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Ian Rowen

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## THE “GAPS” AND EXCESSES OF TRANSITIONAL JUSTICE IN TAIWAN—A RESPONSE TO CALDWELL

Ian Rowen\*

*Abstract:* Ernest Caldwell’s legal history of transitional justice in Taiwan provides scholars a great service by periodizing and clearly summarizing key moments for the formulation and passage of relevant legislation. In so doing, however, it frames ongoing and perhaps ultimately unresolvable struggles over the meaning of history and the possibility of redress for past injustices as “gaps” within “Taiwan’s transitional justice experience,” belying a seemingly ahistorical conceptualization of transitional justice. The language of “gaps” suggests that transitional justice is a practice with a clearly defined and universally-accepted template, toolkit, and timeline, such that there is a commonly-understood set of criteria by which one could objectively evaluate success or completion. In fact, scholars have convincingly shown transitional justice to be constituted by an extraordinarily malleable, diverse, open-ended, and often vaguely-defined set of legal and extra-legal instruments, discourses, and practices that are conducted by a variety of actors and in pursuit of an often-divergent variety of political projects.

This brief argument is based less on the official actions of the Transitional Justice Commission itself, than on a widely-circulated unofficial statement signed by members of the Indigenous Historical Justice and Transitional Justice Committee (Indigenous Justice Committee), which was established by a presidential directive. This statement was issued as response to a speech by China’s leader, Xi Jinping, who asserted that Taiwanese and Chinese people share cultural and blood ties, and that Taiwan belongs to China. Taiwan’s indigenous signees public letter began “Mr. Xi Jinping, you do not know us, so you do not know Taiwan.”<sup>1</sup> My rejoinder here echoes this letter by suggesting that one cannot know about transitional justice in Taiwan without knowing more both about Taiwan’s relationship with China and its simultaneous imbrication and contradiction with indigenous identity and sovereignty.

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Ernest Caldwell’s legal history of transitional justice in Taiwan provides scholars a great service by periodizing and clearly summarizing key moments for the formulation and passage of relevant legislation.<sup>2</sup> In so doing, however, it frames ongoing and perhaps ultimately unresolvable struggles

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\* Ian Rowen is Assistant Professor in the School of Social Sciences at Nanyang Technological University, Singapore.

<sup>1</sup> See generally, *Joint Declaration by the Representatives of the Indigenous Peoples of Taiwan serving on the Indigenous Historical Justice and Transitional Justice Committee*, INDIGENOUS PEOPLES OF TAIWAN TO PRESIDENT XI JINPING OF CHINA, <https://g0v.hackmd.io/s/SyKTh6bM4> (last visited Apr. 22, 2019) [hereinafter *Joint Declaration*]; For Xi’s January 2nd speech, see CCTV Video News Agency, *LIVE: 40th Anniversary of Issuing “Message to Compatriots in Taiwan”*, YOUTUBE (Jan. 2, 2019), <https://www.youtube.com/watch?v=not9jASVHds>; for an analysis of Tsai’s response, see Chris Horton, *Taiwan’s President, Defying Xi Jinping, Calls Unification Offer “Impossible”*, N.Y. TIMES (Jan. 5, 2019), <http://nytimes.com/2019/01/05/world/asia/taiwan-xi-jinping-tsai-ing-wen.html>.

<sup>2</sup> Ernest Caldwell, *Transitional Justice Legislation in Taiwan Before and During the Tsai Administration*, 27 WASH. INT’L L.J. 449 (2018).

over the meaning of history and the possibility of redress for past injustices as “gaps” within “Taiwan’s transitional justice experience,” belying a seemingly ahistorical conceptualization of transitional justice. The language of “gaps” suggests that transitional justice is a practice with a clearly defined and universally-accepted template, toolkit, and timeline, such that there is a commonly-understood set of criteria by which one could objectively evaluate success or completion. In fact, scholars have convincingly shown transitional justice to be constituted by an extraordinarily malleable, diverse, open-ended, and often vaguely-defined set of legal and extra-legal instruments, discourses, and practices that are conducted by a variety of actors and in pursuit of an often-divergent variety of political projects.<sup>3</sup>

Such an ahistorical analytic “gap” is spotlighted by the tightly-focused empirical scope of his article. Although Caldwell’s attention is importantly aimed at Taiwan’s domestic affairs, and specifically its legislative actions, my short reply here will further argue, in line with an earlier co-authored piece, that such a treatment would be complemented by greater attention to the wider geopolitical context in which President Tsai Ing-wen and the Democratic Progressive Party (DPP)-majority legislature have crafted and framed their legal and political approaches to transitional justice.<sup>4</sup> This context is, of course, the ineluctable irredentist military threat represented by the People’s Republic of China (China), which overshadows much of Taiwan’s political space, and the promise and peril of transitional justice-associated language and practice as potential resources for nation-building in a such a contested and multi-cultural territory.

My brief argument here will, perhaps counter-intuitively, use as its central example not the official actions of the Transitional Justice Commission itself, which was established via legislation, but a widely-circulated unofficial statement signed by 26 of the 28 members of the Indigenous Historical Justice and Transitional Justice Committee (Indigenous Justice Committee), which was established by a presidential directive. This statement was issued on January 8, 2019, in response to a speech by China’s

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<sup>3</sup> For a fuller discussion based on multi-sited and comparative case studies, see JAMIE ROWEN, *SEARCHING FOR TRUTH IN THE TRANSITIONAL JUSTICE MOVEMENT* (2017); see generally Paul Gready & Simon Robins, *Rethinking Civil Society and Transitional Justice: Lessons From Social Movements and ‘New’ Civil Society*, 21 INT’L J. HUM. RTS. 956 (2017) (analyzing the role of civil society in transitional justice projects).

<sup>4</sup> Ian Rowen & Jamie Rowen, *Taiwan’s Truth and Reconciliation Committee: The Geopolitics of Transitional Justice in a Contested State*, 11 INT. J. TRANSITIONAL JUST. 92, 105 (2017).

leader, Xi Jinping, who asserted that Taiwanese and Chinese people share cultural and blood ties, and that Taiwan belongs to China. Taiwan’s indigenous signees public letter began “Mr. Xi Jinping, you do not know us, so you do not know Taiwan.”<sup>5</sup> My rejoinder here echoes this letter by suggesting that one cannot know about transitional justice in Taiwan without knowing more both about Taiwan’s relationship with China and its simultaneous imbrication and contradiction with indigenous identity and sovereignty.

To build this argument, it is worth briefly recapping the domestic challenges faced by the transitional justice process to illustrate why both the indigenous and cross-Taiwan Strait contexts remain so relevant. Although Taiwan’s pursuit of transitional justice witnessed several major legal and political breakthroughs, including the passage of the 2016 Illicit Assets Act and the 2017 Transitional Justice Bill, as well as Tsai’s public apology to Taiwan’s indigenous people and creation of the Indigenous Justice Committee, its implementation has been highly contentious. This is not only due to partisan fractiousness and media criticism, but also the complications of coordinating multiple agencies, including the Ministry of Culture and even the Central Bank, which may be requested to issue currency scrubbed clean of images of the late authoritarian President Chiang Kai-shek.<sup>6</sup>

The most serious transitional justice-related public relations crisis erupted in late 2017, when a Transitional Justice Commission staffer leaked an unauthorized recording of a private meeting during which then-Deputy Chairman Chang Tien-Chin flippantly suggested that the commission should “manipulate” public opinion against then-New Taipei City mayoral candidate, Hou You-yi, who Chang allegedly described as the “most despicable case [of concern] in transitional justice.”<sup>7</sup> Hou had led the Taipei Police Department’s Criminal Investigative Division during the 1989 investigation of pro-democracy publisher Nylon Deng, who self-immolated in his office as police massed outside his door. Deng has since been remembered as a martyr to Taiwan’s pro-democracy and pro-independence movements. Chang’s comments were roundly criticized both by media outlets as well as the DPP

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<sup>5</sup> See *Joint Declaration*, *supra* note 1; for Xi’s speech, see CCTV Video News Agency, *supra* note 1; for an analysis of Tsai’s response, see Horton, *supra* note 1.

<sup>6</sup> Chen Yu-fu & William Hetherington, *Currency Redesign Likely Cheaper than Speculated*, TAIPEI TIMES (Dec. 27, 2018), <http://www.taipeitimes.com/News/taiwan/archives/2018/12/27/2003706855>.

<sup>7</sup> Stacy Hsu, *Deputy Chairman Resigns From Transitional Justice*, TAIPEI TIMES (Sept. 13, 2018), <http://taipeitimes.com/News/front/print/2018/09/13/2003700317>.

leadership, including then-Premier William Lai. Not only Chang, but four of the five members present in the meeting soon stepped down, as did Commission chairman Huang Huang-hsiung.<sup>8</sup> Hou went on to handily win his election and said that if history repeated itself with the same conditions, he would have conducted his investigation the same way.<sup>9</sup>

The decision to simultaneously pursue two distinct institutional tracks—one general “Transitional Justice Commission” to address post-1945 injustices, and one aimed at indigenous issues, “The Presidential Indigenous Historical Justice and Transitional Justice Committee,” with no specific temporal bounds, will likely be remembered as one of the Tsai administration and DPP leadership’s most consequential choices for its approach to transitional justice. As Caldwell cogently notes, the legislative bills only cover the era of Kuomintang (KMT) rule of the Republic of China over Taiwan, and thereby do not directly address the injustices committed during earlier colonial periods, during which Japanese and Qing rulers had seized indigenous lands that eventually passed into the hands of the KMT and its business partners. The choice of time period, therefore, limited the possibility of long-sought measures of redress for Taiwan’s indigenous people for both KMT and pre-KMT era violations. However, rather than pursue remedies in the legislature, where eventual passage of any more transitional justice bills still remained in question, Tsai opted instead on August 1, 2016 to deliver a public apology to Taiwan’s indigenous people for “four centuries of pain and mistreatment,” and to issue “Guidelines for Establishment of the Presidential Office Indigenous Historical Justice and Transitional Justice Committee” (Indigenous Justice Commission).<sup>10</sup> Although such a high-profile apology was an unprecedented step for a Taiwanese leader to take, and scholars such as Scott Simon have argued that Tsai’s approach to “natural sovereignty” was “consistent with the spirit of both the United Nations Declaration on the Rights of Indigenous Peoples and Taiwan’s own Basic Law on Indigenous Peoples,” her later response to indigenous demands for land rights was

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<sup>8</sup> *Id.*

<sup>9</sup> Luo Yizhi (羅曄智), ‘*Zhua Zheng Nanrong wenxin wukui tan dangdang!*’ *Houyouyi: Yifa xingshi, zai lai yici haishi yao zhixin* (「抓鄭南榕問心無愧坦蕩蕩！」侯友宜：依法行事，再來一次還是要執行) [“Catch Zheng Nanxuan’s innocence and frankness!” *Hou Youyi: Acting according to law, once again, still have to perform*], STORM MEDIA (Sept. 14, 2018, 8:20AM), <https://www.storm.mg/article/495509>.

<sup>10</sup> Ing-wen Tsai, *Full text of President Tsai Ing-wen’s Apology to Indigenous People*, FOCUS TAIWAN (Aug. 1, 2016), <http://focustaiwan.tw/news/aip/201608010026.aspx>.

protested by some prominent indigenous activists who had previously supported her.<sup>11</sup>

The role of indigeneity in the forging of contemporary Taiwan’s cultural and political consciousness is too complex to be fully addressed in this brief treatment. Needless to say, it is driven both by the rich cultural diversity and social disparity within Taiwan, as well as by the instrumentality of discourses of indigeneity for the performance of national difference from China and from Chinese (or Han Taiwanese) people as an imagined community. Not only have self- or state-identified indigenous peoples staked political claims on their ethnic identities, but discourses of indigeneity have also been used by independence activists and even the campaigns and administration of past-DPP Chair and President Chen Shui-bian, among others, to assert notions of “inherent sovereignty” for Taiwan.<sup>12</sup> The reframing of such persistent legal and political problems as those of “transitional justice” has affected and arguably accelerated these projects.

Therefore, although the transitional justice legal process has been affected by partisan fractiousness and scandal, the communicative and informal institutional capacities of both the Truth and Reconciliation Committee (TRC) and the Indigenous Justice Commission have paid back other kinds of political dividends. These have not yet been manifested by, for example, a comprehensive rearticulation of indigenous land rights or formal moves towards self-rule, but rather in novel styles of national and international political performance. For example, on December 9, the TRC exonerated 1,505 people it deemed wrongly convicted of crimes during the authoritarian period. The performative effect of the exoneration was augmented by the commission’s conducting an indigenous Atayal ritual, attended by Vice President Chen Chien-jen, timed to coincide with the 70th Anniversary of the Universal Declaration of Human Rights.<sup>13</sup> The choreography of this commemoration exemplified the ongoing convergence between discourses of indigeneity and international human rights norms that characterize Taiwan’s evolving approach to transitional justice.

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<sup>11</sup> Scott Simon, *The Roots of Taiwan’s Indigenous Peoples Protests*, TAIWAN INSIGHT (Oct. 9, 2017), <https://taiwaninsight.org/2017/10/09/the-roots-of-taiwans-indigenous-peoples-protests/>.

<sup>12</sup> Scott Simon, *Paths to Autonomy: Aboriginality and the Nation in Taiwan*, in *THE MARGINS OF BECOMING: IDENTITY AND CULTURE IN TAIWAN* 221, 239 (Carsten Storm & Mark Harrison eds., 2007), [http://faculty.washington.edu/stevehar/Simon paths to autonomy.pdf](http://faculty.washington.edu/stevehar/Simon%20paths%20to%20autonomy.pdf).

<sup>13</sup> Chen Yu-fu, *Commission Exonerates 1,505 People*, TAIPEI TIMES (Dec. 10, 2018), <http://www.taipeitimes.com/News/front/archives/2018/12/10/2003705830>.

Such a convergence was made even more manifest following the January 2019 speech by Xi Jinping, which asserted that both sides of the Taiwan Strait belonged to the same Chinese nation, and that unification of Taiwan and Mainland China under a “One Country, Two Systems” framework, similar to that of Hong Kong, was a historical inevitability. This speech was widely panned in Taiwan’s public sphere. Tsai Ing-wen responded with a strongly-worded rejection of Xi’s claims, which were articulated through a normative commitment to democracy, human rights, and the rule of law. Her speech saw her approval numbers rise dramatically, a striking turnaround after the DPP suffered humiliating losses in the December 2018 city and county elections.<sup>14</sup>

Importantly, transitional justice was articulated into this political shift not by the official TRC, but by an unofficial statement signed by 26 of the 28 members of the Indigenous Justice Committee. Spearheaded by vice-Chairman Pasuya Poiconx, also Dean of the College of Indigenous Studies at National Dong Hwa University, and members Mateli Sawawan and Lin Shu-yao, Secretary-General of the Taiwan Association for Human Rights, it was completed in two days in a Facebook group discussion.<sup>15</sup> The letter took aim at the governments of both Taiwan and China, although given its addressee, it was assuredly more critical of the latter:

We are the indigenous peoples of Taiwan, and we’ve lived in Taiwan, our motherland, for more than 6,000 years. We are not the so-called “ethnic minorities” within the “Chinese nation”. The stories our ancestors tell . . . that Taiwan is — and has always been — the traditional territory of the indigenous peoples on this land. Taiwan is the sacred land where generations of our ancestors lived and protected with their lives. It doesn’t belong to China. We the indigenous peoples of Taiwan have witnessed the deeds and words of those who came to this island, including the Spanish, the Dutch, the Koxinga Kingdom, the Qing Empire, the Japanese, and the Republic of China. . . . We the indigenous peoples of Taiwan have pushed this nation forward towards respect for human rights, democracy, and freedom. After

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<sup>14</sup> Chris Horton, *Faced With Tough Words From China, Taiwan Rallies Around Its Leader*, N.Y. TIMES (Jan. 19, 2019), <https://www.nytimes.com/2019/01/19/world/asia/china-taiwan-president.html>.

<sup>15</sup> IPCF-TITV 原文會 原視, 習近平一國兩制說 原轉會: 不退讓台灣主體性 2019-01-20 Pinuyumayan IPCF-TITV 原文會 原視 族語新聞, YOUTUBE (Jan. 20, 2019), <https://www.youtube.com/watch?v=KsJW7rc3BWU>.

thousands of years, we are still here. . . . The national future of Taiwan will be decided by self-determination of the Taiwanese indigenous peoples and all the people who live on our motherland. No government, political party, or organization has the right to negotiate with any foreign power in an attempt to surrender the control of the traditional territory of ours, the indigenous peoples of Taiwan. We have never given up our rightful claim to the sovereignty of Taiwan.<sup>16</sup>

This letter is remarkable for a variety of reasons, including its claim that indigenous people were not only the sovereigns of Taiwan, but the nation’s standard-bearer for the struggle for “human rights, democracy, and freedom.” Although this was not an official statement of the Commission, it was signed by a large majority of its members, and several more signees were invited in order to include at least one representative from each of Taiwan’s recognized indigenous groups.<sup>17</sup> It was also, according to Poinconx, aimed at multiple audiences in addition to Xi, in the hopes that “Taiwanese compatriots will also recognize our circumstances as indigenous people. We hope that this letter will really present what kinds of roles we play, in the past, and also in the present, and even in the future. I think that as the country faces such a big obstacle, we indigenous people must also make our voice heard.”<sup>18</sup> The statement appeared in Taiwan’s high-circulation daily newspaper and website, the *Apple Daily*, was translated into English by “g0v,” a civil tech social activist collective, and reported on by high-profile international media outlets, including the *New York Times* and *Quartz*, which seldom cover Taiwan’s indigenous people.

In sum, while the conduct and eventual results of official commissions and committees remain crucial, what should be clear from the above account is that transitional justice discourse has already suffused domestic and international narratives of Taiwan as a nation, and of democracy and human rights within and beyond it. This underscores the important contribution of Caldwell’s scholarship. It also demonstrates the need for broader and deeper analysis of Taiwan’s case as a pioneer of transitional justice within Asia and as a potential model for other states, whether contested or not, that seek creative approaches to geopolitical and domestic public policy challenges.

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<sup>16</sup> *Joint Declaration*, *supra* note 1.

<sup>17</sup> Interview with Juan Chun-Ta, Presidential Office Consultant (Jan. 20, 2018).

<sup>18</sup> . IPCF-TITV 原文會 原視, *supra* note 15 (author translating and transcribing Poiconx’s statements).



