

國際刑法學會台灣分會叢書系列 3

*International Association of Penal Law, Taiwan Chapter Series 3*

# 民主·人權·正義

Democracy · Human Rights · Justice

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- 蘇俊雄教授七秩華誕祝壽論文集 -

**Essays in Honor of Professor Dr. Jyun-hsyong Su for His 70<sup>th</sup> Birthday**

國際刑法學會台灣分會 主編

Edited by International Association of Penal Law  
(AIDP), Taiwan Chapter



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本書收錄刑事法學類文章十二篇，公法學類文章十六篇。刑事法學類執筆的國內外刑事法學者跨越五個研究世代，有 Hans-Ludwig Schreiber、蔡墩銘、Günther Jakobs、Ingeborg Puppe、李聖傑、Bernd Schünemann、陳志龍、Albin Eser、王效文、林鈺雄、楊雲驊、何賴傑；公法學類執筆者橫跨三個世代，有許宗力、許玉秀、陳慈陽、蔡宗珍、黃昭元、江玉林、葛克昌、蕭文生、陳英鈴、陳春生、李震山、蔡志方、林明昕、林明鏘、陳耀祥、盛子龍。都是以寫作態度誠懇、研究嚴謹知名的學者，他們的作品值得細讀。

This book contains twelve papers on Criminal Law and sixteen papers on Public Law. The topics on Criminal Law cover the elements of criminal responsibility; objective attribution; traditional protection of life; modern cyber crimes; economic crime; and related issues on the scope of prosecution and the rule of law. Topics on Public Law include general and special administrative control; the issues of fundamental rights related to DNA and fingerprints; the establishment of administrative self-governance and parliamentary order; procedural issues on constitutional review. Authors of papers on Criminal Law embrace five research generations, and authors of papers on Public Law three research generations. These authors are known to be sincere writers and methodical researchers. We recommend their works to you.

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# 序

本書係國際刑法學會台灣分會為祝賀蘇俊雄大法官七十大壽而出版的論文集，繼一九九二年出版的環境刑法國際學術研討會論文集（International Conference on Environmental Criminal Law）及一九九七年為本人祝壽而出版的論文集「現代刑事法與刑事責任」二書，編列為本學會叢書系列三。蘇大法官為國際刑法學會台灣分會前任理事長，因此為其祝壽而出版祝壽論文集，實屬義不容辭之事。此事由本會理事許玉秀大法官提議，在短時間之內，不少憲法、行政法及國內外刑事法學者熱烈參與，終於看到蘇俊雄大法官七十祝壽論文集順利出版。在此對於各位撰文者、譯者、參與編輯工作者及元照出版公司表示誠摯謝意。

蘇大法官與本人皆畢業於台灣大學法律學系及法律學研究所，兩人雖非同班同學，惟在法律學研究所就讀期間，由於選讀相同科目關係，有機會互相認識，對其學識豐富、語言能力出眾，至為欽佩。在台灣大學法律學研究所畢業後，我有幸先考取獎學金前往德國深造，半年後，蘇大法官亦前來德國。由於同在德國佛萊堡大學法學院就讀的關係，兩人開始有密切的交往。

蘇大法官除具有日、英、德各種語文基礎之外，其另有法語之基礎，使其留學期間運用外文書籍之能力，勝人一籌，此為當時留德的台灣學生望塵不及之處。蘇大法官在德國前後居留八年，完成博士學位後，曾在科隆大學東歐法制研究所（Institut für Ostrecht, Universität Köln）從事博士後研究。

從德國回國後，蘇大法官立即為母校台灣大學聘為法學院法律學系副教授，五年後晉升為教授。蘇大法官不僅對於造就台灣法學人才不遺餘力，更關心省政，於一九七七年出馬競選省議員，順利當選，但並未放棄教學工作，於是一方面從事法學教育，另一方面熱衷問政，皆有非凡的成就。

在台灣政治民主化以後，學政皆優的蘇大法官於一九九四年被選為第六屆司法院大法官，並於二〇〇三年任滿後，離開司法院，但並未放棄其為桑梓服務的志願，令人敬仰。

蔡墩銘

# Preface

The Taiwan Chapter of the International Association of Penal Law is publishing this anthology in honor of the 70<sup>th</sup> birthday of Constitutional Court Justice Su, Jyun-hsyong, who is a former President of the Chapter. This is the third book published by the International Association of Penal Law (AIDP), Taiwan Chapter Series, predated by the 1992 anthology of papers presented at the International Conference on Environmental Criminal Law and the 1997 book for my birthday titled “Modern Criminal Law and Criminal Responsibility”. Constitutional Court Justice Hsu, Yu-Hsiu, who is a trustee of the Taiwan Chapter proposed this project and many national and international experts in Constitutional Law, Administrative Law, and Criminal Law contributed papers. I am grateful to all the authors, translators, editors, and Angle Publishing for their contributions, which made this anthology a delight on which to work.

Justice Su and I both attended the undergraduate and graduate Law Program in National Taiwan University. Though we were not in the same cohort, we got to know each other by taking some of the same courses in the graduate program. His outstanding scholarship and communication skills impressed me and still do. Later, Justice Su joined me at Freiburg University in Germany to continue our advanced studies. During this time in Germany, our relationship changed from being acquaintances to that of close friends.

Justice Su’s command of Japanese, English, German and French helped to expand his literature review of law into more areas than was typical of his peers in Freiburg.

Justice Su lived in Germany for eight years. After he completed his dissertation, he worked as a post-doctoral researcher respectively at the Institute for the legal systems in Eastern Europe at Köln University.

After Justice Su returned from Germany, he was immediately hired by his alma mater, the National Taiwan University, as Associate Professor at the College of Law. He was promoted to Full Professor five years later. Justice Su was not only dedicated to educating legal talents in Taiwan, but also concerned about provincial politics there. In 1977, he ran for public office and was elected to the Taiwan Provincial Assembly. As a politician, though, Justice Su never gave up his legal scholarship, and he succeeded in both politics and academics.

After Taiwan's democratization, Justice Su served a term as a Constitutional Court Justice from 1994 to 2003 and he is still much respected for his continued professional community service.

*Tsai, Tun-Ming*  
*Translated by Dr. John H. Song*



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# 刑事法學

## Criminal Law

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# Ist der Mensch für sein Verhalten rechtlich verantwortlich?

Schreiber, Hans-Ludwig

## I.

1. Verantwortlichkeit, Handlungsfähigkeit, Freiheit der Willensbestimmung sind bestimmende zentrale Kategorien des Rechts und der Rechtspraxis. Das gilt nicht nur für das Strafrecht, sondern für das Zivil- und auch für das Staatsrecht.

Die Schuld bildet die Basis des Strafrechts. Grundlage der Bestrafung ist die willentlich erfolgende Verletzung einer strafrechtlichen Norm. Sie erlaubt und begrenzt zugleich den staatlichen Zugriff auf den Täter. Strafrechtliche Repression ohne Schuld ist nach einem Urteil des Bundesverfassungsgerichts rechtsstaatswidrig und verletzt den Menschen in seiner Würde und in seiner Handlungsfreiheit<sup>1</sup> In seinem bis heute allenthalben zitierten Grundsatzurteil hat der Bundesgerichtshof einen indeterministischen Schuldbegriff übernommen und wie folgt wörtlich formuliert: „Strafe setzt Schuld voraus.“ Schuld ist Vorwerfbarkeit. Mit dem Unwerturteil der Schuld wird dem Täter vorgeworfen, dass er sich nicht rechtmäßig verhalten, dass er sich für das Unrecht entschieden hat, obwohl er sich rechtmäßig verhalten, sich für das Recht hätte entscheiden können. Der innere Grund des Schuldvorwurfs liegt darin, dass der Mensch auf freie, verantwortliche, sittliche Selbstbestimmung angelegt und deshalb befähigt ist, sich für das Recht und gegen das Unrecht zu entscheiden, sobald er die sittliche Reife erlangt hat und solange die Anlage zur freien sittlichen Selbstbestimmung nicht

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<sup>1</sup> Art. 1 und Art. 2 GG.