society could be a sign of popular constitutionalism despite the repressive development against the law at the moment. Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 *E. ASIA L. REV.* 51 (2012).

119. See Stephen C. Angle, *Decent Democratic Centralism*, 33 *POL. THEORY* 518, 528 (2005); Tong Mu (佟木), *Minzhu Jizhongzhi Lilun Jiagou Tanxi* (民主集中制理论架构探析) [*Analysis of the Theoretical Structure of Democratic Centralism*], 4 *DAIZONG XUEKAN* (岱宗学刊) [*DAIZONG J.*] 16, 17 (2000).

began claiming Taiwan as “Free China” in the 1950s; the CCP did likewise, proclaiming that China is already a democratic country.¹²⁰ Unsurprisingly, Taiwanese people under the KMT’s authoritarian rule widely and sincerely believed that Taiwan was free and democratic, and so do the majority of Chinese people in PRC according to various political attitude surveys.¹²¹

Last but not least, the Trojan horse effects make the political leaders of the authoritarian state extremely insecure. With increasing Trojan horse effects, the state feels a growing urge to strengthen its legitimacy and resilience. Paradoxically, Trojan horse effects arise from the success of legal reforms, but also result in the regime’s insecurity, which in turn may impede legal reforms. As a result, occasional setbacks of rule of law developments occurred after the initial successes of legal and economic reforms. In Taiwan, the success of the Model was concurrent with the era of “white terror” imposed by the KMT in an effort to widely suppress human rights due to the fear of rising “rights consciousness” among the people fueled by nationalistic hatred towards the émigré regime. This ironic phenomenon has appeared in China as well. On the one hand, the Xi administration showed some signs of determination to carry out legal reforms further than its predecessor did, as evidenced by the progressive judicial reform agenda announced after the Third and Fourth Plenums of the Eighteenth CCP Central Committee in 2013 and 2014, respectively.¹²² On the other hand, the Party has reaffirmed its position above the law,¹²³ and CCP leaders have further tightened their social control and crackdowns of human rights movements, underground religious groups, and nongovernmental organizations that engage in sensitive social issues. Legal activists have also been closely monitored, with

120. See, e.g., Han Zhen (韓震), *Zhongguo caishi dangjin shijie zuida de minzhu guojia* (中国才是当今世界最大的民主国家) [*China Is the Largest Democratic Country in the World*], QIUSHI WANG (求是网) [QSTHEORY.CN], http://www.qstheory.cn/dukan/qs/2017-11/15/c_1121947684.htm.

121. Asian Barometer Survey, a leading cross-country survey of political attitudes across Asia, shows that most survey respondents in China supported democracy but on average they also rated the Chinese system as already quite democratic (7.22 on a scale of 10). The score is higher than their counterparts in Japan (7.02), South Korea (6.51), Hong Kong (5.23), and only slightly lower than Taiwan (7.33). See TIANJIAN SHI, *THE CULTURAL LOGIC OF POLITICS IN MAINLAND CHINA AND TAIWAN* 194 (2014).

122. CCP Central Committee, *The Decision on Major Issues Concerning Comprehensively Deepening Reforms*, CHINA DAILY (Nov. 16, 2013), http://www.china.org.cn/china/third_plenary_session/2013-11/16/content_30620736_3.htm. See also Donald Clarke, *China’s Legal System and the Fourth Plenum*, 20 ASIA POL’Y 10 (2015); Cheng Li, *Fourth Plenum Has Opened Up Discourse on Constitutionalism, Governance*, BROOKINGS (Nov. 3, 2014), <https://www.brookings.edu/articles/fourth-plenum-has-opened-up-discourse-on-constitutionalism-governance/>; Weitseng Chen, “*Sir, We Suggest You Be Fired*”—Lessons for China from Taiwan’s Judicial Reforms, 2 CHINESE J. COMP. L. 289 (2014).

123. Clarke, *supra* note 122.

many put behind bars already.¹²⁴ This reverse trend is particularly evident after President Xi Jinping took over the helm.¹²⁵

D. *The Practical Limits of the Model*

An examination of the Model as a strategy to develop the rule of law will not be complete without reviewing its practical limits. The authoritarian state tries to contain the Trojan horse effects by setting up firewalls between areas where the rule of law is necessary and areas where it is considered suspect. How would this manipulating strategy impact the rule of law as a whole? This can be illustrated by a comparison between law enforcement in pre- and post-democratic Taiwan, where the Model completed its full life cycle.

In Taiwan, most noticeably, one core feature of the rule of law—putting the state under the scrutiny of the judicial system—was not achieved during the authoritarian era but only *after* democratization. In sharp contrast to its widely applauded role during democratization, judicial review in fact only played a dummy role under the KMT's authoritarian rule. At most, it merely improved the consistency of judicial interpretations and had less to do with human rights protection and corrections of abuse of power.¹²⁶ It was not until *after* democratization that Taiwan's Constitutional Court became active. From 1987 to 2004, the time period from the beginning of democratization to the first presidential term after the ruling party turnover, there were 361 decisions, ninety-five of which struck down laws for infringing constitutional rights. Before that, the Court rarely struck down any law based on human rights violations. One prominent exception was its bold Interpretation No. 166 (1980), which held part of the Act Governing the Punishment of Police Offenses (1943) unconstitutional.¹²⁷ In response, the KMT administration chose to simply ignore the decision, which would otherwise weaken its excessive police power. The Act remained in force until its abolishment in 1991 after democratization.

124. The most recent crackdown saw more than 200 lawyers detained by the Chinese police in July 2015. See Andrew Jacobs & Chris Buckley, *China Targeting Rights Lawyers in a Crackdown*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html>.

125. This trend generally began during the last few years of the Hu-Wen administration, and the Xi administration has continued and even strengthened this development. See Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 936, 968 (2011); Fu, *supra* note 116; Dongsheng Zang, *Rise of Political Populism and the Trouble with the Legal Profession in China*, 6 HARV. CHINA REV. 79 (2010).

126. Prior to the democratization, the KMT tightly controlled the nomination process for the justices of the Constitutional Court. 1 SIFA YUAN (司法院) [JUDICIAL YUAN (TAIWAN)], TAIWAN FAJIE QIXIU KOU SHU LISHI (台灣法界耆宿口述歷史) [ORAL HISTORY ON SENIOR LEGAL PROFESSIONALS IN TAIWAN] 79, 132 (2005).

127. Constitutional Court Interpretation No. 166 (Nov. 7, 1980) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=166.

Similarly, the administrative litigation regime, the creation of which usually opens up the space for public discourse and raises hope of further reforms in the authoritarian state, did not seem to contribute to Taiwan's democratization at any significant level, either. On the contrary, the administrative litigation system was extremely under-used during Taiwan's authoritarian years and came to life only after democratization. The administrative court began operating in Taiwan in 1950. By 1960, however, the average number of administrative litigation cases per year was only 109, with plaintiffs prevailing on average in only fourteen cases annually.¹²⁸ Only senior judges could be assigned to administrative courts, not because of their expertise but due to their eligibility for the privilege of having a high salary with a low workload.¹²⁹ By contrast, there were 9,196 cases in 2004, with plaintiffs prevailing in 1,034 cases.¹³⁰ The tipping point occurred years after democratization.¹³¹ The practice of state compensation litigation also suggests a similar trend. The number of cases (Figure 2) remained low until the mid-1990s, nearly a decade after democratization, and the percentage of cases won also increased accordingly from approximately an average of 15% prior to the democratization to an average of 20% in the first decade of post-democratization.¹³²

In a similar vein, China passed the Administrative Litigation Law (ALL) in 1990 but the system remains highly constrained considering the ample opportunity that the ALL might provide for public discourse.¹³³ Despite gradual improvements, practical obstacles toward the ALL have been largely identified, such as official interference with lawsuits, the high percentage of case withdrawals, and difficulties faced by plaintiffs in obtaining legal representation.¹³⁴ Since 1997, the number of accepted cases had more or less leveled off until a recent amendment in 2015 that encouraged the courts to accept more cases.¹³⁵ Also, the PRC State Compensation Law, enacted

128. The numbers are computed based on the statistics published in SIFA YUAN (司法院) [JUDICIAL YUAN (TAIWAN)], SIFATONGJI NIANBAO (司法統計年報) [JUDICIAL STATISTICS YEARBOOKS].

129. Interview with a Judge, Taipei District Court (Taiwan) (Aug. 7, 2014); Interview with a Judge, Administrative Court (Taiwan) (Dec. 12, 2014); Interview with a Legal Historian, Academia Sinica (June 15, 2015).

130. See source cited *supra* note 128.

131. The number of administrative litigation cases in 1987, the year when martial law was abolished, was twice that of 1980, three times that of 1970, twelve times that of 1960, and 138 times that of 1950.

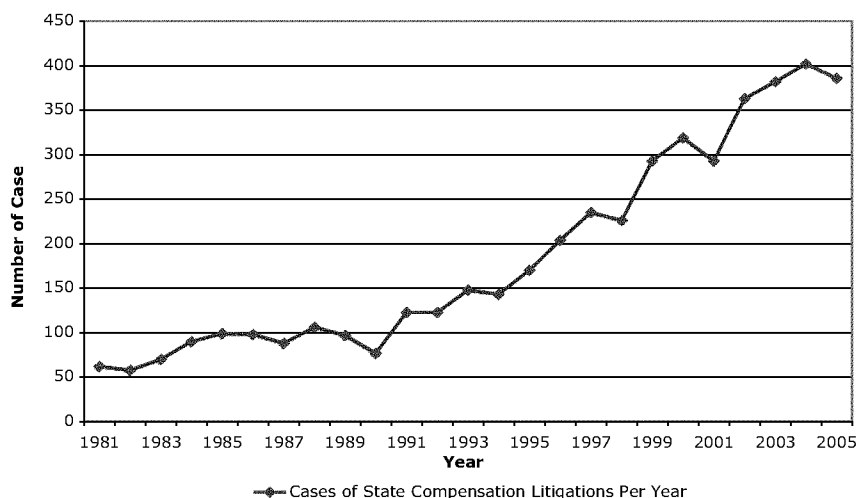
132. See source cited *supra* note 128.

133. Neysum A. Mahboubi, *Suing the Government in China, in* DEMOCRATIZATION IN CHINA, KOREA, AND SOUTHEAST ASIA? LOCAL AND NATIONAL PERSPECTIVES, *supra* note 5, at 141, 144.

134. *Id.*

135. Prior to the recent ALL amendment (effective May 1, 2015), the number of cases per year had been approximately 100,000 since 1997, with 15–20% of cases decided in favor of the plaintiffs. See Mahboubi, *supra* note 133, at 145; He Haibo, *Litigations Without a Ruling: The Predicament of Administrative Law in China*, 3 TSINGHUA CHINA L. REV. 263 (2011). The 2015 ALL amendment has given rise to the increase in the number of cases as it expanded the list of justiciable causes of action in article 12 (e.g., to include disputes about eminent domain decisions).

FIGURE 2. AMOUNT OF STATE COMPENSATION LITIGATION IN TAIWAN
1981–2005.



Source: Statistics on state compensation litigations published in SIFA YUAN (司法院) [JUDICIAL YUAN (TAIWAN)], SIFATONGJI NIANBAO (司法統計年報) [JUDICIAL STATISTICS YEARBOOKS].

in 1994, seems to face even larger constraints in practice. The number of accepted cases across the country remained very low as of 2015. The first three years after its adoption saw an extremely small number of accepted cases (average 371 per year),¹³⁶ which is understandable given that this was at the initial stage. Although the number of cases increased thereafter, it has hovered around 2,300 per year between 1998 and 2014, less than 3% of the number of administrative litigation cases every year.¹³⁷

The ghost of the Model's authoritarian components lingered even after democratization occurred in Taiwan. Freedom of speech and assembly in Taiwan continued to be subject to various restrictions until after numerous social and student movements in the 1990s. Such was also the case with judicial independence and the control of judicial corruption. In 1999, public confidence in the court system

136. Keith Hand, *Watching the Watchdog*, 9 PAC. RIM L. & POL'Y J. 95, 133 (2000).

137. The numbers are computed based on the statistic published in *Zhongguo fa lü nian jian she* (中国法律年鉴社) [Law Yearbook of China Publishing House], *ZHONGGUO FALU NIANJIAN* (中国法律年鉴) [LAW YEARBOOK OF CHINA]. From the executive summaries about state compensation cases in the *Law Yearbook of China*, one can often find that the courts treat the drop in case load from time to time to mean improvements in "the reputation of the judiciary," "protection of the people's rights," and "judicial innovation." Compared to Taiwan's State Compensation Law, the scope of justiciable matters under China's State Compensation Law is much more limited. This may help explain the small number of accepted cases in China.

remained questionable.¹³⁸ Not until years later did surveys suggest otherwise, showing an average 67% satisfaction rate between 2008–2017 among all involved in judicial matters in courts.¹³⁹

After all, legalization under the Model may not work as the sole substitute for political accountability. But these limits may be compensated for by other supplementary institutions. Social organizations such as temples, lineages, tribes, clans, or business associations may provide similar functions that would usually be generated by democratic institutions. Presbyterian churches in Taiwan, for example, relied upon a democratic mechanism for the internal distribution of foreign aid across the island in the 1950s and 1960s. Led by liberal ministers, Presbyterian churches also participated actively in social and political reforms later on.¹⁴⁰ In China, recent studies have also illustrated how temples and clans in rural areas have performed democratic functions of holding government officials accountable.¹⁴¹ Such temples and lineage groups acquired the moral authority to define and enforce norms requiring local officials to fulfill their public responsibilities.¹⁴² These practices at the grassroots level suggest that supplementary institutions are needed for addressing problems and demands for effective governance that fall outside what the Model can afford. Briefly, the factors that support the Model's work may exist beyond the legal and political realm. As such, the Model is unlikely to succeed in countries where supplementary institutions do not exist or

138. A survey in 1999 found that trust in the courts was low, with 34% of the respondents questioning the fairness of courts. Tsung-Fu Chen, *Democracy and Rule of Law in Taiwan* 14–16 (Research Ctr. for Taiwan Econ. Dev., Nat'l Central Univ., Working Paper Series No. 2003-0006, 2003), http://rcted.ncu.edu.tw/download.php?tid=RCTED_NO%202003-0006.

139. SIFAYUAN TONGJICHU (司法院統計處) [DEPARTMENT OF STATISTICS, JUDICIAL YUAN], YIBAN MINZHONG DUI SIFA RENZHI DIAOCHABAOGAO (一般民眾對司法認知調查報告) [SURVEY OF THE GENERAL PUBLIC'S PERCEPTION OF COURTS] (2017), <http://www.judicial.gov.tw/juds/u106.pdf>.

140. Cheng Mu-Chun (鄭睦群), Taiwan Jidu Zhanglao Jiaohui Guojia Rentong yu qi Lunshu Zhuanhuan zhi Yanjiu 1970–2000 (台灣基督長老教會國家認同與其論述轉換之研究 1970–2000) [A Study of the National Identity Transformation of Presbyterian Church in Taiwan, 1970–2000] (June 28, 2013) (unpublished Ph.D. dissertation, Chinese Culture University) (on file with author); RIGGER, *supra* note 56, at 73, 108; Hsu Ming-Hung (許明閔), Taiwan Jidu Zhanglao Jiaohui Zhengjiao Guanxi zhi Yanjiu (台灣基督長老教會政教關係之研究) [The Research of the Presbyterian Church in Taiwan's Political-Religious Relationship] (June 15, 2008) (unpublished M.A. dissertation, Soochow University) (on file with author). Further, both Presidents Chiang Ching-Kuo and Lee Teng-Hui admitted that such religious activism made the government aware of the importance of religious freedom. See GUOSHIGUAN (國史館) [ACADEMIA HISTORICA], CHIANG CHING-KUO ZONGTONG YU WO: LEE TENG-HUI BILU YU LEE TENG-HUI KOU SHU LISHI (蔣經國總統與我：李登輝筆記與李登輝口述歷史) [PRESIDENT CHIANG CHING-KUO AND ME: THE DIARY OF PRESIDENT LEE TENG-HUI] 76, 151, 212, 217 (2004).

141. See, e.g., LILY L. TSAI, ACCOUNTABILITY WITHOUT DEMOCRACY: SOLIDARY GROUPS AND PUBLIC GOODS PROVISION IN RURAL CHINA (2007).

142. Lily L. Tsai, *The Struggle for Village Public Goods Provision*, in GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA 117, 128 (Elizabeth Perry & Merle Goldman eds., 2007).

where shared moral values and trust have been severely undermined such as in post-conflict states.

IV. ANALYZING THE CRITICAL JUNCTURE: DIFFERENCES BETWEEN THE MODEL IN TAIWAN AND IN CHINA

Given the strikingly similar mindsets underlying the Model in Taiwan and China, will the Model in China run its full life cycle as it did in Taiwan, and eventually lead to democratization? This Part responds to this most puzzling question by examining the critical juncture of the Model's total transition in Taiwan during the 1990s when democratization occurred.

Any potential democratization that takes place under authoritarian regimes is confronted with the following dilemma—Why would the sovereign want to tie its own hands? After all, regime survival has always been the paramount concern for both the CCP and the KMT. Some pundits therefore consider external factors such as economic or political crises to be the major factors in ruling elites yielding power. Indeed, major breakthroughs for legal reforms in Taiwan—such as lifting restrictions on elections and enacting labor laws—mainly occurred when the KMT was confronted with either political or economic crises. Similarly, after the SARS epidemic crisis in 2003, then-Premier Wen Jiabao's comment bore a tone identical to that of former Soviet Union president Mikhail Gorbachev in the wake of the Chernobyl nuclear disaster: “our first step should be to open the flow of information. Only then can we enable the public to supervise the government and prevent social instability.”¹⁴³

Nevertheless, what the king gives, the queen could take back. How can one trust politicians' strategic commitment to law and rely on authoritarian parties to implement genuine democratic reforms? In Part III.A, this Article contended that the short-term horizon of the targeted groups that the party-state tries to please may compensate for the credibility problem and thus make an instrumental commitment feasible in terms of economic development. Nonetheless, this is unlikely to be the case with political rights. Democratic reforms based merely on the party's strategic commitment to law could fail eventually, even if the party believes that the legal constraints on its paramount power is in its own best interests at a given time. The party's preference may change and pressing considerations of regime survival may ultimately outweigh a rational cost-benefit analysis.

Alternatively, the hope for democracy, drawn from Chinese political philosophy, may lie in a “good emperor” who is willing to tie his own hands and introduce democratic reforms from the top. A frequently mentioned example is Taiwan's former president Chiang Ching-Kuo, once a cruel executor of crackdowns on liberal movements, who has

143. GILLEY, *supra* note 1, at 250.

been more recently perceived to be a key figure in the democratization of Taiwan.¹⁴⁴ Chiang decided to carry out democratic reforms with the knowledge that the KMT could lose power.¹⁴⁵ In China, it is not difficult to perceive among the general public a similar hope that a “good emperor” might emerge within the CCP and lead the country toward democracy.

With these discussions in mind, this Article focuses on the institutional conditions of the critical juncture in Taiwan’s total transition, instead of the significance of any individual figure. This Part identifies four structural factors concerning law enforcement and the configuration of Taiwan’s legal system, arguing that these internal and external factors either do not exist, or have minor or even opposite effects in China. In the absence of these factors, the Model may end up with a different trajectory in China unless other supplementary conditions emerge.

A. *The Fusion of Early Legal Transplantation in the Mainland and Japanese Colonial Legacy in Taiwan*

Starting conditions matter greatly to transitions and, in the context of Taiwan and China, account for differences that result in variations in the costs and obstacles to reforms on both sides.¹⁴⁶ In China, legal reforms only began years after the economic transition kicked off in 1979. In comparison, when the KMT relocated to Taiwan, two giant waves of early legal transplant efforts in Asia merged on this island—one from Mainland China and the other from Japan. This historical coincidence contributed to the modernization of Taiwan’s legal system that began nearly a century earlier than that of China’s.

When the KMT assumed control of Taiwan in 1945, it did not create a legal system from scratch but simply imported a complete one it had established in Mainland China, one modeled on continental civil

144. This view, understandably, remains contestable. For a discussion, see Wu Nai-The (吳乃德), *Huiyi Chiang Ching-Kuo, Huainian Chiang Ching-Kuo* (回憶蔣經國, 懷念蔣經國) [*Reformer or Dictator? Reassessing the Role of Chiang Ching-Kuo in a Democratic Transition*], in *ERSHI SHIJI TAIWAN MINZHU FAZHAN* (二十世紀台灣民主發展) [TAIWAN’S DEMOCRATIC DEVELOPMENT IN THE 21ST CENTURY] 467 (2004); TAYLOR, *supra* note 64.

145. When his chief advisor sought Chiang’s confirmation on reforms by asking, “Are you aware that these political reforms may cost the KMT its rule in Taiwan?,” Chiang replied, “There is no party in the world that can rule permanently.” See CHEN SHOU-YUN (陳守雲), *DONGXI CHIANG CHING-KUO* (洞悉蔣經國) [UNDERSTANDING CHIANG CHING-KUO] 179 (2016).

146. The importance of the starting conditions also implies that not all countries have equal chances to successfully make democracy work. For a recent discussion about the role of preconditions during different “waves” of democracy, see Francis Fukuyama, *Democracy and the Quality of the State*, 24 *J. DEMOCRACY* 5 (2013); Larry Diamond et al., *Reconsidering the Transition Paradigm*, 25 *J. DEMOCRACY* 86 (2014). For a similar discussion in the context of law and development literature, see Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 *U. TORONTO L.J.* 341 (2009).

law systems in Europe, especially Germany. For instance, the 1946 Constitution, drafted by Carsun Chang, who graduated from Humboldt University with a Ph.D., was modeled after Germany's 1920 Weimar Constitution. Existing laws, for example, included those passed to regulate legislative procedures, taxation, the financial system, the civil service, professional license examinations, customs, international trade, administrative reconsiderations, and administrative litigation, as well as many others that might have imposed great constraints on the party-state if stringently enforced. To reclaim its legitimacy as the orthodox leader of China and differentiate itself from the communist mainland, the KMT kept this legal system brought from the mainland intact, with the addition of a few ad hoc laws to circumvent inconvenient legal constraints.¹⁴⁷

Prior to Taiwan's adoption of the KMT's legal system, largely transplanted from Germany, Japan had introduced a similar civil law system in Taiwan during its colonial rule between 1895 and 1945. The Meiji Constitution, also based on the German constitutional model, was applied in Taiwan during Japan's colonial rule. Legal historians in Taiwan have well documented the practices of property law, criminal law, civil and criminal procedure, and even constitutional litigation under the colonial legal framework.¹⁴⁸ Legal professionals also emerged as early as the 1910s. Briefly, the practices of the rule of law and the resulting changes in legal culture began in Taiwan decades before the KMT's relocation.

The synergy and coherence between the early legislation on the mainland and the Japanese colonial legacy of legal reforms constructed a very different starting point for the Model in Taiwan compared to that in China. From the beginning, political dissidents and liberal reformists were able to resort to existing laws to challenge and negotiate with the KMT. Compared to China, where reformists have been calling for legislation that does not even exist yet, the point from which the Model in Taiwan started has facilitated the emergence of Trojan horse effects.

One good example involves property rights protection. Legal scholars in China had devoted years to voicing the necessity of private property protection before the Property Law was finally passed in 2007. In contrast, the notion of property rights has been well accepted in Taiwan since Japanese rule.¹⁴⁹ To transplant its modern property

147. See discussion *supra* Part II.

148. Japan's 1889 Meiji Constitution had been applied in Taiwan since the beginning of Japanese rule. As early as the 1920s, local elites had started to discuss political issues in the context of constitutionalism and commonly cited the constitution to challenge the colonial government's policies.

149. See, e.g., Lin Wen-Kai (林文凱), *Rizhi Chuqi Jilong Tudi Jiu fen Shijian de Falu Shehui Shi Fenxi* (日治初期基隆土地糾紛事件的法律社會史分析 1898–1905) [A Study of Legal Social History on the Land Disputes in Keelung During the Early Japanese Colonial Period 1898–1905], 48 CHENGDA LISHI XUEBAO (成大歷史學報) [CHENG KUNG J. HIST. STUD.] 1 (2015).

laws onto this island, where Chinese customary laws had long governed land transactions, the Japanese colonial government conducted a thorough investigation of customary laws in Taiwan, including those relating to mortgage, inheritance, common property, and secured transactions. Recent studies have also unveiled how local landowners and Japanese investors resorted to intense litigation to solve disputes resulting from conflicts between Japanese laws and Chinese customary laws.¹⁵⁰ Sophisticated legal reasoning, negotiations, and political lobbying activities were involved in the progress of the legal system's synchronization carried out by the colonial government.¹⁵¹ Subsequently, in the early 1950s, the KMT conducted a successful land reform to further streamline property ownership and paved the way for implementing its Property Law (1929) brought from the mainland. This existing private property regime enabled Taiwanese political activists and lawyers to work on eminent domain issues with greater ease than their Chinese counterparts, who often had struggled, and continue to struggle, with insufficient legal weapons and a risky extra-legal approach, namely, street demonstrations.

The other benchmark of comparison of the substance of the two legal systems is the justiciability of laws, or the degree to which laws are vigorously enforced or exist mainly as the state's symbolic gesture. On one hand, the level of justiciability affects the potential and the costs of people commencing legal battles; on the other, justiciability represents the extent of the party's commitment made by law and serves as a holding mechanism that affords the party time to decide the timing for law to intervene. In China, laws regarding social welfare commonly use a great deal of moral language and uncertain legal concepts to detract from their justiciability.¹⁵² In contrast, for laws (or certain provisions in specific laws) that the Chinese government intends to rely upon to improve governance, the language used is clearly more hospitable to justiciability, with deliberate control over the potential outcome if necessary. The PRC Administrative Litigation Law (1989) is a case in point. To curb mis-governance and abuses of power at the local level, the scope of administrative litigation is narrowed to a list of several specific economy-oriented matters that have the potential to affect economic growth, including disputes regarding

150. Lin Wen-Kai (林文凱), *Ye Pin Qi Guan? Qingdai Taiwan Tudi Yezhuquan yu Susong Wenhua de Fenxi* (業憑契管? 清代臺灣土地業主權與訴訟文化的分析) [*Deed Owner, Land Owner? Property Rights in Land and Litigation Culture in Qing Taiwan*], 18 *TAIWANSHI YANJIU* (台灣史研究) [TAIWAN HIST. RES.] 1 (2011).

151. WANG, *supra* note 45, at 15–36; Lin, *supra* note 150; Tseng Wen-Liang (曾文亮), *Quanxin de Jiuguan: Zongdufu Fayuan dui Taiwanren Jiazu Xiguan de Gaizao 1898–1943* (全新的舊慣: 總督府法院對台灣人家族習慣的改造) [*Old Customs Made New: Transformation of Kazoku Customs in Colonial Taiwan, 1898–1943*], 17 *TAIWANSHI YANJIU* (台灣史研究) [TAIWAN HIST. RES.] 125 (2010).

152. Fairly speaking, socioeconomic rights are not considered justiciable according to orthodox constitutional law theories. Many of these social welfare-related laws in China pertain to socioeconomic rights.

issues of business licensing, confiscation of properties, or the infringement of business autonomy. In contrast, land disputes, which involve local politics and tax revenues, had been intentionally excluded from the justiciable scope of administrative litigation until 2015.¹⁵³

In comparison, the scope of the justiciability of Taiwan's Administrative Litigation Law (1932), which was modeled on German law, does not seem to have been politically manipulated during the legal transplant process. A broader degree of justiciability has been granted to citizens. In fact, many of the KMT's administrative laws, mainly enacted in the 1930s and 1940s, appear to be more advanced and liberal in some aspects than their original German or Japanese counterparts. This is the case in part because the scholars in charge of the drafting were liberal minded, and in part because the KMT leaders of that era did not take legality seriously and did not consider these administrative laws to be effective constraints on the state. In light of this, Taiwan's Administrative Litigation Law allows people, in clear and direct language, to challenge "any administrative decision considered to be an illegal violation of citizens' rights."¹⁵⁴ Unsurprisingly, enforcement became problematic during the authoritarian era; however, it was this gap between "law on the books" and "law in action" that empowered reformists and political dissidents to challenge the state. In comparison, as a latecomer, the CCP has been far more cautious than the KMT when confronting modern Western legal concepts and implementing the Model, as evidenced by numerous statements from CCP leaders who used the phrase "hostile foreign forces" as a catch-all phrase to condemn foreigners for intruding into China's domestic affairs. Their concerns have affected China's institutional development. For example, to avoid facilitating constitutionalism, the CCP, unlike the KMT, is wary of creating any form of judicial review at the expense of aggravating legislative conflicts and therefore compromising China's legal modernization efforts.¹⁵⁵

B. Nationalism and the Legal Profession

Nationalism is an important driving force underpinning the overall transitions in both Taiwan and China.¹⁵⁶ The nature of such nationalism, however, is different on either side, and it has shaped the

153. This policy was specified in several internal notices issued by the People's Supreme Court and provincial courts. In May 2015, the ALL amendment finally expanded the list of justiciable of causes of action to include disputes about eminent domain matters.

154. Xingzheng susongfa (行政訴訟法) [Administrative Litigation Act] (promulgated by the Republic of China (Taiwan), Nov. 17, 1932, effective June 23, 1933), art. 4, <http://law.moj.gov.tw/LawClass/LawAllIf.aspx?PCode=A0030154>.

155. See, e.g., Keith Hand, *Understanding China's System for Addressing Legislative Conflicts*, 26 COLUM. J. ASIAN L. 139, 143–44 (2013).

156. NATIONALISM, DEMOCRACY AND NATIONAL INTEGRATION IN CHINA (Leong H. Liew & Shaoguang Wang eds., 2004); C.L. Chiou, *Emerging Taiwanese Identity in the 1990s*, in TAIWAN IN THE ASIA-PACIFIC IN THE 1990s, at 21, 29–31 (Gary Klintworth ed., 1994).

trajectory of reforms in opposite ways. In China, nationalism helped the CCP to unite the masses and defuse various social tensions, thereby supporting the Model.¹⁵⁷ In contrast, nationalism in predemocratic Taiwan helped political dissidents to mobilize followers, thereby forcing the KMT to suspend the Model and implement drastic political reforms to defuse rising tensions.¹⁵⁸

In theory, nationalism needs a target, or an enemy, so that its supporters can project their strength outwards while being inwardly united.¹⁵⁹ The concept of nationalism was introduced to the Chinese people from the West in the nineteenth century, and this introduction itself is a political phenomenon. The concept of nationalism must be understood as an aspiration to two freedoms—the freedom of a nation from domination by foreign powers and the freedom of individuals to collectively form a nation of their choice.¹⁶⁰ The differences in the nature of nationalism in Taiwan and China lie in their respective targets, which were chosen along the lines of the two aspects of freedom, respectively. China's nationalism is outward-looking, centered on national freedom, and driven by the national humiliation of the late nineteenth century as a result of the invasion by Western powers.¹⁶¹ Aiming to rebuild a modernized state with global influence, nationalism increases the legitimacy of the CCP's reforms and sustains the Model.

By contrast, two strands of nationalism exist in Taiwan. The KMT, similar to the CCP, used nationalism after its relocation to Taiwan in a similar outward-looking fashion against colonial powers, and therefore enhanced the legitimacy of its authoritarian rule. However, another strand of nationalism, based on the ethnic Taiwanese identity,

157. Elizabeth Perry demonstrates how nationalism works with what she calls “controlled polarization” and “controlled mobilization” to carry out the CCP's strategy for releasing social tension while ensuring various social groups (especially workers and intellectuals) do not join hands. This strategy is largely based on the socialist notion of “class struggles” and its reinterpretation. In this regard, the social structure of KMT's nationalism is also much less complex than that of the CCP's and, therefore, less sustainable in the face of political challenges. See Perry, *supra* note 108.

158. The role of nationalism and issues of national identity in Taiwan's democratization have been well documented in political science literature, but there has been little discussion in the context of the rule of law development. See, e.g., FELL, *supra* note 39, at 55–84; RIGGER, *supra* note 4.

159. Target means here an opposing culture, country, race, or ruler. It could be an expression of “envy (*ressentiment*)” or the “unbearable sense of being unnoticed,” which Liah Greenfeld uses to describe the nature of German nationalism in the nineteenth century that targeted the culturally and economically dominant countries in the West, including France and England. See Glen Drover & K.K. Leung, *Nationalism and Trade Liberalization in Quebec and Taiwan*, 74 PAC. AFF. 205 (2001); LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY 372–78 (1992).

160. Hans J. Morgenthau, *The Paradoxes of Nationalism*, 46 YALE REV. 481 (1957).

161. See Yu Ying-shih (余英時), *Minzhu yu Minzu Zhuyi* (民主與民族主義) [*Between Democracy and Nationalism*], XINLANG LISHI (新浪历史) [SINA HISTORY] (Aug. 8, 2013), <http://history.sina.com.cn/his/zl/2013-08-08/113051184.shtml>; Edward Friedman, *Preventing War Between China and Japan*, in WHAT IF CHINA DOESN'T DEMOCRATIZE: IMPLICATIONS FOR WAR AND PEACE 99 (Edward Friedman & Barrett L. McCormick eds., 2000).

developed at the same time and was used by political dissidents to oppose the KMT. Instead of looking for foreign enemies, the latter strand of nationalism was centered on individual freedom and portrayed the KMT, with its traditional political supporters—mainlanders—as a minority émigré regime ruling a local Taiwanese majority (or “benshengren”), who were also Han Chinese but had migrated to Taiwan much earlier than the KMT and the mainlanders, at different stages after the seventeenth century.¹⁶² This view was fueled by various discriminations against the local Taiwanese, such as language or government employment policies.¹⁶³ As a result, the latter strand of nationalism against the KMT eventually prevailed over the former, contributing to the fall of the Model and Taiwan’s subsequent democratization.¹⁶⁴

Taiwan’s experience in fact echoes the experience of democratization in other parts of the world where many states began a democratic transition with a high degree of nation-state ethnic diversity.¹⁶⁵ Although Taiwan is ethnically a Chinese society, fifty years of assimilation stringently enforced by the Japanese colonial government were enough to produce one or two generations of younger citizens that had varying degrees of Japanese identity and no experience of Chinese rule. Former President Lee Teng-Hui publicly admitted that he fully identified as Japanese before the age of twenty-two and once felt honored joining the Japanese imperial army to fight against KMT troops. This confusion or conflict of national identity led to an effective ethnic division underlying nationalism in Taiwan. Nationalism therefore contributed to de facto interparty competition largely along ethnic lines. Within the KMT, party elites were likewise divided along similar ethnic lines, causing a party split in the early 1990s.

Nationalism also drove Taiwan’s legal profession to challenge the Model. During its authoritarian rule, the KMT tightly controlled the number of attorneys by restricting the bar exam admission rate. This policy reflected the KMT’s concern about the role of Taiwanese attorneys in light of their rebellious tradition under Japanese colonial rule. Facing injustice and discrimination under the colonial rule, Taiwanese attorneys played a progressive role in local communities,

162. *Benshengren*, or the majority local Taiwanese, consist of several linguistic groups migrating from different regions within southern China, including the Hokkien and Hakka people.

163. In general, the mainlanders monopolized top positions in the party, state, SOEs, and education system. For instance, it was the norm that local Taiwanese would be at best admitted to deputy posts in Chiang Kai-Shek’s administration.

164. The conflict between the two strands of nationalism has slowly faded away in Taiwan, although it remains extant within the senior generation. This conflict still partially accounts for the divided politics in Taiwan, as well as factional politics within the KMT.

165. JUAN J. LINZ & ALFRED STEPHAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION* 24–33 (1996).

and this tradition persisted under the KMT's rule, as many attorneys participated actively in local elections as a critical anti-KMT force.¹⁶⁶

Due to the KMT's restrictive policy, the majority of attorneys between 1950 and 1991 were mainlanders—the KMT's main political supporters. For instance, 96.4% of the lawyers registered with the Taipei Bar Association in 1960 were mainlanders, who accounted for only 14% of the total population at that time (Figure 3).¹⁶⁷ As the number of local Taiwanese attorneys slowly increased over the course of thirty years, the numbers of mainlanders and local Taiwanese lawyers were roughly equal by 1985, and by the late 1990s the ratio of mainlanders was quickly reduced to about 1:4, reflecting the ratio of the two ethnic groups (1:6). Thanks to nationalism, this majority empowered the legal profession to act collectively as a significant force to challenge the KMT. By the early 1990s, independent bar associations emerged along with this demographic change. The Taipei Bar Association, for instance, dropped its long-term political support for the KMT and proposed its own political reform agenda, including the abolition of the Temporary Provisions that had frozen the Constitution for more than thirty years.¹⁶⁸

In short, diverging from its role in China, nationalism in Taiwan turned out to be a destructive force against the KMT. Eventually it made the Model unsustainable and the KMT was forced to respond by carrying out drastic political reforms.

C. *Elections as an Alternative Law Enforcement Platform*

As a minority émigré regime, the KMT not only resumed but also expanded local elections that had been first put in place during the colonial era, aiming to use elections as a mechanism to enlist native elites to its cause.¹⁶⁹ It largely succeeded in that regard throughout

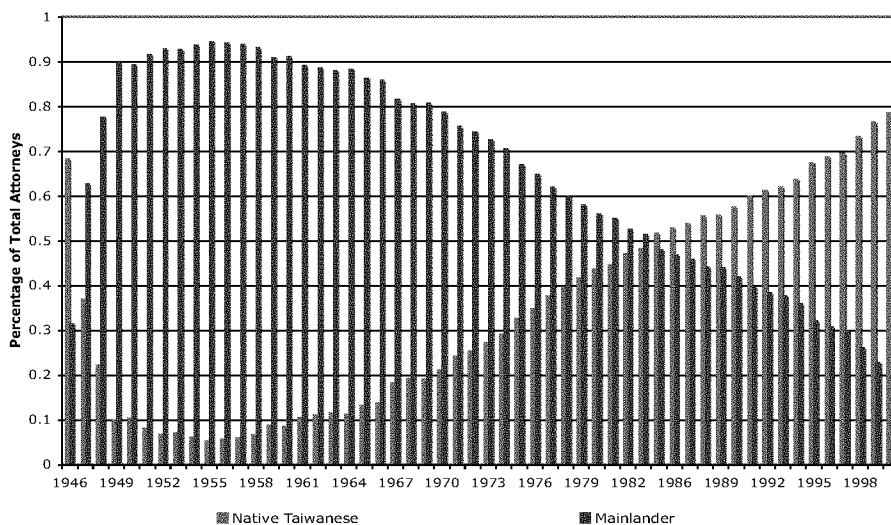
166. Jane Kaufman Winn & Tang-chi Yeh, *Advocating Democracy: The Role of Lawyers in Taiwan's Political Transformation*, 20 *LAW & SOC. INQUIRY* 561, 580–81 (1995).

167. The distinction between “mainlander” and “local Taiwanese” was made clearly in the attorney registration form of the Taipei Bar Association, the dataset of which is what the Figure 3 is based on. The registration form required the registering attorneys to disclose their “ancestral hometown province” (*jiguan*), rather than their place of birth. The “ancestral hometown province” had to be in line with that shown on one's national identity card. For example, a lawyer who was born in Taipei, Taiwan, would be nonetheless required to identify his origin with his parents' hometown (e.g., Henan province, China). Such disclosure was commonly required in most other administrative forms at the time. Not until several years after the democratization were such disclosure requirements gradually abolished and replaced with “the place of birth.”

168. WANG TAY-SHENG (王泰升) & TSENG WEN-LIANG (曾文亮), *ERSHI SHIJI TAIPEI LUSHI GONGHUI HUI SHI* (廿世紀臺北律師公會會史) [THE HISTORY OF THE TAIPEI BAR ASSOCIATION IN THE 20TH CENTURY] 270–71, 283, 341–43 (2005).

169. For example, Rigger suggests that a major function of elections in Taiwan was to facilitate mobilization of ordinary citizens as well as local elites, whose participation was channeled in ways that favored the KMT regime. See RIGGER, *supra* note 4, at 8.

FIGURE 3. DEMOGRAPHIC CHANGE IN THE ATTORNEY COMMUNITY IN TAIWAN 1946–2000.



Source: WANG TAY-SHENG (王泰升) & TSENG WEN-LIANG (曾文亮), *ERSHI SHUJI TAIPEI LUSHI GONGHUI HUI SHI* (廿世紀臺北律師公會會史) [THE HISTORY OF THE TAIPEI BAR ASSOCIATION IN THE 20TH CENTURY] (2005).

most of the period of authoritarian rule.¹⁷⁰ By doing so, the KMT could also honor its promise of democracy to both the Taiwanese people and the international community. As a result, local elections turned out to be a critical alternative mechanism to imposing legal constraints on the state.

During election campaigns—a temporary but relatively uncensored public forum—activists daringly tested the permissible limits of political taboos.¹⁷¹ For example, one of the fiercely debated topics during the campaigns throughout the 1960s was the constitutionality of the KMT's restriction on national congressional elections.¹⁷² Over time, using legality as a political weapon, dissidents found increasingly receptive audiences among an increasingly articulate and economically secure electorate. In the 1980s, many liberal and human rights lawyers started to participate in elections as candidates too.

Another characteristic of Taiwan's electoral system is the high frequency of elections, which amplified the foregoing effects.¹⁷³ Between 1946 and 1998, varying elections at different levels of government were held almost every year or every other year during this period.

170. See Bruce J. Dickson, *The Kuomintang Before Democratization: Organizational Change and the Role of Elections*, in *TAIWAN'S ELECTORAL POLITICS AND DEMOCRATIC TRANSITION* 42 (Hung-Mao Tien ed., 1996).

171. In Taiwan, the length of campaigns is around one month.

172. See *TAIWANSHENG ZIYIHUI* (臺灣省諮議會) [TAIWAN PROVINCIAL CONSULTATIVE COUNCIL], LEE CHIU-YUAN KOU SHU LISHI (李秋遠先生口述歷史) [ORAL HISTORY ON LEE CHIU-YUAN] (2001).

173. Only sixteen out of fifty-three years during this period had no election. See RIGGER, *supra* note 4, at 20–21.

Following democratization, this frequency eventually reached a point where party leaders across the political spectrum agreed to conduct necessary electoral reforms to avoid the problems of perpetual campaigning, voter burn-out, and wasteful expenditure.¹⁷⁴ Unsurprisingly, faced with such a density of elections, the KMT was forced to be more wary of any legality concerns because of this regular scrutiny with national scope or significance.

After all, both the quality and the frequency of elections matter. When a society has no previous experience of competitive democracy, the legitimacy of democracy may take root through electoral competition.¹⁷⁵ Historically, as Jan Teorell found, multiparty elections, even if flawed and limited, is one of the most promising ways to set forces in motion that decrease the authoritarian regime's grip on power over time.¹⁷⁶ In Taiwan, despite their many flaws, local elections were generally viewed as comprehensive and institutionalized, giving rise to a de facto inter-party competition.¹⁷⁷ With the exception of the provincial governor, the heads of the executive branch and members of the legislative branch at all four levels of local governments had been subject to regular elections since 1950 (Table 1). The KMT ended up facing a "trickle-up effect"—a political class emerged both within and outside of the party and required more horizontal and vertical opening up of the regime to accommodate their political careers.¹⁷⁸

Similar to the KMT, the CCP has adopted local elections as a symbol of honoring its promise of democracy. The CCP appears, however, to be capable of offsetting the possible "trickle-up effect" by various "penetrating-down" measures.¹⁷⁹ The CCP confines local elections to

174. For example, between 2000 and 2010 there were twenty-seven elections in total carried out at both the central and local levels. Except in 2007, there were two to three elections on average every year. See JIANCHA YUAN (監察院) [THE CONTROL YUAN (TAIWAN)], TAIWAN DIQU XUANJU PINFAN DIAOCHA BAOGAO (台灣地區選舉頻繁調查報告) [INVESTIGATION REPORT ON THE HIGH FREQUENCY OF ELECTIONS IN TAIWAN] (Control Yuan Investigation Report No.0039, Apr. 8, 2011), <https://www.cy.gov.tw/sp.asp?xdURL=.%2FdiRSS/detail.asp&ctNode=871&mp=1&no=1149>.

175. YUN-HAN CHU, CRAFTING DEMOCRACY IN TAIWAN 48 (1992); Hung-Mao Tien & Tun-jen Cheng, *Crafting Democratic Institutions*, in DEMOCRATIZATION IN TAIWAN: IMPLICATIONS FOR CHINA 23, 33–34 (Steve Tsang & Hung-Mao Tien eds., 1999). Rigger also suggests that elections in Taiwan be treated as an independent variable that helps to explain Taiwan's democratization, rather than as a mere dependent variable that reflects the outcome of political reforms. See RIGGER, *supra* note 4, at 11.

176. TEORELL, *supra* note 9, at 157. However, allegations to the contrary exist. For example, Lust argues that elections sometimes reinforce, rather than undermine, authoritarian regimes because elections may aid the ruling elites' ability to grant special privileges to local elites. See Lust, *supra* note 12.

177. This is not to say that local elections ran perfectly in Taiwan. On the contrary, it was not until years after democratization that bribery and violence ceased to be serious problems in local politics. See Yung-Mau Chao, *Local Politics on Taiwan*, in TAIWAN: BEYOND ECONOMIC MIRACLE 43, 49 (1992).

178. Cheng & Lin, *supra* note 65, at 166.

179. The CCP's intervention in local elections has been well documented. Frequent issues include control over the nomination process or restrictions of the power of the elected posts. See, e.g., LI FAN (李凡), ZHONGGUO JICENG MINZHU FAZHAN BAOGAO (中国基层民主发展报告) [REPORT OF GRASSROOTS DEMOCRACY IN CHINA] 10–18 (2005).

TABLE 1. SCOPE OF LOCAL ELECTIONS UNDER JAPANESE AND THE KMT'S RULE PRIOR TO DEMOCRATIZATION.

Year	Types of elections	Seats
Under the Japanese rule		
1935	• Township Councillor (only 50% of seats were for election)	3,618
	• City Councillor (only 50% of seats were for election)	259
	• Prefecture Councillor (only 50% of seats were for election)	149
Under the KMT rule		
1946	• Village or Borough Warden	6,304
	• Township Councillor	7,771
	• Township Head	272
	• Country/City Councillor	523
	• Taiwan Provincial Assembly	30
1950	• Township Head	360
	• Country/City Councillor	814
	• County Magistrate/City Mayor	21
1954	• Taiwan Provincial Assemblyman	57
1969	• National Representative Bodies Elections (limited opening, but expanding in 1972, 1980, and again in 1989)	26* (1969) 104* (1972) 173* (1980)

*Combination of elected additional members of the Legislative Yuan and those of the National Assembly. Taiwan's National Assembly, similar to China's National People's Congress, represented Leninist thinking about governmental structure. It was abolished as a result of the 2005 constitutional amendment.

Source: Chia-lung Lin, *Paths to Democracy: Taiwan in Comparative Perspective* 140 (1998) (unpublished Ph.D. dissertation, Yale University) (on file with author).

the lowest level of local government (i.e., the village, with a few exceptions at the township level). A lack of detailed regulations and other procedural issues inherent in local elections, such as those involving candidate nominations, also greatly limits the impact that local elections may have.

Going forward, it is not impossible that the CCP may expand local elections should it consider such an opening beneficial for its governance and legitimacy.¹⁸⁰ It is equally possible that the CCP leaders

180. It is no secret that CCP leaders have been showing a strong interest in the "Singapore model," where good governance is paired with non-liberal rule. However, in their respective works, Tan Cheng-Han, Stephan Ortmann, and Mark Thompson have argued that elections in Singapore, albeit limited, have played a key role in the "Singapore model," and that if Chinese leaders want to replicate the Singapore model, they need to consider introducing necessary democratic mechanisms for improving political accountability. See Stephan Ortmann & Mark R. Thompson, *China and the "Singapore Model,"* 27 *J. DEMOCRACY* 39 (2016); Cheng-Han Tan, *The Beijing Consensus and Possible Lessons from the "Singapore Model"?*, in *THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED THE WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT*, *supra* note 26, at 69.

become confident at winning elections and thus feel more comfortable to expand the practice of holding elections.¹⁸¹ However, it is less likely at present that the CCP should have incentives to expand local elections to the degree or in the way that the KMT did. Among the scholarly discussion, promoting intra-party democracy within the CCP appears to be a more viable alternative to inter-party competition.¹⁸² Although an increasing number of professionals—especially attorneys—have been reported to participate in local elections, the impact of local elections remains within the CCP's comfort zone.¹⁸³ Unlike elections in Taiwan, the local elections in China appear to have a very limited impact on facilitating law enforcement and institutionalizing nonparty reform forces.¹⁸⁴

D. International Pressure

International pressure is one significant external factor that has transformed the Model in Taiwan, together with the three internal factors discussed above. This resonates with the literature on the relationship between democracy and development, which suggests that geopolitical factors do matter and often distort the correlation between development and political change that would otherwise be (statistically) significant.¹⁸⁵ This phenomenon could be observed during the

181. This is similar to the KMT's consideration when deciding to open up the elections. As Tun-Jen Cheng suggested in 1989 when examining Taiwan's initial democratic breakthrough in the 1980s, "[d]emocratization in Taiwan will continue because the ruling party has been able to maintain its dominant position in new political frameworks." Indeed, the KMT maintained its dominance for more than a decade. See Tun-Jen Cheng, *Democratizing the Quasi-Leninist Regime in Taiwan*, 41 *WORLD POL.* 471 (1989).

182. For a general discussion, see, e.g., ZHENG YONGNIAN, *THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR: CULTURE, REPRODUCTION, AND TRANSFORMATION 195–96* (2010); Cheng Li, *Intra-Party Democracy in China*, BROOKINGS INST. (China Leadership Monitor Report No. 30, 2009), <https://www.brookings.edu/research/intra-party-democracy-in-china-should-we-take-it-seriously/>; He Baogang, *Intra-party Democracy: A Revisionist Perspective from Below*, in *THE CHINESE COMMUNIST PARTY IN REFORM*, *supra* note 28, at 192. Some critics also argue that such intraparty democracy is less to do with polity than party reorganization. It is not de jure pluralism but simply de facto factional politics within the CCP, which in fact has been shadowed by Xi's consolidation of power, and therefore is paradoxical and ultimately untenable. See, e.g., LYNCH, *supra* note 14, at 77.

183. For a general discussion, see Xin He, *The Party's Leadership as a Living Constitution in China*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES* 245, 249–51 (Tom Ginsburg & Alberto Simpser eds., 2014); Kevin J. O'Brien & Rongbin Han, *Path to Democracy? Assessing Village Elections in China*, in *GRASSROOTS ELECTIONS IN CHINA* 359 (Kevin J. O'Brien & Suisheng Zhao eds., 2011).

184. Comparative research also shows that intellectuals and political dissidents in Taiwan were more radical and active than their counterparts in China. This is partially associated with the opportunity for them to participate in local elections. See Merle Goldman & Ashley Esarey, *Intellectual Pluralism and Dissent*, in *POLITICAL CHANGE IN CHINA: COMPARISONS WITH TAIWAN*, *supra* note 65, at 49, 75–76.

185. Carles Boix pinpoints international forces as an "omitted factor" in the prominent work of Adam Przeworski and Fernando Limongi which refutes the assertion about a positive correlation between development and democracy. See Carles Boix, *Democracy, Development and the International System*, 105 *AM. POL. SCI. REV.* 809, 827 (2011); Przeworski & Limongi, *supra* note 2.

Arab Spring, the outcome of which has been greatly shaped by geopolitical factors.¹⁸⁶

For the purposes of the discussion here, international pressure mainly refers to international public opinion as well as the international community's direct or indirect interference or engagement in Taiwan's and China's domestic politics. The United States, among others, has been a major source of such pressure, exerting influence on both sides. Economically, globalization has driven and accelerated legal reforms on both sides. Politically, international politics have also frequently condemned both authoritarian parties for violations of human rights and pressed the parties for better accountability. That said, international pressure has had a much greater impact on Taiwan's political transition than China's due to Taiwan's reliance on the United States for security support in the face of the potential cross-strait conflict with China.¹⁸⁷

In general, the impact of international pressure on Taiwan has been something of a U-curve over the course of the fifty-year transition.¹⁸⁸ The downward trend began after World War II when the KMT relocated to Taiwan, and it lasted until the late 1970s when the United States started rapprochement with China.¹⁸⁹ After that, feeling abandoned by its international allies, the KMT took democratic initiatives to respond to its international legitimacy crisis, which led to the beginning of the upward trend.¹⁹⁰ During the downward trend, the international context greatly helped to sustain the KMT's authoritarian rule in that anti-communism had a higher priority over democracy during the Cold War era. Nonetheless, the United States still had a great impact on Taiwan's legal reforms at this stage through its condemnation of the KMT's human rights violations and through the assistance of American legal experts. USAID, for example, was directly involved in Taiwan's economic policy making throughout the 1960s, giving rise to commercial law reforms that were mainly geared toward addressing foreign investors' demands for legalization. Such legal transplantation from the United States, especially in the

186. Hicham Ben Abdallah El Alaoui, *Foreword* to *TAKING TO THE STREETS: THE TRANSFORMATION OF ARAB ACTIVISM*, at vii (Lina Khatib & Ellen Lust eds., 2014).

187. A potential of conflict across the strait greatly shaped the mentality of both the CCP and the KMT and their respective styles of governance due to their long-term rivalry. The KMT responded to the international pressure largely based on its perception of China's diplomatic relationship with the rest of the world.

188. Jacques deLisle, *International Pressures and Domestic Pushback*, in *POLITICAL CHANGE IN CHINA: COMPARISONS WITH TAIWAN*, *supra* note 65, at 185.

189. *Id.*

190. MOODY, *supra* note 99, at 186; LARRY DIAMOND, *THE SPIRIT OF DEMOCRACY: THE STRUGGLE TO BUILD FREE SOCIETIES THROUGHOUT THE WORLD* 112 (2008).

areas of banking, securities, and corporate law, continued to take place throughout the following decades.¹⁹¹

When the international context changed after the late 1970s and the U-curve turned upwards, the KMT immediately showed its insecurity because the United States–China rapprochement gave the CCP an international context and support similar to what had been previously offered to the KMT. As a result, this series of geopolitical and diplomatic crises in the late 1970s incentivized the KMT to carry out democratization in the 1980s as a means of enhancing its legitimacy once again, both domestically and internationally.¹⁹² As a result, this international pressure also contributed to the demise of the Model in Taiwan.

In comparison, despite the prominent engagement in China's legal reforms, the international community has adopted a more sophisticated and modest strategy to engage China due to the regime's more hostile attitude on many issues.¹⁹³ The CCP has strongly defended the Model by drawing a clear line between the rule of law and democracy, and between governance and political reforms. China's global rise has granted the CCP far more autonomy than the KMT in the face of international pressure. As Carl Minzner indicates, “[f]oreign actors involved in the [legal reform] process, such as the American Bar Association or the Yale-China Law Center, have always been secondary partners invited to participate by Chinese authorities who have themselves controlled the pace, speed, and content of reforms.”¹⁹⁴

Furthermore, the CCP has been watching the democratic developments in Taiwan closely and learned from the KMT's failure to contain the Trojan horse effects. Trojan horse effects have indeed taken place, but what differentiates both sides is the KMT's and the CCP's awareness of them. In Taiwan, such effects happened before the KMT realized that legality had become a crucial component of its legitimacy. Thanks to its instrumental attitude toward law, the KMT felt comfortable, if not naive, about adopting a number of relatively well-drafted administrative laws as soon as it began modernizing the legal system

191. In contrast, the United States had little influence over the legal system during the Republican era prior to 1949 despite the involvement of the prominent American scholar Roscoe Pound as a legal advisor to the KMT administration. For a discussion about pre-1949 era, see Jedidiah J. Kroncke, *Roscoe Pound in China: A Lost Precedent for the Liabilities of American Legal Exceptionalism*, 38 *BROOK. J. INT'L L.* 1 (2012). For a discussion of post-1949 years, see WANG, *supra* note 45, at 178–95; Chen, *supra* note 47, at 111–15.

192. A number of memoirs and biographies of retired, senior KMT policymakers have unveiled how significantly these crises affected their policymaking at the time. See, e.g., HUANG TIAN-TSAI (黃天才) & HUANG ZHAO-HENG (黃肇珩), GU ZHENFU RENSHEN GJISHI (辜振甫人生紀實) [BIOGRAPHY OF GU ZHEN-FU] 413–18 (2005); ACADEMIA HISTORICA, *supra* note 140; TAYLOR, *supra* note 64, at 300, 316, 359.

193. See Katharina Pistor, *Mixed Reception: Culture, International Norms, and Legal Change in East Asia—Comment: The Law and the Non-law*, 27 *MICH. J. INT'L L.* 973 (2006); Paul Gewirtz, *The U.S.–China Rule of Law Initiative*, 11 *WM. & MARY BILL RTS. J.* 604 (2003).

194. Minzner, *supra* note 125, at 968.

in the early twentieth century. In terms of substantive and procedural constraints of state power, many of these transplanted laws were more progressive than their counterparts in Germany and Japan, two major sources of the KMT's legal transplantation. The KMT did not expect the failure of enforcing these laws to empower progressive legal professionals several decades later and thus seriously impede its legitimacy down the road.

The KMT's fall is not the only source of the CCP's wariness. Progressive lawyers played a disruptive role and brought down authoritarian rule too in Eastern Europe and Latin America. In the wake of numerous precedents, the CCP as a latecomer has taken preemptive measures and appeared much less tolerant of reform-minded lawyers. This cautiousness seems to have led to a higher degree of insecurity than that of the KMT in the face of rising right consciousness among the people. Despite its impressive economic achievements, the KMT revealed its insecurity by imposing unprecedented repressive measures targeting civil and political rights during the heyday of the Model (1960–1980). It would not be surprising if the CCP went further, given the lessons it has learned.

In short, international factors will likely have far less of an impact on China's legal and political systems. The Chinese economy and global markets are greatly interdependent at this point, and the global need for China's collaboration on geopolitical issues is also immense. The CCP may never fear losing its global position the way the KMT did prior to democratization.

E. A Comparative Look: China to Follow Taiwan?

Theories about authoritarian rule of law and constitutionalism have generally depicted authoritarian rule as transitional. This presumption may not be correct—authoritarian rule may be enduring, and a democracy may also revert to authoritarianism.¹⁹⁵ For instance, Singapore exemplifies an enduring non-liberal state with high levels of economic wealth. It has diversified the scholarly understanding of constitutionalism by representing a type of illiberal constitutionalism in a normative sense, which is arguably different from what literature labels “mere rule-of-law constitutionalism” or “instrumental

195. In the early 2000s, several China specialists proposed the “resilient authoritarianism” theory to depict the ability of the CCP, which has been able to adapt itself to changes and thus be resilient. Along with further reforms over the past fifteen years, this literature earned much less attention than before. However, it is worthy revisiting the thesis considering the reverse trend of political development after Xi rose to power. At the moment, surveys still show a high level of social and political trust in China. Seventy-seven percent of the Chinese survey respondents believed that the CCP government were responsive to their demand, while only 36% of the respondents thought so in democratic Taiwan. See WENFANG TANG, POPULIST AUTHORITARIANISM: CHINESE POLITICAL CULTURE AND REGIME SUSTAINABILITY 157 (2016). For a good literature review of “resilient authoritarianism,” see Minxin Pei, *The Chinese Political Order: Resilience or Decay?*, 21 MOD. CHINA STUD. 1 (2014).

constitutionalism.”¹⁹⁶ Similarly, academics have documented many young democracies that have reverted to authoritarianism after their democratic transitions during the global third wave of democracy.¹⁹⁷ In Taiwan, “democratic recession” remains a concern, while “democratic consolidation” is an oft-discussed topic among intellectuals. Sometimes, its staggering economy and divided politics are also accompanied by a nostalgia for authoritarianism. All in all, a dynamic and diverse evolution of authoritarianism exists, together with the ebb and flow of political fads; accordingly, our understanding of the relationship between the rule of law and authoritarianism (or democracy) needs to be more diversified.

This Article does not intend to argue that China will become an enduring, wealthy non-liberal state like Singapore. In fact, compared to the Model in Taiwan, Singapore’s model is much less compatible with China, considering the city-state’s small-size, colonial influence, and multiethnic societal structure.¹⁹⁸ What this Article would like to foreground is the rich and complex contexts that are largely missing from the current literature but should underlie any forecast of China’s transition to the rule of law based on a comparison with Taiwan’s. One such common prediction is that China will follow Taiwan’s path to democracy once the rule of law has taken root. As this Article reveals, however, the very different dynamics and structures between the legal transitions of China and Taiwan seem to suggest otherwise for the foreseeable future.

Naturally, one way or another, the presumption of a transitional authoritarian regime often gives rise to a unilinear approach to forecasting China’s future. This linear view has turned out to be theoretically problematic and empirically questionable.¹⁹⁹ In political science literature, many commentators have opted for a contingent approach, which assumes that the evolution of authoritarianism (as well as democracy) is contingent upon multiple factors.²⁰⁰ Francis Fukuyama, known for his influential thesis of “the end of history,” has changed his once-optimistic position predicting the triumph of liberal democracy; instead, he now suggests the presence of diverse transitional trajectories based on rich historical evidence dating back to the Roman and Chinese empires, with a relatively pessimistic view about Asia’s

196. Tushnet, *supra* note 73, at 397–98. See also Thio Li-ann, *Constitutionalism in Illiberal Politics*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 133, 142–43 (Michel Rosenfeld & András Sajó eds., 2012).

197. The Third Wave generally refers to the democratic transitions from the mid-1970s until the early 1990s. For a discussion about the democratic recession, see, e.g., Steven Levitsky & Lucan Way, *The Myth of Democratic Recession*, 26 *J. DEMOCRACY* 45 (2015); Larry Diamond, *The Democratic Rollback*, 87 *FOREIGN AFF.* 36 (2008).

198. For a further explanation about this view, see *supra* note 180. See also DAVID SHAMBAUGH, *CHINA’S FUTURE* 4–5, 134–36 (2016).

199. For a further discussion, see Nathan, *supra* note 1; Perry, *supra* note 108, at 6–9.

200. For a literature review in the context of the relationship between economic modernization and political democratization, see Chen & Lu, *supra* note 7, at 705–07.

future as likely to be geopolitically unstable.²⁰¹ In fact, one may not have to go back to the Roman Empire and ancient Chinese history to reach the same conclusion. The jurisdictions in Asia which have a Chinese majority have indicated such a diversity by way of contrasting development trajectories in Taiwan, Singapore, Hong Kong, and China, all of which have embraced the idea of the rule of law. While Taiwan has evolved into a liberal democracy with a free market economy, Singapore represents an illiberal democracy with remarkable state capitalism.²⁰² Hong Kong has been struggling to pursue greater democratic openness under the rule of Beijing while maintaining its classic *laissez-faire* market economy. China appears to be the most resilient Leninist state. The traits of these jurisdictions sufficiently refute the notion of a single Asian model predicting any similar pathway or outcome shared by Asian developmental states that have accepted the rule of law.

As demonstrated in Part III, a great deal of similarities between Taiwan and China do indeed exist across the board. The linear, optimistic view concerning China's rule of law transition and democratic future is arguably based on these shared paths. Both the KMT and the CCP adopted the Model in order to advance legalization which would function as a substitute for democracy, with other functional substitutes created for injecting better accountability and political competition into the party-state. Drawing support from traditional Chinese political philosophy, the Model is also widely believed to be a practical roadmap toward democracy, and both the KMT and the CCP have proven to be skillful in maximizing the utility of the rule of law during the borrowed time. Gradually, continued legal reforms in both predemocratic Taiwan and China fostered a rising rights consciousness and indeed forced the party-states to take legality more seriously. In the face of Trojan horse effects, both parties have been compelled to bind themselves to the legality that has gradually become part of the legitimacy of the regime in addition to economic growth and nationalism.

That said, the differences between Taiwan and China shed more light on whether the Model in China will repeat its life cycle in Taiwan and lead eventually to any form of full-fledged democracy. As emphasized, the Model is merely transitional rather than conclusive. The four factors identified in this Part constitute the critical juncture of the fall of the Model in Taiwan. These critical factors, however, do not exist, have evolved very differently in China, or both. To visualize this critical juncture that brought down the Model in Taiwan, the analogy of the production of a play may be illuminating: lawyers and

201. FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER* 459, 464–79 (2011).

202. The nature of an illiberal democracy also determines the configurations of Singapore's constitutionalism. For example, Singapore emphasizes the social obligation of property rights in land and hence does not provide constitutional protection for them.

reformists driven by nationalism were the actors, with the early legislation as a ready script for the play; furthermore, competitive elections provided a large, national stage for law enforcement in addition to limited courts, while nationalism served as a great marketing tactic to attract audiences. In China, by contrast, there is an increasing but still small number of actors, fewer ready scripts and far smaller stages, and the marketing effort is diluted instead of enhanced by outward-looking nationalism. In the foreseeable future, it is unlikely that China will follow Taiwan's transition to the rule of law which had greatly contributed to Taiwan's democratization.

To be clear, theoretically or practically, a democratic China is not impossible in the long run,²⁰³ although the past few years have seen an increasingly cautious, if not pessimistic, emergent view by students of Chinese politics.²⁰⁴ As argued, the Model is transitional rather than conclusive. China's legal development remains relatively uneven and limited so it would be premature to conclude that increasing legal progress will not trigger democratization in China eventually, or that strong legality can be achieved without democracy.²⁰⁵ Many commentators have proposed various roadmaps for a potential democratic transition, based on a rich literature of democracy and the relevant contingent factors.²⁰⁶ Endogenous factors include, for example, income per capita²⁰⁷ and income inequality,²⁰⁸ while exogenous factors are also crucial, such as the structure of the international system²⁰⁹ and socio-economic crises triggered by the bursting of the bubble economy, a protracted power struggle within the party, or natural or public health disasters.²¹⁰ These factors, as argued, will eventually force the CCP

203. For example, Larry Diamond is of the view that China will inevitably democratize, and probably sooner than expected, sometime in the mid-2020s, although the first post-CCP regime will probably be "a much more dangerous form of authoritarian rule, perhaps led by a nationalistic military looking for trouble abroad in order to unify the national at home." See Diamond, *supra* note 1, at 12–13.

204. Responding to a sudden disappearance of the debate on China's potential democratization after the mid-2000s, Kevin O'Brien wondered whether most China specialists had accepted that authoritarianism is resilient and fundamentally here to stay in China. See Kevin O'Brien, *Studying Chinese Politics in an Age of Specialization*, 20 J. CONTEMP. CHINA 535, 536–37 (2011). See also LYNCH, *supra* note 14, at 69.

205. See deLisle, *supra* note 5.

206. See, e.g., SHAMBAUGH, *supra* note 198; Cheng Li, *Top-Level Reform or Bottom-up Revolution?*, 24 J. DEMOCRACY 41 (2013); Diamond, *supra* note 1; GILLEY, *supra* note 1; BAOGANG HE, *THE DEMOCRATIZATION OF CHINA* (2002).

207. Carles Boix & Susan C. Stokes, *Endogenous Democratization*, 55 WORLD POL. 517 (2003); SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 31 (expanded ed. 1981) (1960). However, the causal effect of income on democracy has been under debate for the past two decades. See, e.g., Daron Acemoglu et al., *Reevaluating the Modernization Hypothesis*, 56 J. MONETARY ECON. 1043 (2009); Daron Acemoglu et al., *Income and Democracy*, 98 AM. ECON. REV. 808 (2008); Przeworski & Limongi, *supra* note 2.

208. BOIX, *supra* note 2, at 10–11; Daron Acemoglu & James Robinson, *A Theory of Political Transitions*, 91 AM. ECON. REV. 938 (2001).

209. Boix, *supra* note 185.

210. See, e.g., Nathan, *supra* note 1; Bruce Gilley, *Taiwan's Democratic Transition: A Model for China?*, in *POLITICAL CHANGE IN CHINA: COMPARISONS WITH TAIWAN*, *supra* note 65, at 215, 224.

leaders to advance political reforms; otherwise China's economy and its political stability will be impeded, followed by a descent into disorder, a scenario that even prodemocracy activists do not want. That said, many questions remain: there is considerable uncertainty over what exactly the process will look like (peaceful or violent, bottom-up or top-down?); how long the process will take (will it be as quick as the Arab Spring, or conversely, as uncertain as the prolonged political turmoil after the Arab Spring? Would a state-controlled, gradual transition be more realistic?); and what type of polity will China end up with (a liberal or illiberal democracy; paired with communitarian, liberal democratic, or Confucian constitutionalism?). One thing, however, is certain: the debate about China's democratic future will continue and remain heated for some time to come.

CONCLUSION: TRANSCENDING THE RULE OF LAW FOR DEMOCRACY

Over the years, one fashionable opinion has been that China will follow Taiwan and eventually democratize, accompanied by its progress in rule of law reforms and increasing integration into the world economy. Not only have insightful politicians referred to Taiwan to make a case about the prospect of democracy in China, but ordinary Chinese people also closely watch how democracy runs in this culturally Chinese society across the Taiwan Strait. This view also resonates with one school of transition studies that was built on the general belief that economic and political liberalization reinforce each other and would work together to depoliticize legal institutions once ridden by politics. Indeed, Taiwan is arguably the only democratic country that has demonstrated the practices of democracy in a way that the Chinese people can easily relate to and that can inform their choices about polity design. However, anecdotal observations are insufficient to support the presumption of a linear transition. This Article bridges this gap in the literature by comparing China with Taiwan in terms of the interaction between legal and political transitions.

The first half of this Article explored the similarities between Taiwan and China, which might suggest that convergence is optimistically possible. These similarities in fact reflect how the CCP and KMT parties lead. Both parties, as self-interested, rational actors whose choice of rule of law transition strategies are shaped by their own cost-and-benefit analysis, have similar mentalities in their decisions as to what is governed by general legal principles, how this should be adjudicated, who should be granted jurisdiction over which disputes, and when chosen agencies should intervene. This is due not only to their shared Leninist party ideology and Chinese political philosophy, but also to similar settings of the institutions critical for economic reforms at the time when the parties initiated legal reforms to support development.

To forecast the future path of the Model, however, it is more critical to focus on the differences between China and Taiwan, in particular on the factors identified in this Article as Taiwan's four pillars of the transition from mere legal instrumentalism toward normative rule of law and democracy. For one, the fusion of the KMT's early legal transplantation in the mainland and the Japanese colonial legacy in Taiwan served as an advantageous starting point that facilitated the Trojan horse effects in later years. Second, Taiwan's wide and competitive local elections provided an alternative law enforcement mechanism under authoritarian rule. Equally important was the inward-looking nationalism that empowered the legal profession as a whole to challenge the legitimacy of the Model and of the KMT as an émigré regime. Lastly, the pressure exerted by geopolitics and the global economy placed great constraints on the KMT and simultaneously empowered liberal reformists, including those within the party. In comparison, these four critical factors either do not exist or have generated opposite dynamics in China's rule of law transition.

The KMT and the CCP are fraternal twins. Not only did they cope with similar political and economic conditions, but they also adopted a similar strategy to modernize the state apparatus while pursuing economic growth. However, they have nongenetic distinctions that have the potential to make their lives entirely different. This Article has cast doubt on the convergence theory that rests its argument on the similarities rather than the differences between the two sides. Reformists and policy makers who believe that China will follow Taiwan need to create alternative incentives as well as an impetus for China's transition that can compensate for the absence of the transformative factors that this Article has identified. At the opposite end of the spectrum, those who do not consider Taiwan to be a good comparison with China should revisit their claim or lose a great resource for forecasting the evolution of the Model in China. Nonetheless, the differences should not necessarily be translated into a pessimistic democratic outlook for China in the long term. New factors that did not exist in predemocratic Taiwan do, and will have a great impact on the Model, in China, such as the vibrancy of the use of the Internet and the new social media. The CCP arguably has also been placed under more pressure than the KMT to discipline its unruly local officials across the massive country by resorting to the law. With or without the transformative factors present in Taiwan, China certainly still has a long road ahead toward a future with open-ended possibilities.

