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Introduction

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Last December the Taiwan Research Programme of the London School of Economics convened a Special Workshop on developments relating to justice in Taiwan. The workshop presented the perspectives of an able group of diverse scholars and commentators, whose views are represented in this volume.

Justice in Taiwan is, of course, intrinsically important to the island's 23 million people, who struggle daily to fulfill the promise of a democratic political system. Understanding the problems of achieving justice on the island is also important to foreign policy-makers, scholars and other opinion-molders outside Taiwan who know its political and economic significance. To be sure, China, which hopes eventually to reincorporate the island, has the most to learn from it, especially since the People's Republic confronts an even greater, more complex challenge than Taiwan in meeting popular demands for justice.

Taiwan has recently been undergoing a dual transformation. Politically, it is making the transition from an authoritarian dictatorship to a vibrant democracy. Legally, with respect to criminal justice, it has been moving from an inquisitorial system, still marked by some traditional Chinese attitudes but with borrowed continental European forms, to a more Anglo-American type of adversarial system, absent the jury trial.

The military-dominated dictatorship that Chiang Kai-shek's Kuomintang (Nationalist Party or KMT) brought to Taiwan in 1945 at the end of World War II made the previous half-century of Japanese rule look mild by comparison. Like the dictatorship of Mao Zedong that succeeded it in Mainland China in 1949, the KMT party-state was constructed along Leninist lines. In the mid-1980s, Chiang's son, Chiang Ching-kuo, in response to strong domestic and international pressures, initiated the process that has led to recent democratic political and legal reforms. Yet the system still bears some of the traces of KMT authoritarianism.

Both the Nationalists and the Communists have continued to respect the image of Sun Yat-sen as founder of the Republic of China. It spanned almost four decades on the Mainland from its establishment in 1912, following the collapse of the Qing dynasty, to the Communists' ascension in 1949. Only recently, however, has it become possible to test the free operation of the unique separation of powers system that Sun imaginatively devised to combine the virtues of the Western political framework inspired by Montesquieu with those of traditional Chinese government. Sun believed that in China's context the classical three branches of government – legislative, executive and judicial – that prevailed in

various configurations in the West had to be supplemented by two additional branches or *yuan* – an examination *yuan* for recruiting the nation's officials and a control *yuan* for monitoring their performance.

Because Lenin – not Sun – was his true guide, Chiang Kai-shek never sought to freely implement the five-power structure that was erected in Sun's name, but operated it through a dictatorial party-state. Mao Zedong openly rejected Sun's structure in favor of Soviet forms. Now, however, after a generation of gradual political change in Taiwan, a remodeled KMT and its principal opposition, the Democratic Progressive Party (DPP), have an opportunity, for the first time, to demonstrate the workability, and perhaps even the superiority, of Sun's imaginative embellishment of Montesquieu. Students of comparative government will surely note that this gives a unique twist to Taiwan's democratization efforts, and, on the Mainland, Chinese reformers inside and outside the Communist Party necessarily have more than an academic interest in this major innovation in Chinese political-legal culture.

Unfortunately, this democratic experiment with Sun's five-power structure is being conducted by a society that is badly riven by its modern political history. That is the significance of Dr Fang-Long Shih's contribution to this volume, entitled ‘Memory, Partial Truth and Reconciliation Without Justice: the White Terror Luku Incident in Taiwan.’ It illustrates the long, post-1945 KMT oppression that accounts for the abiding bitterness, indeed hatred, that, more than six decades later, continues to mark the island's daily politics. How Taiwan has managed to transform itself into a functioning democratic polity in a bitterly-divided and mistrustful society is a remarkable story, one that is far from concluded.

The formal criminal justice system was, of course, an essential instrument of KMT oppression. Not surprisingly, the advent of democracy brought forth a host of demands for reforming that system, which has undergone an extraordinary transformation during the past 20 years. Although the reform process has not run its course, what has been accomplished, as Professor Wang Jaw-Perng's informative essay makes clear, amounts to a veritable revolution in the curbing of arbitrary police and prosecutorial power. Not only have prosecutors and judges managed to gain substantial independence from political authority, but, consistent with the adversarial system introduced in 2002, there has also been a significant shift in the balance of power between prosecutors and judges. For example, prosecutors no longer have the power to approve either searches and seizures or detentions pending trial. Court approval must be obtained. Moreover, as part of the adversarial process, prosecutors' trial responsibilities have been enlarged. They can no longer rely on inquisitorial judges to shoulder the main burden of bringing out the evidence at trial; they must now play an active role. The new system also imposes challenging obligations upon judges, who are now to become less active but more neutral decision makers, and upon lawyers, who are expected to take a more dynamic part in trials. All these legal actors are still adjusting, often uncomfortably, to their new duties and opportunities.

The jury is the most famous aspect of the Anglo-American adversarial system. Yet Taiwan's gradual assimilation of that system has thus far excluded any effort to institute juries. One wonders whether, as democracy takes firmer root, there will be a rising demand for some form of popular participation in the criminal process. The implications of such a change would be profound and highly political. One

need only ask whether former President Chen Shui-Bian and his wife would have been convicted on various corruption charges if they had been tried before a representative jury that required a unanimous vote in order to convict. This is not to suggest that evidence of their corruption was lacking but that, in an emotional atmosphere, juries have been known to refuse to convict some defendants regardless of the evidence.

Japan has just joined those countries that have adopted some form of popular participation in criminal trials. It now requires three judges to collaborate with six laymen in deciding both guilt and sentencing in serious cases. South Korea is engaging in a similar reform. Taiwan would do well to watch these developments. It should also take note of China's apparently less genuine, recent attempts in certain provinces to introduce an informal ‘jury system’ that goes beyond the long-authorized but uneven use of one or two lay assessors in basic court trials.

Taiwan's adversarial system may in practice emerge as a unique compromise between Anglo-American and continental European versions, which have themselves been undergoing change. Yet, whatever the type of criminal process chosen, certain problems are likely to endure because they are universal. For example, the wheels of justice often grind too slowly even in the best and fairest systems, and Taiwan too has had to confront the thorny issues associated with the right to a ‘speedy trial.’

This collection of papers also presents some foreign experiences that offer indirect insights into Taiwan's society and justice as well as suggestions for further comparative research. One thing is certain. We have just begun to explore this theme. More detailed conferences are needed. We could easily devote a separate volume to the analysis of how Taiwan has quite successfully reduced corruption among prosecutors and judges, but not local politicians, or how its current experiment with adapting American-style ‘plea bargaining’ is faring. I hope that this initial workshop and the thoughtful articles contained in this volume will stimulate similar programs and continuing research.

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