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How Taiwan's Constitutional Court Reined in Police Power: Lessons for the People's Republic of China

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ARTICLE

HOW TAIWAN'S CONSTITUTIONAL COURT
REINED IN POLICE POWER: LESSONS FOR THE
PEOPLE'S REPUBLIC OF CHINA*

Margaret K. Lewis & Jerome A. Cohen⁺

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INTRODUCTION

For over six decades, police in Taiwan¹ could lock up people they deemed “hooligans” (*liumang*)² for years with at most a cursory review by the courts. It was not until Taiwan’s Constitutional Court (the “Court”)—also known as the Grand Justices of the Judicial Yuan—stepped in that important change began to occur, culminating in the ultimate repeal of the law

1. In this Article, we use “Taiwan” to refer to the territory under the effective control of the Republic of China (“ROC”) government (including the island of Taiwan itself as well as Matsu, Penghu, and Kinmen (a.k.a. Jinmen or Quemoy)), unless otherwise specified.

2. We use the pinyin Romanization of the Chinese characters for the term instead of translating “*liumang*” into English. Considering the lengthy development of the unique concept of *liumang* in Taiwan, it is not surprising that the term does not lend itself to easy translation. Varyingly translated as “hooligan,” “hoodlum,” and “gangster,” *liumang* does not fit squarely into the definition of any of these words. Hooligan raises images of youth and especially young sports fans who have crossed the line from exuberant to destructive behavior. Although hoodlum does not carry the same youthful connotation, it still implies a certain thuggish quality that does not necessarily embrace the full panoply of *liumang* behavior. The nuances among the various terms related to “hooliganitis” were humorously explored in a 1981 *New York Times* piece. See William Safire, *On Language*, N.Y. TIMES MAG., Aug. 16, 1981, at 9. Finally, “gangster,” by definition, indicates that the person is involved in some sort of shady, if not blatantly criminal, organization. Although the concept of *liumang* includes people involved in gangs, a person can act entirely independently when engaging in *liumang* behavior. “Liumang” further has a non-legal aspect and has played into popular culture both in Taiwan and Mainland China. For example, in his article titled *Wang Shuo and Liumang (‘Hooligan’) Culture*, Geremie Barmé explains, “Liumang is a word with some of the most negative connotations in the Chinese language. Here the expression is used loosely in an attempt to describe both a social phenomenon and its cultural refraction.” Geremie Barmé, *Wang Shuo and Liumang (‘Hooligan’) Culture*, 28 AUSTL. J. CHINESE AFF. 23, 28 (1992). As with the term “*liumang*,” the Liumang Act has a variety of translations, most notably “Act for the Prevention of Gangsters,” “Anti-Hoodlum Law,” and “Anti-Hooligan Act.”

that authorized the police-dominated process. As a result, in 2009, all of Taiwan's imprisoned liumang who did not have concurrent criminal sentences were released.

The path toward abolition—albeit winding, long, and complex—is a glowing example of the judiciary, executive, and legislature carrying out their respective duties in a democratic, cooperative, and relatively transparent manner. In particular, the often-overlooked Court played an essential role in curbing police power. This Article discusses the detailed process by which judges, officials, and legislators—spurred by civic groups, lawyers and academics—brought about annulment of the relevant legislation, the Act for Eliminating Liumang (檢肅流氓條例) (The “Liumang Act” or “LMA”). Crucial to this process was a series of Court interpretations, combined with sustained efforts by law reform groups and a gradual realization by the legislative and executive branches that the Liumang Act could no longer be justified as compatible with the values of post-martial-law, democratic Taiwan. The Court's gradual invalidation of various provisions of the Liumang Act was a necessary, albeit standing alone insufficient, force behind the Act's ultimate abolition.

Part I of this Article introduces the former legal regime for punishing liumang. Part II takes a step back to explain how the Court functions and the scope of its powers. We address the Court's initial interpretations regarding the punishment of liumang in Part III, followed in Part IV by a detailed analysis of the final interpretation and the two underlying petitions for constitutional review that stimulated it. Part V charts the Liumang Act's rapid demise after the Court's final interpretation.

In Part VI, we look across the strait to consider what lessons Taiwan's experience has for the People's Republic of China (“PRC”) now that it has finally abolished its analogous police-imposed punishment system of re-education through labor (“RETL”). Because of the extremely limited role of constitutional interpretation in the PRC, reforms to RETL had to await a purely political solution rather than a judicial decision or even a constitutional interpretation by the Standing Committee of the National People's Congress, the only PRC institution explicitly authorized to make such an interpretation.

The Decision of the Chinese Communist Party's Central Committee in late 2013 announcing that RETL would be abolished provided the requisite political will to finally end RETL in December 2013. Abolition of RETL is an important milestone in the PRC's journey to limit unfettered police power. Serious questions remain, however, about alternative punishment systems that are already being used in place of RETL. The issue now is whether the PRC truly took a step towards reining in police powers or merely shifted those powers to different forms of so-called "administrative" punishments" as well as increased application of some of the vaguer provisions of PRC criminal law.³

I. *THE LEGAL REGIME FOR PUNISHING LIUMANG*

Taiwan, an island one hundred miles away from the southeast coast of mainland China, was officially incorporated into China's territory by the Qing Dynasty in 1683. In 1895, the Qing Dynasty, after being defeated in the first Sino-Japanese War, ceded Taiwan and its outlying islands to Japan. In 1945, however, at the end of World War II, Japan was forced to renounce jurisdiction over Taiwan and the island again fell under Chinese rule. The government of the Republic of China ("ROC"), controlled by President Chiang Kai-shek's Nationalist Party ("Kuomintang" or "KMT"), reintegrated the island into the ROC's territory. After losing the Chinese Civil War to Mao Zedong's Communist Party on the Mainland in 1949, the KMT regime took refuge on the island of Taiwan, which was already under its martial law, and made the island its exclusive base for maintaining the ROC government.

For the subsequent four decades, the KMT suspended parts of the ROC Constitution⁴ and consolidated power in the executive branch and the military under the Temporary Provisions Effective During the Period of Communist Rebellion

3. See, e.g., Verna Yu, *Labour Camps May Become a Thing of a Past, But What Will Replace Them?*, S. CHINA MORNING POST, Nov. 5, 2013, http://www.scmp.com/print/news/china/article/1347815/labour-camps-may-become-thing-past-what-will-replace-them?utm_source=edm; *infra* Part VI (discussing the various police options, legal and illegal, for replacing re-education through labor ("RETL")).

4. MINGUO XIANFA [Constitution] (1947) (Taiwan), *translated at* <http://english.president.gov.tw/Default.aspx?tabid=434>.

(“Temporary Provisions”). The KMT’s “complex structure of external and internal security organizations” wielded ultimate power over the island.⁵ The KMT’s ordinarily discreet, albeit tremendous, day-to-day police power was on full display during several high-profile outbreaks of public unrest. Among the most egregious exercises of repression were the violent silencing of protestors and dissidents following the “2-28” uprising of February 28, 1947, and the harsh government response to pro-democracy demonstrations culminating in the notorious crackdown following the 1979 Kaohsiung Incident on International Human Rights Day.

Throughout the martial law period, the police easily found support for their actions in suppression-friendly laws and regulations. Although outwardly aimed at liumang behavior, such as gang participation and gambling activities, the relevant legal framework—the Act for Eliminating Liumang During the Period of Communist Rebellion (The “1985 Liumang Act”) and its forerunner, Taiwan Province Measures on Repressing Liumang—also provided expedient measures for silencing political opponents who did not fit the conventional description of liumang.⁶ As was the case in practice under RETL on the Mainland, police unilaterally made the decision to condemn liumang. The punishment imposed on liumang at the time was the dreaded *guanxun* (管訓), translated literally as “control and training.” However, “control and training” was, in actuality, an extraordinarily harsh military-administered punishment that could be used to detain perceived troublemakers indefinitely.⁷

5. Edwin A. Winckler, *Institutionalization and Participation on Taiwan: From Hard to Soft Authoritarianism?*, 99 CHINA Q. 481, 491 (1984).

6. See Taiwan Sheng Jieyan Shiqi Qudi Liumang Banfa (台灣省戒嚴時期取締流氓辦法) [Taiwan Province Measures on Repressing Liumang During the Martial Law Period] (1955) (Taiwan) [hereinafter Taiwan Province Measures on Repressing Liumang During the Martial Law Period], replaced in 1985 by Dongyuan Kanluan Shiqi Jiansu Liumang Tiaoli (動員戡亂時期檢肅流氓條例) [Act for Eliminating Liumang During the Period of Communist Rebellion] (1985) (Taiwan). The more simply named Jiansu Liumang Tiaoli (檢肅流氓條例) [Act for Eliminating Liumang] [hereinafter Act for Eliminating Liumang] followed in 1992 and remained in effect until January 2009.

7. The 1955 Measures provided a powerful means of locking up people under the guise of “studying life skills.” Taiwan Province Measures on Repressing Liumang During the Martial Law Period, *supra* note 6.

The Law for the Punishment of Police Offenses served as a potent supplementary device for police during the martial law period.⁸ Under that law, a counterpart to the PRC's then-prevailing Security Administration Punishment Regulations, police could summarily detain people for up to two weeks at local police stations for a wide range of minor offenses with no participation by prosecutorial or court officials.⁹

In 1971, one scholar commented on the police's broad discretion: "Administrative regulations have defined an extremely broad area within which the police have a free hand to use whatever methods they consider effective and proper."¹⁰ Consequently, despite the fact that the KMT had brought with it to Taiwan the ROC's Criminal Procedure Code (刑事訴訟法),¹¹ police could easily avoid the judicial process required by the Code. Although the KMT's tight grip on the judiciary during the years of martial law virtually guaranteed desired outcomes if it chose to invoke the formal criminal process, in many cases—especially politically charged ones—it was more convenient to bypass the judicial system by resort to administrative punishments.

The government announced the cancellation of martial law on July 15, 1987, but the actual transition of power from military to civilian authorities took several years. The government only abolished the Temporary Provisions in 1991 and did not dissolve the feared Taiwan Garrison Command that presided over the military justice system until July 31, 1992, marking the definitive shift to civilian control.

In contrast to the entrenched police repression on the Mainland under Communist rule, the past twenty years have witnessed a startling transformation of Taiwan's criminal justice

8. Wei Jing Fa Fa (違警罰法) [Law for the Punishment of Police Offenses] (promulgated Sept. 3, 1943, effective Oct. 1, 1943, last amendment Oct. 21, 1954) (Taiwan), available at <http://law.moj.gov.tw/LawClass/LawContent.aspx?PCODE=D0080077>.

9. For a detailed description of policing practices in Taiwan, see generally Jeffrey Martin, *A Reasonable Balance of Law and Sentiment: Social Order in Democratic Taiwan from the Policeman's Point of View*, 41 *LAW & SOC'Y REV.* 665 (2007).

10. Lung-Sheng Tao, *Reform of the Criminal Process in Nationalist China*, 19 *AM. J. COMP. L.* 747, 764 (1971).

11. XINGSHI SUSONG Fa (刑事訴訟法) [Criminal Procedure Code] (promulgated July 28, 1928, amended June 23, 2010) (Taiwan), available at <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp>.

system. Perhaps the most immediately notable shift was the transformation of the draconian, military-run *guanxun* into the Ministry of Justice's *ganxun* (感訓) or "reformatory training," a more conventional form of imprisonment for which judicial review, albeit truncated, was required in every case.

Even during the waning years of martial law, Taiwan began to see the beginnings of judicial involvement in decisions that had formerly been left exclusively to the police. The 1985 Liumang Act had introduced the use of special "public security tribunals" (治安法庭) within the district courts to determine whether allegedly serious liumang should be incarcerated, but those courts provided little check, both because of daunting procedural barriers to mounting a defense and the courts' general pro-KMT/police propensity.¹² Even the 1992 version of the Liumang Act changed little with regard to procedures, as the police continued to have tremendous discretion to incarcerate people for up to three years. This discretion was meaningfully reined in only when the Constitutional Court became involved, as detailed in Parts III and IV below.

The gradual decline in the previously unfettered punishment powers of Taiwan's police must be viewed within the larger context of reforms to the criminal justice system that had gathered strong support. Beginning in the late 1990s, Taiwan's Criminal Procedure Code underwent seismic changes, even while further reforms to the procedures for liumang cases appeared to stall and court review of serious liumang cases remained behind closed doors without any prosecutorial involvement and using heavily truncated judicial proceedings.

The National Judicial Reform Conference in 1999 laid out the framework for sweeping criminal procedure reforms that introduced a "reformed adversarial system" (改良式當事人進行主義). This reform sought to elevate the roles of defense counsel and prosecutors in the courtroom, shift judges to a more neutral position and place the burden of proof squarely on the

12. Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 554 (2002) ("In the context of authoritarian rule, the KMT judicial authorities usually paid limited attention to the dignity or human rights of the accused.").

prosecutors.¹³ As reforms progressed, the judiciary, legislature, and executive gradually recognized the untenable gap between the new procedures applied to “criminal” cases and those used for “liumang” cases. The fact that suspected liumang often faced concurrent criminal charges for the same acts underscored the overlap between the Liumang Act and the Criminal Code (刑法) and cast further doubt on the perceived continuing need for the Act.

Over time it became clear that the Liumang Act was increasingly anachronistic when viewed against Taiwan’s Criminal Procedure Code. Yet, as Taiwan’s criminal justice system cruised forward to embrace sweeping reforms, the Liumang Act somehow fell off the bandwagon and was left stumbling to catch up. For years, the Liumang Act remained an aberration, but unique is not the same as unconstitutional. As explained in more detail below, the Constitutional Court heard challenges to the Liumang Act in 1995 and 2001, yet both times the Court, while taking certain responsive actions, declined to strike down the Act in its entirety. The Legislative Yuan, in turn, revised the Liumang Act in response to each constitutional interpretation, but the main substance of the Act remained intact. After the Court’s 2001 interpretation, reformers became concerned that the momentum behind abolishing the Liumang Act had all but ceased.

Then, in the fall of 2007, the Justices solicited opinions from legal experts on two additional petitions challenging the constitutionality of the Liumang Act that had been long pending before the Court.¹⁴ The hope among critics of the Act was that the Court would finally hold that the entire Act was unconstitutional. Instead, in Interpretation No. 636 issued on February 1, 2008,¹⁵ the Court held only that the Liumang Act had to again be revised in a piecemeal fashion, as had been

13. Margaret K. Lewis, *Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT’L L. 651, 665–66 (2009).

14. As noted below, petitions for constitutional interpretations are not publicly available, which means that people either learn their contents through the legal grapevine or only when the Constitutional Court publishes its decision to accept or reject the petition. *Infra* Part II.

15. J.Y. Interpretation No. 636, 21 SHIZI 1 (Const. Ct. Feb. 1, 2008), translated at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=636.

done in 1995 and 2001 in Interpretation Nos. 384¹⁶ and 523,¹⁷ respectively. It was the Court's view that, in its capacity as the guardian of the ROC Constitution, it was not the Court's job to demand repeal of the entire Liumang Act if more modest action was sufficient to solve the constitutional infirmities. As a result, the fate of the Liumang Act once again shifted to the legislature, which had to decide whether to repeal the Act or keep it alive, albeit in an increasingly altered form.

Interpretation No. 636 apparently persuaded Taiwan's political elite that the Liumang Act was proving to be more trouble than it was worth. After President Ma Ying-jeou took office in May 2008, the Executive Yuan recommended its abolition. In January 2009, the legislature took the dramatic step of repealing the Liumang Act in its entirety. The Court's repeated, careful review of the Liumang Act was vital to pushing the legislature into action.

II. *STRUCTURE OF CONSTITUTIONAL REVIEW*

To understand the important role of the three relevant constitutional interpretations in the demise of the Liumang Act, it is first necessary to take a step back and explain the structure of constitutional review in Taiwan.

The Constitutional Court is the final arbiter in questions that require interpretation of the ROC Constitution (憲法) and is further charged with unifying the interpretation of laws.¹⁸ Unlike ordinary judges in Taiwan, who have lifetime appointments subject to limited exceptions,¹⁹ a Justice on the Court is limited to an eight-year term. The shift from lifetime to

16. J.Y. Interpretation No. 384, 7 SHIZI 226 (Const. Ct. July 28, 1995), *translated at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=384.

17. J.Y. Interpretation No. 523 (Const. Ct. Mar. 22, 2001), *translated at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=523.

18. Although not of importance in the liumang context, the Constitutional Court also holds the power to dissolve political parties that are deemed in violation of the Constitution. *See* Sifa Yuan Da Faguan Shenli Anjian Fa (司法院大法官審理案件法) [Constitutional Interpretation Procedure Law] arts. 19–33 (promulgated Sept. 15, 1948, amended Feb. 3, 1993) (Taiwan) [hereinafter CIPL], *translated at* http://www.judicial.gov.tw/constitutionalcourt/en/p07_2.asp?lawno=73.

19. *See* MINGUO XIANFA art. 78 (1947) (Taiwan). Article 81 of the Constitution provides for lifetime tenure except if the judge has been found guilty of a criminal offense, subjected to disciplinary action, or declared to be under interdiction. *See id.* art. 81.

eight-year terms—and a reduction in the number of Justices from seventeen to fifteen—occurred in 2003.²⁰ In order to facilitate this transition and create a staggered appointment system, eight of the fifteen Justices were appointed to four-year terms in 2003, with the other seven serving eight-year terms. A Justice's term may not be renewed. Nevertheless, because of the newness of the eight-year term system, it remains to be seen whether the Additional Articles of the Constitution will be interpreted to allow a Justice to be reappointed a few years after stepping down from the bench. If a future president decides to nominate a person who has previously served as a Justice, it could result in a protracted battle because the nominee not only would need to pass through the mud-wrestling politics of the Legislative Yuan but also would need an interpretation from the Court holding that the Additional Articles of the Constitution allow for such a reappointment.

Justices are drawn from five categories: (1) Supreme Court judges; (2) members of the Legislative Yuan; (3) distinguished professors; (4) judges from international courts or other public or comparative law specialists; and (5) people who are highly reputed in the legal field and have political experience.²¹ According to the Organic Law of the Judicial Yuan (司法院組織法), no more than one-third of the Justices shall qualify under any single one of these five categories.²² Yet, an early study notes that the Constitutional Court is dominated by academics and career judges.²³ As of 2005, the Court was composed of seven

20. Despite not taking effect until 2003, these changes were adopted in 2000 as part of revisions to the Additional Articles of the Constitution of the ROC. See ZHONGHUA MINGUO XIANFA ZENGXIU TIAOWEN (中華民國憲法增修條文) [Additional Articles of the Constitution of the ROC] art. 5, translated at <http://www.gio.gov.tw/info/news/additional.htm> (last visited Apr. 29, 2014). The Additional Articles were last amended in 2005.

21. See *Sifa Yuan Zuzhi Fa* (司法院組織法) [Organic Law of the Judicial Yuan] art. 4, §1 (promulgated Mar. 31, 1947, amended Jan. 21, 2009) (Taiwan), translated at http://www.judicial.gov.tw/constitutionalcourt/p07_2asp?lawno=81. These general categories only set forth the minimal qualifications. For example, not every Supreme Court judge is qualified to serve on the Constitutional Court: the judge must have served on the Supreme Court for more than ten years and have a distinguished record during that time of service. *Id.*

22. See *id.* § 2.

23. See Thomas Weisheng Huang, *Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan*, 19 TEMP. INT'L & COMP. L.J. 1, 8 (2005) ("Despite

Justices from the judiciary, seven from academia, and one from government.²⁴ Notably, twelve of these Justices were educated abroad as well as at home.²⁵ It is unclear how the Taiwanese government reconciled this composition with the statutory one-third rule. Roughly half of the Justices' terms expired at the end of 2007. By March 2008, there were only eleven sitting Justices; the four vacancies resulted from a failure of the KMT-controlled Legislative Yuan to approve the nominees of then President Chen Shui-bian of the Democratic Progressive Party. These vacancies were filled after Ma Ying-jeou assumed office and, by May 2009, the Court was back up to its full bench of fifteen and remained at fifteen as of April 2014.²⁶

Petitions for constitutional interpretations reach the Court through several channels, many of the details of which are set forth in the Constitutional Interpretation Procedure Law (司法院大法官審理案件法)²⁷ and its Implementing Rules (司法院大法官審理案件法施行細則).²⁸ Central and local government agencies may file a request when they are uncertain about how the Constitution pertains to the exercise of their powers or when they are uncertain about the constitutionality of a particular law or order that affects their work. For example, government agencies may apply when there is a dispute among them about the meaning of the Constitution. Natural persons, legal persons, and political parties may also apply for constitutional interpretations when they believe that their constitutional rights have been infringed. In this case, there is a requirement that all other judicial remedies be exhausted before the request is filed, and the request must be directed at the constitutionality of the law or order that was applied by the court of last resort.²⁹ When

the guidelines for selecting Justices, the statistics show that the Constitutional Court has been dominated by academics and professional judicial careerists.”).

24. *See id.*

25. *See id.* (explaining that statistics “show that Justices have overwhelmingly been educated abroad, particularly in Germany, Austria, and the United States”).

26. *See* Justices of the Constitutional Court, Judicial Yuan-Justices, http://www.judicial.gov.tw/constitutionalcourt/en/p01_03.asp (last visited Apr. 29, 2014).

27. This law is more directly translated as the “Law Governing the Hearing of Cases by the Grand Justices, Judicial Yuan,” but we use the generally accepted translation in this study.

28. CIPL, *supra* note 18, art. 5.

29. At the time of writing, the Judicial Yuan had approved—but the legislature had failed to pass—revisions to the Constitutional Interpretation Procedure Law that

reviewing petitions filed by natural or legal persons, the Constitutional Court does not decide individual cases as does the US Supreme Court. Rather, it examines the constitutionality of a law or order divorced from the concrete case that gave rise to the request for an interpretation. Accordingly, in Interpretation No. 636, there is no mention of the particular facts of the *liumang* cases that prompted the petitions. Members of the Legislative Yuan may also request an interpretation when they are uncertain either as to the application of the Constitution itself or the constitutionality of a particular law. In this situation, at least one-third of the members of the Legislative Yuan must agree to the petition's filing.

Finally, with respect to judges, in 1995 the Constitutional Court held in Interpretation No. 371 that a judge may suspend proceedings *sua sponte* (i.e., by the judge's own volition) and apply for a constitutional interpretation when the judge believes that a statute or regulation that is before the court is unconstitutional.³⁰ Indeed, the first time a judge used this procedure was to question the constitutionality of the *Liumang* Act, and this same procedure was used in the petitions that led to Interpretation No. 636. Interestingly, this judge-initiated procedure is the only means of filing a petition that is not provided for in the Constitutional Interpretation Procedure Law.

Turning to the substance of the petition, the Constitutional Interpretation Procedure Law provides that a petition must include the following components: (1) purpose of the petition; (2) issues and facts, and the related constitutional provisions; (3) grounds for the petition, position adopted by the petitioner, and arguments; and (4) list of exhibits attached.³¹ These general

would introduce a number of procedural changes, including that citizens would no longer have to exhaust all channels for relief. *See* Press Release, Judicial Yuan, Sifa Yuan Yuanhui Tongguo Sifa Yuan Da Faguan Shenli Anjian Fa Xiuzheng Cao'an (司法院院會通過司法院大法官審理案件法修正草案) [Judicial Yuan Approves Draft Revisions to the Constitutional Interpretation Procedure Law] (2013), *available at* http://www.judicial.gov.tw/constitutionalcourt/p10_02.asp?id=109037.

30. J.Y. Interpretation No. 371, 7 SHIZI 26 (Const. Ct. Jan. 20 1995). The Constitutional Court's decision to allow judges in all lower courts to adjourn proceedings and refer constitutional questions to the court was significant in that it indirectly broadened citizens' access to obtain constitutional interpretations early in the litigation process.

31. CIPL, *supra* note 18, art. 8.

requirements are clarified on the Judicial Yuan's website, along with clerical issues such as the size of paper that petitioners must use.

The first step when the petition comes in the door is for a panel of three Justices to review it, determine whether the petition meets the above procedural requirements, and, if the requirements are met, pass it along to the full Constitutional Court for further discussion.³² If the petition is denied by the full court after review by the three-Justice group, the Court will issue a "decision not to accept the petition" (不受理決議). Neither the Constitution nor the Constitutional Interpretation Procedure Law expressly authorizes the Constitutional Court to pick and choose cases based on their perceived importance. In practice, we were told that the Court sometimes rejects petitions if the Justices think that they have no constitutional importance.³³ To avoid criticism, the Court might not clearly state the reason for rejection and instead note that the petition fails to state which provisions of the law in question violate specific constitutional articles or that the petition simply does not raise constitutional issues. For example, in April 2014, the Court rejected the applications of three death row inmates who claimed that the death penalty is unconstitutional.³⁴ Although the stated reason was that the applicants did not specify why the death penalty violated the ROC Constitution, it is unclear to what extent this procedural explanation was also a convenient way to avoid addressing controversial issues. In rejecting the applications, the Court acknowledged there are questions regarding both the constitutionality of the death penalty as well

32. *See id.* art. 10. From conversations with people familiar with the workings of the Constitutional Court, we were told that the fifteen Justices are divided into five subgroups, and petitions are assigned by rotation.

33. In writing this Article and the related book, we relied on Taiwan's conventional laws, rules and regulations, judicial decisions and other government publications, scholarly writings, newspaper and magazine articles, conversations with judges, prosecutors, lawyers, police, and scholars; as well as visits to government agencies, police stations, and even the institutions for punishing liumang. Names have been redacted from all conversations, as was promised to the people with whom we spoke.

34. *See, e.g.*, Wang Wenling, *3 Si Fan Shenqing Shi Xian Quan Shu Bei Bohui* (3 死犯聲請釋憲 全數被駁回) [*3 Death Penalty Petitions Dismissed in Full*], UDN.COM (Apr. 18, 2014, 8:24 PM), <http://udn.com/NEWS/BREAKINGNEWS/BREAKINGNEWS2/8621632.shtml>.

as whether it violates international human rights norms that have been incorporated into Taiwan's domestic law. The Court may also delay acceptance for long periods, as was seen in the case of the petitions addressed in Interpretation No. 636.

Constitutional Court decisions, which are consecutively numbered, are made publicly available and are conveniently posted on the Judicial Yuan's website.³⁵ For example, in Decision No. 1269, issued on July 30, 2005, the Court announced its decision to reject thirty-seven petitions, one of which addressed the Liumang Act. In a few paragraphs, the Decision describes the petition and the reasons why the Court rejected it. The petitioner had been committed to reformatory training by the public security tribunal of the Taipei District Court, and the public security tribunal of the Taiwan High Court had rejected his appeal. The Constitutional Court denied his challenge to the constitutionality of several provisions in the Liumang Act and its Implementing Rules (檢肅流氓條例施行細則) because the petition failed to meet the requirements of the Constitutional Interpretation Procedure Law; namely, the public security tribunal did not rely upon the challenged provisions in the Liumang Act when making its decision.³⁶ Albeit cold comfort for the petitioner, the decision was at least helpful to future petitioners in that it provided guidance regarding arguments that the Court found inadequate.

The rejected petitioner in the above example is far from being in the minority. The Court accepts only a tiny percentage of petitions for constitutional interpretations. As reported in an introductory brochure issued by the Court, from July 1, 1948, to September 30, 2003, the Court received 7640 petitions and issued only 566 decisions. Among the 7640 petitions filed, 815 (10.67%) were filed by governmental agencies, whereas 6825 were filed by individuals (89.33%). The pattern of only accepting a small number of cases has continued in recent years. Since 1998, the number of interpretations announced in any one year has ranged from a high of twenty-eight in 1998 to a low of 13 in 2007. According to the Judicial Yearbook, in 2007, the Court dismissed 348 cases and issued interpretations in only 13,

35 . *Interpretations*, JUSTICES CONST. CT., JUD. YUAN, R.O.C., <http://www.judicial.gov.tw/constitutionalcourt/EN/p03.asp>.

36. CIPL, *supra* note 18, art. 5, § 1.

with 176 cases listed as pending.³⁷ In 2009, the Court dismissed 412 cases and issued interpretations in only 16, with 246 cases listed as pending.³⁸

If a petition is among the rare few that are accepted, the Justices will proceed to analyze the merits and select a Justice to draft an opinion, which the designated Justice will circulate among all the Justices for discussion prior to voting.³⁹ Standard practice is for Justices to meet three times per week, with extra sessions held “when necessary.”⁴⁰ Oral arguments giving petitioners and others an opportunity to be heard in person are seldom convened, though the Court may call for them “when necessary.”⁴¹ There is no elaboration regarding what this vague “when necessary” provision actually means in practice. When one of the authors of this Article visited the Constitutional Court’s elegant courtroom, the judge showing it joked that this was probably one of the few times that the room’s lights were turned on that year—an exaggeration, but there was more truth than jest in his observation. Our research team was pleasantly surprised when the Court convened a hearing to discuss the petitions that led to Interpretation No. 636 and called on one of our Taiwanese research colleagues to appear as an expert.

Once the draft opinion is ready for a vote to adopt an interpretation regarding the constitutionality of a statute, two-thirds of the Justices must be present to constitute a quorum, and the agreement of two-thirds of those Justices present is required. The two-thirds quorum requirement is the same for an interpretation when a government order is at issue, but the agreement of only a majority of those Justices present is required.⁴² The author of the majority opinion is not disclosed, though Justices may issue individual concurring and dissenting opinions, which can be quite colorful and impassioned. The majority opinion itself is composed of the “holding” of the interpretation and a separate “reasoning” section that, true to

37. *Judicial Statistics Yearbook*, *supra* note 38.

38. *Judicial Statistics Yearbook*, *supra* note 38.

39. CIPL, *supra* note 18, art. 11.

40. *Id.* art. 15.

41. *Id.* art. 13.

42. *Id.* art. 14.

its name, details the bases for the Constitutional Court's holding.⁴³

The Constitutional Interpretation Procedure Law provides that the interpretation may instruct relevant agencies of the need to execute the interpretation and, further, determine the types and means of execution so required.⁴⁴ This general provision is the basis for the Constitutional Court's power to go beyond a mere declaration that a law is unconstitutional and actually order other government bodies to take action. As an alternative to telling other government bodies the means by which the interpretation shall be executed, the Court may simply declare a law, regulation, or order null and void and leave the other bodies to decide what action to take. A modified approach sometimes preferred by the Court is to declare that the law, regulation, or order will become null and void after a specified period, as was used by the Court in the three interpretations regarding the Liumang Act. The next Part turns to the Court's specific involvement in scrutinizing the constitutionality of the Act and, ultimately, prompting the other branches of government to repeal it.

III. INITIAL JUDICIAL INVOLVEMENT IN CURBING POLICE POWER

Although individual liumang decisions by the police formally became subject to court review as early as 1985, the special "public security tribunals" (治安法庭) within the district courts provided little check, both because of daunting procedural barriers to mounting a defense and the courts' general pro-KMT/police propensity.⁴⁵ Revisions to the Liumang Act in 1992 failed to change this review from cursory to substantive. It was only when the Constitutional Court stepped in that real change began to occur.

The Constitutional Court first addressed the Liumang Act in 1995. In Interpretation No. 384, the Court declared that five

43. *Id.* art. 17, § 1.

44. *Id.* § 2.

45. See Wang, *supra* note 12, at 554 ("In the context of authoritarian rule, the KMT judicial authorities usually paid limited attention to the dignity or human rights of the accused.").

articles of the Liumang Act were unconstitutional.⁴⁶ First and foremost, the Court held that Articles 6 and 7, which empowered the police to force people to appear without any judicial approval, violated the right to physical freedom of the person (人身自由), as provided in Article 8 of the Constitution. Article 8 requires that, except in the case where a person is discovered while committing a crime or immediately thereafter (i.e., in *flagrante delicto*), no person shall be arrested or detained other than by judicial or police agencies in accordance with “procedures prescribed by law.” The Court further emphasized that any law used to deprive people of their physical freedom must be proper in substance (其內容更須實質正當) and comply with Article 23 of the Constitution, which provides that freedoms and rights enumerated in the Constitution shall not be restricted by law except as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order, or to advance public welfare. After stating these constitutional bases, the Court held Articles 6 and 7 of the Liumang Act unconstitutional because, as then written, they authorized the police to force people to appear before them without following any judicial procedures. In accordance with this Interpretation, the legislature revised the articles that addressed the police’s authority to force suspected liumang to appear for questioning. The revised articles required that police first obtain judicial approval or, when exigent circumstances required immediate action, that there be prompt judicial review after the fact.

Second, the Constitutional Court held in Interpretation No. 384 that the secret witness system as then set forth in Article 12 of the Liumang Act deprived the accused of the right to defend oneself and hampered the truth-finding function of the Court. Despite this holding, the resulting revisions that allow for secrecy only “when necessary” did little in reality to increase the transparency of the witness system.

Third, the Court struck down the practice of requiring people to serve time in prison followed by time in reformatory training, or vice versa, for the same act. The Justices began by

46. J.Y. Interpretation No. 384, 7 SHIZI 226 (Const. Ct. July 28, 1995), translated at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=384.

noting that, as then written, Article 21 of the Liumang Act allowed the imposition of reformatory training after execution of a criminal punishment for the same act, without regard to whether there was a special preventive necessity to do so. This practice, the Justices explained, could result in the loss of bodily freedom (身體自由).

The legislature revised Article 21 to provide that, if the liumang behavior for which the accused was committed to reformatory training was also the basis for criminal punishment, time spent serving the criminal punishment and time spent in reformatory training would be mutually set-off (相互折抵) on a one-day-for-one-day basis. Finally, the legislature expanded the relief channels available to liumang in response to the Court's holding that Article 5 failed to protect the constitutional right to lodge administrative appeals and institute administrative litigation.⁴⁷

Notably, shortly before issuance of Interpretation No. 384, the Law for the Punishment of Police Offenses passed into history. And, once again, the Court played a key role in the process. In 1990, the Court declared that certain provisions of that law would cease to be effective on May 1, 1991, because those provisions violated the Constitution's protection of physical freedom. In response, the legislature replaced the offending law with a new Social Order Maintenance Law that addresses mild disruptions of social order and is still in use today.⁴⁸ This law covers a wide array of offenses ranging from illegally using another person's identifying documents, to mistreating animals, to willfully picking another person's flowers or other vegetation.⁴⁹

The maximum punishment under the Social Order Maintenance Law is detention (拘留) of up to five days. Significantly, the courts—not the police—have the power to impose this punishment. The law specifies clear judicial decision-making procedures. Aside from enumerated minor violations for which detention is never allowed, if the police,

47. MINGUO XIANFA art. 16 (1947) (Taiwan).

48. Shehui Zhixu Weihu Fa (社會秩序維護法) [Social Order Maintenance Law] (June 29, 1991) (Taiwan), translated at <http://law.moj.gov.tw/LawClass/LawContent.aspx?PCODE=D0080067>.

49. See *id.* arts. 66, 79, 88.

following investigation, believe detention is necessary, they must transfer the case to the district court for a ruling by the summary division, in which single judges decide cases based on the files and without requiring a hearing. If the court orders detention and, without a valid reason, the violator does not appear after receiving notice, only then can the police force the person to appear. The law further includes a chapter on “Relief” (救濟) for people who wish to challenge their punishment. In 2009, 6690 new social order maintenance cases were filed with the district courts, representing a noticeable decrease from the 8754 cases filed in 1998.⁵⁰ Of the 6294 cases closed in 2009, 2028 people were sentenced to detention. Of those people, 1569 were sentenced to one day and only one person was sentenced to over three days.⁵¹

Interpretation No. 523, issued in 2001, precipitated more modest reforms to the Liumang Act than its predecessor. This time, the Justices held that the procedures used for confining suspected liumang under Article 11 of the Liumang Act violated Articles 8 and 23 of the Constitution:

This confinement . . . is a serious restraint on people’s physical freedom. Nevertheless, the Act does not explicitly provide the conditions upon which a court may base its imposition of confinement The Act grants the court discretion to decide the accused’s confinement without regard for whether he is continuing to seriously breach social order, or if he will obstruct the court’s hearing of the case by fleeing, destroying evidence, or threatening informants, victims, or witnesses.⁵²

The Constitutional Court held that the offending provisions would become null and void one year from the date of the Interpretation. Within that year, in 2002, the legislature revised Article 11 by including specific criteria for determining whether confinement was required and by adding two new articles (Articles 11-1 and 11-2) that detailed procedures for canceling (撤銷), stopping (停止), and repeating (再予留置) confinement.

50. *Judicial Statistics Yearbook*, *supra* note 38, tbl. 71.

51. *Judicial Statistics Yearbook*, *supra* note 38, tbl. 72.

52. J.Y. Interpretation No. 523 (Const. Ct. Mar. 22, 2001), *translated at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=523.s

Several years passed with no action from the Constitutional Court, despite reported calls for further judicial review.⁵³ Then, on January 28, 2005, Judge Guo Shu-hao, a public security tribunal judge from the Taichung District Court, applied for an interpretation (the “Taichung Petition”).⁵⁴ Judge Guo suspended proceedings in a liumang case pending before him because of doubts about the constitutionality of the Liumang Act. In December 2005, a similar petition was submitted by a second public security tribunal judge, Judge Qian Jian-rong of the Taoyuan District Court (the “Taoyuan Petition”).⁵⁵ Nearly two years of silence followed. Eventually, in the autumn of 2007, the Constitutional Court convened a hearing to address the issues raised in these two petitions. Interpretation No. 636 followed on February 1, 2008. The detailed legal arguments behind this final and most important interpretation are taken up in the next Part.

IV. *INTERPRETATION NO. 636*

In the Taichung Petition, Judge Guo presented a targeted challenge to the definition of “liumang,” arguing that several of the enumerated categories of liumang behavior violated the constitutional principle of legal clarity (法律明確性原則). Although Judge Qian, in the Taoyuan Petition, also raised this argument, he mounted a more sweeping attack on the Liumang Act, ranging from the constitutionality of the secret witness system to the practice of imposing both reformatory training and criminal punishments for the same act. The main constitutional arguments raised in the petitions are discussed below, along with the Court’s responses thereto.

53. The influential Judicial Reform Foundation (民間司法改革基金會) formed a group to study the Liumang Act. The group suspended its efforts, however, after its petitions failed. Further Constitutional Court interpretations supported by the group and other efforts to repeal the Liumang Act were similarly unsuccessful.

54. Guo Shu-hao, Petition for J.Y. Interpretation (filed with Const. Ct. Jan. 28, 2005) (on file with authors) [hereinafter Guo Shu-hao petition].

55. Qian Jian-rong, Petition for J.Y. Interpretation (filed with Const. Ct. Dec. 16, 2005) (on file with authors) [hereinafter Qian Jian-rong petition].

A. *Definition of Liumang and the Principle of Legal Clarity*

The two petitions vigorously challenged the constitutionality of the statutory definition of liumang. In the Taichung Petition (the narrower of the two), Judge Guo focused on two categories in the definition and argued that the descriptions therein violated the constitutional principle of legal clarity. Sections 3 and 5 of Article 2, as then written, listed the following types of liumang behavior:

3) People who occupy territory; commit blackmail and extortion; force business transactions; eat and drink without paying; coerce and cause trouble; tyrannize good and honest people; or manipulate matters behind the scenes to accomplish the foregoing.

. . .

5) People who are habitually morally corrupt or who habitually wander and act like rascals and the facts are sufficient to believe that they have undermined social order or endangered the life, body, freedom, or property of others.

Judge Guo honed in on the following four types of behavior, though his petition indicated that other parts of the definition possibly also failed to pass constitutional muster: coercing and causing trouble (要挾滋事); tyrannizing good and honest people (欺壓善良); being morally corrupt (品行惡劣); and wandering and acting like rascals (遊蕩無賴). According to Judge Guo, it violated the right to physical freedom, as provided for in Article 8 of the Constitution, to incarcerate people based on these descriptions.⁵⁶ Quoting the Constitutional Court's holding in Interpretation No. 384, Judge Guo contended that these sections failed to satisfy the requirement that any law used to deprive people of their physical freedom must be proper in substance. Moreover, he asserted that the provisions failed to comply with Article 23 of the Constitution, which provides that freedoms and rights enumerated in the Constitution shall not

56. As previously discussed, Article 8 of the Constitution provides, in part, that "physical freedom shall be guaranteed to the people. In no case except that of *flagrante delicto*, which shall be separately prescribed by law, shall any person be arrested or detained other than by a judicial or police organ in accordance with procedures prescribed by law." MINGUO XIANFA art. 8 (1947) (Taiwan).

be restricted by law except as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order, or to advance public welfare.

Judge Guo explained that one aspect of laws being proper in substance is the principle of *nulla poena sine lege* (罪刑法定主義), namely, the principle that there be no punishment without a law authorizing it. This requirement is a basic component of what is broadly known as the principle of legality—the foundational principle that laws be clear and ascertainable. In the criminal context, this requires that people be able to determine what acts are being criminalized.⁵⁷ Otherwise, the law does not serve as an effective guide and people are left without understandable rules to which they can conform. The Constitutional Court explicitly addressed the principle of legality in Interpretation No. 384, in which it wrote that “substantive due process of law covers both substantive law and procedural law and, for substantive law, it must comply with the principle of *nulla poena sine lege*.”⁵⁸ Likewise, as part of the Taoyuan Petition’s more broad-based attack on the Liumang Act, Judge Qian contended that the definition of liumang violated “the principle of *nulla poena sine lege*” (罪刑法定主義) and “the principle of clarity of crimes and punishments” (罪刑明確性原則).⁵⁹

57. As described by one American scholar:

The most fundamental tenet of criminal law is the principle of legality, which today means that criminal liability and punishment can only be predicated on a prior legislative enactment that states what is proscribed as an offense in a precise and clear manner. This is a concept that is reliant on various doctrines, most significantly the “void for vagueness” doctrine and the doctrine of “strict construction.”

John. F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 *DENV. U. L. REV.* 241, 244–45 (2002).

58. J.Y. Interpretation No. 384, 7 SHIZI 226 (Const. Ct. July 28, 1995), translated at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=384.

59. Judge Qian wrote that “the principle of clarity of crimes and punishments” is an important component of *nulla poena sine lege* (罪刑法定原則重要的內涵之一就是罪刑明確原則). Exact phrasing aside, this is a “void for vagueness” argument. In the same section of his petition, Judge Qian further raised the principle of equality (平等原則), namely that people should be treated equally under the law and they should not be subject to unreasonable disparities in treatment (均應平等對待, 不得有不合理的差別待遇). Yet, the fact that there was great disparity in the application of the Liumang Act appears to be more a result of the vagueness problem than a separate ground on which

Although not apparent in the text of the Liumang Act, the principle of legal clarity—specifically *nulla poena sine lege*—is explicitly provided for in the Criminal Code. Article 1 provides that, to be punishable, behavior must be clearly stipulated as punishable by law at the time of the act. This provision, however, is of no concrete guidance in the liumang context because the Criminal Code is freestanding. A challenge to the liumang definition thus had to be rooted directly in the text of the Constitution. The problem is that it is less than clear as to how “clear” a law must be to satisfy constitutional concerns. The very contours of the principle of legal clarity are hard to pin down.

To give shape to this abstract principle, Professor Jaw-perng Wang of National Taiwan University School of Law advocated looking outside Taiwan. In commentary on the constitutionality of the Liumang Act that Professor Wang gave at an academic conference and later submitted to the Constitutional Court,⁶⁰ he explained that the principle of clarity for criminal laws (刑法明確原則) is equivalent to the US constitutional principle of “void for vagueness.”⁶¹ Professor Wang cited the writings of a US legal

to challenge the Act. Judge Qian introduced various aspects of inequality that were raised by the Liumang Act’s application. First, for people who committed a criminal act and who were also determined to be liumang—as compared with pure criminal defendants (i.e., those not simultaneously targeted as liumang)—there was an unreasonable disparity in treatment. Second, within the realm of liumang, various categories of people (i.e., as described by Judge Qian, warned liumang, serious liumang, recidivist liumang after a warning, recidivist liumang after reformatory training, and serious liumang who are caught in the act) received significantly different treatment, and it was difficult to articulate the criteria for making the distinctions. Qian Jian-rong petition, *supra* note 55, at 11. That similarly, or in some cases identically, situated people were in jeopardy of being subject to unequal treatment was vividly demonstrated by a case in which a district-court public security tribunal judge ruled that two people who bird-napped pigeons were not serious liumang. On appeal, one panel took the position that the accused was a serious liumang, and the other ruled that the behavior did not have the requisite characteristic of being an offensive violation. The exact same factual scenario thus led to two contrasting outcomes.

60. Jaw-perng Wang, Professor, National Taiwan University School of Law, Speaker at the National Taiwan University School of Law’s Conference: “Taiwan’s System for Dealing with Liumang: Constitutionality, Criminal Justice, and Broader Implications” (Dec. 14, 2006). Prof. Wang’s address was later published in 2008. In November 2007, Professor Wang was asked by the Constitutional Court to present his views on whether the Liumang Act was constitutional.

61. *See* Wang, *supra* note 60, at 9; *see also* [Jaw-perng Wang, *Yige Tiaoli, Bachu Weixian: Lun Jiansu Liumang Tiaoli* (一個條例，八處違憲—論檢肅流氓條例)] [*The Liumang Act: One Law, Eight Unconstitutional Aspects*], 155 YUETAN FAXUE ZAZHI [TAIWAN L. REV.] 121 (2008).

scholar, John Calvin Jeffries, Jr., in explaining the principle's theoretical underpinnings.⁶² Jeffries draws upon three intertwined doctrines. First is the principle of legality, which “stands for the desirability in principle of advance legislative specification of criminal misconduct.”⁶³ Simply put, the principle condemns judicial crime creation.⁶⁴ Second, Jeffries addresses the vagueness doctrine, which he describes as “the operational arm of legality”: “It requires that advance, ordinarily legislative crime definition be meaningfully precise—or at least that it not be meaninglessly indefinite.”⁶⁵ The third doctrine, the rule of strict construction, provides that criminal statutes be strictly construed against the state.⁶⁶ Jeffries describes this rule as “[t]he second doctrine said to implement the ideal of legality.”⁶⁷ Professor Wang centered his argument on the vagueness doctrine, as did Judges Guo and Qian. In view of the extremely mushy wording of the contested provisions in the liumang definition, it is hard to see how the rule of strict construction would be of any help. The definition is not merely ambiguous, rather it is hopelessly vague.⁶⁸ How can one strictly construe the phrase “wandering and acting like rascals”?⁶⁹

62. John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985).

63. *Id.* at 190.

64. *Id.* at 189.

65. *Id.* at 196 (citations omitted).

66. This rule that ambiguity in a criminal law be resolved against the government and to the advantage of the accused is also known as the “rule of lenity.”

67. Jeffries, *supra* note 62, at 198.

68. In his article, Professor Decker, explains: “A relative of vagueness, ambiguity appears where otherwise understandable legislation lends itself to two or more equally plausible interpretations.” Decker, *supra* note 57, at 243. Despite being two distinct concepts, it is not always clear when legislation tips from being ambiguous to vague, or vice versa: “at what point is it permissible to conclude the legislation contains sufficient specificity that it can be described as ambiguous rather than vague?” *Id.*

69. Neither Judges Qian nor Guo pursued what would be called an “overbreadth argument” in American jurisprudence:

If a party challenges an enactment based on the assertion that one cannot determine whether the regulation intrudes upon otherwise “innocent terrain” then the complaint is one of vagueness. On the other hand, if a challenge is based on an objection that the regulation does, in fact, intrude into territory where it does not belong, then the claim is one of overbreadth. *Id.* at 266. For example, neither judge contended that the Liumang Act could be used against people who were staging peaceful demonstrations outside Taiwan’s Presidential Palace, a not infrequent occurrence.

In his commentary, Professor Wang explored three reasons raised by Jeffries as to why an unclear provision in the criminal law should be void for vagueness.⁷⁰ First, a vague provision violates the separation of powers principle. In those circumstances, the legislature has essentially abandoned its responsibility to define crimes, leaving the courts to take the legislature's rightful place.⁷¹ In liumang cases, the courts were left to flesh out abstract phrases, such as "habitually morally corrupt," with no legislative guidance. The overarching legislative requirement that the conduct in question be "sufficient to have undermined social order" raised similar concerns because it forced judges into the shoes of legislators. The Implementing Rules' further paltry guidance that conduct be "unspecific" (不特定), an "offensive violation" (積極侵害性), and "habitual" (慣常性) was of little, if any, help.⁷²

Second, a vague provision violates the doctrine of notice because the government fails to give people fair notice of what constitutes criminal behavior. As explained by the US Supreme Court, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."⁷³ Did the Liumang Act give fair warning as to when a person's behavior crossed the line between being merely unsociable and rude and instead being downright unlawful? Could a person of common intelligence determine at what point he transformed himself from a contemptible but legal louse to a liumang?

In the Taichung Petition, Judge Guo asserted that people were unable to predict when the Liumang Act would apply to their conduct because of the lack of clarity in the definition of liumang. Judge Guo pointed out that, not only were the aforementioned types of liumang behavior unclear, but also there were no supplemental criteria that made them more

70. See Wang, *supra* note 61, at 11.

71. See Jeffries, *supra* note 62, at 202.

72. Jiansu Liumang Tiaoli Shixing Xize (檢肅流氓條例施行細則) [Implementing Rules for the Act for Eliminating Liumang], art. 4 (promulgated Nov. 27, 1985) (Taiwan).

73. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (citations omitted).

concrete. While acknowledging that absolute clarity is impossible, Judge Qian emphasized the need for people to be able to predict what conduct the law proscribes and argued that, as such, the individual requirements of a crime's components must be concretely described. Like Judge Guo, he attacked the definition of *liumang* because it failed to provide the necessary guidance for people to understand what exactly was proscribed. The Implementing Rules' listing of three characteristics of behavior "sufficient to have undermined social order" was stunningly unhelpful in providing concrete guidance both to individuals who might be deemed *liumang* and, as explained further in the following paragraph, to judges who needed to interpret the law. Indeed, both petitions were written by public security tribunal judges whose jobs were to apply the abstract criteria to specific cases on a daily basis. No one was better suited to give a candid appraisal of how the *liumang* criteria worked in practice, or did not work, as the case appeared to be.

Third, unclear criminal laws are unable to control the indiscriminate exercise of power by the authorities because there is no ascertainable standard of guilt. In other words, there is a threat of arbitrary and discriminatory enforcement because people enforcing the law can essentially base decisions on personal preferences.⁷⁴ Of course, a modicum of discretion is unavoidable, and often desirable, in any criminal justice system. The question is when discretion tips from being a positive force into one that creates an enforcement free-for-all. Professor Wang contended that this third rationale was the strongest basis for the Constitutional Court to hold that certain provisions in the *liumang* definition were unconstitutionally vague.⁷⁵ In particular, he argued that the following proscribed behaviors listed in Article 2(3) and (5) were unconstitutional because people enforcing the law ended up doing so in an arbitrary and discriminatory manner: occupying territory (霸佔地盤); eating and drinking without paying (白吃白喝); tyrannizing good and honest people (欺壓善良); being morally corrupt (品行惡劣); and wandering and acting like rascals (遊蕩無賴).⁷⁶

74. See Jeffries, *supra* note 62, at 212.

75. See Wang, *supra* note 60, at 12.

76. See *id.* at 12.

As Judge Qian pointed out, there were problems with the inherent lack of clarity in the criteria upon which police identified warned liumang and serious liumang.⁷⁷ Even if a person satisfied the general liumang definition, the Liumang Act added another layer of complexity by separating liumang into two categories. Those in the first, milder category, received sanctions limited to a warning (告誡) and a one-year “guidance” period—a period of police-administered supervision resembling probation.⁷⁸ The term “guidance” (輔導) is a bit of an Orwellian euphemism because during the one-year period the emphasis was more on observing the person’s behavior rather than counseling him to reform. These “warned liumang” (告誡輔導流氓—literally “liumang warned and under guidance”)⁷⁹ did not see the inside of a courtroom, except in the rare event that one eventually challenged the determination of his status in administrative court. In contrast, a person alleged to be in the second category, a “serious liumang” (情節重大流氓—literally “liumang for whom the circumstances are serious”), was brought before a public security tribunal, and this tribunal decided whether the person would undergo reformatory training. The average man on the street would likely have no idea that such a distinction existed. The difference in terms of the procedures and sanctions applied to these two separate varieties of liumang was, however, substantial.

In addition, there was a concern that police in different areas of Taiwan took divergent views regarding what qualified as “serious” behavior, as compared with behavior that only warranted “warned” liumang status.⁸⁰ Because the less you see something the stranger it is, police in areas with fewer liumang were said to be more likely to pursue someone as a serious liumang than in areas where liumang were more prevalent. For example, consider a case where the police determined that

77. *See id.* at 13.

78. The criminal law allows for probation for certain offenders. *See* ZHONGHUA MINGUO XINGFA [Criminal Code] arts. 92–93 (amended June 11, 2013) (Taiwan).

79. The phrase “liumang warned and under guidance” is used interchangeably with “liumang listed in the register and under guidance.” This register was maintained by the police and contained the names of all liumang currently under guidance. Warned liumang were also colloquially referred to as “ordinary liumang,” a term that was used by several interviewees who took part in this study.

80. *See* Wang, *supra* note 60, at 11.

someone was a liumang on the basis that he was “eating and drinking without paying” because he ate and drank, refused to pay, and even threatened a bar owner who requested payment. What if the alleged liumang had paid his bills and never threatened the bar owner directly, but the rest of his behavior remained the same? Or if this same person was unemployed and spending his days loafing around in bars, frequenting gambling dens, and behaving aggressively toward people. Was his behavior “morally corrupt,” or merely “morally astray” without rising to the level of being liumang behavior? Could the authorities have found that he was coercing and causing trouble; tyrannizing good and honest people; being morally corrupt; or wandering and acting like a rascal? The police and judges were left to make this judgment with extremely limited guidance. It is this specter of arbitrary and discriminatory enforcement that had Professor Wang and Judges Guo and Qian concerned.

This argument regarding the lack of legal clarity in the definition of liumang partly won over the Constitutional Court. In Interpretation No. 636, the Justices parsed the definition of liumang and declared the following two clauses unconstitutional because they violated the principle of legal clarity: the act of “tyrannizing good and honest people” (Article 2(3)) and “people who are habitually morally corrupt or who habitually wander and act like rascals” (Article 2(5)). The Court further held that the acts of “occupying territory,” “eating and drinking without paying,” and “coercing and causing trouble” were constitutional but problematic, and the Court thus called on relevant authorities to evaluate the possibility of concretely describing these acts. The Justices addressed several other aspects of the definition and found no constitutional problems.⁸¹ The Court’s decision to pluck out discrete offending

81. J.Y. Interpretation No. 636, 21 SHIZI 1 holding, para. 1 (Const. Ct. Feb. 1, 2008), *translated at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=636. (“The provision of Article 2, Section 3, of the [Liumang Act] regarding the acts of ‘committing blackmail and extortion, forcing business transactions, and manipulating matters behind the scenes to accomplish the foregoing’; the provision of Section 4 of the same Article regarding the acts of ‘managing or controlling professional gambling establishments, establishing brothels without authorization, inducing or forcing decent women to work as prostitutes, working as bodyguards for gambling establishments or brothels, or relying on superior force to demand debt

provisions and leave the definition of liumang largely unchanged was consistent with its prior measured approach when reviewing the constitutionality of the Liumang Act.

An attack on the substantive definition of liumang was but one of several challenges to the Liumang Act. The following Sections address criticisms that were aimed at various procedural aspects of the Act. When analyzing the various challenges, it is important to bear in mind the fundamental bifurcated scheme that distinguished warned liumang from serious liumang. The comparatively severe ramifications of being classified as a serious liumang were underscored by Judges Guo's and Qian's challenges to the Liumang Act, which overwhelmingly focused on serious liumang.

B. Power of the Police to Force Suspected Liumang to Appear

In the Taoyuan Petition, Judge Qian looked again to Article 8 of the Constitution, this time to challenge the police's ability to force people to appear, as provided for in Articles 6, 7, 9, 10, and 11 of the Liumang Act. Prior to Interpretation No. 384, Article 6 of the Liumang Act provided that, if a person was found to be a liumang and the circumstances were serious, the police had the power to summon the person without prior warning and, if the summoned person did not comply, to force him to appear at the police station. Article 7 similarly provided that, if a person reengaged in liumang behavior within a year after a determination that he was a liumang, the police had the power to summon him; and, if the summoned person did not comply, the police could force him to appear at the station. For people caught while engaging in liumang behavior, the police could take them directly into custody without any prior summons. In Interpretation No. 384, the Constitutional Court concluded that the Liumang Act's failure to differentiate between people caught in the act and people apprehended at a later time violated Article 8 of the Constitution, which clearly distinguishes between the two situations and prescribes different procedures. As a result of this Interpretation, the legislature revised the Liumang Act to require that police first obtain

repayment'; and the provision of Article 6, Paragraph 1, regarding "serious circumstances" do not violate the principle of legal clarity.").

judicial approval or, when exigent circumstances required immediate action, that there be prompt judicial review after the fact. Judge Qian contended that these revisions did not go far enough.

Judge Qian argued that the procedures and criteria in the Liumang Act were constitutionally lacking when viewed against the procedures for arrests under exigent circumstances in the Criminal Procedure Code. For example, he pointed to the comparatively “strict reasons and requirements” for emergency arrests (緊急拘捕急) in Article 88-1 of the Criminal Procedure Code,⁸² which in part permits emergency arrests when the person is a potential flight risk, provided that the alleged offense is punishable with the death penalty, life imprisonment, or a minimum prison sentence of not less than five years.⁸³ Here, “emergency arrest” means an arrest made by the police unilaterally under exigent circumstances. The Liumang Act did not have an equivalent restriction and, indeed, the punishment for liumang could never reach five years because reformatory training was statutorily capped at three.

Judge Qian further pointed to the differences between the procedures for arresting a person caught in the act of committing liumang behavior (實施中) and a person caught in the act of committing a crime (現行犯).⁸⁴ Under the Criminal Procedure Code, an emergency arrest is subject to immediate review by a prosecutor.⁸⁵ The Liumang Act, in contrast, skipped prosecutorial review and the case proceeded to the court directly, which Judge Qian argued was insufficient as compared

82. Although Judge Qian used the term “emergency arrest” (‘緊急拘捕’) in the Taoyuan Petition, Article 88-1 uses slightly different terminology, namely “discretionary arrest” (‘逕行拘提’). In general, the Criminal Procedure Code uses different terms for arrest with a warrant (‘拘提’) and without a warrant (‘逮捕’). In practice, “arrest without a warrant” means arrest under exigent circumstance, such as when a person is caught in the act. Neither a “discretionary arrest” nor an “arrest without a warrant” requires a warrant at the time that the person is physically taken into custody. They are different, however, in that after a “discretionary arrest,” the police must obtain a warrant (issued by a prosecutor, not a judge) or the arrestee must be released. In contrast, after a straightforward “arrest without a warrant,” the police need not obtain a warrant and may simply send the arrestee to the prosecutor.

83. Qian Jian-rong petition, *supra* note 55, at 15.

84. XINGSHI SUSONG FA [Criminal Procedure Code], art. 92 (promulgated July 28, 1928, amended June 23, 2010) (Taiwan); *see also* Act for Eliminating Liumang, *supra* note 6, art. 10.

85. XINGSHI SUSONG FA [Criminal Procedure Code], art. 92.

with the advanced review provided to criminal suspects. These and other examples raised by Judge Qian highlight aspects where the Criminal Procedure Code provides different, and convincingly more stringent, limitations on the police's ability to arrest suspects. In Interpretation No. 636, the Constitutional Court agreed, to a certain extent, that the Liumang Act's procedural requirements were not only less stringent, but also unconstitutional.

The Court began the reasoning section of Interpretation No. 636 by emphasizing the fundamental right to physical freedom that is contained in Article 8 of the Constitution. The Court went on to quote Article 6 of the Liumang Act regarding arrests without warrants, but did so to announce only that the phrase "circumstances are serious" did not contradict the principle of legal clarity.⁸⁶ Interpretation No. 636 failed to address squarely the issue of arrests under exigent circumstances. That being said, the Court did declare that procedures for transferring an accused liumang to court against his will were unconstitutional.⁸⁷ The Court added that procedures for requiring warned liumang to appear if they

86. J.Y. Interpretation No. 636, 21 SHIZI 1 reasoning, paras. 6–9 (Const. Ct. Feb. 1, 2008).

When a person is determined to be a [liumang] and the circumstances are serious, the police precinct of the directly governed municipality or police department of the county (city), with the consent of the directly supervising police authorities, may summon the person to appear for questioning without prior warning. If the summoned person does not appear after receiving lawful notice and does not have proper grounds for failing to appear, then the police may apply to the court for an arrest warrant. However, if the facts are sufficient to lead the police to believe that the person is a flight risk and there are exigent circumstances, then the police may arrest him without a warrant . . . So-called 'serious circumstances' shall be determined according to the common societal conception of this provision and shall take into consideration the means used to carry out the act, the number of victims, the degree of harm, and the degree to which social order was undermined when examining the totality of the circumstances to determine whether the circumstances are serious. This provision does not contradict the principle of legal clarity.

Id.

87. Act for Eliminating Liumang, *supra* note 6, art. 9 ("If a person voluntarily appears before and is questioned by the police but does not wish to be transferred to the court, the police may not compel him to be transferred to the court. Doing otherwise would violate due process of law."); J.Y. Interpretation No. 636, 21 SHIZI 1 reasoning, para. 9 (Const. Ct. Feb. 1, 2008).

committed another liumang act should be interpreted in the same manner.⁸⁸ The Court dismissed other challenges to Articles 9, 10, and 11 on procedural as well as substantive grounds.⁸⁹

Formal constitutional arguments aside, we see no compelling reason why the procedures for summons and transfers in liumang cases should have been different from, and indeed less protective than, those in criminal cases. Nor could we find any persuasive, or even cogent, evidence that liumang suspects were inherently more dangerous or flight-prone than criminal suspects. Moreover, in view of the huge overlap between criminal and liumang cases, it would have made practical sense to have consistent procedures: the police were likely to summon a suspect for both purposes. The legislature's decision to repeal the Liumang Act thus strikes us as infinitely reasonable from a procedural standpoint.

C. Right to Be Heard by the Review Committee

A second procedural challenge addressed in Interpretation No. 636 was the right of accused liumang to be heard by the review committee, which held the power to declare a suspect to be a warned liumang or transfer the suspect to the court for a determination whether he was a serious liumang. At the time of Interpretation No. 636, accused liumang had no opportunity to participate in this determination process, with the first

88. Act for Eliminating Liumang, *supra* note 6, art. 7.

89. J.Y. Interpretation No. 636, 21 SHIZI 1 reasoning, para. 15 (Const. Ct. Feb. 1, 2008).

As for the petitioners' position that the constitutionality of the provisions of Article 2, Paragraph 1, and Articles 10, 14, and 15 of the Act are in doubt, they are not the legal provisions that the judge in the case at hand shall apply. The constitutionality of these provisions does not influence the results of the court's ruling. In addition, the petitioners allege that the constitutionality of Article 2, Section 2; the proviso of Article 6, Paragraph 1; the proviso of Article 7, Paragraph 1; and Articles 9, 11, 22, and 23 are in doubt, and further question the constitutionality of the Act as a whole. The grounds raised by the petitioners in support of the unconstitutionality of the foregoing provisions are insufficient to constitute concrete reasons for an objective belief that the statute is unconstitutional. These two parts of the petition do not meet the requirements set forth in this Council's Interpretations Nos. 371 and 572 and are therefore dismissed.

Id.

indication that they were even under suspicion usually coming in the form of official notice of the committee's decision.

For the first time, in Interpretation No. 636, the Constitutional Court declared that an accused liumang was entitled to a voice before the review committee. The Court noted that the diverse membership of the review committee—including police, prosecutors, legal specialists, and impartial people from society—was conducive to promoting objective decision-making. Nonetheless, in order to comply with the constitutional guarantee of due process of law, “the accused must have the right to be heard during the proceedings, in addition to the right to receive relief after receiving an unfavorable decision.”⁹⁰ This newly articulated right was never implemented because of the decision to repeal the Liumang Act, but we nonetheless applaud this belated recognition that accused liumang should have been allowed some form of earlier participation in the committee's proceedings.

D. *Serious Liumang: Procedures at the District Court Level*

Challenges to procedural aspects of the Liumang Act were not limited to the stages when the case was in the hands of the police. Judge Qian and other critics raised weighty concerns regarding the constitutionality of procedures used once cases reached the district courts for handling by public security tribunals. Concerns were focused on the use of a secret witness system, the lack of prosecutorial involvement, and the denial of a public hearing.

1. The Secret Witness System and the Right to Confront and Examine Witnesses

The Constitutional Court dealt an initial blow to the secret witness system in Interpretation No. 384, in which it held that the unfettered use of secret witnesses, as then allowed by Article 12 of the Liumang Act, deprived the accused of the right to defend himself and hampered the truth-finding function of the court. However, the resulting revisions that allowed for secrecy only “when necessary” did little to increase the transparency of

90. *See id.* para. 8.

the witness system because in practice secrecy was deemed necessary almost without exception. This raised the question whether the system of using secret witnesses “when necessary” passed constitutional muster in view of the reality that the exception of secrecy had swallowed the general rule of transparency and confrontation. Judge Qian answered “no” and, in Interpretation No. 636, the Constitutional Court agreed.

In the Taoyuan Petition, Judge Qian also contended that, even as revised, Article 12 of the Liumang Act deprived the accused of his right to confront and examine witnesses in violation of the right to physical freedom as it relates to the principle of “proper legal procedures” (正當法律程序原則), which is commonly translated as “due process.” Here, again, Article 8 of the Constitution was the primary constitutional basis, though the argument also rested on the right to institute legal proceedings in Article 16. For concrete support, Judge Qian looked to Interpretation No. 582,⁹¹ issued in 2004, in which the Court addressed whether out of court statements made by a criminal co-defendant against another co-defendant should be admissible in court. Prior to Interpretation No. 582 and the adoption of hearsay rules in the Criminal Procedure Code, all out-of-court statements by one co-defendant were admissible against another co-defendant, regardless of the context. In Interpretation No. 582, the Court began its holding by stating that Article 16 of the Constitution guarantees people the right to institute legal proceedings (訴訟權). As far as a criminal defendant is concerned, this guarantee includes the right to defend oneself adequately in a legal proceeding. Crucial to Judge Qian’s argument was the court’s statement that a criminal defendant’s right to examine a witness is a corollary of the right to defend oneself and is also protected by the principle of due process.

Judge Qian argued that the Court’s reasoning in Interpretation No. 582 should be extended to accused liumang. He posited that legislation can “restrict,” but not “deprive” people of, the right to confront witnesses because a deprivation violates the proportionality principle (比例原則)—the principle

91. See JY Interpretation No. 582, 17 SHIZI 519 (Const. Ct. July 23, 2004), translated at http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=582.

that measures must be reasonable, the least restrictive possible, and not excessive.⁹² Judge Qian continued that Article 12 of the Liumang Act crossed the line between a constitutionally allowable restriction and a flat-out deprivation because it allowed judges to “refuse” an accused liumang’s request to confront and examine witnesses.

The stark deprivation of an opportunity to confront witnesses in liumang cases stands in contrast to Taiwan’s more creative Witness Protection Law (證人保護法),⁹³ which emphasizes the use of voice alteration and other protective measures as alternatives to cutting off all questioning of the witness by the accused. Judge Qian thus continued that while a criminal defendant may have had access to an adverse witness under the Witness Protection Law, in a companion liumang case, the witness suddenly underwent a “metamorphosis” and became a secret, unavailable witness. Not only did this difference in treatment of criminal defendants and accused liumang violate the principle of equality (平等原則) according to Judge Qian, the use of secret witnesses in liumang cases was even more pernicious because it acted as a tool for people (and, most alarming, police) who harbored grudges and sought retaliation.

The Constitutional Court agreed that the secret witness system was constitutionally deficient. Specifically, the Justices explained in Interpretation No. 636 that Article 12 of the Liumang Act restricted the accused’s rights to confront and examine witnesses and to access court files without requiring the tribunal to take into consideration whether, in view of the individual circumstances of the case, other less intrusive measures were sufficient to protect the witness’s safety and the voluntariness of his testimony. For instance, the Court cited the

92. Qian Jian-rong petition, *supra* note 55, at 18. The Constitutional Court stated in Interpretation No. 471 that this principle is enshrined in Article 23 of the Constitution, which provides that freedoms and rights enumerated in the Constitution shall not be restricted by law except as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order, or to advance public welfare. *See* J.Y. Interpretation No. 471, 10 SHIZI 456 (Const. Ct. Dec. 18, 1998).

93. Zhengren Baohu Fa (證人保護法) [Witness Protection Law] (promulgated May 30, 2006) (Taiwan), *translated at* <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=A0030161>.

use of masks, voice alteration, and other protective measures as possible alternatives. The Court held that Article 12 was clearly an excessive restriction on the accused's right to defend himself in a legal action and was inconsistent with the principle of proportionality. The Court further held that procedures violated the principle of due process of law under Article 8 of the Constitution and the right to institute legal proceedings under Article 16 of the Constitution. The secret witness provision as then written in the Act was to be null and void one year from the Interpretation's date of issuance.

The Legislative Yuan, in response, could have adopted a modified "when necessary" formulation. In Interpretation No. 636, the Constitutional Court qualified its critique of the secret witness system by stating that to protect witnesses from endangering their lives, bodies, freedom, or property as a result of being confronted and examined, the rights of the accused and his lawyer may be restricted by concrete and clear statutory provisions that comply with the principle of proportionality under Article 23 of the Constitution. The decision to repeal the Liumang Act rendered this issue moot. Today, the primary law regulating access to witnesses in criminal cases remains the Witness Protection Law. As noted above, the Court went further in Interpretation No. 636 than only addressing confrontation of live witnesses: the Court also held that the Liumang Act unconstitutionally restricted the accused's access to court files.

Professor Wang, who appeared in front of the Constitutional Court to address the merits of the two judicial petitions, extended his critique to notification procedures. He contended that the procedures used to notify accused serious liumang that they were so accused violated the right to defend oneself. When the police transferred a liumang case to the public security tribunal pursuant to Article 9 of the Liumang Act, they were required to notify the accused liumang and his designated friends or relatives of this action. The police, however, were not required to provide the accused liumang with a copy of the transfer document (移送書). In a criminal case, the indictment (the equivalent to the transfer document in a liumang case) must be given to the defendant and must contain the items listed in Article 264 of the Criminal Procedure Code,

including descriptions of the facts and evidence alleged.⁹⁴ The indictment is required to list the allegations so that the defendant can defend himself in a meaningful way. Professor Wang argued that accused serious liumang were not given this same opportunity, and there was no legitimate reason for treating them differently from criminal suspects.

The Constitutional Court did not address notification procedures in Interpretation No. 636, but we agree with Professor Wang that the difference in treatment between criminal and liumang suspects rose to the level of unconstitutional treatment. Put simply, failure to notify the accused in advance of the details on which charges are based denies him an adequate opportunity to answer the charges.

This right is enshrined in the International Covenant on Civil and Political Rights (“ICCPR”), which provides that everyone charged with a criminal offense shall be entitled “[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”⁹⁵ The punishment dispensed to those determined to be serious liumang was the substantive equivalent of criminal punishment, so this right should have been applicable to those accused of being serious liumang.

In 2009, following the repeal of the Liumang Act, Taiwan ratified and incorporated into its domestic legal system the ICCPR, along with the International Covenant on Economic, Social and Cultural Rights.⁹⁶ In 2013 ten independent international human-rights experts were invited to Taiwan to review its implementation of the two human rights covenants in accordance with the practice of the United Nations.⁹⁷ Had the

94. See Wang, *supra* note 61, at 16.

95. International Covenant on Civil and Political Rights art. 14, § 3, Dec. 16, 1966, 999 U.N.T.S. 171.

96. See Ko Shu-Ling, *Legislature Ratifies UN Rights Treaties*, *TAIPEI TIMES*, Apr. 1, 2009, <http://www.taipeitimes.com/News/taiwan/archives/2009/04/01/2003439900>.

97. Following the review, the experts released “*Concluding Observations and Recommendations*,” pointing out government practice inconsistent with the protections under the two human rights covenants. See *REVIEW OF THE INITIAL REPORTS OF THE GOVERNMENT OF TAIWAN ON THE IMPLEMENTATION OF THE INTERNATIONAL HUMAN RIGHTS COVENANTS: CONCLUDING OBSERVATIONS AND RECOMMENDATIONS ADOPTED BY THE INTERNATIONAL GROUP OF INDEPENDENT EXPERTS, INT’L COV. ON CIV. & POL. RIGHTS (2013)* [hereinafter *REVIEW OF THE INITIAL REPORTS*], available at <http://www.humanrights.moj.gov.tw/public/Attachment/33516305719.pdf>. For the review

Liumang Act survived, some of its remaining provisions may not have passed the scrutiny under the ICCPR.

2. Lack of Prosecutorial Involvement

Witnesses were seldom seen in the courtroom during liumang cases, but prosecutors were never present. Judge Qian asserted that the Liumang Act violated the principles of the separation of prosecution and adjudication (審檢分離之控訴原則) and the division of powers and functions (權能區分原則) because no prosecutor was involved in the proceedings. Since prosecutors did not appear, this forced judges into roles unlike those seen in criminal cases. In criminal proceedings, after the initial police investigation, the prosecutors take a lead role with the police being subject to their direction. The prosecutor makes the crucial decision whether to prosecute. In liumang cases, the police made the decision whether to recommend that the accused be sent to confinement, with the only prosecutorial involvement being that a lone prosecutor sat on the review committee. No prosecutor took part in the judicial hearing, and lawyers only appeared in a minority of cases. Nor were the police a “party” in liumang court hearings. The law did not require that police attend the hearing and, in practice, the police did not fulfill the prosecutorial role in court. Clearly, the involvement of a prosecutor would have heightened professional and public confidence in the fairness and accuracy of the liumang adjudication system, but did the Constitution require it?

We stop short of Judge Qian’s position that the absence of prosecutors during the actual court hearing was unconstitutional under either principles of the separation of prosecution and adjudication or the division of powers and functions. In liumang cases, the judge at least had the transfer document, which was prepared by the executive branch. The hearing itself closely resembled prior inquisitorial practices but

process, see Yu-Jie Chen & Jerome Cohen, *Forging Ahead*, S. MORNING CHINA POST, Mar. 29, 2013; Yu-Jie Chen, *A New Tool for Promoting Human Rights in Taiwan*, CHINA POL’Y INST. BLOG (Mar. 24, 2013), <http://blogs.nottingham.ac.uk/chinapolicyinstitute/2013/03/24/a-new-tool-for-promoting-human-rights-in-taiwan/>.

this alone is not sufficient to hold the related provisions of the Liumang Act unconstitutional.

We do agree with Judge Qian that procedures under the Liumang Act did not comport with the spirit of recent reforms to Taiwan's Criminal Procedure Code. Specifically, Judge Qian targeted Articles 22 and 23 of the Liumang Act, which addressed the composition and functions of the public security tribunal, as well as Articles 18 to 24 of the Implementing Rules, which elaborated the relevant provisions of the Liumang Act. We agree that he rightly questioned the wisdom of the public security tribunals' inquisitorial method, specifically the practice of having public security tribunal judges play the dual role of questioning accused liumang and then deciding whether confinement was warranted. This practice stood in stark contrast to the modified adversarial system used for criminal proceedings today. The practice of having a judge serve in effect as both prosecutor and sole adjudicator in the courtroom before sentencing someone to three years in conditions that were virtually identical to a prison was arguably inconsistent with contemporary standards of due process in Taiwan. Procedures that may be permissible before merely imposing a fine or a short stay in a detention cell take on a different gloss when applied to a significant prison sentence. We will never hear the Justices' official views on this issue because the Constitutional Court declined to address the relevant articles of the Liumang Act on procedural grounds.

3. Lack of Public Hearings

Another issue that is absent from Interpretation No. 636 is Professor Wang's critique regarding the constitutionality of barring the public from the courtroom. Although the Constitutional Court did not address this argument in Interpretation No. 636, we believe that it deserves consideration.

In his argument to the Court, Professor Wang maintained that the Constitution requires public hearings before the public security tribunals on the district court level. The system under the Liumang Act involved only the judge, the accused liumang, and sometimes his lawyer and witnesses, even if the accused liumang did not get to see and question them. It was a closed trial. Although Taiwan's Constitution does not expressly grant

people the right to “a speedy and public trial,” as the Sixth Amendment to the US Constitution does,⁹⁸ Professor Wang explained the bases for this right in Article 16 of the ROC Constitution (the right to institute legal proceedings), and Article 8 (the right to physical freedom).⁹⁹ For support, Wang looked to Justice Wu Geng’s concurring opinion in Interpretation No. 368, in which he stated that the right to institute legal proceedings (訴訟權) in Article 16 includes the right to a public hearing.¹⁰⁰ As a caveat, Interpretation No. 368 did not address a liumang case, but Professor Wang proposed that the reasoning be extended to the liumang context. The Constitutional Court later flatly stated in the reasoning section of Interpretation No. 482 that the right to institute legal proceedings includes a public hearing, though this also was not in the context of a liumang case.¹⁰¹

In the context of liumang cases, however, the Court had interpreted Article 8 of the Constitution to require due process and, in Interpretation No. 384, the Court noted that this encompassed the principle that trial proceedings should be open to the public. Therefore, Professor Wang explained, whether Article 8 or Article 16 was used as a basis, accused liumang should have a constitutional right to a public hearing. Due to the seriousness of the consequent punishment involved, we support this view. Moreover, as previously noted, the ICCPR requires that state parties afford people charged with crimes a “fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁰²

98. In 2010, Taiwan passed a Speedy Trial Act (刑事妥速審判法). Although this Act is a step forward in decreasing the time that a case can be pending, as noted by the independent experts reviewing Taiwan’s implementation of the ICCPR, it still fails to meet international standards. See REVIEW OF THE INITIAL REPORTS, *supra* note 97 (“Article 5 of the Speedy Trial Act 2010 further stipulates a maximum period of eight years of pre-trial detention, which, in the opinion of the Experts, violates the ‘reasonable time’ limit of Article 9(3) ICCPR.”).

99. See Wang, *supra* note 61, at 13.

100. The majority opinion did not address this point, but it did note that the right to institute legal proceedings in Article 16 of the Constitution means that people have the right to demand through legal procedures a judicial remedy for the final disposition of disputes over jural relations.

101. J.Y. Interpretation No. 482 (Const. Ct. Apr. 30, 1999), translated at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=482.

102. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966 999 U.N.T.S. 171. The ICCPR provides for an exception in limited cases: “The press

E. *Serious Liumang: Punishment by Reformatory Training*

Critics of the Liumang Act forcefully criticized the manner in which serious liumang were punished. Challenges to the reformatory training system focused on the use of indeterminate sentences and the method of setting off time spent in reformatory training and serving criminal punishments.

1. Indeterminate Sentences to Reformatory Training

Under Article 13 of the Liumang Act, the public security tribunal had the authority to decide whether or not to impose reformatory training, but the tribunal did not decide the actual length of the sentence. Article 19 provided the standard duration: reformatory training was set at between one and three years with the possibility of release after one year, provided that the original ruling court agreed. In Judge Qian's view, a public security tribunal's ruling to commit a person to reformatory training violated the principle of clarity (明確性) because the tribunal failed to state a definite sentence within the one- to three-year window.¹⁰³ In other words, Judge Qian asserted that the indeterminate sentence left the liumang agitated and in fear all day.¹⁰⁴ This, he argued, was constitutionally unacceptable.

For support, Judge Qian relied on Interpretation No. 471,¹⁰⁵ in which the Constitutional Court struck down a mandatory provision in the Firearms Act (槍砲彈藥刀械管制條例) that required three years of forced work (強制工作處分) when a person was convicted of specified offenses,¹⁰⁶ without considering the necessity of the three-year sentence in view of

and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice" *Id.* art. 14 § 1. Similarly, the Organic Law of the Judicial Yuan provides that court hearings shall be open to the public, *see* Sifa Yuan Zuzhi Fa (司法院組織法) [Organic Law of the Judicial Yuan] art. 86 (promulgated Mar. 31, 1947, amended Jan. 21, 2009) (Taiwan), though Taiwanese law allows limited exceptions, such as for trials involving juveniles, *see* Shaonian Anjian Chuli Fa (少年事件處理法) [Juvenile Proceedings Act], art. 34 (promulgated May 18, 2005) (Taiwan).

103. Qian Jian-rong petition, *supra* note 55, at 20.

104. *Id.*

105. J.Y. Interpretation No. 471, 10 SHIZI 456 (Const. Ct. Dec. 18, 1998), *translated at* http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=471.

106. The article at issue, Article 19, has since been repealed.

the defendant's particular situation. The Court explained that the failure to consider individual circumstances violated the proportionality principle.¹⁰⁷ The Court held that judges may sentence people to three years of forced work but are not required to do so. The Court did not directly address indeterminate sentences in Interpretation No. 471. Judge Qian contended that the reasoning of this Interpretation should be extended to reformatory training and, accordingly, judges should be required to mete out definite sentences in liumang cases based on individual circumstances. Judge Qian further questioned the constitutionality of having the actual length of a liumang's reformatory training decided by the administrative agencies that supervised the training. He argued that this practice violated the institutional protections of the constitutional right to institute legal proceedings and also violated the separation of powers principle.¹⁰⁸

Although Judge Qian threw a number of weighty constitutional principles at the practice of indeterminate sentencing under the Liumang Act, the Constitutional Court did not address them in Interpretation No. 636. Unlike the mandatory three-year-sentence provision that the Court held unconstitutional in Interpretation No. 471, the revised Liumang Act allowed for release from reformatory training after one year, subject to certain conditions. Nor did Judge Qian provide clear support for his position that it was unconstitutional for administrative agencies to recommend early release. Moreover, Judge Qian's argument did not address the separation of powers among the judicial, legislative, and executive branches. Based on Taiwan's current governmental structure, the determination of how much of their sentences prisoners should serve and which institution should decide when prisoners can be released in individual cases should be left to the legislature and the executive, respectively. That said, those determinations should be made under sufficient constraints such that there is not unfettered discretion. For example, the parole provision in the Criminal Code provides that, subject to certain limitations, parole (假釋) is available for criminal offenders after they have

107. MINGUO XIANFA art. 23. (1947) (Taiwan).

108. Qian Jian-rong petition, *supra* note 55, at 21.

served half of their term of imprisonment, or twenty-five years of a life sentence.¹⁰⁹

2. Setting Off Reformatory Training and Criminal Punishments

Prior to Interpretation No. 384, Article 21 of the Liumang Act allowed the imposition of reformatory training either before or after execution of a criminal punishment for the same act, without regard to whether there was a special preventive necessity to do so. In Interpretation No. 384, the Constitutional Court held that this practice violated the constitutional guarantee of physical freedom, and it gave the legislature until the end of 1996 to fix the problem. Article 21 of the revised Liumang Act provided that, if the liumang behavior for which the accused was committed to reformatory training was also the basis for criminal punishment,¹¹⁰ time spent serving the criminal punishment and time spent in reformatory training would be mutually set off on a one-day-for-one-day basis. Judge Qian argued that this legislative fix did not solve the constitutional problem. In Interpretation No. 636, the Constitutional Court agreed, to a limited extent. In order to alleviate concerns that the physical freedom of a person subject to both criminal punishment and reformatory training might be excessively deprived, the Court called on relevant authorities to re-examine and revise the phrasing in the Liumang Act.

As background, in Interpretation No. 384, the Court explained that one aspect of due process is that people not be punished for the same act twice. Thereafter, in Interpretation No. 604, the Court clarified that multiple punishments may be imposed for multiple violations and this does not give rise to any issue of double punishment. Judge Qian did not contest this position. Instead, he contended that the “setting off” system had other flaws. Most notably, if a person was imprisoned for one year and then, for the same conduct, began reformatory training upon release from prison, he would still have one to two years left after the one-year deduction. For people sentenced to both

109. ZHONGHUA MINGUO XINGFA [Criminal Code] art. 77 (amended June 11, 2013) (Taiwan).

110. Specifically, time spent serving a fixed-term imprisonment (有期徒刑), detention (拘役) (as punishment, as compared with pre-trial detention (羈押)), and rehabilitation measures (保安處分) was set off from reformatory training.

prison and reformatory training, only those who were sentenced to three or more years in prison thus avoided having to undergo reformatory training. As a result, a *liumang* might as well have committed an act that landed him in prison for three years rather than a lesser offense that would have resulted, for example, in two years of prison and one year of reformatory training.

To highlight the confusion over this practice, Judge Qian raised an example from the 2003 Legal Symposium of the High Court of Taiwan and its Subsidiary Courts. Judges discussed the following scenario at the symposium: if reformatory training and a ten-month prison sentence were proposed for the same act and the prison sentence was finalized first, what should the courts do? One position was that the prison sentence should commence and be completed first, based on the “first finalized, first enforced” principle. Another view was that the person should not be sent to prison but only to reformatory training because, as a result of the short length of the prison sentence, to first send the person to prison would effectively result in double punishment (i.e., ten months in prison followed by a minimum of one year in reformatory training). The very purpose of setting off sentences was to avoid such scenarios. Despite the logical force of the second viewpoint, the discussion ended with a decision to side with the first position—“first finalized, first enforced”—regardless of the length of the criminal sentence, highlighting that illogical is not the same as unconstitutional.

Under the *Liumang* Act, reformatory training could last up to three years. If a person served a ten-month prison sentence and then began reformatory training, the total time behind bars thus would exceed the three-year maximum only if he spent more than two years and two months in reformatory training. Nonetheless, we agree with Judge Qian’s position that this would always constitute “double punishment” no matter how long the duration of reformatory training, and surely anyone whose reformatory training was about to exceed two years and two months, having served ten months in prison for the same act, would have had an even stronger claim for legal relief. That dual imposition of reformatory training and prison time constituted “double punishment” is buttressed by the reality that the two reformatory training facilities also housed regular convicts

under the same roof, albeit in separate areas of the facilities, and that both types of inmates often shared the same training classes. When a person finished his criminal sentence, he may have just moved to a different cell in the same facility to begin his liumang sentence. In other words, the naked eye could not discern a qualitative difference in the nature of the criminal and liumang punishments. The difference between prison and reformatory training was thus quite blurred.

In Interpretation No. 636, the Constitutional Court quoted Article 19 of the Liurang Act, which provided in part:

The term of reformatory training is set at more than one year and less than three years. After completion of one year, if the executing authorities believe that it is unnecessary to continue reformatory training, they may report, with facts and evidence, to the original ruling court for its permission and exempt the person from further reformatory training.

The Court pointed out that when criminal punishment or rehabilitation measures were first carried out for more than three years, there was no need to then commence reformatory training because of the mutual set-off provision. In other words, the punishment for the corresponding criminal case already exceeded the maximum allowable sentence to reformatory training. Accordingly, this situation did not raise doubts regarding excessive restrictions on people's physical freedom.

The Justices therefore focused their attention on the situation when criminal punishment or rehabilitation measures were first carried out for less than three years. Because public security tribunals did not sentence liurang to a fixed term of reformatory training, a liurang could serve anywhere between the statutory minimum and maximum (i.e., one to three years) and that determination was made based on the liurang's progress at the training institute. As a result, the exact amount of time that the liurang should serve in reformatory training following completion of criminal punishment or rehabilitation measures was unclear. For example, if a person already served two years in prison, did he then still have to complete the minimum one year in reformatory training for a total time behind bars of three years? Alternatively, could the training institute personnel agree to release him immediately because he had already spent more than the minimum one-year term

behind bars? If the Liumang Act was interpreted as meaning that reformatory training should be enforced for a minimum of one year beyond the criminal sentence, the Court cautioned that the physical freedom of the person subject to reformatory training might be excessively restricted. In Interpretation No. 636, the Court commanded the relevant authorities to re-examine and revise the Liumang Act to alleviate this concern.

In a partial concurring opinion, three Justices faulted the majority for not addressing whether the Liumang Act violated the principle of *ne bis in idem*, which translates from Latin as “not twice for the same,” and means that no legal action can be instituted twice for the same cause of action.¹¹¹ Namely, this concern arose because of the substantial overlap between offenses in the Criminal Code (and specialized criminal laws) and liumang acts, an issue also raised by Professor Wang. It was standard practice for suspected liumang to face concurrent criminal charges stemming from the same acts. The concern that people were thus being tried in court twice for the same underlying acts was very real even though the Constitutional Court failed to address this issue head-on in Interpretation No. 636.

111. According to Judge Qian’s view, the principle that people not be punished for the same act twice is also called “the principle of the prohibition against double jeopardy” (雙重危險禁止原則). This statement is misleading because the two concepts are not necessarily coextensive. This highlights a vexing problem in comparative law terminology and translations. Some of Taiwan’s terminology comes from Germany, some from Germany via Japan, some from the United States, and still other terminology is unique to China/Taiwan. The principle of *ne bis in idem* is varyingly translated in Taiwan as “do not punish the same behavior twice” (一行為不二罰), “do not punish the same act twice” (一事不二罰), “do not punish the same act again” (一事不再罰), “prohibition against repeat punishments” (禁止重複處罰), and “prohibition against double punishments” (禁止雙重處罰). In Interpretation No. 604, the majority opinion used “do not punish the same behavior twice” (一行為不二罰), but concurring and dissenting opinions by justices in this same interpretation used other formulations. Judge Qian also argued that the Liumang Act violated the principle that the “same matter not be tried twice” (一事不再理) because the criminal and liumang cases arising from a single act were tried before different courts in different proceedings. In addition to constitutional concerns, Judge Qian argued that this practice wasted judicial resources and was unnecessary, a critique shared by judges whom we interviewed.

F. *The Liumang Act as a Second Criminal Procedure Code*

The most fundamental question according to Judge Qian was whether Taiwan needed to have a “second Criminal Procedure Code” that resulted in the accused being subject to two proceedings and the concomitant waste of judicial resources. This, however, is a policy argument more properly directed at the Legislative Yuan. As expected, the Constitutional Court declined to address this issue.

The argument that the concurrent use of the liumang and criminal justice systems squandered resources may not be a constitutional one, but it is a compelling one. Judge Qian argued that the Liumang Act, in its entirety, contradicted the proportionality principle because there were alternative means to obtain the same legislative purposes as the Liumang Act but with less harm.¹¹² Judge Qian raised this paramount question in the final pages of the Taoyuan Petition. He asserted that there were still a number of unconstitutional provisions, singling out the secret witness system as a particularly egregious constitutional violation. Put simply, he drew the Constitutional Court’s attention to how glaringly antiquated the Liumang Act had become. Like Judge Qian, over the course of our research we recognized the Liumang Act’s historical role in combating the criminal underworld, yet we seriously questioned the continuing need for it under Taiwan’s present day legal system. Thankfully, the executive and legislative branches finally conceded that the time to retire the Liumang Act had arrived.

V. *FROM INTERPRETATION NO. 636 TO REPEAL*

In Interpretation No. 636, the Constitutional Court gave the Legislative Yuan one year to fix the constitutional infirmities in the Liumang Act, or the offending provisions would become null and void.¹¹³ The countdown to February 1, 2009, had begun.

112. For support, Judge Qian invoked Interpretation No. 544, in which the Justices cited the availability of other alternative means to attain the same purposes with less harm as a component of whether a law is consistent with the proportionality principle. Qian Jian-rong petition, *supra* note 55, at 31.

113. J.Y. Interpretation No. 636, 21 SHIZI 1, Reasoning, para. 14 (Const. Ct. Feb. 1, 2008).

Based on experience with the first two constitutional interpretations that addressed the Liumang Act, conventional wisdom expected that the legislature would once again revise the Act in a piecemeal fashion in order to meet only the minimal requirements laid down by the Constitutional Court. As the year wore on, it also looked increasingly likely that those revisions would come at the final hour, as was done with previous amendments. Although the Legislative Yuan had always held the power to abolish the Liumang Act, that scenario was deemed unlikely, both because the Court had called for only limited revisions and because there is no political capital to be gained by looking soft on crime, in Taiwan or elsewhere. Prospects for repeal were further dampened in light of the insistence on keeping the Liumang Act even after the Court declared part of the Act unconstitutional in 1995 and 2001. Following these earlier interpretations, the legislature emphasized that the Act was an efficient weapon to crack down on crime (掃黑利器).

Adding another obstacle to reform, whether well-founded or not, police and other officials with whom we spoke repeatedly stated that the common people supported the Liumang Act because they were afraid of liumang. This is not to say that all police were against revising the Liumang Act. A National Police Agency official told us that he supported revisions done through the people's representatives in order to improve the Act. This same official emphasized that people need to consider the victim's perspective because there are times when the criminal law alone is insufficient. For example, what if upon leaving a restaurant you find a man standing next to your car who politely

In light of the fact that amending the law requires a certain period of time—and so that the relevant authorities can conduct a comprehensive analysis of the Act by taking into consideration both the need to protect people's rights and the need to maintain social order—those parts of the following provisions that are inconsistent with relevant principles of the Constitution shall become null and void no later than one year from the date of this Interpretation: Article 2, Section 3, regarding the act of “tyrannizing good and honest people,” Section 5 of the same Article regarding “people who are habitually morally corrupt or who habitually wander around and act like rascals,” and Article 12, Paragraph 1, which excessively restricts the transferred person's right to confront and examine witnesses and to access court files.

Id.

tells you that he has watched your car so that it would not be stolen, and shouldn't you give him a little money to buy something to drink? The threat is implicit but easily understood. Opponents of the Liumang Act countered that the Criminal Code is sufficient to deal with these kinds of situations, such as through Article 304, which covers crimes of coercion (強制罪). There is also the Social Order Maintenance Law, which authorizes detention (拘留) for up to five days for various types of injurious conduct.¹¹⁴ A person may, for instance, be punished by such detention for using another person's identifying documents or for deceiving by carrying a toy gun that looks like a real gun and thereby endangering safety.¹¹⁵

Then, in the autumn of 2008, the new administration of President Ma Ying-jeou unexpectedly broke the political stalemate. On November 17, 2008, the Executive Yuan submitted a proposal to the Legislative Yuan for abolition of the Liumang Act. In the proposal, the Executive Yuan set forth five reasons in support of its position. First, as pointed out in the concurring opinion to Interpretation No. 636, even if the legislature revised the Act, there would still be lingering questions regarding the constitutionality of reformatory training. The Executive Yuan even borrowed the language in the concurring opinion when arguing that it was difficult to make the Liumang Act compatible with the Constitution no matter how it was revised.

Second, the Executive Yuan argued that the legal nature of the Act was unclear because it contained components of both administrative law and criminal law. The Executive Yuan bluntly asked whether provisions in the Act actually belonged to administrative law or criminal law, and it further pointed out that the unclear nature of the Act made it difficult to protect the rights and interests of the accused.

Third, the overlap between the Liumang Act and criminal laws resulted in needless duplication. This point clearly echoed the arguments raised by Judge Qian regarding the necessity and wisdom of perpetuating the liumang system.

114. ZHONGHUA MINGUO XINGFA [Criminal Code] art. 19 (amended June 11, 2013) (Taiwan).

115. *Id.* arts. 66 § 2, 65 § 3.

Fourth, enforcement of the amended Act would have created administrative difficulties; after noting the Constitutional Court's holding that an accused liumang had a right to be heard during the proceedings before the review committee, the Executive Yuan advised that this would impose a further burden on the committee's work.

Finally, the Executive Yuan urged that times had changed and, not only was the Act no longer necessary, it was contrary to Taiwan's increasing embrace of human rights. The Executive Yuan briefly traced the Act's history since 1955 and concluded that criminal laws and the Social Order Maintenance Law were sufficient for society's current needs. To underscore this point, the Executive Yuan attached an appendix with a table setting forth the different types of liumang behavior and how criminal laws and the Social Order Maintenance Law could be used to address the same behavior.

Legislative debate ensued in December 2008, and representatives of the Executive Yuan, Judicial Yuan, and National Police Agency testified before the Legislative Yuan. Legislators raised concerns that criminal laws alone would be insufficient to protect the public and further inquired about the impact of releasing incarcerated liumang. One legislator estimated that, of twenty-three county and city police departments, sixteen supported repeal—to which the National Police Agency representative replied that left seven police departments which supported only revising the Act.¹¹⁶

The majority police support for abolishing the Act might seem odd at first glance, given that the Act provided police with an additional tool to remove troublemakers from the street. We can only speculate because the legislative record does not clarify why the vast majority of police departments reportedly supported repeal. Perhaps it was because the police too were embracing a more human-rights friendly approach. It might also have been because police were eager to be rid of a rigid point system that led to demerits if liumang quotas were not met.

Despite some legislators' concerns, the voices for abolition prevailed by assuaging fears that repeal would lead to a

116. See Legis. Yuan, 7th Term, 2d Sess., 2d Meeting Rec., 98 LEGISYUAN GAZ. 501 (2008).

deterioration in public order and by emphasizing the antiquated nature of the Liumang Act. On January 23, 2009, the Legislative Yuan officially voted to repeal the Act. Because most incarcerated liumang had concurrent criminal sentences, only 176 liumang were actually released upon repeal, providing persuasive evidence that the Act had become superfluous.

The retirement of the Liumang Act is a testament to the spirit of legal reform in Taiwan. The executive and legislative branches both deserve credit for recognizing that the Act had outlived its time and for carrying out their respective duties in a democratic, cooperative, and transparent manner. Reform-minded scholars and lawyers also deserve praise for pushing the debate forward even when it was politically unpopular to do so. That said, the role of the Constitutional Court—and lower court judges who prompted the Court to take a closer look at the Liumang Act—deserves special attention both because it is a shining example of the Court's willingness to give heft to constitutional rights in post-martial law Taiwan and because the Court's involvement was key to pressuring the other branches to take action. In large part thanks to the Constitutional Court, the Liumang Act is now a remnant of history, and that is exactly what it should be.

VI. *CHINA'S RE-EDUCATION THROUGH LABOR*

Taiwan was not the only Chinese political system to use a police-dominated institution to put people behind bars for long periods. Across the Taiwan Strait, police in the PRC have also employed a panoply of equivalent, even harsher, measures to punish those who are deemed “anti-social” by the authorities. Most notoriously, from the mid-1950s until 2013, they had the power to dispatch a very broad range of people to what soon became known as “re-education through labor” (“RETL”), without the need to gain approval from the procuracy (prosecuting authorities) or courts, or to allow the intervention of lawyers. At the time of abolition, the term of such detention was limited to three years, with a possible extension to a fourth year by the Committee for the Administration of Re-education-Through-Labor, which administered RETL sentences. Although the Committee was composed of police and officials from other branches of the local government, it was controlled by police in

reality. Courts could review the detention in accordance with China's Administrative Litigation Law (行政诉讼法), but only after the person had been sent off for "re-education." That review process was not invoked in most cases and, even if it succeeded (as it did only on rare occasions), offered only modest comfort to a person who had continued to be detained during the lengthy litigation process.

Similar to the regime for punishing liumang in Taiwan before its abolition, RETL in China was supposedly a "non-criminal" detention measure for confronting anti-social conduct. Nevertheless, in certain respects, the RETL sanction was even more severe than criminal punishment. Many criminals whose offenses are arguably more harmful to society than those of RETL offenders find themselves sentenced to far shorter terms than the maximum three or four years that could be dispensed to RETL offenders. Domestic and foreign investigative reports that hit headlines in RETL's final year of use vividly demonstrated the brutal conditions in labor camps.¹¹⁷ People subject to RETL recounted exploitive working conditions, severe beatings and torture imposed on them.¹¹⁸

Over the years, calls for abolishing or reforming RETL continued. The period of 2003 to 2005 was an initial high point of the rising tide against RETL. Some optimistic, influential, and energetic law reformers believed that the time had finally come to eliminate RETL and put an end to the ability of the police to impose long-term administrative detention. In 2004, more than 420 delegates to China's National People's Congress ("NPC") signed a petition calling for the repeal of the RETL system.

The petition, however, failed to sway powerful forces in the government. In particular, China's Ministry of Public Security ("MPS") was a formidable opponent. The MPS fought to stall efforts in the NPC to abolish RETL. Yet, in order to comply with

117. *Magazine Exposé Reinigorates Calls to End RTL*, DUIHUA HUMAN RTS. J. (Apr. 11, 2013), <http://www.duihuahrjournal.org/2013/04/magazine-expose-reinigorates-calls-to.html>.

118. *See New Documentaries Take on the Horrors of China's Labor Camp System*, PROBE INT'L (May 7, 2013), <http://journal.probeinternational.org/2013/05/07/new-documentaries-take-on-the-horrors-of-chinas-labor-camp-system/>; *see also* Steven Jiang, *Chinese Labor Camp Inmate Tells of True Horror of Halloween 'SOS'*, CNN (Nov. 7, 2013), http://edition.cnn.com/2013/11/06/world/asia/china-labor-camp-halloween-sos/index.html?hpt=hp_c1.

the demands of current legislation governing deprivations of liberty, even the MPS acknowledged that, if RETL was to continue, it must finally be authorized by a law enacted by the NPC or its Standing Committee. Prior to abolition, the only authorization for RETL was a smattering of national and local decisions and regulations.

Although calls for reform of RETL quieted after 2005 and again after a burst of interest in 2010, they returned with renewed vigor in 2012, in part due to high profile cases that put the abuses of the system back in the spotlight.¹¹⁹ The new Communist Party leadership, which assumed office in 2012, responded with a commitment to reform the system. In January 2013, reports briefly surfaced that Meng Jianzhu, the newly-installed chair of the powerful Political-Legal Committee of the Communist Party and recent Minister of Public Security, directed that the use of RETL be terminated by the end of the year. In March 2013, after the NPC's annual meeting, new Premier Li Keqiang told a press conference that, with respect to RETL reform, "the relevant departments are working intensively to formulate a plan, and it may be laid out before the end of this year."¹²⁰ Also in early 2013, a number of provinces and cities, including Guangdong, Yunnan, Hunan, Shandong and Shenzhen, stopped approving RETL cases, and some labor camps in these places were transitioned into compulsory drug treatment centers.¹²¹

119. See, e.g., Andrew Jacobs, *Opposition to Labor Camps Widens in China*, N.Y. TIMES, Dec. 14, 2012, http://www.nytimes.com/2012/12/15/world/asia/opposition-to-labor-camps-widens-in-china.html?_r=0; Keith Zhai, *Rape Victim's Mother Tang Hui Wins Damages Over Labour Camp Sentence*, S. CHINA MORNING POST, July 16, 2013, <http://www.scmp.com/news/china/article/1283035/rape-victims-mother-tang-hui-wins-appeal-landmark-labour-camp>.

120. *Premier Li Keqiang Meets the Press Today*, CHINA DAILY (Mar. 17, 2013), http://www.chinadaily.com.cn/china/2013npc/2013-03/17/content_16314566.htm.

121. *Yunnan Jiao Ting Laojiao Shenpi Zhongguo Kaiqi Laojiao Gaige Guanjian Yi Bu* (云南叫停劳教审批 中国开启劳教改革关键一步) [*Yunnan's Suspending of Approval of RETL Sentences is a Key Step in China's Reforming of RETL*] (Feb. 6, 2013), <http://www.chinanews.com/fz/2013/02-06/4554405.shtml>; see *Shandong Sheng Yi Zanting Laodong Jiaoyang Shenpi* (山东省已暂停劳动教养审批) [*Shandong Province Suspends Approval of RETL Sentences*] (July 24, 2013), http://news.xinhuanet.com/politics/2013-07/24/c_116671976.htm; see also Verna Yu, *Labour Camps May Become a Thing of a Past, But What Will Replace Them?*, S. CHINA MORNING POST (Nov. 5, 2013), http://www.scmp.com/print/news/china/article/1347815/labour-camps-may-become-thing-past-what-will-replace-them?utm_source=edm; *Laojiao Gaige Fang'an huo Quanhui Hou*

In October, Zhou Qiang, the new President of the Supreme People's Court, asked the courts to "actively cooperate in the anticipated reform of RETL, explore and improve institutions to speed up trials of minor criminal cases, and to vigorously promote community correction work."¹²² This was the first sign of the judiciary's involvement in broader reforms regarding RETL since the new leadership put forth its reform agenda. Zhou was obviously preparing the criminal courts to expect a serious increase in their burdens because many offenders previously sent to RETL would soon be prosecuted instead. Yet there were still reports that the new President, Xi Jinping, was encountering daunting opposition from conservatives challenging his resolve to abolish RETL.¹²³

Reformist hopes were rekindled in November 2013 when the Decision of the Chinese Communist Party's Central Committee announced the Party's intent to end RETL.¹²⁴ The Decision—a key document setting forth the Party's broad strategy in economic and social affairs—did not include a timeline for abolition or a clear statement of what would happen to people currently undergoing RETL. And, despite great fanfare in the media regarding the leadership's call for abolition, the actual substance of the proposed legislative reform was murky.

After years of false starts for reforms, opponents of RETL had learned to keep their expectations modest. It therefore came as a pleasant surprise when the government followed up on its pledge and, at the end of December 2013, declared the

Chutai (劳教改革方案或全会后出台) [*Reform of RETL to be Introduced After Plenum*] (Nov. 7, 2013), <http://www.dfdaily.com/html/33/2013/11/7/1085027.shtml>.

122. *Zui Gao Fa: Peihe Laojiao Gaige Tansuo Wanshan Qingwei Xing An Kuai Shen Kuai Jie Jizhi* (最高法：配合劳教改革探索完善轻微刑案快审快结机制) [*Supreme People's Court: Supporting Reform of RETL by Exploring and Perfecting the System for Swiftly Handling Minor Criminal Cases*], XINHUA (Oct. 23, 2013), http://news.xinhuanet.com/legal/2013-10/23/c_117844201.htm [hereinafter Supreme People's Court: Supporting Reform of RETL].

123. Benjamin Kang Lim & Ben Blanchard, *Insight—Failure to End China's Labor Camps Shows Limits of Xi's Power*, REUTERS (INDIA), (Nov. 6, 2013), <http://www.reuters.com/article/2013/11/06/us-china-politics-xi-insight-idUSBRE9A514U20131106>.

124. Hannah Beech, *China to Close Notorious Re-Education Through Labor Camps*, TIME (Nov. 16, 2013), <http://world.time.com/2013/11/16/china-to-close-notorious-re-education-through-labor-camps/>.

end of RETL.¹²⁵ The official government media announced, “After abolition, those still serving Laojiao [RETL] time will be set free. Their remaining terms will not be enforced.”¹²⁶ This announcement was welcome and overdue. What the government failed to clarify, however, was how the types of people whom the authorities previously sent to RETL would be handled in the future.

Over the years, reformers had proposed different options for either modifying RETL or replacing it with alternative sanctions, including enacting the Law for the Correction of Unlawful Conduct (违法行为矫治法) to replace RETL, reducing the maximum term of RETL from three years to eighteen months or even a year, alleviating the harshness of the sanction by allowing RETL prisoners more freedom, restricting police discretion by clarifying criteria for determining what kind of conduct and what type of person should be subject to RETL, improving the examination and approval procedures, and partially judicializing the process by requiring that in every case some type of court review take place before a person was consigned to RETL’s administrative punishment.¹²⁷

Some reformers took a more radical approach, proposing to transform future RETL decisions by the police into mere recommendations and to give the decision-making power to the courts. In fact, the draft of the Law for the Correction of Unlawful Conduct, which had twice been included into the NPC’s legislative agenda in 2005 and 2010, reportedly included such an arrangement. Yet, the draft was stalled because no consensus could be reached on whether the decision-making power should be shifted from the police to the courts.¹²⁸ Pilot

125. Zhu Ningzhu, *China Abolishes Reeducation Through Labor*, XINHUA (Dec. 28, 2013), http://news.xinhuanet.com/english/china/2013-12/28/c_133003042.htm.

126. *Id.*

127. For a detailed discussion of proposed legal reforms, see SARAH BIDDULPH, *LEGAL REFORM AND ADMINISTRATIVE DETENTION POWER IN CHINA* (2007).

128. *Weifa Xingwei Jiaozhi Fa Shifou Xuyao Zhiding Hai Xu Tongchou Kaolu* (违法行为矫治法是否需要制定还需统筹考虑) [*Comprehensive Consideration Still Needed to Decide Whether to Enact the Law for the Correction of Unlawful Conduct*] (Mar. 9, 2013), <http://lianghui.people.com.cn/2013npc//2013/0309/c358677-20734160.html>; *Weifa Xingwei Jiaozhi Fa Nanchan Bei Shi Wei Laojiao Zhidu Zhongjie Zhe* (《违法行为矫治法》难产 被视为劳教制度终结者) [*Deemed Terminator of RETL, The Law for the Correction of Unlawful Conduct Yet to Pass*], XINHUA (Aug. 16, 2012) http://news.xinhuanet.com/legal/2012-08/16/c_112738640.htm.

projects on “education and correction of unlawful conduct” were the subject of experiments in four cities in 2011, but little is known about the content of these projects and whether the judiciary was given the power to determine RETL sentences.¹²⁹ It was not until the remarks of the President of the Supreme People’s Court in 2013 that it looked likely courts would soon step in and handle criminal prosecutions of many offenders who were previously processed as RETL targets.

The final announcement of RETL’s repeal in December 2013 rightly met with praise from within the PRC and beyond. The passing of RETL into history removed a longstanding method of violating human rights and brought the PRC one step closer towards ratification of the ICCPR. The government’s decision to abolish rather than modify RETL of course also ended the debate regarding the possibility of more modest reforms to the sanction. But abolition did not end the broader conversation regarding the state’s ability to deprive people of liberty for various anti-social conduct.

Now that RETL has been abolished, people who previously fell within its scope are being shifted to other forms of social controls. To be clear, we are not arguing that the all types of people previously handled by the RETL system should be set free without any government monitoring or more serious forms of intervention. The concern, however, is that the fanfare of RETL’s demise might mask persisting issues with deprivations of liberty that meet neither the PRC’s Criminal Procedure Law nor international human rights norms with which the PRC government itself has stated its intent to comply.

For example, most ordinary drug offenders, who constituted a major part of the group sent every year to such re-education, will probably be confined in existing administrative treatment centers for up to six months or a year rather than sent to court, and the same can be expected for commercial sex workers. Even prior to abolition of RETL, international non-governmental organizations were already raising concerns about the use of “custody and education”—another police controlled

129. *Si Shi Shidian Laojiao Zhidu Gaige You Weifa Xingwei Jiaoyu Jiaozhi Qudai* (四市试点劳教制度改革 由违法行为教育矫治取代) [*Four Cities Reforming RETL by Replacing It with Education and Correction of Unlawful Conduct*], (Aug. 29, 2012) http://news.xinhuanet.com/politics/2012-08/29/c_123642847.htm.

sanction—to detain commercial sex workers for months at a time.¹³⁰ Lawyers within China have similarly called for an end to the practice.¹³¹

A miscellany of other petty offenders who do not respond well to the fifteen-day maximum detention currently dispensed by the police under the Security Administration Punishment Act (治安管理处罚法) may find themselves in “legal education” centers or other types of “community correction” units that have detained people for longer periods without judicial approval or lawyer’s intervention.¹³² Others have found themselves detained for only a few days under the guise of “legal study classes” even if not sent away for longer stays at special centers.¹³³

Moreover, despite a new mental health law, police are likely to continue the involuntary commitment to psychiatric hospitals of certain political dissidents, religious or Falun Gong adherents, and other recalcitrants.¹³⁴ They may also be

130. See “Custody and Education”: *Arbitrary Detention for Female Sex Workers in China*, ASIA CATALYST (Dec. 2013), <http://asiacatalyst.org/blog/2013/12/report-custody-and-education-arbitrary-detention-for-female-sex-workers-in-china.html> (“However, largely unknown to the general public, similar administrative penalties [to reeducation through labor] remain in effect, including the Custody & Education (C&E) system targeting commercial sex workers and their clients.”).

131. *Lushi Jianyi Chexiao “Maiyin Piaochang Renyuan Shourong Jiaoyu Banfa”* (律师建议撤销《卖淫嫖娼人员收容教育办法》) [*Lawyers Suggest Revoking The Measures on Custody and Education of Commercial Sex Workers*], http://mp.weixin.qq.com/s?__biz=MzA5NjM1NzUwOA==&mid=200286955&idx=3&sn=9e1a0ba640b30d4a758f93e3587e2f86&scene=1&from=groupmessage&isappinstalled=0#rd.

132. See, e.g., Xin Yu (心语), “*Jiao Zheng Fa*” *Ke Zhi Shequ Jianyu Hua? Gongmin Huyu Renda Tingzhi Shenyi* (《矫正法》可致社区监狱化? 公民呼吁人大停止审议) [*The Law for the Correction May Turn Communities to Prisons? Citizens Call For People’s Congress to Stop Reviewing (the Draft)*], RADIO FREE ASIA (Feb. 27 2014), <http://www.rfa.org/mandarin/yataibaodao/renquanfazhi/sy-02272014101150.html>.

133. See Donald Clarke, *Why Chinese Needs a Good Word for “Irony”, and Why it’s Too Soon to Bid Farewell to Re-education Through Labor*, CHINESE LAW PROF BLOG (Nov. 28, 2013), http://lawprofessors.typepad.com/china_law_prof_blog/2013/11/why-chinese-needs-a-good-word-for-irony-and-why-its-too-soon-to-bid-farewell-to-re-education-through.html.

134. “*The Darkest Corners*”: *Abuses of Involuntary Psychiatric Commitment in China*, AMNESTY INT’L (Aug. 22, 2012), <http://www2.amnesty.org.uk/blogs/countdown-china/%E2%80%9Cdarkest-corners%E2%80%9D-abuses-involuntary-psychiatric-commitment-china>.

increasingly tempted to resort to many forms of illegal detention, ranging from kidnapping to “black jails.”¹³⁵

Prominent among other politically disempowered groups are petitioners, often penniless, who are protesting allegedly illegal land takings and other abuses of power by local officials. Human rights organizations have documented numerous instances of petitioners being detained or forcefully returned to their home provinces.¹³⁶

At the other end of the power spectrum, even high-ranking Party members face their own forms of sanctions without procedural protections. It would have been surprising to find government officials in a RETL facility, but it is nonetheless worth noting the continuing use of severe Party-administered deprivations of liberty that lack any judicial intervention.¹³⁷

Finally, a number of questions remain for those cases that formerly would be siphoned to RETL but will now be handled through the formal criminal justice system instead of an alternative administrative system. Will they receive the full process provided for in the Criminal Procedure Law, recognizing that many barriers remain to accessing evidence, witnesses, and other information crucial to mounting an effective defense?¹³⁸ Or will they be subject to the truncated “simplified procedures” as provided in the Criminal Procedure Law or the new, experimental “simple and fast” criminal process (轻刑快审) that is being used to speed up the adjudication of minor crimes that are punishable by three years’ imprisonment or less? The President of the Supreme People’s Court emphasized the significance of this speedy process as a reform

135. Sophie Richardson, *Dispatches: Casting a Light into China’s Black Jails*, HUMAN RTS. WATCH (Mar. 28, 2014), <http://www.hrw.org/news/2014/03/28/dispatches-casting-light-china-s-black-jails>.

136. See *China: Rampant Violence and Intimidation Against Petitioners*, HUMAN RTS. WATCH (Dec. 9, 2005), <http://www.hrw.org/news/2005/12/07/china-rampant-violence-and-intimidation-against-petitioners>; see also *China Bans Petitioners Appealing Directly to Higher Authorities*, REUTERS (Apr. 23, 2014, 11:54 PM), <http://www.reuters.com/article/2014/04/24/us-china-petitioners-idUSBREA3N08120140424>.

137. See Flora Sapio, *Shuanggui and Extralegal Detention in China*, 22 CHINA INFO. 7, 7 (2008) (highlighting the fact that the Party has the power to detain officials suspected of corruption).

138. See, e.g., MIKE MCCONVILLE, *CRIMINAL JUSTICE IN CHINA: AN EMPIRICAL INQUIRY* 5 (2011) (examining these concerns from an empirical perspective).

initiative that is intended to supplement the abolition of RETL.¹³⁹

It is hardly surprising that the PRC is finding ways to push minor cases through the criminal justice system: the United States, for example, relies overwhelmingly on guilty pleas and Taiwan allows “negotiation procedures” for minor offenses.¹⁴⁰ What remains to be seen with China is what shape Chinese “plea bargaining” or other rapid forms of case resolution will take. Recent reports that some localities are using criminal detention—which allows police to hold suspects up to thirty days—as a replacement for RETL indicate that perhaps a tool meant for use during the investigation phase is itself being turned into a form of punishment.¹⁴¹

In short, there remain more questions than answers about what RETL’s abolition means for the thousands of cases that would annually fall under its umbrella. Without a clear vision for what a RETL-free PRC will look like, we must wait and see whether China’s leadership will finally leave RETL to the history books in substance as well as name, as its neighbor across the strait has already done.

Despite the major political, legal, economic, and social differences between Taiwan and the PRC, Taiwan’s example can be of great assistance to those Mainland law reformers concerned with what alternatives are filling the gap left by the end of RETL. In China, legal reforms on paper have often failed to strengthen significantly the ability of people accused of criminal or quasi-criminal violations to challenge the government’s case in practice. Thus, there is reason to question whether the end of RETL merely “changed the soup but not the medicine” (換湯不換藥) or, in terms more familiar to English readers, put old wine in new bottles.¹⁴²

139. Supreme People’s Court: Supporting Reform of RETL, *supra* note 122.

140. See Lewis, *supra* note 13.

141. Verna Yu, *How China Using Criminal Detention in Place of Re-education Through Labour*, S. CHINA MORNING POST, (April 21, 2014, 3:21 AM), <http://www.scmp.com/news/china/article/1492192/china-using-criminal-detention-place-re-education-through-labour>.

142. CORINNA-BARBARA FRANCIS, AMNESTY INT’L, CHANGING THE SOUP BUT NOT THE MEDICINE: ABOLISHING RE-EDUCATION THROUGH LABOUR IN CHINA (2013), available at <http://www.amnesty.org/en/library/info/ASA17/042/2013/en>.

Taiwan's experience offers a tested roadmap for gradually reducing arbitrary police powers. For example, knowledge of Taiwan's former bureaucratic procedures for determining who should be deemed a *liumang*, and to what extent, may prove useful as the PRC considers how to improve the criteria and the procedures for deciding who should be subject to RETL's successors. Indeed, the Taiwan precedent of classifying offenders into two categories and subjecting only those in the second, more serious category to incarceration may stimulate new Mainland thinking about how to reduce the numbers of those who are to suffer long-term administrative detention, numbers that have been far larger in the PRC than in Taiwan.

Now that the heads of the local public security apparatus in China appear to be playing at least a slightly diminished role in the extremely powerful Party political-legal committees that control the administration of justice, the time might finally be right to start making inroads into the overwhelming police influence over decisions when to deprive people of physical liberty because of allegedly dangerous behavior.

As we have suggested, Taiwan's former administrative procedures left much to be desired in terms of their fairness to potential targets of the system. Yet Mao himself once exhorted "We have had a good many teachers by negative example." We hope that Mainland legislators will regard Taiwan's now abolished procedures not as favorable precedents to be followed indefinitely but rather as negative examples to be increasingly avoided. The predecessor of the *Liumang* Act was first promulgated in 1955, a repressive era under Chiang Kai-shek's iron-fist rule. By the time of the *Liumang* Act's abolition, it was deemed a remnant of the past that no longer fit Taiwan's impressive progress toward the rule of law. RETL, similarly, was officially established in a turbulent, nightmarish era of the PRC's history. Slowly it, too, became viewed by many in China as seriously inappropriate in light of their country's social and economic progress and heightened awareness of the importance of protections against arbitrary police conduct. Such an evolving consensus added to the reform momentum, as has been demonstrated in Taiwan's case.

The very inadequacies of the *Liumang* Act spurred an earlier generation of Taiwan reformers to insist upon some form

of judicial review of the relevant administrative decisions, leading to the establishment of the “security tribunals” in the local district courts. One of the key questions confronting those Mainland legislators and officials who, despite the formal end of RETL, wish to retain long-term administrative detention but in some modified form is whether the present system of allowing judicial review in principle, albeit restricted in practice, should be replaced by a system of compulsory judicial review in every case. If so, they will have to determine the nature of that judicial review. Should it take the form of the existing review prescribed by the PRC’s Administrative Litigation Law? If all administrative incarceration decisions are to be reviewed, that would add substantially to the burdens of the court system unless the number of targets is substantially reduced. Or should some specially adapted, more abbreviated, procedures be devised to help the courts discharge the expanded duties contemplated?

In this respect also, the Taiwan experience would be very relevant. Knowledge of the origins, operation, advantages, disadvantages, and demise of the “security tribunals” should prove highly instructive. Again, the special court procedures used for *liumang* cases, if properly assessed in accordance with rule of law values, should be regarded as a negative example. Despite the authorized participation of defense counsel, the failure of the “security tribunals” to provide accused *liumang* with other procedural protections provided to accused criminals gave them much of the appearance and reality of the very inquisitorial judicial system that Taiwan’s criminal justice reforms of the past decade were designed to eradicate. Especially appalling were the severe limitations upon the opportunities for the target and his counsel to identify and cross-examine the witnesses against him.

Given existing political constraints and other distorting influences upon PRC courts, which significantly diminish prospects for independent judicial action, it would be most unfortunate if the PRC should establish the equivalent of Taiwan’s “security tribunals” to review decisions to send people to “custody and education,” “community corrections,” or other forms of non-criminal deprivations of liberty. That would impose further restrictions on fair court procedures while misleading the public into thinking that adequate court review

was being granted. It would be far better for China's judicial resources to be expanded to ensure that all decisions imposing or recommending restraints on liberty will receive in practice the same judicial review as currently available in principle under the Administrative Litigation Law. Taking reforms a step further, it would be even better if witnesses regularly appeared in court for many types of cases under both the Administrative Litigation Law and Criminal Procedure Law, as compared with current practice where witnesses are nearly always absent.

Of course, real change will also require that judges not only be adequate in numbers but also be willing to stand up to the police who bring cases before them. We recognize that empowering the Chinese judiciary to take a more assertive position vis-à-vis the police would be no easy task. Nonetheless, making sure that there are adequate numbers of judges to give each case serious scrutiny is a necessary first step. Our hope is that the prospect of a meaningful judicial review in every case where administrative detention is decided upon or recommended by the police will stimulate police to be more cautious in their appraisals and reduce the number of cases that come before the court.

From a broader perspective, what might China learn from our examination of the life and death of the Liumang Act? Apart from the desirability of completely abolishing long-term administrative detention, we believe the attention of people in Mainland China should focus on the roles that democratic political-legal institutions played in its gradual reform and ultimate demise. Especially prominent was the role of Taiwan's Constitutional Court, an institution that, sadly, has no counterpart on the Mainland, where the Standing Committee of the NPC has the exclusive power to interpret the Constitution but, in practice, does not exercise it.

For a long period under the KMT dictatorship in Taiwan, the Constitutional Court served as mere window dressing for the system's rule of law charade. Yet, as the martial law regime began to unravel, the Court began to spread its wings and increasingly demonstrate a capacity for imaginatively and vigorously holding the other branches of government to the legal standards of government under law. In fact, many of the Constitutional Court's new interpretations stimulated, indeed

insisted upon, further reforms in accordance with the Justices' impressive knowledge not only of the ROC's Constitution but also of the governments and legal systems of the principal Western democracies. The publishing of Justices' concurring and dissenting opinions as well as the Constitutional Court's majority opinion has further spurred a robust debate over the meaning of the provisions enshrined in Taiwan's Constitution.

As we have shown earlier, the Constitutional Court's deft handling of the sensitive problems of long-term administrative detention, beginning in 1995 with the first of three interpretations that ultimately led to abolition, is a prime illustration of how constitutionalism can fruitfully take root in Chinese political-legal culture and benefit the development of democratic government and the rule of law. The Court's interpretations wisely selected from and responded to the broad range of requests presented to it by increasingly energetic legal and judicial experts. Those interpretations made clear that many of the features of the Liumang Act were inconsistent with the basic values of Taiwan's rapidly evolving democratic system. The Constitutional Court therefore required the legislature, with the assistance of the executive, to revise the offending provisions within a reasonable time.

The Constitutional Court's handling of these cases also illustrates the limits under which it exercises its powers. Despite the many constitutional failings of the Liumang Act, the Court did not believe itself free to invalidate the legislation in its entirety. Nor did it assert the power to address issues that were not raised by the applications for review that had been submitted. These constraints left the overall fate of this politically sensitive legislation to the democratically elected branches of government, and in 2009, as we have seen, the newly-elected KMT administration and the KMT-dominated legislature obliged by abolishing it. In this instance, the three main branches of the ROC's distinctive system of five branches of government performed in textbook fashion.

This example of the separation of powers among Taiwan's main branches of government and the ability of the Constitutional Court to act as a powerful final arbiter of constitutional issues—including operationalizing rights set forth in the ROC Constitution—is currently impossible to replicate in

the PRC. There, at best, the branches exercise a separation of functions under the nominal control of the NPC and its Standing Committee, which, like the other branches, are under the actual control of the Communist Party. As a result, the exact contours of an RETL-free PRC will be shaped by political forces instead of by judicial action.

Although this case history of the recent constitutional process in Taiwan should be of enormous interest to Mainland reformers, in the present political climate there is little prospect that the PRC is ready to consider establishment of a similar constitutional court. The most that many experts think feasible might be the authorization of a constitutional committee within the NPC that would scrutinize all proposed legislation in order to determine whether any provisions in the draft are inconsistent with the Constitution. Even that may well be more than China's current leaders are prepared to support.

CONCLUSION

We began this study when the Liumang Act was still in force in Taiwan and RETL was still being used in the PRC. We now find ourselves concluding a project that first turned into a historical piece for Taiwan and then, several years later, for the PRC. Despite these welcome developments, challenges remain on both sides of the strait. Taiwan continues to grapple with reforms to its criminal justice system, such as introducing citizen participation through a type of consultative jury, and with broader issues of how to accommodate demands for greater citizen participation in the government, as demonstrated during the Sunflower Movement's occupation of the Legislative Yuan in March-April 2014. But these issues are part of healthy, open debates in a democratic society, not manifestations of entrenched police repression. The demise of the Liumang Act marked the disappearance of one of the last clear vestiges of Taiwan's authoritarian past. In contrast, the end of RETL removed but one of many controversial practices that can be used to restrict people's liberty with few if any checks to ensure the decision comports with even the limited protections in the PRC's Criminal Procedure Law.

We hope that our study offers further support for the true demise of RETL, meaning in substance as well as in name, and

the establishment of at least a constitutional committee within the NPC, if not an independent constitutional court. We also hope that the new Xi Jinping leadership has the wisdom to see that other forms of unfettered police powers should likewise become relics of the past. Surely there are many Taiwan legal experts across the strait who are willing and able to provide valuable advice on charting a path forward now that RETL belongs to the PRC's past.

