

On legislating transitional justice

Written by Huang Cheng-yi (黃景儀) and Yeh Hung-ling (葉宏玲)
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For several consecutive days, the Chinese Nationalist Party's (KMT) legislative caucus has been blocking legislation for the promotion of transitional justice proposed by the Democratic Progressive Party (DPP). They first withdrew en masse from voting on the draft act, then proposed that it be reconsidered. In the end, the KMT was too few in numbers, and the party lost the vote on whether the proposal should be reconsidered before being submitted to the Judiciary and Organic Laws and Statutes Committee by 68 votes against 25.

While this was going on, the legislative chamber echoed with slogans calling the proposed transitional justice commission a DPP inquisition and saying that transitional justice was an excuse to implement "green terror" — green being the color associated with the DPP — and that it seems transitional justice has deteriorated into a tool for the DPP to settle scores with the KMT in a "blue-green battle."

However, if only the KMT's legislative caucus was willing to put in a little effort, it would discover that the main task of the transitional justice commission would be to draw up new legislation. In other words, it would deal with legal issues and it would be far from anything even remotely similar to an inquisition. Even though the second half of the draft bestows the commission with investigative rights and the right to enforce protection of property, these rights are only provided in preparation for their use after the passage of related legislation.

The proposed act is preparatory legislation intended to provide a legal framework. It divides transitional justice into four parts: opening up archives, historical memory, restoring faith in the judiciary and dealing with ill-gotten party assets. Within two years, the transitional justice commission should provide concrete plans and implementation measures for these four parts.

According to article 11 of the draft act, if it is necessary to draw up or amend a law or administrative order, the relevant drafts should be presented to the Cabinet, together with the plan and implementation measures.

This is why the title of the act is explicit in saying the "promotion" of transitional justice, instead of "immediate implementation."

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Understandably, dealing with the large-scale human rights violations and the distortions resulting from the constitutional chaos that occurred during the authoritarian era is a great undertaking that requires long investigation and comprehensive preparations.

Looking at the internal workings of political parties, the proposed act could restrain DPP legislators and stop them from proposing individual bills, thus avoiding a deluge of legislative bills in an attempt to gain credit while shifting blame elsewhere. From the perspective of parliamentary politics, this is a pledge on the part of the legislative majority party — and next ruling party — concerning the implementation of transitional justice.

However, transitional justice in fact signifies the comprehensive understanding, reflection and re-evaluation of authoritarian rule by a democratic society. Looking at the experiences of other countries, there is often a truth and reconciliation commission with the right to study archives and subpoena witnesses, and people of different political convictions and across generations are included in the collective reflective process through a large number of public hearings and frequent media broadcasts.

Once the truth about the authoritarian era has been put together and clarified, this commission will produce a comprehensive national report that will determine the responsibility of the perpetrators, handle authoritarian political symbols, correct incorrect legal rulings issued during the authoritarian era and make systemic suggestions for reforming the judiciary and intelligence agencies.

Transitional justice involves a comprehensive understanding of different regimes, and it should also look at constitutional aspects and review the legitimacy of the Martial Law era. This is a fundamental democratic process that cannot, nor should it be, broken down and reduced into a set of legal bills and then considered resolved.

Based on the current draft, the transitional justice commission will spend two years working on preparatory legislation. Is this something that will meet public expectations? A short while ago, military police forcefully searched the home of a member of the public, which highlights the importance of maintaining political archives.

The draft political archives act, which the KMT has been blocking vigorously for a long time,

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has been identified by the DPP's legislative caucus as a priority and it has been listed for committee review.

The question is whether, once the transitional justice act is passed, this priority bill that has been lying around in the legislature for many years will have to be reviewed only after the transitional justice commission has been set up. With an eye to restraining its legislators from individually proposing party asset bills in an attempt to accumulate political capital, the DPP needs to consider the issue of intraparty discipline.

If the transitional justice commission is legally entrusted with the right to determine the legislative schedule for introducing the relevant legislation, it would encroach on the power of individual legislators to introduce a bill, and the commission would in reality become an agency under the Executive Yuan with the power to restrain the powers of the legislature, which ranks above the Executive Yuan and thus the transitional justice commission.

In addition, according to the legislation, if the commission does not complete its task within the stipulated two years, it can ask the Cabinet for an extension, "one year at a time."

It is not clear for how long such extensions could continue to be issued.

Apart from confirming the right of the government to go ahead with transitional justice, the most valuable part of this act is that it empowers the government to issue injunctions on illegitimate property and to carry out administrative investigations. However, it must never be forgotten that the ultimate goal of these powers is to unearth the truth and to bring about justice.

This is why it would be better to give the transitional justice commission real functionality and allow it to promptly promote the preservation and opening up of archives and carry on with truth investigations, rather than wait another two years for this to happen.

President-elect Tsai Ing-wen (蔡英文), who will take office in less than a month, once said that Taiwan must grasp this unique opportunity to carry out transitional justice. If it is not handled

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well, the issue of traditional justice will come back to haunt us time and again. The next time it appears, it could well be the DPP that is being questioned.

Due to the totality of the harm caused during the authoritarian era, dialogue concerning these laws must not be constrained within a political party. This dialogue must include victims, victims' family members, civic organizations, experts and academics to include the participation of more members of the public.

This would help bolster the legitimacy of the legislation and bring about the advent of a Taiwanese truth and reconciliation commission sooner rather than later.

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Translated by Perry Svensson

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