

# The Innovative Spirit of Academia Sinica's Law Institute

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The tenth anniversary of the founding of Academia Sinica's Law Institute gave me a push to read a bit on how the Institute came to be. The genesis of the Institute stretches back to an initial planning committee in 1999. While the original proposal failed to garner the required support, a second committee convened in 2003 succeeded in germinating the seed that would, in July 2011, become the Law Institute.

One of the four fundamental principles to which the planning committee appointed in 2003 agreed was “to revamp legal studies in Taiwan by breaking new ground with an innovative spirit”（「以創新的精神，突破國內法學研究瓶頸，開創法學研究新局」）。<sup>1</sup> Nearly two decades after this principle was articulated, the Law Institute is embodying this spirit. It not only houses a stellar group of permanent research professors, but it also brings in consistently strong post-doctoral researchers and visiting scholars who add energy to fuel the innovative spirit.

I am honored to be the first foreign professor to have the status of distinguished visiting professor（客座教授）at the Law Institute. And I am grateful to all my colleagues at the Law Institute for welcoming me into their community. Little did I know when my dear teacher, mentor, and friend Professor Jerome A. Cohen first arranged for me to visit Taiwan on a joint

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<sup>1</sup> IAS, <https://www.ias.sinica.edu.tw/introduction> (last visited Sept. 7, 2021).  
Online: <http://publication.ias.sinica.edu.tw/81418012.pdf>;  
<http://publication.ias.sinica.edu.tw/80719012.pdf> (Chinese version).



research project in 2006 that it would become such a cherished part of my academic and personal life. Or that when I first met Professor Yu-Jie Chen over a decade ago in New York City that we would later sit in her office in Taipei chatting about research projects over a pot of oolong tea.

While this volume rightly celebrates all that the Law Institute has accomplished in its first decade, it is also a chance to look forward at how it will continue to break new ground and embody an innovative spirit in the years ahead with respect to its six core research areas: (i) Constitutional Structure and Human Rights; (ii) Administrative Regulation and Judicial Remedies; (iii) Law, Science, and Technology; (iv) Jurisprudence and Social Transformation; (v) Legal Development in China, Hong Kong, and Macau; and (vi) Comparative Study of Judicial Systems, Empirical Study of Judicial Behavior, and Legislative Studies.

Writing this in Taipei as Taiwan emerges from its worst outbreak since the start of the pandemic, I am grateful to be living in a country whose citizenry — despite a cacophony of political views and a constant battle against mis/dis-information — has tackled pandemic controls with vigilance. I am also heartened that Taiwan has scholars at the Law Institute to help inform decisions in the months and years ahead when an innovative spirit will continue to be critical.

For example, the pandemic has highlighted how experience with martial law and, more generally, authoritarian rule understandably provide reason for caution when the government asks, or even requires, people to provide information about their whereabouts and to restrict their movements. What limits should there be on government-imposed quarantines? And how can contact tracing apps and other technological responses to controlling the pandemic be created and implemented in ways that minimize concerns about individual privacy? The choices that Taiwan makes to address not only COVID-19 but whatever future threats to public health emerge will require thoughtful consideration of constitutional structures and human rights,

administrative regulation and judicial remedies, as well as the interplay among law, science, and technology.

Nor is public health the only looming challenge that will benefit from creative legal minds. With the world's lowest birthrate,<sup>2</sup> Taiwan's increasingly inverted population pyramid<sup>3</sup> means that issues about the viability of pensions and other services for an aging population will be under greater strain. Pension reform has already been an issue before the Constitutional Court, but the underlying problems remain. What future legal disputes, and creative legal solutions, will chart a path that provides for the needs of Taiwan's population old and young?

And can legal scholars perhaps even help to nudge the birthrate in a positive direction? The Constitutional Court's 2017 ruling (Interpretation No. 748) that the prohibition on marriage between two persons of the same sex violated the Constitutional guarantees of freedom of marriage and the right to equality was groundbreaking. Without the Court's ruling, it likely would have taken much longer for same-sex marriage to be legalized. Even with the Court's ruling, the legislature ran right up against the Court's two-year deadline for compliance in 2019.

Looking back on 2019 from today, the two years since realizing marriage equality have, however, failed to see real progress with respect to expanding options for family building by LGBT couples. Legal impediments likewise limit the ability of single women to use assisted reproductive technologies. The innovative spirit of the Law Institute is a positive force to inform debates playing out both in political arenas and courtrooms about the paths to parenthood. Indeed, shortly after passage of the law implementing Interpretation No. 748, the Law Institute held a conference titled "Beyond 748:

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<sup>2</sup> COUNTRY COMPARISONS: TOTAL FERTILITY RATE, <https://www.cia.gov/the-world-factbook/field/total-fertility-rate/country-comparison> (last visited Sept. 7, 2021).

<sup>3</sup> NATIONAL DEVELOPMENT COUNCIL, [https://pop-proj.ndc.gov.tw/main\\_en/Pyramid.aspx?uid=4106&pid=4104](https://pop-proj.ndc.gov.tw/main_en/Pyramid.aspx?uid=4106&pid=4104) (last visited Sept. 7, 2021).

Same Sex Marriage and Family.”<sup>4</sup>

I am also writing just as the United Nations’ Intergovernmental Panel on Climate Change (IPCC) has issued a yet even more dire assessment of the climate crisis.<sup>5</sup> Taiwan recorded its hottest May since 1947 and experienced a serious drought this summer that has only recently abated with a return of soaking rains. How can law influence human behaviors to mitigate environmental harm in Taiwan? And how can law help address the growing human rights concerns that come with the climate crisis? Legal innovation is becoming a matter of Taiwan’s, and humankind’s, survival.

And constantly in the background of all these domestic debates is the knowledge that Taiwan’s very existence as “Taiwan” is threatened by Beijing’s intention to add “Province” to the name. As someone who initially visited Taiwan nearly a decade after the first direct presidential election, it has been a process to wrap my head around how the legal and political systems are still rooted in the “Republic of China” while that construct is for many at best an unsettling fit for their identities today and for some — especially for those who personally suffered or whose family members did — a painful presence in their lives. Yet the people of Taiwan are denied the security of knowing that they can work out at their own pace and on their own terms how to define their home country.

In this challenging space, the Law Institute can continue to serve as an incubator for ideas of how to tackle fundamental questions about Taiwan’s identity, including conversations about the future of the “Republic of China” constitutional structure. When the Law Institute celebrates its twentieth birthday in 2031, it will coincide with the hundredth anniversary of the Provisional Constitution of the Political Tutelage Period that preceded the

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<sup>4</sup> IAS, <http://regasia.ias.sinica.edu.tw/index.html> (last visited Sept. 7, 2021).

<sup>5</sup> CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, <https://www.ipcc.ch/report/ar6/wg1/> (last visited Sept. 7, 2021).

ROC Constitution.<sup>6</sup> The ROC Constitution has undergone significant revisions since its enactment in 1947, but it remains the bedrock of Taiwan's legal and political systems.

Thus, on the one hand, the Law Institute is a space for exploring the potential futures for Taiwan's domestic legal framework while under the shadow of an existential threat by Beijing. On the other hand, with "Legal Development in China, Hong Kong, and Macau" as a core part of its work, the Law Institute is also immersed in building ties and understanding the same place that could overturn Taiwan's entire legal system and, more generally, the Taiwanese people's very way of life. This tension is part and parcel of life in Taiwan: China as Taiwan's largest trading partner and largest threat; "China" (before establishment of the People's Republic) as a source of a legal system that still undergirds Taiwan today and the PRC today as increasingly hostile to the civil and political rights that define a democratic Taiwan.

The "Hong Kong" in "Legal Development in China, Hong Kong, and Macau" adds another layer of complexity to the Law Institute's mission. Watching the rapidly increasing repression of people's human rights and erosion of independence of the legal system in Hong Kong has made Taiwan's legal scholars and broader society appreciate even more the freedoms they won after decades of martial law. It also has underscored what is at stake should Taiwan be controlled by Beijing. Moreover, for the Law Institute, Hong Kong's plight has made clear that the former practice of hopping on a plane to Hong Kong will not automatically resume once the pandemic abates: there are real security concerns to consider depending on how the Hong Kong authorities might perceive the person's work and other activities.

In the years ahead, I nonetheless hope that the Law Institute can navigate how to study China, and collaborate with China-based scholars, even as

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<sup>6</sup> Hungdah Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan* (with Documents), 1993(2) MARYLAND SERIES IN CONTEMPORARY ASIAN STUDIES, <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1114&context=mscas>.

tensions are expected to increase. This is first important for Taiwan. The flow of trade, investment, and people across the strait requires an understanding of China's legal system not just on paper but also in operation. Moreover, if Taiwan and China are to eventually reach a period of repose, it is crucial to have people on both sides who can communicate effectively even when tensions are high. If that point of repose is reached, interpersonal ties can be activated even if some have fallen into hibernation.

If the Law Institute's scholars can surmount the obstacles and provide in-depth, clear-eyed analysis of China and Hong Kong in the years ahead, they will also be doing a service to audiences far beyond Taiwan. China and Hong Kong legal studies in the United States and other countries face significant challenges today that only look to deepen in the years ahead. I recall fondly participating in legal reform conferences in China during the aughts that brought together PRC legal scholars with American, Taiwanese, and others for energetic, candid conversations. I also remember sitting in the Taipei District Court with two visiting scholars from Beijing as we chatted with Taiwanese judges. Both of these scenes could not happen today.

In sum, in 2003 the Law Institute's planning committee sought "to revamp legal studies in Taiwan by breaking new ground with an innovative spirit" (「以創新的精神，突破國內法學研究瓶頸，開創法學研究新局」). Today, I would rephrase a key challenge as "to revamp China and Hong Kong legal studies in Taiwan by breaking new ground with an innovative spirit." Scholars at the Law Institute can write and say things that are perilous for their counterparts in China and Hong Kong. The world needs them to be unflinching voices who do not pull punches.

I know my colleagues at the Law Institute have more than enough spirit for the task. Just as the dramatic rainstorms in the hills of Nangang surrounding Academia Sinica suddenly can give way to bursts of sunlight, the scholars at the Law Institute bring piercing insights and verve to their work. They also bring a spirit of humor that I greatly appreciate. At the Law Institute,

it is common for academic colloquia on weighty topics to be peppered with bursts of laughter. This spirit makes me confident that we will be celebrating many more achievements and many more anniversaries of the Law Institute in the decades ahead.

