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## THE LEGAL DEVELOPMENT OF TAIWAN IN THE 20TH CENTURY: TOWARD A LIBERAL AND DEMOCRATIC COUNTRY\*

Tay-sheng Wang

### I. INTRODUCTION

The legal development of Taiwan<sup>1</sup> in the twentieth century reflects the complex legacy of "one land with two national flags." A government imposed by Japan ruled Taiwan for the first half of the twentieth century (1895-1945), followed by a government originating in China (the Chinese mainland) in the second half of the century (1945-2000). The people who came from Japan or Republican China became the leading class in Taiwan. Accordingly, these two regimes were regarded by the native inhabitants as foreign rulers.<sup>2</sup>

Taiwan's legal institutions underwent a radical change on the eve of the twentieth century. Prior to 1895, the laws in Taiwan were dominated by the Chinese legal traditions of the late nineteenth century. The state law introduced by pre-war Japan and Republican China was largely modeled on the individualist, liberal law of the modern West that was still novel to the rulers of Japan and China. Taiwan has thus been exposed to the so-called "reception of Western law."<sup>3</sup> The term

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\* This article was originally presented as *The Development of Taiwan's Legal Systems: Towards a Western-style Law*, CONFERENCE ON TAIWAN IN THE 20TH CENTURY: A RETROSPECTIVE VIEW, in THE CHINA QUARTERLY AND THE GOVERNMENT INFORMATION OFFICE, R.O.C., (Taipei, Dec. 14-15, 1999). When I wrote that piece, no one could imagine that the Council of Grand Justices would find the newly-amended constitutional provisions unconstitutional, that the National Assembly would be virtually abolished, and that the opposition party would win the presidential election for the first time in Taiwan's history. This revised version of course has taken these crucial events into account. Chinese and Japanese names in this article are given in the Chinese and Japanese name order, with the family name first. The names of the Chinese and Japanese authors who have published in English are given as they are in their publications. I would like to thank Laura A. Cecere and Niclas Ericsson for revising the English in the manuscript and giving valuable comments during my tenure as a visiting scholar in the East Asian Legal Studies Program of Harvard Law School. I remain responsible for any opinions or errors herein. A Chinese version of this article will be separately published in Taiwan.

<sup>1</sup> The term "Taiwan" is not restricted to the Taiwan Island itself, but refers also to the Pescadore Islands and other subordinated islands. Kinmen and Matsu are regarded as part of Taiwan when I discuss events that occurred in Taiwan after 1949. See Tay-sheng Wang, *Chapter 4: Taiwan*, in *ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA* 124-25 (Poh-Ling Tan ed., 1997) [hereinafter Wang, *Taiwan*].

<sup>2</sup> It is interesting to note that legal terms in this paper are romanized from the respective "national language," Japanese [hereinafter J] or Mandarin Chinese [hereinafter C], of different periods. Mandarin Chinese is romanized in the pinyin system.

<sup>3</sup> On the reception of Western law, see generally Sawaki Takao, *Hō no keiju* [The reception of

“Western law” includes continental European law and Anglo-American law. However, as discussed below, continental European law was the more prevalent of the two because pre-war Japan and Republican China had adopted continental European law before acquiring Taiwan.

This Article examines the process of legal modernization in Taiwan during the past century. It focuses on the positive law of the state, including various legislation, executive measures, and judicial decisions, which have been the primary means of introducing the individualist, liberal legal system of the modern West into an Asian country like Taiwan. Part II presents a general picture on development of the Taiwan’s legal systems to provide a context for the laws promulgated throughout the twentieth century. Parts III, IV, and V discuss the changes in constitutional law, criminal justice and civil justice from late 1895, when Japan established its colonial government on the island, to May 20, 2000, when the Chinese Nationalist administration ended its rule in Taiwan.<sup>4</sup> These parts also examine the extent to which the people of Taiwan have had, in general, access to these imported institutions and ideas.<sup>5</sup>

## II. ETHNICITY, STATES, AND LAWS

Every state has laws that facilitate the governance and administration of the state, and that can evolve into an independent rule system. Even though the basic substance of the laws enacted by two different states may be the same, these laws are subject to separate legal sovereignty and are therefore different in the formative sense. Additionally, values and attitudes exert significant influence over the interpretation and application of official law and upon the daily

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*law*], in *GAIKOKUHŌ TO NIHONHŌ* [FOREIGN LAW AND JAPANESE LAW] 115-58 (Itō Masami ed., 1966). Pre-war Japan and Republican China adopted Western-style law primarily for the purpose of ending the extraterritoriality of Western powers. The political leaders of Japan and China, who were influenced by legal thoughts of ancient China, did not sincerely receive the individualism and liberalism from which modern Western law was derived. See TAY-SHENG WANG, *LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895-1945: THE RECEPTION OF WESTERN LAW* 27-34, 175-76 (2000) [hereinafter WANG, *LEGAL REFORM IN TAIWAN*].

<sup>4</sup> The emergence of a new administration composed largely by the opposition party is significant in not only political but also legal development. See WANG TAY-SHENG, *TAIWAN FALŪSHI GAILUN* [GENERAL DISCUSSION ON TAIWANESE LEGAL HISTORY] 139, 171 (2001) [hereinafter WANG, *TAIWANESE LEGAL HISTORY*].

<sup>5</sup> The essence of colonial rule, exploiting others for the interests of the ruler(s), is immoral in and of itself; therefore, it is not necessary to ask whether the Japanese colonial rule in Taiwan was good or bad. Nevertheless, some of the results of the colonial rule were probably beneficial in some aspects. For example, the Japanese colonialists established a complete official registration system for real estate and households. Similarly, the authoritarian rule of the Chinese Nationalist Party should be blamed for its anti-democratic essence, but some of the results were beneficial for today’s Taiwan, such as, its establishment of a sovereign government with armed forces on the island.

behavioral patterns of private individuals.<sup>6</sup> Different ethnic groups possess varying legal values and attitudes because of their unique culture or historical experiences. In Taiwan's case, various states and ethnic groups have all helped to shape its legal history in the twentieth century.

A. *The Period of Japanese Rule (1895-1945)*

Japan acquired Taiwan in 1895 as a result of Japan's overwhelming victory in the Sino-Japanese War over the interests in Korea. Prior to the arrival of the Japanese, the Han Chinese (*hanren* [C]) had been the dominant ethnic group in Taiwan. According to a Japanese survey conducted in 1896, the population of "islanders" (*Hontōjin* [J]) was 2.5 million.<sup>7</sup> "Islanders" as a legal term usually included three groups: Hokkien (*Holo*, *Fulaoren* [C]; or Southern Fukienese, *Minnanren* [C]) and Hakka (*Kejiaren* [C]), both of whom were Han Chinese, and the plains aborigines (*Pingpuzu* [C]) who had been assimilated by the former two groups.<sup>8</sup> The term "Taiwanese" was later used by those "Islanders" to identify themselves during the period of Japanese colonial rule.<sup>9</sup> In addition, mountain aborigines (*Gaoshanzu* [C]) who preserved their original culture comprised about three percent of the total population of Taiwan. The number of incoming metropolitan Japanese (*Naichijin* [J], literally the "people in homeland") was very small relative to the population of Taiwan (reaching only six percent of the total population by 1942), but they were the elite ethnic group in Taiwan's society.<sup>10</sup> They brought with them Japanese legal codes and Japanese legal experience.

Japan had largely completed its modern codes modeled on continental European law of the late nineteenth century when it occupied Taiwan in 1895.<sup>11</sup> Promulgation of Western-style codes played an important role in nation-building during the Meiji era (1868-1912). The codes acted as a tool to unify the nation and to eliminate Western

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<sup>6</sup> See LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 15-16 (1975).

<sup>7</sup> See CHEN SHAO-XIN, *TAIWAN DE RENKOU BIANQIAN YU SHEHUI BIANQIAN* [POPULATION AND SOCIAL CHANGE IN TAIWAN] 95-98 (1979).

<sup>8</sup> See ANEHA SHŌHEI, *HONTŌJIN NOMI NI KANSURU SHINZOHŌ OYOBI SŌZOKUHŌ NO TAIYŌ* [SUMMARY ON THE FAMILY LAW AND SUCCESSION LAW FOR MATTERS INVOLVING ONLY TAIWANESE] 10-12 (1938).

<sup>9</sup> See Tu Weiming, *Cultural Identity and Politics of Recognition in Contemporary Taiwan*, 148 *CHINA Q.* 1115, 1124 (1996). Mountain aborigines were excluded from the scope of "Taiwanese" during the Japanese period.

<sup>10</sup> See CHEN, *supra* note 7, at 96-97.

<sup>11</sup> See Dan F. Henderson, *Law and Political Modernization in Japan*, in *POLITICAL DEVELOPMENT IN MODERN JAPAN* 419-36 (Robert E. Ward ed., 1968).

extraterritoriality.<sup>12</sup> However, the Japanese government did not automatically apply these modern codes to Taiwan, which was not part of its territory when the codes were drafted.

### 1. *Special Colonial Law As a Principle (1895-1922)*

The Taiwanese armed resistance against the Japanese military takeover forced the Japanese authorities to realize that there were political, cultural, and other differences between Japan and Taiwan. As a result, they decided to adopt the Western (especially the English) style of colonial rule to govern this newly-acquired island.<sup>13</sup> Many legal principles of Western colonial practice were adopted in establishing a legal system for Taiwan.<sup>14</sup>

From 1895 to 1922, Taiwanese civil matters were basically governed by their old customs and abundant special laws that related to administrative, criminal, and sometimes civil matters in the colony. This period is therefore called "special colonial law as a principle." It should be noted, however, that for the purpose of uniformity in the whole state, many Japanese Western-style criminal and administrative laws took effect in Taiwan. Furthermore, although the administrative agencies (for example, the police) and the courts in colonial Taiwan were to a certain degree different from those in metropolitan Japan (*Naichi* [J], literally "homeland" or Japan proper), they were basically consistent with the Western model.<sup>15</sup> In other words, modern Western law first entered Taiwan alongside the swords of the Japanese rulers, wearing the cloak of metropolitan Japanese law.

### 2. *The Metropolitan Japanese Law As a Principle (1923-45)*

In the late 1910s, in order to eliminate the ethnic self-identification of the colonized peoples influenced by the Wilsonian principle of self-determination, the Japanese Empire decided to increase the push to assimilate. Meanwhile, with the growth of democracy in metropolitan Japan, most Japanese democrats argued strongly that colonial administration should be reformed on the basis of a colonial policy of

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<sup>12</sup> See *id.* at 389-91, 433; see also FRIEDMAN, *supra* note 6, at 221-22.

<sup>13</sup> See Harry J. Lamley, *Taiwan Under Japanese Rule, 1895-1945: The Vicissitudes of Colonialism*, in *TAIWAN: A NEW HISTORY* 204-06, 209 (Murry A. Rubinstein ed., 1999); Edward I-te Chen, *The Attempt to Integrate the Empire: Legal Perspectives*, in *THE JAPANESE COLONIAL EMPIRE, 1895-1945*, at 248-54 (Ramon H. Myers & Mark R. Peattie eds., 1984).

<sup>14</sup> See WANG, *LEGAL REFORM IN TAIWAN*, *supra* note 3, at 47-50.

<sup>15</sup> See *id.*

assimilation.<sup>16</sup> The policy of "extension of the homeland" was thus adopted. Under this policy, Japan extended the application of its laws to its colonies to the greatest extent possible. Consequently, from January 1, 1923, the greater part of Japanese law was directly implemented in Taiwan, including the Japanese civil and commercial codes and numerous administrative laws. This "Japanese law extension" was, in reality, equivalent to "the extension of the modern Western law."<sup>17</sup>

However, after 1936, a policy of "imperialization of subject peoples" (*kōminka* [J]) was put into effect. At almost the same time, Taiwan entered the wartime period (1937-45).<sup>18</sup> Thus, Japanization and wartime mobilization became the main concerns of the law in colonial Taiwan during this period. As a result, the liberalism in Western-style law was always disrespected, and remained largely untransformed by the Japanese authorities.

#### B. *The Period of KMT Rule (1945-2000)*

After the defeat of Japan in the Second World War in 1945, China, under the administration of the Chinese Nationalist Party (*Koumintang* [C], "KMT"), acquired Taiwan abruptly, as Japan had in 1895.<sup>19</sup> All Japanese residents were ousted from the island, and the second wave of Chinese immigration to Taiwan began.<sup>20</sup> Those who migrated from the Chinese mainland (*neidi* [C]) since 1945 are collectively called here the "Mainlanders" (*waishengren* [C], literally, "people from other provinces"), which is distinguished from the "native Taiwanese" (*benshengren* [C], literally "people of this province") who inhabited the island before 1945, including Hokkien, Hakka, and Aborigines. The Mainlanders did not accept the Japanese colonial rule in Taiwan, but brought their legal codes and experience in China to the island. Native Taiwanese, who had hardly participated in the nation-building of mainland China, had no option but to accept Chinese citizenship.<sup>21</sup>

The KMT had established the legal system in the Republic of China ("ROC") before annexing Taiwan in 1945. For the purpose of promoting national unity and eliminating Western extraterritoriality, the

<sup>16</sup> See Mark R. Peattie, *Japanese Attitudes Toward Colonialism, 1895-1945*, in THE JAPANESE COLONIAL EMPIRE, 1895-1945, *supra* note 13, at 104-09. See also Lamley, *supra* note 13, at 220.

<sup>17</sup> See WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 52-55.

<sup>18</sup> See Peattie, *supra* note 16, at 120-22.

<sup>19</sup> See Lamley, *supra* note 13, at 247.

<sup>20</sup> See Wang Tay-sheng, *The Impact of Modern Western Law on the Chinese in Taiwan*, 1 AUSTL. J. ASIAN L. 195-96 (Sean Cooney trans., 1999) [hereinafter Wang, *The Impact of Modern Western Law*].

<sup>21</sup> Even though a few native Taiwanese joined the KMT regime in China, they made up a small proportion of the whole population in Taiwan under Japanese rule.

KMT regime followed the example of Meiji Japan by enacting Western-style (especially German-style) codes from the late 1920s to the mid-1930s. The ROC laws were therefore basically oriented toward the modern West, the content of which was deeply influenced by Japanese jurisprudence. Nevertheless, these individualist, liberal legal norms had not been practically enforced in China due to the chaos of continuous war during the period after their promulgation.<sup>22</sup> In light of these circumstances, it is interesting to ask why the implementation of the law of the ROC has been so successful in Taiwan.

### 1. *The Transition of the Legal System (1945-49)*

The ROC legal system took effect in Taiwan on October 25, 1945. In November 1945, the ROC's local government in Taiwan declared that the Japanese colonial law would remain temporarily effective, except those laws that were enacted to oppress the people or were contrary to ROC law. Most Japanese laws were repealed after October 25, 1946, and all public and private matters became principally governed by ROC law.<sup>23</sup> Nevertheless, the old Japanese code was substantively preserved in Taiwan. This was not because the new rulers intentionally maintained them (as the Japanese adopted the old Taiwanese customs during the 1895-1922 period) but rather was due to the fact that the new ROC codes were initially modeled on the old Japanese codes, which had the same German roots.

On the other hand, the KMT regime intentionally maintained the political structure left by the Japanese colonialists. The ROC's local government in Taiwan possessed relatively autonomous authority in the executive and military affairs of Taiwan, just as its predecessor did. Moreover, in practice, the high-ranking officials within the executive and judicial organs were always Mainlanders, who filled the vacancies of the Japanese *Naichijin*.<sup>24</sup> In 1947, dissatisfied native Taiwanese strongly protested against discrimination and misrule. The response of the KMT, like that of Japanese colonialists fifty years earlier, was a ruthless military massacre and terrifying repression, in what became known as the

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<sup>22</sup> See Jyh-pin Fa, *Early 20th-Century Law Reform in China*, in THE TAIWAN EXPERIENCE, 1950-1980, at 187-89 (James C. Hsiung et. al. eds., 1981); Dan F. Henderson, *Japanese Influences on Communist Chinese Legal Language*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 158-87 (Jerome A. Cohen ed., 1970).

<sup>23</sup> See TAIWAN NIANJIAN [YEARBOOK OF TAIWAN] E8, E15 (Taiwan Xiansheng Baoshe ed., 1947).

<sup>24</sup> See Wang Tay-sheng, *Taiwan Zhanhou Chuqi Falü Tixi De Chengjie (1945-1949) [Transition of Legal System in Early Postwar Taiwan, 1945-1949]*, 29 TAIDA FAXUE LUNCONG [NATIONAL TAIWAN UNIVERSITY LAW REVIEW] 33-40, 43-44 (1999) [hereinafter Wang, *Transition of Legal System*].

"February 28 Incident."<sup>25</sup> From the viewpoint of native Taiwanese, Taiwan was once again governed by "outsiders."<sup>26</sup>

## 2. *The Law of an Authoritarian State (1949-87)*

As a result of the defeat of the KMT in the Chinese civil war, the KMT-led ROC central government moved to Taiwan in December 1949. Taiwan became a *de facto* state in late 1949, because there was an independent sovereign government on the island. On the basis of a different territory and population, the ROC on Taiwan ("ROCOT") was distinct from the original ROC government that had been displaced by the government of the People's Republic of China ("PRC") on October 1, 1949.<sup>27</sup> However, the ROCOT government officially traced its origin to the establishment of the ROC on January 1, 1912.<sup>28</sup> Accompanying the KMT regime which fled to Taiwan in 1949 were a large number of Mainlanders. However, the Mainlanders only accounted for about 13 percent of Taiwan's entire population. From then on, Taiwan and China became two separate countries, each with its own distinct legal system.

The KMT regime in Taiwan continued to implement the ROC legal system established on the Chinese mainland, in significant part for the purpose of proclaiming itself the legitimate government of China. Since the wartime legal institutions had been completed in 1948 and 1949, before the ROC central government moved to Taiwan, the ROC legal system actually met the need of the KMT regime for imposing an authoritarian rule over a society in which it had no popular power base.<sup>29</sup> Elements of Western liberalism in ROC laws were reduced, especially in the fields of the constitution, administrative regulation, judiciary, and criminal justice, all of which were closely related to the national

<sup>25</sup> See generally TSE-HAN LAI ET AL., *A TRAGIC BEGINNING: THE TAIWAN UPRISING OF FEBRUARY 28, 1947* (1991).

<sup>26</sup> See Lamley, *supra* 13, at 248; Tu, *supra* note 9, at 1124.

<sup>27</sup> But the PRC government asserts that it is the legitimate Chinese government and is successor to all the territory the ROC government governed, including Taiwan. In fact, when the succession of the Chinese government occurred in October 1949, the question of sovereignty of Taiwan was not yet settled by postwar treaty, and therefore the P.R.C. was not entitled to Taiwan, in accordance with international law. The KMT regime reestablished a central government in Taiwan in December 1949, declaring itself to be the rightful Chinese government. See WANG, *supra* note 4, at 132-33. Many articles have discussed this issue from the perspective of international law or constitutional law. See generally LIANGGUOLUN YU TAIWAN GUOJIA DINGWEI [ASSERTION OF "TWO COUNTRIES" AND THE STATEHOOD OF TAIWAN] (Hwang Jau-Yuan ed., 2000). "The ROC on Taiwan" has been recently used to designate this *de facto* state by American scholars. See e.g., SHELLEY RIGGER, *POLITICS IN TAIWAN: VOTING FOR DEMOCRACY* 7 (1999).

<sup>28</sup> See also Ralph N. Clough, *The Enduring Influence of the Republic of China on Taiwan Today*, 148 CHINA Q. 1054, 1055 (1996).

<sup>29</sup> See THOMAS B. GOLD, *STATE AND SOCIETY IN THE TAIWAN MIRACLE* 20 (1986). For a discussion of these wartime legal institutions, see *infra* notes 42-43 and accompanying text.



governing power. On the other hand, with the legacy of Japanese rule, the ROC civil and commercial codes were easily followed in Taiwan.<sup>30</sup> In the 1960s and 1970s, the prosperous economy in Taiwan further promoted the prevalence of modern civil and commercial law based on the Western concept of capitalism. In the 1950s, the ROCOT government joined the Cold War camp of the Western democracies led by the United States, and, consistent with this, American legal institutions and ideas were to a certain extent "imported" into Taiwan.<sup>31</sup>

The administration of ROC law, however, was largely controlled by Mainlanders who had been influenced by the Chinese traditions of collectivism and their historical experiences in chaotic China. Furthermore, "sinotization" was the primary goal in national education and various social activities.<sup>32</sup> Many Chinese legal traditions that were contrary to the spirit of modern Western law were practiced without criticism. Under these circumstances, the spread of Western legal ideas of individualism and liberalism barely reached the ordinary people.

Because the ROCOT government lost most of its international recognition during the 1970s, the KMT regime had to make further reforms to bolster its legitimacy in the early 1980s. Meanwhile, a new generation of Taiwanese intellectuals, who were influenced by Western liberal ideas gradually demanded political and legal reform. The KMT's suppression of dissent in the 1979 Kaohsiung Incident did not stop Taiwan's democratization. Many of the native Taiwanese elite continued to support an opposition movement that led to the formation of the Democratic Progressive Party ("DPP") in 1986. The Mainlander-led KMT had no alternative but to loosen the grip of its authoritarian rule.<sup>33</sup>

### 3. *Liberalization and Democratization of Law (1987-2000)*

The lifting of martial law in 1987 opened up a new era.<sup>34</sup> There was pressure to modify the numerous legal provisions that unreasonably restricted civil and political rights. In addition, Taiwan's economy was further liberalized during this period.<sup>35</sup> An increasing number of

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<sup>30</sup> For a discussion of the Japanese legacy in postwar Taiwan's legal development, see WANG, *LEGAL REFORM IN TAIWAN*, *supra* note 3, at 174-83.

<sup>31</sup> See WANG, *TAIWANESE LEGAL HISTORY*, *supra* note 4, at 136; see also Jane Kaufman Winn & Tang-chi Yeh, *Advocating Democracy: The Role of Lawyers in Taiwan's Political Transformation*, 2 *LAW & SOC. INQUIRY* 579 (1995).

<sup>32</sup> See Clough, *supra* note 28, at 1064-66.

<sup>33</sup> See Ramon H. Myers, *A New Chinese Civilization: The Evolution of the Republic of China on Taiwan*, 148 *CHINA Q.* 1072, 1078-79 (1996); RIGGER, *supra* note 27, at 106-28.

<sup>34</sup> See Myers, *supra* note 33, at 1080; Tu, *supra* note 9, at 1115.

<sup>35</sup> See, e.g., Yao-Kuo Eric Chiang, *Regulatory Reform in Taiwan, 1987-1996*, at 13 (1997) (unpublished Ph.D. dissertation, University of Washington) (on file with author).

Taiwanese now had a feel for the legal institutions that had their origins in Western liberalism.

In the 1990s, Taiwan moved toward becoming a liberal and democratic country.<sup>36</sup> As discussed below, the people of Taiwan reshaped their Constitution by approving six amendments between 1991 and 2000. After 1991, popular representatives and administrative chiefs, including the president, were elected by popular vote. These elections allowed the KMT to transform itself from a foreign regime to a native one in which the Mainlanders lost their original dominant status. Despite these changes, the KMT was defeated by the DDP in the presidential election of March 2000.

Newly-elected Chen Shui-bian was inaugurated as president on May 20, 2000. The fifty-five year rule of the KMT regime had been terminated through the democratic process at the end of the twentieth century. Taiwan's legislature which was composed of representatives, continuously modified the ROC law to meet the needs of Taiwan's people. This process can be called the "Taiwanization of the ROC law." Similarly, the political identity of the Taiwanese, including native Taiwanese and Mainlanders, emerged from the conflict of the 1990s.<sup>37</sup>

### III. THE CONSTITUTION

#### A. Governmental Structure

##### 1. Separation of Powers Under the Meiji Constitution

The principle of separation of powers has its roots in Western Constitutionalism. Although the Japanese government initially declared that the Meiji Constitution was at most partially applicable to Taiwan, it later alleged that the Constitution did apply to Taiwan.<sup>38</sup> The government structure of Taiwan was built in accordance with the Meiji Constitution. Under this Prussian-style Constitution, sovereignty resided in the Emperor, not the people. The sovereign political powers of the Emperor actually rested in the various organs of the state. When the Emperor exercised his executive power, all his acts required the

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<sup>36</sup> See generally Hung-mao Tien & Yun-han Chu, *Building Democracy in Taiwan*, 148 CHINA Q. 1141, 1141-1170 (1996).

<sup>37</sup> See WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 5-9, 134-35, 138-39, 279-80, 296, 331-34, 376 n.1, 378. An increasing number of Mainlanders identified themselves as Taiwanese in the 1990s. The common experiences shared by Taiwan's citizens have also contributed to the emergence of Taiwanese identity. Cf. ALAN WACHMAN, TAIWAN: NATIONAL IDENTITY AND DEMOCRATIZATION 91-92 (1994).

<sup>38</sup> See WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 39.

counter-signature of a minister of state in the Cabinet. The Emperor's command over the Army and Navy was issued only upon the advice of the General Staff Headquarters. His legislative power required the consent of the Diet. Judicial power had to be exercised by the courts, although this was done in the name of the Emperor.<sup>39</sup> Accordingly, the Governor-General in the Government-General of Taiwan was entrusted with the executive and military authority on Taiwan under the supervision of a minister of the state and the General Staff Headquarters, respectively.

After 1919, however, the post of commander-in-chief was created to direct Taiwan's garrison independent of the governor-general. The governor-general could also issue special ordinances (*ritsurei* [J]), with the same effect as Diet-enacted statutes, with the approval of the Cabinet (in the name of the Emperor). He therefore possessed the power to legislate with regard to the people of Taiwan.

On the other hand, the courts had the sole power to adjudicate. The decisions of Taiwan's courts could not be appealed to the Japanese Supreme Court in Tokyo. The governor-general, however, had executive authority; he could control the administration of these courts (e.g., the appointment of judicial officials). He also had military authority for some time, and legislative authority within certain limitations. All of his powers, however, were supervised by the central government in Tokyo.<sup>40</sup>

## 2. *Separation of Powers Under the ROC Constitution*

China's constitutional law determined the basic framework for Taiwan's government structure between 1945 and 1949. At that time, the Chinese constitutional law itself was undergoing a great transition. The 1931 Provisional Constitution of the ROC was still in effect when the KMT came to Taiwan in 1945. Under this constitution, sovereignty resided in the people, but the KMT actually exercised sovereign political power on behalf of the people who were not yet able to elect representatives during "the period of political tutelage." The executive, legislative, and judicial authority of the state was entrusted to separate departments of the National Government (*Guomin zhengfu* [C]) which

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<sup>39</sup> See generally JAPANESE LEGISLATION IN THE MEIJI ERA 383-86, 401-03 (Ryosuke Ishii ed., William J. Chambliss trans., 1958); Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 6, 13 (Arthur von Mehren ed., 1963).

<sup>40</sup> See Edward I-te Chen, *Japanese Colonialism in Korea and Formosa: A Comparison of the Systems of Political Control*, 30 HARV. J. ASIATIC STUD. 132-40 (1970).

was controlled by the KMT, and, in practice, by a central standing committee of the party.<sup>41</sup> The separation of powers was not adopted until the ROC Constitution entered into force on December 25, 1947.

The ROC Constitution followed Sun Yat-sen's five-power government plan, instituting five branches (*yuan*) to exercise executive, legislative, and judicial powers under the Western model. Meanwhile, the Constitution provided for a popularly elected National Assembly, empowered to elect or recall the president and amend the Constitution. Under the Constitution, the president's promulgation and enforcement of laws required the counter-signature of the head of the Executive Yuan, and the appointment of the head of the Executive Yuan required the consent of the Legislative Yuan. Accordingly, the head of the Executive Yuan played a role similar to that of prime minister in Western countries. Several months after implementing the Constitution, however, the National Assembly enacted the "Temporary Provisions for the Period of Mobilization to Suppress the Rebellion" ("Temporary Provisions") in 1948. The Temporary Provisions strengthened the president's emergency powers and restricted certain freedoms of the people.<sup>42</sup>

Under the legal framework of the 1931 Provisional Constitution, the Executive Yuan delegated its executive power on Taiwan to the governor-general of the Taiwan Provincial Administration Executive Office during the period from October 1945 to May 1947. He headed the Garrison Command in Taiwan at the same time. Unlike his counterpart during the Japanese colonial rule, the governor-general of the ROC had no authority to issue ordinances with the same effect as statutes enacted by the Legislative Yuan, and he could not administer the courts in Taiwan. However, the "new" governor-general, like his counterpart in the Japanese period, still possessed executive and military authority on the island under the supervision of the central government outside Taiwan (in China at this time). Beginning May 16, 1947, the chairperson of the Taiwan Provincial Government held supreme executive authority in Taiwan, which expanded to military authority when Chen Cheng took this job in early 1949. Finally, after martial law was put into force in Taiwan on May 20, 1949, executive and judicial authority on Taiwan were legally merged into the military office.<sup>43</sup>

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<sup>41</sup> See WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 152-54.

<sup>42</sup> See Herbert H. Ma, *Adoption of the ROC Constitution of 1946*, in THE TAIWAN EXPERIENCE, 1950-1980: CONTEMPORARY REPUBLIC OF CHINA *supra* note 22, at 298-307. Ma believed that the ROC Constitution adopted neither the British cabinet system nor that American presidential system, and its government system was a unique type adopting parts of both systems. *Id.*

<sup>43</sup> See TSE-HAN LAI ET AL., *supra* note 25, at 57; Wang, *Transition of Legal System*, *supra* note 24, at 34-41.

Since late 1949, there has been doubt as to who is the ultimate decision-maker of the executive branch in Taiwan. The ROC Constitution expressly provides that the Executive Yuan shall be the highest administrative organ of the state. Nevertheless, the KMT regime in practice used the Temporary Provisions to transform the ROCOT government into a "presidential system" for over forty years until the termination of the "Period of Mobilization to Suppress the Rebellion" in 1991.<sup>44</sup> The president could be re-elected repeatedly without any limits on his term of office. By adding the power derived from his chairmanship of the KMT, he became a lifetime dictator.<sup>45</sup> The authority of such a dictatorial president was equivalent to, or even greater than, that of the governor-general in Taiwan during the periods of Japanese rule and early KMT rule.

Constitutional revision in the 1990s focused on, among other things, a reorganization of the government's structure. The National Assembly abolished the Temporary Provisions in April 1991 and enacted a new set of amendments ("Additional Articles"). The 1991 Additional Articles reinstated the limits on the term of office for the presidency, restricted the president's emergency powers, and attempted to reduce the overwhelming presidential powers existing under the Temporary Provisions. According to the 1997 Additional Articles, however, the president can nominate the head of the Executive Yuan without the consent of the Legislative Yuan, but the head of the Executive Yuan, rather than the president, shall be responsible to the Legislative Yuan as before. The dictatorial presidential system was thus transformed into a semi-presidential (or dual-executive) system.<sup>46</sup> The relationship between the ROC president and the head of the Executive Yuan is similar to that between the Japanese governor-general of Taiwan and his chief of civil administration.<sup>47</sup>

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<sup>44</sup> See Jau-Yuan Hwang & Jiunn-rong Yeh, *Taiwan, in ASIA-PACIFIC CONSTITUTIONAL YEARBOOK 1995*, at 287 (Cheryl Saunders & Graham Hassall eds., 1997). The president was authorized to form a National Security Council under his direct leadership. Via the Council, composed of the vice president, the heads of the five Yuans, major ministers of the Executive Yuan, and even the Secretary General of the National Assembly, the president could exercise significant decision-making powers in the name of "national security" over virtually every government-related activity.

<sup>45</sup> See *id.* at 287. The authority of the president who was not chairman of the KMT obviously declined.

<sup>46</sup> See *id.* at 291.

<sup>47</sup> When the governor-general of Taiwan was a military officer, he always trusted his chief of civil administration to deal with civil affairs. Although the governor-general of Taiwan did not have free power to nominate a chief of civil administration, his recommendation was quite influential. See HUANG ZHAO-TANG, *TAIWAN ZONGDU FU [THE GOVERNMENT-GENERAL OF TAIWAN]* 166, 215 (Huang Ying-zhe trans., 1989).

The legislative branch was relatively weak in Taiwan. Under Japanese rule, there was no colonial parliament in Taiwan. During the 1945-49 period, the Council (*Canyihui* [C]) of Taiwan Province was indirectly elected by citizens in Taiwan; however, it neither effectively checked the power of the governor-general nor freely enacted Taiwan's own laws. Since late 1949, there existed a national parliament, whose constituency *de facto* was all of the people in Taiwan, but *de jure* also included those on the Chinese mainland. The parliament was further divided into three organs: the National Assembly, the Legislative Yuan, and the Control Yuan. The former two were discussed above. The Control Yuan was composed of members elected by the provincial and municipal councils. One of the major functions of the Control Yuan was to approve the appointment of the head, vice-head, and Grand Justices of the Judicial Yuan, and the head, vice-head, and members of the Examination Yuan. It was on this basis that it bore some similarity to the upper house of a Western parliament.<sup>48</sup> This division of powers actually weakened its ability to check the executive branch.

The 1992 Additional Articles dramatically changed both the status and the powers of the Control Yuan. The members of the Control Yuan were no longer elected; instead, they were appointed by the president with the consent of the National Assembly. Although the Control Yuan was no longer a popularly elected body, it still wielded the powers of impeachment, audit and investigation. Yet the power of consent that was originally exercised by the Control Yuan was transferred to the National Assembly.<sup>49</sup> Hence, the parliament was divided into two: the Legislative Yuan and the National Assembly. This was not quite the same as the British system of an upper house and a lower house because a statute may be enacted by the Legislative Yuan without the involvement of the National Assembly. There was no institutional way to resolve a conflict between these two "parliaments."<sup>50</sup> This was cured, however, by the 2000 Additional Articles, which substantially abolished the National Assembly and shifted almost all of its powers to the Legislative Yuan.<sup>51</sup>

The authority and prestige of the ROC parliamentary system suffered from the lack of elections. In 1954, the ROCOT government suspended elections of the Legislative Yuan, Control Yuan, and National

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<sup>48</sup> Ma, *supra* note 42, at 301; *see also* Interpretation 76 of the Council of Grand Justices.

<sup>49</sup> *See* Hwang & Yeh, *supra* note 44, at 299.

<sup>50</sup> Wang, *Taiwan*, *supra* note 1, at 136-37.

<sup>51</sup> The 2000 Additional Articles provide that representatives shall be elected to form a National Assembly to decide the proposals that are submitted by the Legislative Yuan to amend the Constitution, change the territory, or impeach the president or vice president. Such an election for a passive National Assembly is factually similar to a referendum.

Assembly on the grounds of national emergency, and therefore, the members elected in 1948 were to continue in their roles indefinitely. This posed a great challenge to the very meaning of democratic representation. In accordance with modern constitutionalism, members of a legislature should be subject to frequent, fair, and contested elections. In practice, the representation of the native Taiwanese in the central government was seriously diluted by the majority representation of the Mainlanders.<sup>52</sup> Consequently, the native Taiwanese, who constituted a supra-majority in Taiwan, could not participate in deciding national affairs through a domestic parliament, a situation not unlike their experience under Japanese colonialism.

It took two decades before the 1972 Temporary Provisions authorized the president to create popularly elected "additional seats" in the three national elective bodies. Since then, the number of additional seats steadily increased, but it remained comparatively less than the number of "tenured" representatives.<sup>53</sup> The problem was not completely resolved until 1991 when all tenured representatives were forced to "retire" in response to a mandate from the Council of Grand Justices. Thus, the ROCOT government started holding genuine elections on a regular basis, first in the National Assembly election in December 1991, followed by the Legislative Yuan election in December 1992.<sup>54</sup>

Incrementally, a separation of the courts from the executive branch was realized. As early as 1952, during the martial law period, the jurisdiction of military tribunals over routine criminal offenders was shifted to the ordinary courts, except where espionage or insurrection was involved. However, both the district courts and appellate courts were placed under the administrative supervision of the Ministry of Justice, which was under the Executive Yuan. That was similar to the situation during the Japanese period, in which the Bureau of Justice in the Government-General administered the high court and district courts in Taiwan. Since July 1980, all three types of courts have been placed under the supervision of the Judicial Yuan, but the Yuan itself is mainly an administrative organ in charge of court organization and the appointment of judicial personnel rather than a court.<sup>55</sup> In practice,

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<sup>52</sup> See Interpretation 31 of the Council of Grand Justices; Hwang & Yeh, *supra* note 44, at 284-86.

<sup>53</sup> See Hung Chiu and Jyh-pin Fa, *Law and Justice Since 1966, in THE TAIWAN EXPERIENCE, 1950-1980: CONTEMPORARY REPUBLIC OF CHINA* *supra* note 22, at 315-16.

<sup>54</sup> See Interpretation 261 of the Council of Grand Justices; Hwang & Yeh, *supra* note 44, at 290-91.

<sup>55</sup> See Hwang & Yeh, *supra* note 44, at 297.

following the end of the authoritarian rule of the KMT regime, executive authorities have not interfered with the judges.<sup>56</sup>

Another important development for Taiwan's judicial branch was the establishment of judicial review over the actions of the executive and legislative branches. There was no judicial review system in Taiwan under the Japanese rule. Under the ROC Constitution, however, the Council of Grand Justices (a component of the Judicial Yuan) is vested with the exclusive power of judicial review and the powers of interpreting the Constitution and unifying the interpretations of laws and ordinances.<sup>57</sup> During the period of law for an authoritarian state, the Council operated to legitimize, rather than constrain, the excesses of the KMT's rule.<sup>58</sup> However, during the democratization of Taiwan, the Grand Justices gradually wielded their power of judicial review to curb administrative discretion, protect personal liberty, and dismantle authoritarian corporatism.<sup>59</sup>

Since the dictatorship has ceased to exist, the arbitrator in law, the Grand Justices, finally resolves political conflicts resulting from different interest groups. The power of judicial review reached its peak in 2000 when the Council of Grand Justices handed down Interpretation 499, which held that the fifth of Additional Articles promulgated by the National Assembly was unconstitutional. The Articles would have allowed the National Assembly to prevent elections and permitted original members to postpone their terms for a short period.<sup>60</sup>

### 3. *Division of Powers Between the Central and Local Governments*

Separation of powers is also an issue between the central and local governments. In 1920, the Japanese introduced a system of local government with some semblance of autonomy, in the Western sense, into Taiwan. Under a three-tier system of local government (province and sub-province, mid-level municipality and county, and lowest-level township and village), a certain amount of decentralization occurred as more authority was delegated to the ranking officials responsible for various jurisdictions. All heads of local governments, however,

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<sup>56</sup> See WANG, *TAIWANESE LEGAL HISTORY*, *supra* note 4, at 234-35.

<sup>57</sup> Ma, *supra* note 42, at 300.

<sup>58</sup> In one rare exception in 1960, Interpretation 86 of the Council of Grand Justices stated that both the district courts and appellate courts should be placed under the administrative supervision of the Judicial Yuan rather than the Ministry of Justice in the Executive Yuan. However, the Executive Yuan did not follow this interpretation until 1980.

<sup>59</sup> See Sean Cooney, *A Community Changes: Taiwan's Council of Grand Justices and Liberal Democratic Reform*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 253-80 (Kanishka Fayasuriya ed., 1999).

<sup>60</sup> See WANG, *TAIWANESE LEGAL HISTORY*, *supra* note 4, at 163-64.



functioned under the direct supervision of the governor-general. Local councils were merely advisory, and the high-level government appointed their members. After 1935, the provincial and municipal councils were, to a certain extent, granted decision-making powers, and half of their members were elected either by the lower councils within their jurisdictions at the province level or by qualified voters at the municipality level. Although qualified voters elected half of their members, the local councils in the townships and villages remained only advisory bodies.<sup>61</sup>

Local autonomy gradually grew in postwar Taiwan. From 1945 to 1949, Taiwan became a province of China, and the lower levels of local governments were established. The most significant change in the local government was that all members of the local councils and the heads of townships and villages were elected by the general public.<sup>62</sup>

As of late 1949, there existed a central government in Taiwan; thus, a three-tier system of local government again emerged on the island. The ROC Constitution guaranteed local self-government, providing that certain legislative and executive powers were to be exercised exclusively by the provincial or county governments, respectively. However, this was not fully implemented until the 1990s. After the early 1950s, the Provincial Assembly and the executives and councils of the counties were elected under an administrative order, which was subject to cancellation or change at any time by the Executive Yuan. The Executive Yuan also appointed the chairperson of the provincial government. This system lasted for four decades until the 1992 Additional Articles mandated direct, popular elections of both the executive heads and the councils for the provincial and county governments. The Legislative Yuan then passed enabling laws to implement such elections. Because the jurisdiction of the Taiwan Provincial Government and that of the central government overlapped, the 1997 Additional Articles abolished the elections for the governor and council of the Taiwan Provincial Government and shifted its powers to either the county governments or the central government. Accordingly, two levels of local governments were left.<sup>63</sup>

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<sup>61</sup> See *id.* at 176-83; Lamley, *supra* note 13, at 225-27.

<sup>62</sup> See Wang, *supra* note 24, at 53-59.

<sup>63</sup> See Hwang & Yeh, *supra* note 44, at 300-02; WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 189-92.

## B. *Fundamental Rights and Liberties*

### 1. *Under the Meiji Constitution*

The Meiji Constitution was relatively conservative with regard to the protection of human rights. Chapter II of the Meiji Constitution, entitled "Rights and Duties of Subjects," contained provisions concerning the fundamental rights and liberties of Japanese subjects. Those rights and liberties were not based on the natural rights philosophy of the West, but were bestowed by a benevolent act of the Emperor. Diet-enacted statutes promulgated by the Emperor could therefore violate any rights and liberties set forth in the Constitution.<sup>64</sup>

In the 1920s, many Taiwanese intellectuals were engaged in political and cultural movements. When colonial authorities interfered, the intellectuals asserted their fundamental rights and liberties provided by the Meiji Constitution to publish periodicals and newspapers, to rally assemblies, to petition the Diet, and to establish several political associations, including an opposition party, in the 1920s and early 1930s. Everything changed when the war came in 1937. During the wartime period, the Taiwanese lacked even a means to express their opinions and grievances in the press. The Taiwanese were not granted suffrage rights until 1935. However, these suffrage rights, like those of the metropolitan Japanese, were limited to males only; furthermore, unlike the metropolitan Japanese, the Taiwanese were excluded from the right to elect representatives in the Imperial Diet.<sup>65</sup>

### 2. *Under the ROC Constitution*

The provisions for fundamental rights and liberties in the 1931 Provisional Constitution of the ROC were as conservative as those in the Meiji Constitution.<sup>66</sup> By contrast, the ROC Constitution purports to guarantee a range of political, economic and social rights. These are set out in Chapter II and include, for example, equality before the law regardless of sex, religion, race, class or party affiliation, freedom of speech, teaching, writing and publication, freedom of assembly and association, the rights to subsistence, work and property and the right to

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<sup>64</sup> See JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 39, at 396-400.

<sup>65</sup> See Lamley, *supra* note 13, at 231-34, 244; WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 166-67. The elections in the Japanese era are significant in the development of electoral system on Taiwan. See RIGGER, *supra* note 27, at 34-38.

<sup>66</sup> See WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 167. Like those in the Meiji Constitution, any rights and liberties set forth in the 1931 Provisional Constitution could be violated by statute.

an education. These rights may not be restricted by the legislature except for the purpose of "preventing infringement upon the freedom of other persons, averting an imminent crisis, maintaining social order, and advancing public welfare."<sup>67</sup>

The human rights situation in postwar Taiwan under the KMT was a mere extension of Japanese wartime rule. The only exception was the exercise of the suffrage right, but popular elections had been limited to the local government level for a long time, as mentioned above. At the beginning, the heads of the ROC provincial government essentially continued the military rule of their counterparts in the Japanese period. After late 1949, the ROCOT government administered the island and implemented quite a number of laws that severely violated the fundamental rights and liberties of Taiwan's people, under the martial law (1949-1987) or the Temporary Provisions for the Period of Mobilization to Suppress Rebellion (1948-1991). The KMT regime actually followed the teaching of Sun Yat-sen's "revolutionary human right" ("*geming minquan*" [C]), which argued that human rights were not heaven-given, but granted to nationals who were loyal to the nation. This is similar to the philosophy embedded in the Meiji Constitution that the Emperor granted fundamental rights to loyal subjects.<sup>68</sup> The actual implementation of the Constitution's bill of rights did not occur until the emergence of political liberalization and democratization in the late 1980s and through the 1990s.<sup>69</sup> Only then were the fundamental rights and liberties of Taiwan's people at a level higher than what had existed during Japanese rule. Accordingly, the Western philosophy of human rights showed itself more clearly than in any other period.

#### IV. CRIMINAL JUSTICE

##### A. *Criminal Law*

##### 1. *The Japanese Period*

In 1896, Japan's Western-style criminal code was brought to the island.<sup>70</sup> The Japanese Penal Code of 1880 included many principles that were the product of the 1789 French Revolution and were regarded as essential to a civilized concept of justice in nineteenth century

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<sup>67</sup> See Cooney, *supra* note 59, at 255.

<sup>68</sup> See JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 39, at 398.

<sup>69</sup> See Hwang & Yeh, *supra* note 44, at 303.

<sup>70</sup> Ritsurei [Administrative Order] No. 4 of 1896 provided that criminal matters in Taiwan should be decided in principle according to the Japanese Penal Code of 1880.

continental Europe. First, it stated that no person should be held guilty of an offense not expressly covered in the code when the act was done. Second, it established the principle of equality before the law. The administration of justice could not vary according to the social class of the accused, his family standing, or other social relations, except as to offenses against the imperial family. Third, the statute set out the principle that guilt was personal and individual, not collective. In 1908, the Japanese Penal Code of 1907 was simultaneously put into force in both Japan and Taiwan. This code was essentially German in origin. Subjectivism was clearly visible: judges were given broad latitude to mete out punishments, even to suspend the execution of a sentence.<sup>71</sup>

Nevertheless, certain criminal laws in colonial Taiwan were contrary to these European principles. The Bandit Punishment Law of 1898 allowed newly enacted harsher punishments to be imposed retroactively, but the law was not used after 1916. The Hokō[J] (*baojia* [C]) Law of 1898 recognized collective responsibility, providing that a Taiwanese could be punished for the crime of his neighbor. This provision was seldom used after the 1920s and became invalid in 1945. Meanwhile, not until 1920 was the policy of discrimination against the Taiwanese in the suspension of a sentence abandoned.<sup>72</sup>

After the 1920s, the severity of punishment was no longer the supreme concern of the criminal justice system in colonial Taiwan. In the first half of this century, Japanese criminal law, influenced by legal thought in contemporary continental Europe, recognized that the prevention of crime was more important than its punishment, and the penalties it prescribed were directed more at reformation of the wrongdoer than retaliation against him. Such ideas affected the criminal law in colonial Taiwan.

Taiwanese political criminals suffered very harsh criminal sanctions during the first two decades of Japanese rule; but from the 1920s to the mid-1930s, most were not severely punished. Before 1920, ordinary crimes committed by members of the general public were dealt with according to the principle of severe punishment. However, after the 1920s, the punishment of flogging was abandoned, and most criminals were punished by fines. Meanwhile, more than half of all sentences of penal servitude were for terms of not more than six months, and the number of defendants sentenced to life in prison or death was never more than ten per year. During the wartime period, criminal

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<sup>71</sup> See Takayanagi, *supra* note 39, at 14-18; JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 39, at 563-73.

<sup>72</sup> See WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 125, 128, 131, 135-36. The sentences of only four Taiwanese were suspended from 1908 to 1915, compared to sixty-two Japanese.

punishments on the Taiwanese were somewhat heavier than the lenient period immediately prior; nevertheless, the harsh criminal sanctions in the first two decades never returned. It is fair to say that during the latter period of the Japanese rule, public order in Taiwan was maintained by the assurance of, not the severity of, criminal punishments.<sup>73</sup>

## 2. *The KMT Period*

The ROC Criminal Code of 1935, in force in Taiwan beginning in 1945, is similar to the Japanese Penal Code of 1907. Therefore, the aforementioned principles of promulgation of crime and punishment, equity of punishment, and individualistic criminal responsibility are incorporated in the ROC criminal law. The ROC Code also recognizes the importance of prevention of crime and reformation of the wrongdoer.<sup>74</sup> Contrary to the principle of equity, however, the ROC Criminal Code imposes heavier punishments on those accused of murder or bodily harm if the victims are their parents or grandparents rather than the general public.<sup>75</sup> In addition, a special criminal law provided that a person would be punished if he failed to report a rebel neighbor. This law was enacted in 1950, and attempted to emphasize collective responsibility. It was seldom used in the 1980s, and finally abolished in 1991.<sup>76</sup>

The lenient Japanese treatment of political crimes during the latter period did not carry over to the KMT period. Like the Japanese in their first two decades of rule, the KMT regime harshly punished political dissidents during the period from the 1950s to 1980s. The penalty prescribed in the Statute for Punishments on Rebellion, like that in Japan's Bandit Punishment Law, was often the death penalty. This statute was not abolished until 1991.<sup>77</sup> Starting in the 1990s, criminal liability for political activities was limited to acts of violence against the government. This basic freedom was never recognized during the period of Japanese rule.

For the KMT, the most valuable legacy of the Japanese was that the native Taiwanese were law-abiding.<sup>78</sup> However, criminal punishments that were imposed on the people by the KMT, were, in

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<sup>73</sup> See *id.* at 132-34.

<sup>74</sup> See Frederick H. Chaffee et al., *Public Order and Safety in Taiwan*, in *THE TAIWAN EXPERIENCE, 1950-1980: CONTEMPORARY REPUBLIC OF CHINA*, *supra* note 22, at 306.

<sup>75</sup> CRIMINAL CODE, arts. 272, 280, 281 (R.O.C).

<sup>76</sup> See ZHONGHUA MINGUO SHI FALÜ ZHI (CHUGAO) [HISTORY OF THE REPUBLIC OF CHINA, DRAFT GAZETTEER OF LAW] 521 (Guoshiguan ed., 1994).

<sup>77</sup> See *id.* at 519-20.

<sup>78</sup> See WANG, *LEGAL REFORM IN TAIWAN*, *supra* note 3, at 136-37, 182.

general, much more severe. According to official statistics,<sup>79</sup> during the 1950-53 period, defendants in criminal trials were more often sentenced to penal servitude than fines. After 1954, the number of defendants subject to fines increased, but the number of defendants sentenced to penal servitude still accounted for about twenty percent of total penalties. This rate of sentencing to prison was ten percent higher than it was in the latter period of Japanese rule.<sup>80</sup>

For unknown reasons, the rate of penal servitude sentences has gradually increased to about forty percent of total penalties in the period since 1988, although the term of penal servitude is often not more than six months. In addition, the number of defendants sentenced to death remains high. The use of the death penalty dramatically increased in 1989 because, according to the Judicial Yuan, serious crimes occurred more frequently than before, and severe punishments had to be employed as a deterrent.<sup>81</sup> This practice actually reflects the Chinese legal tradition that severity of punishment is necessary to maintain public order.

## *B. Criminal Trial and Police Sanction*

### *1. Criminal Court and Its Procedure*

The Japanese Code of Criminal Procedure came into force in Taiwan at the end of the nineteenth century. The Japanese Code of Criminal Instruction of 1880 adopted the French semi-inquisitorial method rather than the Anglo-American accusatory method in public trial. Accordingly, for the first time in Taiwan an advocate was permitted to defend the accused at trial. The procurator, on the other side, charged the suspect with certain crimes and still kept his official dignity, as the French tradition treated judges and procurators as part of the magistrature. The judge was very active at trial, often extracting a confession from the accused rather than acting as an umpire. In the instance of a felony, a case first went through "preliminary investigation"; during this stage, counsel could not assist the accused. The Japanese Code of Criminal Procedure of 1922 took effect in Taiwan on January 1, 1924. The new, renamed code adopted some German measures, but the original French influences were not eliminated. However, it is worth noting that under

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<sup>79</sup> See TAIWAN GAODENG FAYUAN, TAIWAN SIFA TONGJI ZHUANJI [COMPILATIONS ON STATISTICS OF TAIWAN'S JUDICIARY], 1948-1997. The percentages to follow in the text were calculated by the author.

<sup>80</sup> See WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 132 tbl.4-7.

<sup>81</sup> See SIFAYUAN, SIFA ANJIAN FENXI [THE ANALYSIS ON JUDICIAL CASES] 246-47, 350 tbl.II-51 (1990).

the new code counsel could assist the accused in the preliminary investigation.<sup>82</sup>

There were special laws for criminal procedure in colonial Taiwan. Since the beginning of the last century, colonial law granted procurators and the police in Taiwan broad powers to summon, interrogate, search, or detain persons not *in flagrante delicto*; powers that in metropolitan Japan belonged only to the preliminary judge.<sup>83</sup>

This type of criminal trial was maintained in postwar Taiwan. The ROC Code of Criminal Procedure of 1935 adopted the semi-inquisitorial method, except for the system of "preliminary investigation." The code treated procurators as "preliminary judges." Thus, procurators had the power to summon, interrogate, search, or detain persons; and counsel was not allowed to assist the suspect during the investigation conducted by procurators.<sup>84</sup> In 1967, the code was renamed the Code of Criminal Procedure, but the basic structure of criminal trials remained intact. Not until 1982 was counsel allowed to be present while the police or procurator examined the suspect. In an attempt to resolve the problem of heavy caseloads in Taiwan's courts, the modifications in the 1990s strengthened the simplified judgment and further restricted the right to repeat appeals so as to expedite the proceedings.<sup>85</sup> After a century, the procurator's power to detain a suspect was finally held unconstitutional by the Grand Justices in 1995, and was later abolished by the Legislative Yuan in late 1997.<sup>86</sup>

## 2. *Criminal Sanctions by the Police*

During the period of Japanese rule, the police were empowered to deal with certain "criminal" matters. The Summary Judgment Law allowed the police to summarily decide both police offenses (after 1896) as well as certain misdemeanors (after 1904), few of which were submitted to the courts for review. Meanwhile, under the Taiwan Vagrant Discipline Regulation of 1906, vagrants could be warned to

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<sup>82</sup> See Takayanagi, *supra* note 39, at 20-22; WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 291.

<sup>83</sup> See WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 129-30. The procurator had power to detain the suspect for twenty days (1905-1923) or ten days (1924-1945). The police had no such a power to detain.

<sup>84</sup> See Wang, *Taiwan*, *supra* note 1, at 141-43. The procurator had the power to detain the suspect for two months and to extend the detaining period to at most four months with the approval of the court. According to law, the police had to acquire permission from procurators for summoning, interrogating, searching, or detaining persons.

<sup>85</sup> See WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 241.

<sup>86</sup> See Article 245 of the Code of Criminal Procedure; Interpretation 392 of the Council of Grand Justices.

have fixed residences or jobs and failing that, could be sent to work in a vagrant camp for one to three years. The decision to send a person to a vagrant camp was nominally a "disposition for maintaining public order," but in fact was equivalent to a criminal penalty. The decision was made by the police, with the approval of the governor-general, with no means of judicial appeal. However, it should be noted that at the end of the wartime period, almost no one was imprisoned in vagrant camps.<sup>87</sup>

During the KMT period, the police were only empowered to summarily decide police offenses. Nevertheless, the KMT regime continued the Japanese vagrant camp system and proceeded to implement it on a large scale. The police could decide to send a person to a vagrant camp under the direction of the Taiwan Garrison Command.

This situation did not change until the 1980s. The Grand Justices held in 1980 that the courts, rather than police authorities, should decide the punishments of detention and compulsory labor for police offenses. The system, however, remained in effect; and therefore the Grand Justices held it unconstitutional again in 1990.<sup>88</sup> This system was finally replaced in 1991 by the Law for Maintaining Social Order. Since then, the court decides those police offenses punishable by detention, suspension, or prohibition of business. Similarly, since 1985 courts have reviewed the police decision to send a person to the vagrant camp. Despite the 1992 revisions to the vagrant system, the Grand Justices held in 1995 that some provisions of the vagrant system were contrary to due process and therefore unconstitutional.<sup>89</sup> Accordingly, the Legislative Yuan modified these unconstitutional provisions at the end of 1996.

### 3. *Access to Court*

During the Japanese period, the number of cases dealt with by the criminal courts was far less than that decided by the police. Therefore, under Japanese rule, native Taiwanese were not often tried in modern courts with Western-style criminal procedure. This was not at all important to the Japanese authorities. The real purpose of employing a summary judgment system was simply to reinforce the authority of policemen who, in the eyes of the Taiwanese, represented the Japanese colonial government. In fact, colonial judicial officials won more respect from people than the police did, although a majority of them were Japanese. Many advocates, regardless of their ethnic origin, performed

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<sup>87</sup> See WANG, *supra* note 3, at 99-100, 119-25.

<sup>88</sup> See Interpretations 166 and 251 of the Council of Grand Justices.

<sup>89</sup> See Interpretation 384 of the Council of Grand Justices.



well in defending the accused at trials. Taiwanese intellectuals also learned the concept of due process.<sup>90</sup> As a result, people came to prefer to be tried by a court.

During the KMT period the courts played a more important role in criminal justice than did the police. However, in contrast to the Japanese era, the KMT martial court was also involved in the criminal justice of general public. The courts of the KMT period were initially dominated by Mainlanders who did not necessarily insist on Western ideas of due process.<sup>91</sup> In the context of authoritarian rule, the KMT judicial authorities usually paid limited attention to the dignity or human rights of the accused. It took three or four decades for this to change. The recent democratization of Taiwan requires the judicial authorities to pay more respect to the human rights of the accused than before. Only in the context of a judiciary, which upholds the dignity and human rights of the accused, does access to the courts benefit the people in general.

## V. CIVIL JUSTICE

### A. *Civil and Commercial Law*

#### 1. *The Japanese Period*

The 1898 Japanese Civil Code was modeled on the drafts of the German Civil Code. It adopted the nineteenth century concept of Western individualism, with its three basic principles of absolute ownership, freedom of contract, and responsibility for negligence. This code was, in principle, applicable only to the metropolitan Japanese on the island.<sup>92</sup> Civil and commercial matters involving only Taiwanese were to be regulated by the "old Taiwanese custom" influenced by Chinese legal traditions. However, these old customs were likely modified by Japanese jurists with the training of Western jurisprudence when they were accepted as "customary law." Moreover, some special civil statutes further superseded customary laws. As a result, continental European institutions such as ownership, pledge, and mortgage were introduced to Taiwan by about 1905. Additionally, native Taiwanese were also affected by the Japanese residents'

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<sup>90</sup> See WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 80-84, 86-88, 100-02, 130-31.

<sup>91</sup> See WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 259-61.

<sup>92</sup> See Takayanagi, *supra* note 39, at 31; JAPANESE LEGISLATION IN THE MEIJI ERA, *supra* note 39, at 591; Ritsurei [Administrative Order] No. 8 of 1898. Those Taiwanese civil matters that involved a Japanese citizen and did not involve property rights in land were governed by Japanese Western-style law.

experience of using continental civil and commercial systems (for example, the concept of company and negotiable instruments).<sup>93</sup>

Starting in 1923, continental civil and commercial law entered the lives of native Taiwanese to a great extent through the Japanese civil and commercial codes that were applicable to them with the exception of the books on family law and succession. It is worth noting, however, that the courts had brought certain modern Western legal ideas and terminology into the customary law when they decided Taiwanese family and succession cases. Nevertheless, the influence of Chinese legal traditions remained strong in the Taiwanese customary law; for example, daughters had no right to inherit the family estates of their deceased parents.<sup>94</sup>

## 2. *The KMT Period*

The ROC Civil Code and commercial statutes, which were also modeled on German laws, came into force in Taiwan on October 25, 1945. The ROC Code was familiar enough to the native Taiwanese who had already experienced more than twenty years of German-rooted Japanese civil and commercial codes. Moreover, the ROC family and succession law adopted more Western elements than Japan's Taiwanese customary law did. For example, a daughter now had the right to inherit the properties of her deceased parents. The Mainlanders had difficulty in implementing the ROC laws when they lived on the Chinese mainland. These obstacles to implementation actually decreased when implementation was attempted in Taiwan because the Japanese rulers left a complete official registration system for real estate and households. This legacy also included relatively prevalent court buildings in Taiwan.<sup>95</sup> An additional favorable factor was that peaceful public order was maintained for a long time in postwar Taiwan.

The ROC civil and commercial law grew dynamically after being enforced in Taiwan. First, American-style legal concepts such as chattel mortgage, securities exchange, punitive damages, and injunctions had been introduced, passively at first, but actively later on, to ROC law.<sup>96</sup>

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<sup>93</sup> See WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 146-60.

<sup>94</sup> See *id.* at 145-46, 161-68.

<sup>95</sup> See *id.* at 182-83.

<sup>96</sup> Due to the economic aid of the United States, the American-style chattel mortgage was provided in the Law on Transactions Secured by Personal Property of 1963, and securities exchange in the Exchange Law of 1968. Under the pressure of the United States in trade negotiations, the concept of punitive damages in the Anglo-American law was accepted by Article 33 (now 88) of the Copyright Law of 1985. However, the Law for Prevention and Sanctions against Family Violence actively adopted American-style injunctions in the 1990s. See WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 334.

Secondly, since the mid-1980s, many provisions in the ROC Civil Code that were disadvantageous to women have been revised, partly in response to the demands of feminists in Taiwan.<sup>97</sup> Finally, in 1999, one third of all provisions in the book on obligations of the Civil Code were revised, and rules for several kinds of contracts that were commonplace in Taiwan were codified therein. A dramatic revision for the book on rights over property of the Civil Code was also being discussed.<sup>98</sup>

## B. *Civil Trial and Mediation*

### 1. *Civil Procedure*

The Japanese Code of Civil Procedure of 1890 took effect in Taiwan at the end of the nineteenth century. Similarly, a special law in 1905 was enacted to strengthen the authority of the judge and weaken the rights of litigants so that the German-style court proceedings provided in the 1890 Code could be simplified. The Japanese Code of Civil Procedure of 1926 was then applied to Taiwan. This new Code did not change the basic structure of the procedure but made certain modifications to expedite the proceedings. On the other hand, from 1923, unlike the colonial criminal procedural law, there were no special provisions to govern a civil trial in Taiwan.<sup>99</sup>

After late 1945, the ROC Code of Civil Procedure of 1935 replaced the Japanese 1926 code in form, but in substance, it continued its predecessor's German-style civil procedure. Then, like the criminal procedural law, the civil procedural code was, with minor modifications, renamed the Code of Civil Procedure in 1968. The Code of 1968 basically kept the framework of the civil trial intact. Until 1990, also for the purpose of decreasing the caseload of the court, summary proceedings and mediation by judges were emphasized, and the right to repeat appeals was further restricted. More importantly, in 1999 and 2000, the Code of Civil Procedure (like the Civil Code), was "revised to the largest extent in this century," in order to reshape a civil procedural law better suited to Taiwan.<sup>100</sup>

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<sup>97</sup> See, e.g., Arts. 1002, 1017, 1030-31, 1089 of the Civil Code; Interpretations 365, 410, 452 of the Council of Grand Justices.

<sup>98</sup> See WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 330-34. The revised book on obligations became effective on March 5, 2000.

<sup>99</sup> See Takayanagi, *supra* note 39, at 32; WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 50, 55.

<sup>100</sup> See WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 359-62.

## 2. *Official Mediation in Civil Disputes*

From the beginning of the Japanese period, the local government, in accordance with Chinese legal tradition, was allowed to mediate civil disputes. The 1904 Civil Disputes Mediation Law provided that any civil dispute could be mediated by the head of the local government, and that if a compromise was reached, the parties could not file suit in the court again, but could apply for compulsory execution of the settlement by the local government. An administrative official as mediator always urged, with his power and prestige, that the parties accept his proposals for dispute resolution, and thus actually exercised the power of adjudication over civil disputes without any review by the courts.<sup>101</sup>

Soon after the beginning of KMT rule, China's county mediation system was brought to Taiwan. The Statute for County Mediation was promulgated in 1955. Under the statute, a mediation committee (composed of local people rather than officials) was in charge of mediating any civil dispute and those criminal cases in which the prosecution was initiated only upon request by the victim. If a compromise was reached, the court could (and since 1982, must) review the settlement, and the parties might apply for its compulsory execution in the courts. In contrast with Japan's administrative mediation, the court has exercised judicial oversight of county mediation, even though it is an extralegal dispute resolution mechanism.<sup>102</sup>

## 3. *Access to Court*

During the period of Japanese rule, the Taiwanese people initially preferred administrative mediation to court litigation. But after the 1920s, people became accustomed to using modern courts to resolve their civil disputes, and the number of cases actually litigated in the court increased until they eventually surpassed the cases decided by the administrative mediation procedure. This positive attitude of the Taiwanese towards litigation encouraged the ultimate reception of Western-style civil and commercial law, along with attached procedural laws.<sup>103</sup>

However, access to the courts in the Japanese period must not be overestimated. The Japanese authorities eagerly promoted administrative mediation to reduce the caseload of the courts and were reluctant to increase their investment in the judiciary. The Taiwanese

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<sup>101</sup> See WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 90-91.

<sup>102</sup> See WANG, TAIWANESE LEGAL HISTORY, *supra* note 4, at 248-49.

<sup>103</sup> See WANG, LEGAL REFORM IN TAIWAN, *supra* note 3, at 91-94.

hesitated to use the courts to resolve civil disputes because they were influenced by the Han Chinese anti-litigation tradition and worried about the Japanese judicial officials' unfamiliarity with native languages and customs. The expense and time required for a lawsuit also prevented many people from accessing the courts.<sup>104</sup>

During the KMT period, the number of lawsuits in courts continued to grow, and the effect of the Western-style positive law on people's behavior was stronger than before. In the face of the urbanization of Taiwan, when a dispute occurs, the parties often have difficulty in finding a well-respected mediator who has relational connections with both of them, and they therefore resort to help from the state authority, for example, the court. The capitalistic economy in Taiwan also brings about many complicated disputes that cannot be resolved without a court.<sup>105</sup>

Unlike during the Japanese period, however, the rate of employing the court in civil disputes decreased during the KMT period. The state authority provided three kinds of non-litigation methods for resolving civil disputes: namely, court mediation, county mediation and labor mediation. According to the statistics of one commentator, more than eighty-two percent of all civil disputes were resolved by litigation in 1976-84, compared to only sixty-four percent in 1985-93; and finally, in 1997, the number of disputes resolved by litigation was almost the same as that of disputes resolved by all the mediations mentioned above.<sup>106</sup>

The KMT regime has not made enough of an investment in the courts. Heavy caseloads have resulted in unreasonable delays for a trial. This has deterred people from using the courts. It is also worth noting that the degree to which creditors could benefit from the enforcement procedure of the district courts in the 1990s was less than before. The KMT regime did not improve the quality of judicial administration, and discouraged people from using the courts for dispute resolution. To make matters worse, distrust of the courts, stemming partly from the corrupt image of Taiwan's judges, remained prevalent in Taiwan.<sup>107</sup> There has been a strong demand for judicial reform in Taiwan, and a national conference for this purpose was convened in July of 1999.

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<sup>104</sup> See *id.* at 84-85, 91, 95.

<sup>105</sup> See Wang, *Taiwan*, *supra* note 1, at 154.

<sup>106</sup> See WANG, *TAIWANESE LEGAL HISTORY*, *supra* note 4, at 368-69.

<sup>107</sup> See *id.* at 369-72; Wang, *Taiwanese*, *supra* note 1, at 153.

## VI. CONCLUSION

In 1895, Japan brought its Westernized law to Taiwan and started the tendency "away from traditional China, toward the modern West" in Taiwan's state law. The Japanese authorities did not honor Western constitutionalism in Taiwan, but the Taiwanese began to employ this idea against Japanese misrule in the 1920s. Western-style criminal measures did come to Taiwan under Japanese rule; however, human rights were neglected in the Japanese criminal justice system. Thus, it was the civil justice system that was most affected by Western institutions.

The change of regime in 1945 did not improve the situation, but rather, made it even worse in some respects. The incoming KMT regime always deprived the Taiwanese people of the same political participation and fundamental rights and liberties that were withheld during the period of Japanese rule. The suppression of political dissent was harsher under the KMT than it had been under the Japanese after the 1920s. The general public also trusted the courts less than during the Japanese period. Similarly, only civil and commercial law had advanced in receiving Western individualist, liberal institutions, and ideas.

Since the second half of the 1980s, however, the development of constitutional law and criminal justice has extended past the high water mark reached in the 1920s, and civil and commercial law has continued to keep pace with global legal developments. Taiwan has, incrementally, become a liberal, democratic country at the end of the twentieth century. This does not mean, however, that those transplanted Western-style laws are operating in exactly the same way they do in Western countries, which have over three centuries of legal modernization. Taiwan's people have utilized Western legal institutions and ideas, which are widely divergent from their traditional ones, for only a century. Given the difficult history of the last hundred years, Taiwan has come remarkably far.

