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The Inquisitorial History of the Criminal Practice in Taiwan

1. Introduction

Taiwan adopted the exclusionary rule and the hearsay rule while amending its Criminal Procedure Code in 2003. Today, any accused is allowed to exclude illegally-obtained evidence, as well as out-of-court statements which might prejudice his trial. While the criminal justice system is quite adversarial and accusatorial under the 2003 amendments, it is interesting to locate what it looked like before 2003, which might explain why Taiwan adopted a more adversarial and accusatorial approach to law and order in 2003. After Italy amended its continental criminal procedure code by adopting special procedures and an adversarial model in 1988, Taiwan might be the second jurisdiction with similar continental background to adopt an adversarial and accusatorial model of criminal procedure in the world. This study analyses the inquisitorial practice of the criminal justice system in Taiwan before 2003 in order to provide sufficient and necessary information for further comparative studies between any continental jurisdiction other than Italy and Taiwan.

2. Inquisitorial and accusatorial systems

As Professor Craig M. Bradley mentioned, the inquisitorial system and the accusatorial system are two main approaches to criminal procedure in most legal systems of the world.[1] It is worth mentioning that: "The accusatorial approach often has been contrasted with the inquisitorial model because of an emotional attitude which makes the former the haven of guaranteed civil right, and the latter the symbol of an investigatory and judicial technique that sacrifices those same civil liberties on the altar of law enforcement."[2] It should be noted that this study does not use the term "adversary system" which would imply that it is only within this type of system that there are opposing prosecution and defense. In fact, both modern accusatorial and inquisitional systems have opposing parties and the powers of the state are separated between the prosecutor and the judge, thus allowing the defendant the right to counsel.[3] One can fairly state that the continental criminal procedure carries the imprint of the

[1]See: Craig M. Bradley, Criminal Procedure: A Worldwide Study, Overview, xv（1999）.

[2]See: Ennio Amodio and Eugenio Selvaggi, An accusatorial system in a civil law country: the 1988 Italian Code of Criminal Procedure, 62 Temple Law Review 1211, 1213（1989）.

[3] Indeed, the European Convention on Human Rights and Fundamental Freedoms in Article 6 requires these features in the legal systems of its signatory states. See Adversary, Wikipedia Encyclopedia, http://en2.wikipedia.org/wiki/Adversary_system（last visited, Nov. 10th, 2010）.

inquisitorial pattern and the criminal process in common law countries is fashioned after the accusatorial tradition. In sum, "the parties' initiative in collecting and producing evidence and the corresponding role the judge has to play as the referee in a dispute in which the public prosecutor is fully responsible for the burden of defending society by suppressing criminal behavior, are characteristics of an accusatorial system. The inquisitorial procedure is, however, a procedure in which the judge is expected to take the fact-finding initiative both before and during trial --- the state, rather than the parties, is responsible for eliciting the facts of the criminal case."[4]

3. The Historical Background of Inquisitorial Tradition in Taiwan（R.O.C.）

3.1 Colonial History

Taiwan had been a neglected island before the 17th century. Before 1662, Taiwan was partly colonized by the Dutch (the Dutch East India Company in 1624） and Spain（from 1628 to 1642, ousted by the Dutch). After Jheng, Cheng-gong defeated the Dutch in 1662 and set up the Eastern part of Ming Dynasty Government. In this period, Taiwan was officially governed by the Chinese for the first time.

Twenty-one years later, while Jheng's grandson, who was the ruler at that time, surrendered control of the island to the Ching Dynasty of China in 1683. The Ching Dynasty began its rule of Taiwan which lasted 212 years, until 1895. After Japan won the Sino-Japanese war, Taiwan was ceded to Japan in 1895, pursuant to the Treaty of Shimonoseki. From 1895 to 1945, Taiwan was controlled by the Japanese Government.[5] Following Japan's defeat and surrender in August 1945 at the end of World War II, Taiwan was retroceded to the Chinese people（then the Republic of China, R.O.C.） on October 25th and again placed under Chinese governance.

3.2 Inquisitorial Legacy

Taiwan was ruled by the Chinese for most of its recorded history（more than 250/300 years）. Chinese legal traditions therefore influenced Taiwan's legal developments much more than others. Traditional feudal Chinese governance was a centralized system, which accorded to the ruler[6] discretionary judicial power, as well as executive power. This discretionary approach became a "rule of the person," meaning that each person of authority could make a decision

[4]See: Ennio Amodio and Eugenio Selvaggi, An accusatorial system in a civil law country: the 1988 Italian Code of Criminal Procedure, 62 Temple Law Review 1211, 1213（1989）.

[5] This study is not intended to conduct any research about legal developments in Taiwan before 1945. On the legal reforms in the era of Japanese colony, see: Tay-sheng Wang, Legal Reform in Taiwan under Japanese Colonial Rule: 1895-1945, The Reception of Western Law, 36-104（University of Washington Press, 2000).

[6] It was the Emperor nationally and the mayor（a local governor） locally.

based on the prevailing beliefs, the most expedient choice, or the status of the person to be punished.[7]

However, due to the Japanese governance of Taiwan, Western style legal concepts and ideas began to be imported into Taiwan, since Japan had almost finished its legal westernization while acquiring title to Taiwan.[8] It is fair to say that the modern Western law entered Taiwan for the first time together with the incoming westernized Japanese authority. It is noteworthy that Japan adopted its legal framework mainly from Imperial Germany. Japanese criminal justice system was therefore radically inquisitorial at that time. In short, in the period between 1895 and 1945, Taiwan underwent a different type of westernized inquisitorial criminal justice system under Japanese authority.

Before resuming sovereignty over Taiwan in 1945, the ROC government, under the administration of the Chinese Nationalist Party（i.e. the Kuomintang, KMT) established its legal system following the example of Japan by enacting Western style, especially German-style, codes from the late 1920s to mid-1930s. In 1935, the ROC government enacted the Chinese Criminal Procedure Code for the first time. Even though most Japanese laws were repealed after October 25, 1946, and ROC laws mainly governed the public and private matters, it is interesting to note that the old German-based Japanese codes were substantially preserved in Taiwan.[9] Under both Japanese and Chinese inquisitorial traditions, the use of torture during criminal investigation was officially sanctioned or condoned because of reliance on confessions in order to obtain confessions from either defendants or witnesses.[10]

4. Inquisitorial Practices under the 1967 ROC Criminal Procedure Code

4.1 The Prosecution System

Originating from German sources, the ROC Criminal Procedure Code recognizes the private prosecution system, as well as the public prosecution system. In general, a private prosecution allows the victim of a crime to assume the responsibility of instituting prosecution against the suspect without interference from the government, while the victim believes that he would play a more effective role to prosecute than the public prosecutors, especially when the victim intends to avoid the suspect being “non-prosecuted” because he has

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[7] See: Pamella A. Seay, Law, Crime, and Punishment in the People’s Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People’s Republic of China, 9 Indiana International and Comparative Law Review 143, 143（1998）.

[8]See: Dan F. Henderson, Law and Political Modernization in Japan, in Political development in modern Japan, Robert E. Ward ed., 419-36 (1968）.

[9]See: Tay-sheng Wang, The legal development of Taiwan in the 20th century: toward a liberal and democratic country, 5-6, available at: http://www.law.ntu.edu.tw/faculty/prof/tswang/Wang%203.0.doc (last visited, Nov. 10th, 2010）.

[10] See Jaw-Perng Wang, Taiwan’s Proposed Adoption of the Right to Silence, 5（an unpublished S.J.D. Dissertation of University of Chicago School of Law, 1995, 12）.

collected enough evidence for conviction. However, a victim has to pay for investigating the crime without financial assistance from the Government, even though it is free to institute a private prosecution.[11]

4.1.1 Public Prosecution

The public prosecutor takes the responsibility for investigating crimes on behalf of the state and screens the innocent from the guilty. In order to discover the facts, the public prosecutor may use necessary means to investigate evidence. Investigation begins when the public prosecutor knows there is suspicion that an offense has been committed, due to a complaint, a report or a voluntary surrender, or for other reasons.[12] The ROC Criminal Procedure Code provided the public prosecutor with the power to summon arrest, interrogate and detain[13] the suspect, as well as the power to search, attach and inspect those persons or property involved with the committed crime. Accordingly, the public prosecutor is authorized to issue an indictment, a written disposition of non-prosecution, a written appeal and a reply in the prosecutor's own name.[14] Similar to Germany, "this neutral role extends to the trial and post-trial phases: the public prosecutor can ask the court, at the end of trial, to acquit the defendant for lack of sufficient evidence and the public prosecutor's office can bring an appeal against any conviction in favor of the defendant."[15] Though there was no plea-bargaining by the prosecutor's office or by any other actor in the system, public prosecutors are granted certain discretionary powers that allow them to dismiss some minor offenses without initiating a public prosecution.[16]

4.1.2 Private Prosecution

[11]It is worth mentioning that a merely vexatious and malicious private prosecution is basically prohibited, since the private prosecutor is required to prove it is not a case for civil action and the private prosecution is not being used to threaten the alleged offender according to Article 326, Paragraph 2 of the ROC Criminal Procedure Code.

[12]See Paragraph 1 of Article 228 of the ROC Criminal Procedure Code.

[13]The public prosecutor's power to detain the alleged offender was abolished in 1997.

[14]In the investigation, the public prosecutor has to be neutral and give equal attention to circumstances favorable and unfavorable to the defendant. See Paragraph 1 of Article 2 of the ROC Criminal Procedure Code. Also, the public prosecutor has to enclose everything deriving from his investigation, whether favorable or unfavorable to the accused, in the dossier which will be turned over to the court later on if the suspect is indicted.

[15]In fact, after the public prosecutor has made up his/her mind to file formal charges, he will usually attempt to obtain a conviction. Especially when the defendant is represented by counsel, the public prosecutor usually defines his role as an advocate, not as a neutral arbiter. See: Thomas Weigend, Chapter 6, Germany, in Criminal Procedure: A Worldwide Study, Craig M. Bradley ed., 209（1999）.

[16]Pursuant to Article 60 of the Court Organization Act, the functions of the public prosecutors include: investigation, prosecution, non-prosecution, enforcing prosecution, assisting in private prosecution, taking charge of private prosecution.

Although there is no grand jury system in Taiwan, the public prosecutors do not have the exclusive authority to initiate prosecution, since there is a parallel "private prosecution" system in Taiwan. In general, private prosecution is designed to prevent arbitrary prosecutorial policy, when the victim considers it impossible for the public prosecutor to decide to indict, but believes that the suspect will be convicted. Since the private prosecutor attorney is assumed to play the public prosecutor's role, any procedural act that may be performed by the public prosecutor may also be performed by a private prosecutor-attorney.[17] The private prosecution has to prove the offence beyond reasonable doubt, while the court is also entitled to investigate the evidence. Interestingly, the law treats the private prosecution differently than the public prosecution. In practice, the court distrusts the private prosecution to some extent, due to the fact that there is much commercial consideration before the attorney accepts the delegation to file a private prosecution. On the contrary, the public prosecutor decides to accept the case mainly on the bases of the legal opinion. Even though the private prosecution does not provide the victim with public assistance in regard to the investigation, it is an opportunity for the victim to carry out justice by himself if he believes himself to be more capable of convicting the accused.

4.2 Police Power

The ROC has had a National Police Force. According to Paragraph 1, Subparagraph 17, Article 108 of the ROC Constitution,[18] Taiwan has a unified or centralized police system that is very different from the United State's localized or decentralized police system. In addition, the police force could be divided into the national and local levels, [19] both of which are under the jurisdiction of the Ministry of Interior through the National Police Administration.[20] In addition to enforcing the law and maintaining public order, the police in Taiwan are empowered to deal with certain criminal matters.[21] It is noteworthy

[17]See: Article 329, Paragraph 1 of the ROC Criminal Procedure Code.

[18]Article 108, Paragraph 1 of the ROC Constitution provides: "In the following matters, the Central Government shall have the power of legislation and administration, but the Central Government may delegate the power of Administration to the provincial and hsien governments…17. Police system…"

[19]Paragraph 1 of Article 109 of the ROC Constitution provides: ''In the following matters, the provinces shall have the power of legislation and administration, but the provinces may delegate the power of administration to the hsien…10. Provincial police administration…" And Paragraph 1 of Article 110 of the ROC Constitution provides: "In the following matters, the hsien shall have the power of legislation and administration…9. Admistration of hsien police and defense…"

[20] Under this structure, Professor Howard A. Kurtz considers the Taiwan's police administration and police training program to be among the best in the world. See: Criminal Justice Centralization Versus Decentralization in the Republic of China, available at: http://www.llcc.cc.il.us/gtruitt/SCJ290spring2002/china%20cjs%20central.htm（last visited, Nov. 10th, 2010）.

[21] This might result from the Summary Judgment Law under Japanese colonial rule. The Summary Judgment Law allowed the police to decide

that "the Law Governing Offences Punished by the Police," enacted in the 1950s, permitted the police to impose sanctions of administrative detention and compulsory labor upon the police offenders（minor misdemeanors） without judicial surveillance. Besides, "the Law Governing Offenses Punished by the Police" also permitted the police office to subject a person to reformatory education, learning of living skills, correctional training, detainment or subject him to hard labor.[22]

In practice, the police usually charged the suspect with a misdemeanor under this police law whenever it was unable to investigate the crime within the period of twenty-four hours required by the ROC Constitution.[23] With this maneuver, the police could easily detain the suspect for seven days.[24] This Law became a powerful instrument and excuse which the police might utilize to initial or extend the period of detention for their investigation of a serious crime, without probable cause or reasonable suspicion to arrest or detain under Criminal Procedure Code, by first arresting and detaining the suspect for mere police offenses. Moreover, supervision under the prosecutor also became impossible. This police power was finally replaced in 1991 by "the Law for Maintaining Social Order." Since 1991, the court is the only authority which is entitled to decide both police offenses and criminal defenses punishable by police offence detention, suspension, or prohibition of business.

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summarily both on police offenses (after 1896) and on 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 have fixed residences or jobs and, failing that, they could be sent to work in the vagrant camp for one to three years. The decision to send a person to the vagrant camp was nominally a "disposition for maintaining public order," but, in fact, it 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 nobody was imprisoned in vagrant camps. See Tay-sheng Wang, Chapter 4: Taiwan, in ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA, Poh-Ling Tan ed., 99（1997).

[22]See former Article 28 of the Law Governing Offenses Punished by the Police（abolished on 1 July1991）. It provided:"Those who are loitering with intent or lazy and habitually commit offenses punished by the police would be imposed severer punishments than others. They may be sent to reformatory education or to learning living skills in a specific place after releasing from a prison."

[23]Paragraph 2, Article 8 of the ROC Constitution provides: "When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform the said person, and his designated relative or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial."

[24]See: Tsung-fu Chen, The Rule of Law in Taiwan, in The Rule of Law: Perspectives from the Pacific Rim, L. Gordon Flake ed., 114（2000).

4.2.2 Gangsterism Preventive Power

Furthermore, under the 1985 Statute for Prevention of Gangsterism, designed to incarcerate violent hoodlums, the police was authorized to arbitrarily classify a person as a gangster, to force him to appear before the police or arrest him, to adopt a secret witness system and to impose a rehabilitative program upon him（i.e. to send a person to the vagrant camp where he/she would be deprived of nearly all civil rights） without any participation or surveillance of the prosecutor.[25] Article 6 and Article 7 of the 1996 Statute for Prevention of Gangster[26] allowed the police to arrest the person who was subpoenaed but failed to appear. Also, the police may arrest those who are committing the offenses without prior subpoenas. Both of the above articles authorized the police to arrest people without prior notice or warrants. The police had the full discretion to decide whether to charge an individual as a hoodlum, because the suspect was deprived of the right to cross-examination of the witness under the secret witness system, which offered the police an opportunity to produce fake witness in order to detain or incarcerate the suspect.[27]

Due to this uncontrolled power, the police might also easily detain suspects, while completely avoiding the procedural requirements prescribed in Criminal Procedure Code. It can arbitrarily classify those who are targeted as gangsters or hoodlums. Many gangsters or hoodlums were "created" instead of being "discovered", due to this administrative maneuver. Moreover, this Statute became a technique which permitted the police to begin a period of detention for

[25]To some extent, the police play similar role as that of the prosecutor under this Statute. See Articles 5, 6, 7, 12, and 21 of the 1985 Statute for Prevention of Gangsterism.

[26]Article 6 of the 1985 Statute for Prevention of Gangsterism provided: "After a person is listed as a gangster and its circumstance is serious, the police bureaus may subpoena him to appear without any warnings. The police may arrest the person who was subpoenaed but failed to appear." Article 7 of the 1985 Statute for Prevention of Gangsterism provided: "Within a year after a person is listed as a gangster and has been given such warning, the police bureaus may subpoena him to appear if he still meets any condition as prescribed in any section of Article 2.

[27]In the reasoning of Interpretation No. 384 of the Grand Justice Council（1995）, the Grand Justice Council declared: ''Article 12, Paragraph 1 of the Statute for Prevention of Gangsterism provides that ''In handling the case of gangsters, the Police or the Court shall examine a witness separately in secret if the accuser, victims or witnesses ask their names and identities to be confidential. In any notices or minutes, their names or identities shall be replaced by code numbers. Names or identities of secret witnesses shall not be revealed." Its Paragraph 2 provides: "The accused and his retained lawyer may not request to confront or cross examine secret witnesses." Without considering the circumstances of the case, the SPG demands that courts examine a witness separately in secret as a secret witness, as well as prevents the accused and his lawyer from confronting or cross examining secret witnesses, simply because the accuser, victims, or witnesses request their names and identities to be confidential. It abridges the accused of the right to defense, hampers the court's truth finding function, possibly forces the accused to accept the correction and training programs without sufficient evidence and it is, of course not permitted by the Constitution.''

the investigation of a serious crime by charging the suspect as the gangster or hoodlum, especially after 1991 when the Law Governing Offences Punished by the Police was abolished and replaced by the Law for Maintaining Social Order.

This situation continued until 1995. After the Legislative Yuan modified those unconstitutional provisions declared by the Grand Justice Council in 1995,[28] in the proceedings against gangsters judges supervise the police powers. The procedural protection in this field became similar to that of Criminal Procedure Code. The police are not allowed to arrest a suspect without a warrant, to present secret witness without cross-examination, and to impose reformatory education and imprisonment when the suspect was convicted of a criminal offense. At the end, the Legislative Yuan repealed the Statute for Prevention of Gangsterism in 2009 after some of its provisions were declared unconstitutional by the Grand Justice Council in 2008.[29]

4.2.3 The Inquisitorial Legal Framework

While the court is actually in charge of reviewing the police decisions regarding the maintaining of public order and prevention of gangsterism, the public prosecutor is not entitled to participate. In other words, the court is required to investigate the case ex officio and the proceedings are quite inquisitorial. The system under the Statute for Prevention of Gangsterism and the Law for Maintaining Social Order should be neither accusatorial, nor adversarial. However, until today, the practice of police powers follows the inquisitorial pattern.

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[28]See Interpretation No. 384 of the Grand Justice Council（1995）. In this Interpretation, the Grand Justice Council declared that: "In no case except that of flagrante delicto, which shall be separately prescribed by law, shall any person be arrested or detained other than by a judicial or police organ in accordance with the procedure prescribed by law. No person shall be tried or punished other than by a court, in accordance with the procedure prescribed by law. Any arrest, detention, trial or punishment which is not carried out in accordance with the procedure prescribed by law may be resisted. The phrase that 'in accordance with the procedure prescribed by law' in the above sentence means that the procedure offering a legal basis on which the governmental organ imposes any measures restraining people's liberty, no matter whether their status is a criminal defendant or not, must be prescribed by statutes. The contents of the statutes must be proper in substance and comply with the relevant conditions set up in Article 23 of the Constitution. Articles 6 and 7 of the Statute for Prevention of Gangsterism authorize the police to force people to appear before the police station without following any necessary judicial procedure."

[29] See Interpretation No. 636 of the Grand Justice Council（2008）. In this Interpretation, the Grand Justice Council declared that: "The provisions of Article 2, Section 3, regarding "tyrannizing good and honest people," Section 5 of the same Article regarding "people who are habitually morally corrupt or who habitually wander around and act like rascals," and Article 12, Paragraph 1, regarding excessively restricting the transferred person's rights to confront and examine witnesses and to access court files are all inconsistent with the relevant principles of the Constitution. These provisions shall become null and void no later than one year from the date of this Interpretation."

4.3 Inquisitorial Powers with regard to the Interference with Physical Freedom

4.3.1 Stop, Frisk, Search and Seizure

In addition to the above-mentioned police powers, the police are subordinated to the public prosecutor's office during the investigations of criminal offenses. In Taiwan, stops and frisks are regulated by "Police Duty Enforcing Act" and not by the Criminal Procedure Code. Since procedural issues did not attract legal attention in the past, rarely did the court address the issue whether search and seizure violated human rights protection, not to mention stop and frisk.[30]

The authorities generally do not make warrantless searches, which were common before the lifting of the Martial law.[31] Before 2001, although the search warrant was required to effectuate a search, the public prosecutor was entitled to issue a search warrant during the stage of investigation.[32] The public prosecutor or the judge might personally conduct a search without a search warrant.[33] A warrant, issued by a prosecutor or a judge, must be obtained before the search, except when incidental to arrest in principle. Critics claim that the "incidental to arrest" provision is not only unconstitutional, but it is also frequently interpreted broadly by the police to justify searches of locations other than actual sites of arrests. In addition, anything that can be used as evidence or is subject to confiscation may be seized, no matter is it discovered during the process of search or ordered to surrender or deliver it.[34] The evidence collected without a warrant, according to regulations, is not excluded from introduction during a trial. However, a policeman who carries out an illegal search can be sued for illegal entry and sentenced to up to one year's imprisonment. It was seen as an invasion of privacy, while an undetached public prosecutor accompanied by the police could search anywhere without reviewing the necessity of the search. Not until 2001 did the Legislative Yuan revise the part of search and seizure of the ROC Criminal Procedure Code. Thus, former Article 129 was abolished in 2001 and since that time only a judge is allowed to issue a search warrant.[35] Except in emergency, police must obtain warrants from a judge in order to search or seize property or persons.[36] Furthermore,

[30]For instance, police search cars routinely at roadblocks under the authority of Police Duty Enforcing Act. In addition, in the past, allegations were made that police and security agencies interfere with the right to privacy through such means as surveillance and interception of correspondence and telephone calls.

[31]According to the National Police Administration, warrantless searches are allowed only in specialized circumstances, such as the arrest of an escapee or in cases when facts indicate a person is in the process of committing a crime and the circumstances are urgent. In any such case, the police must file a report with the prosecutor or court within 24 hours.

[32]See former Paragraph 3 of Article 128 of the ROC Criminal Procedure Code.

[33]See former Article 129 of the ROC Criminal Procedure Code.

[34]See Article 133 of the ROC Criminal Procedure Code.

[35]See Paragraph 3 of Article 128 of the ROC Criminal Procedure Code.

[36]See Article 131 of the ROC Criminal Procedure Code.

the Interpretation No. 535 of the Grand Justice Council has decided on constitutional parameters for reasonable stop, frisk and search by the police, which reasserts the constitutional principle of due process of law and prescribes clearly the limits of unwarranted search by the police, in order to strike a balance between the protection of citizens from unwarranted search and the police's safety in enforcing laws.

4.3.2 Arrest

Since a suspect who is legally summoned should appear before the summoning official at the scheduled time, a suspect who fails to appear without good reason may be arrested with a warrant.[37] A public prosecutor is empowered to issue an arrest warrant.[38] In some instances,[39] an accused may be arrested with a warrant without being served with summon in advance. It may happen in cases of strong suspicion that an offence has been committed.

In cases of flagrante delicto, the person discovered during the act of committing an offence or immediately thereafter may be arrested without a warrant by any person, including the police.[40] Besides, an emergency arrest without a warrant by the police is also allowed under some circumstances. For example, when a person is implicated to be a co-offender in flagrante delicto and there are facts sufficient to warrant strong implication. It may also happen when a person has escaped from the execution of punishment or from detention or when the officer strongly suspects, due to the facts, that the person has committed the crime and he refuses to be interrogated by the police and runs away. Equally, it may happen in cases of arrest of a strongly suspected person who has committed a crime which carries a possible death sentence or at least five years in prison and there are facts sufficient to justify an apprehension that he may abscond.[41] If a suspect is arrested with or without a warrant, he shall be sent to the prosecutor's office and a public prosecutor has to decide whether to release or detain him.

[37]See Article 75 of the ROC Criminal Procedure Code.

[38]See Paragraph 3 of Article 77 of the ROC Criminal Procedure Code.

[39]Such as the instances when a suspect has no fixed domicile or residence, he has either absconded or there are facts sufficient to justify an apprehension that he may abscond, there are facts sufficient to justify an apprehension that the suspect may destroy, forge and alter evidence, conspire with a co-defendant or witness, he has committed an offence punishable with death penalty or life imprisonment or he is faced with a minimum punishment of imprisonment for not less than five years. See Article 76 of the ROC Criminal Procedure Code.

[40]In addition, a person is considered to be in flagrante delicto if he is pursued with cries that he is an offender, he is found in possession of a weapon, stolen property or other item sufficient to warrant a suspicion that he/she is an offender or his/her person, clothees and the like show traces of the commission of an offence sufficient to warrant such suspicion. See Article 88 of the ROC Criminal Procedure Code.

[41]See Paragraph 1 of Article 88-1 of the ROC Criminal Procedure Code.

4.3.3 Detention

After interrogation and examination by a public prosecutor, a suspect might be detained if the public prosecution considers that necessary.[42] The public prosecutor, as well as the judge is entitled to issue a writ of detention during the period of investigation.[43] Still, there is a limitation that detention of an accused might not exceed two months during the stage of investigation.[44] In practice, detention usually became an instrument for the public prosecutor's convenience to "coerce" the suspect to "confess."[45] Provisions in the articles concerning the public prosecutor and the right to detain gave rise to criticism concerning "Due Process" and the suspect's human rights protection. Although there is no "investigating magistrate" in the ROC criminal justice system, the public prosecutor also played its role as an investigating magistrate with the power to search and detain in the past. Not until 1997 did the situation change. The public procurator's power to detain a suspect was finally held unconstitutional, based on Article 8 of the ROC Constitution, by the Grand Justice Council in its Interpretation No. 392 in 1995,[46] and later, it was abolished by the

[42]In Taiwan, in order to become a public prosecutor or a judge, a person has to pass the Judicial Examination. After passing the exam（the passing rate is only around 3%) the future judges and prosecutors are trained by the Ministry of Justice and Judicial Training Institute. Then, they are assigned to district courts and local prosecutor's offices to observe the practice. After finishing the training, becoming a public prosecutor or a judge depends on his/her performance and will during the training. Even after being assigned as a public prosecutor（or a judge）, he may request to be a judge（or a public prosecutor）five years later, since these have the same background and qualification. Thus, a public prosecutor generally thinks of himself as no different from a judge, except that they play different roles during the criminal proceedings. This may be the reason why the legislators provided a public prosecutor with the right to issue search warrants and a writ of detention at the very beginning. See: Jaw-Perng Wang, Taiwan's Proposed Adoption of the Right to Silence, 13（an unpublished S.J.D. Dissertation of the University of Chicago School of Law, 1995, 12）.

[43]See former Paragraph 3 of Article 102 of the ROC Criminal Procedure Code.

[44]See former Paragraph 1 of Article 108 of the ROC Criminal Procedure Code.

[45]While the author of this study was a court clerk, from 1995 to 1997, not only a public prosecutor, but also a judge usually detained the suspect or the accused for a short term（such as one week or half month）. The accused was instructed to take an opportunity to "retrospect," particularly when he was considered lying. Under these circumstances, detention became a notorious instrument giving the suspect or the accused both psychological and physical pressures, although it was, to some extent, effective.

[46]It reasoned: The term "trial", defined in Article 8, Paragraphs 1 and 2 of the Constitution, means trial by court. He who has no authority to try a case cannot conduct this proceeding. The "Court", as defined in Article 8, Paragraphs 1 and 2 means a tribunal composed of a judge or a panel of judges empowered to try cases. According to Article 8, Paragraph 2 of the Constitutional, any organ other than a court who has arrested or detained a person shall surrender the detainee to a competent court for trial within 24 hours of the said action. Therefore, Code of the Criminal Procedure, Article

Legislative Yuan in late 1997. In 1997 an amendment to the Code of Criminal Procedure shifted the power of investigative detention from the prosecutors to the courts. Under the 1997 law, prosecutors must apply to the courts within twenty-four hours after the arrest, in order to obtain a permission to continue detaining an arrestee.[47] The duration of this pretrial detention is limited to two months and the courts may approve a single extension of two months.[48] Limits may also be set for detention during trial. If a crime is punishable by less than 10 years of imprisonment, no more than three extensions of two months each may be granted during the trial and appellate proceedings.[49] The authorities generally observe these procedures and trials usually take place within three months of indictment.

After this legislation, only a judge is empowered to issue a writ of detention.[50] A public prosecutor has to apply for a writ of detention if necessary. Thus, a suspect enjoys better protection during a public prosecutor's investigation, because a detached judge is required to review if it is really necessary to detain under the given circumstance. Whether the judge should still be entitled to issue the writ of detention or extend the period of detention on his/her own during the stage of trial still remains to be seen in Taiwan.

4.4 A Controversial Murder Case Prompting Calling for Criminal Justice Reform

On the night of 23-24 March 1991, Ms. Yeh, In-lan and her husband Mr. Wu, Ming-han were stabbed to death at their home in the town of Hsichih County (in the northern part of Taiwan). Five months later, on 13 August 1991, police traced a fingerprint left at the scene of the crime to a marine soldier named Mr. Wang, Wen-hsiao. He was taken into custody on 13 August 1991 and confessed to the police immediately. More than 36 hours after he had been taken into custody, Mr. Wang, Wen-hsiao added new information to his confession and implicated his brother, Mr. Wang, Wen-chung, and his brother's three classmates, whom he could not name, as accomplices. However, his various confessions to the murder are inconsistent. Without an arrest warrant, the police detained Mr. Wang, Wen-chung. Therefore, he named his three classmates, Mr. Liu, Bing-lang, Mr. Su, Chien-ho and

101, and Article 102, Paragraph 3 applies mutatis mutandis on Article 71, Paragraph 4, and Article 120, which empowers a prosecutor other than a judge to detain suspects. Article 105, Paragraph 3 of the same Code empowers the prosecutor to grant request for detention, submitted by chief officer of the detention house. Article 120, Paragraph 1 and Article 259, Paragraph 1 of the same Code empowers the prosecutor to withdraw, suspend, resume, continue detention, or to take any other measure in conjunction with the detention. These provisions are incongruous with the spirit of the before mentioned Article 8, Paragraph 2 of the Constitution.

[47]See Paragraph 1 of Article 93 of the ROC Criminal Procedure Code.

[48]See Paragraph 5 of Article 108 of the ROC Criminal Procedure Code.

[49]Also, during the second appeal, only one extension may be granted. See Paragraph 1, Article 108 of the ROC Criminal Procedure Code.

[50]See Paragraph 3 of Article 102 of the ROC Criminal Procedure Code.

Mr. Chuang, Lin-hsun, with whom he committed this murder together.[51]

Since Mr. Wang, Wen-hsiao was tried speedily by a military court, found guilty and executed in January 1992, it is unknown whether he was ill treated during interrogation by the military prosecutor and the police. The military court proceedings of his trial were later reported by the authorities to have been lost. His brother, Mr. Wang, Wen-chung was also tried by a military court and sentenced to two years and eight months' imprisonment, which he has already served.[52]

In August 1991, the police arrested those three persons, aged 18, on 15 August 1991 in Hsichih. The police did not have any arrest warrant, did not inform these men's families about the arrests and searched Mr. Chuang's home without a search warrant. During interrogation by the Hsichih police, each of the three was told that the others had already confessed. Although all of them confessed the alleged offenses during the police interrogation, it is worth noting that none of the confessions they made was consistent with each other and all of them later denied committing the murder. Although a large amount of physical evidence, including blood and fingerprints, was found at the scene of the crime, none of it has ever been linked to Mr. Liu, Mr. Su or Mr. Chuang. The confessions of the three differ on key points, such as the timing of the offence, the kind of murder weapons used and the motive for the crime. They were all charged with offenses under the Act for the Control and Punishment of Banditry with Robbery, Murder and Rape, a combination of offences which carries a mandatory death sentence on 4 October 1991. Their trial opened before Shilin District Court on 11 October, 1991 and they were tried before a panel of three judges. During the trial, the three men asserted to have been tortured and coerced to make false confessions and that there have been no direct or physical evidence to convict them, other than their confessions.[53]

Although Taiwan's Criminal Procedure Code does not allow conviction solely on the basis of confession, the confessions frequently constituted the major item of evidence in criminal cases in

[51]Mr. Wang, Wen-chung alleged that on the same evening, Mr. Su, Chien- ho and Mr. Liu, Bin-lang went out for the evening with him and his brother Mr. Wang, Wen-hsiao, both of whom were completing their military service at the time. They spent the evening in Hsichih County and Keelung City before returning home in the early hours of the morning.

[52]Mr. Wang, Wen-chung served two years in prison for his alleged role of an accomplice in the crime. After his release, he retracted his oral evidence and stated publicly that the police had forced him to implicate his classmates. In addition, Mr. Wang, Wen-hsiao was executed for his prole in the murders on 11 January 1992.

[53]The three of them described being beaten and having water or urine forced into their mouths. Mr. Su and Mr. Chuang also claimed to have been subjected to electric shocks to their genitals. In the case of Mr. Su's, the police allegedly smeared a concentrated chemical on the wounds on his genitals caused by the electric shocks. Mr. Liu also asserted that police put a thick yellow book against his chest, hammered him on the chest, then hung him upside down and started pouring water and urine into his mouth.

Taiwan, especially before its amendment in 2003. In this case, the court based its verdict almost exclusively on the "alleged coerced" confessions. Corroborative evidence was almost completely non-existent. There were no corroborating eye-witnesses and no direct physical evidence linking the co-defendants to those crimes. The allegations of torture and the apparent lack of material evidence, coupled with extensive irregularities in the investigative process, including unlawful detentions and illegal searches, give grave cause for concern that there has been a miscarriage of justice in this case. During the district court proceedings, the judges reportedly refused to call some of the defense witnesses, including fellow prisoners who might have corroborated the men's allegation of torture and several other people who claimed to have seen the three men elsewhere on the night of the murder. The coroner's testimony appeared to rule out any possibility that the female victim had been raped and forensic evidence from the scene of those crimes was apparently not presented to the court. In spite of this, the men were found guilty of all charges and on 18 February 1992 they were sentenced to death. After a lengthy and convoluted series of appeals to the High Court and the Supreme Court, the Supreme Court on 13 February 1995 confirmed the original verdicts and the final sentence was rendered.[54]

Although each judicial instance in Taiwan sentenced them to death, they were not executed, since the case was considered an obvious miscarriage of justice for years - so apparent that none of the five Ministers of the Department of Justice in office since 1995 was willing to sign the warrant for the execution[55] and the public Prosecutor-General in Taiwan has filed special appeals[56] for them, based on their defenses of torture and coerced confession, which were all denied by the Supreme Court. After the granting of retrial in November 2000,[57] the Taiwan High Court acquitted the three men on 13 January 2003, based on insufficient evidence.[58] However, in

[54]According to the criminal procedure law which was in effect at that time, the evidence for conviction was sufficient.

[55]Article 461 of the ROC Criminal Procedure Code provides: "A death penalty shall be subject to the approval of the highest judicial administrative organ issuing an order and shall be executed within three days after receipt of the said order; Provided, that where the public prosecutor in charge of the execution has found that merits of the case actually present some grounds for a retrial or an extraordinary appeal（special appeal）, he may, within three days, request the highest judicial administrative organ to reexamine the case."

[56]Article 441 of the ROC Criminal Procedure Code provides: "If it is discovered after a final judgment that the trial was conducted contrary to law, the Prosecutor-General may file an extraordinary appeal（special appeal）with the Supreme Court."

[57]The verdict is not uncontroversial because prior to this judgment, more than 40 judges have heard this murder case at its various stages.

[58]Mr. Tsai, Kuo-tsai, spokesman for the Taiwan High Court, said that weaknesses in the evidence against the three were the main reason for the acquittal. For example, the fingerprints and hair collected at the crime scene did not match theirs. Their individual testimonies did not match one another either. The kitchen knife believed to have been the murder weapon was "lost" during military trial. See: Taiwan Headline, January 14, 2003,

August 2003 the Supreme Court overturned that verdict and ordered the case to be remanded to the Taiwan High Court again.[59] The three men had already spent more than seven years on death row before their acquittal on 13 January 2003. Since they were found guilty again in the new trial, they face the death penalty once more. Even though after twelve years of investigation and nine trials in the District Court and the High Court, the Supreme Court's judgment in August 2003 leaved much room for debate on many issues related to the murder case, such as the applicability of exclusionary rule to police misconduct, the admissibility of scientific evidence, etc. This murder case is still pending trial.

What had been an almost forgotten case suddenly leaped into the public eye as the nation's top prosecutor basically admitted to having made a mistake. The case has been at the forefront of human rights concerns in Taiwan ever since. It suggests that Taiwan's criminal procedure code needs a thorough review. The case has sparked an emotional debate concerning criminal justice system in Taiwan - the courts, legislators, attorneys, human rights groups and even the President of the ROC was asked to pardon.[60] Whatever that decision will be, the murder case has served to force Taiwan's criminal justice system out of the shadow of its authoritarian political past and turn it into the semblance of something that a modern liberal democracy does not have to be ashamed of.

5. Pre-2003 Adjustments for Better Human Rights Protection

5.1 Right to Remain Silent During Interrogation and Confession

In the past, under the principle of "finding the real truth" the issue of prompt interrogation was frequently neglected, even ignored, by the police, public prosecutors and the court. The law provided that a suspect or an accused, being interrogated or examined by officers, shall be informed that he is suspected of committing an offence, as well as charged for an offence and of the new charge, if the original

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http://th.gio.gov.tw/show.cfm?news_id=16526（last visited, 10 November, 2010）.

[59]The Supreme Court's August 2003 judgment commented that "there is much room for debate" on many issues related to the case. For example, a large amount of physical evidence, including blood and fingerprints, was found at the scene of the crime, but none of it has ever been linked to those three. Also, the confessions of the three differ on key points, such as the timing of the offence, the kind of murder weapons used and the motive for the crime. The allegations of torture and apparent lack of material evidence, coupled with extensive irregularities in the investigative process, including unlawful detentions and an illegal search gaveve grave cause for concern that there has been a miscarriage of justice in this case.

[60]While the author of this study was a staff member in the President Office（the equivalent of White House in the U.S.A.） in charge of nationwide pardon affairs, in 2000, the President once considered giving amnesty to the three. However, before official documents were issued, the Taiwan High Court granted a retrial in November 2000, which made the case inconsistent with the Pardon Act.

charge was changed after he has been informed.[61] However, it was sometimes intentionally neglected or ignored by the police, since there was no instrument applicable to enforce the rule and confessions resulting from police misconducts were still good evidence at trial,[62] as shown in the controversial murder case. Interrogation or examination should be held in an honest manner without any violence, threat, inducement, fraud and any other improper means[63] and any confession extracted by violence, threat, inducement, fraud, unlawful detention or other improper devices is not admitted in evidence,[64] since it was difficult for the defendant to prove that the confession was unlawfully extracted, the court usually admitted it in evidence in a given case.

Even if violation of former Article 95, Article 98 or Article 156 was found, confessions deriving from illegal means were automatically admissible, unless there was causation between illegal detention and confession.[65] The public prosecutor described, for instance: "It used to be a failed attempt for me to warn the police not to violate due process in investigating criminal cases."[66] This practice made it almost impossible for the defendant to secure legal interrogation without any violation of law. Thus, draft amendments and revisions were proposed to improve the protection of defendants under interrogation or examination. Moreover, accompanying these drafts, Taiwanese Supreme Court announced that: "Since violation of procedure rule（Article 95） would possibly result in inadmissible confession, it should not be presumed admissible without further investigation."[67] In this subsection, this study will review recent

[61]See former Article 95 of the ROC Criminal Procedure Code.

[62]In practice, records of police interrogation were the most important evidence at trial, because there was a dominant belief in Taiwan that the first statement of the accused is closest to the truth and that the later statements are less trustworthy due to the outside influence. Because of the belief that the truth can be revealed from the first statement of accused, judges and public prosecutors tended to give great weight to the police records in evaluating a case. See: Jaw-Perng Wang, Taiwan's Proposed Adoption of the Right to Silence, 10（an unpublished S.J.D. Dissertation of the University of Chicago School of Law, 1995, 12）.

[63]See former Article 98 of the ROC Criminal Procedure Code.

[64]See former Paragraph 1 of Article 156 of the ROC Criminal Procedure Code.

[65]See 72 Tai Sun 1332（a Taiwan Supreme Court decision, 1983）.

[66]It was said by Mr. Chen Jui-jen, a public prosecutor at the Shihlin district prosecutors' office. Mr. Chen also said that when the executive branch of the government gradually released its control over judicial affairs, Taiwan's court system became more independent in determining whether investigative agencies had undermined the civil rights of crime suspects in the process of criminal investigations. "Now, I have to say 'no more', because the police themselves would phone me from time to time and inquire about the legality of the things they planned to do." See: ''Big Brother' makes way for due process of law'', Taipei Times, November 18, 1999, available at: http://th.gio.gov.tw/show.cfm?news_id=3358（last visited, 10 November, 2010）.

[67]See: 88 Tai Sun 5762 and 89 Tai Sun 1239（Taiwan Supreme Court decisions, 1999, 2000）.

developments with regard to the right to remain silent and the right to counsel in Taiwan's criminal justice system.

The 1967 ROC Criminal Procedure Code did not provide the defendant with the right to remain silent. Neither does the ROC Constitution. In practice, rarely did the defendant remain silent during interrogation from which the court would be drawing inference against the accused. Pressures on the accused during the police's or public prosecutor's interrogation deserve careful consideration, because the accused was usually coerced under unfamiliar environment and procedure. Moreover, the police had often told or implied to the suspect and arrestee that if they would confess to the public prosecutor, it would be more likely to obtain release on lower bail and not to be detained.[68]

Aside from a decisive change that handed authority for detention back to the court system, a proposal of the Miranda Warning to protect the alleged offender from coercion during interrogation was passed in 1997. It requires all interrogating officers（including police, public prosecutor, and judge） to inform the alleged offender of the right to remain silent, the right to retain attorney present when being questioned and the right to ask to investigate evidence favorable to the suspect. In cases when the charges are amended subsequently, the police must inform the suspect.[69] Without "reading a suspect his rights" the statute says, the suspect's answers may not be used as evidence in trial.[70] At the same time, the amendments of 1997 also prohibited interrogations that were overly exhaustive or went on through the night.[71] The Supreme Court hereupon overruled its former decisions and declared that the court should investigate if any violation of procedural rules exists and if there is causation between violation and confession.[72] Furthermore, if the accused asserted that the confession derives from violation of the right to remain silent, the court has to investigate whether it is true before any further investigation can proceed.[73] However, this right to remain silent is different from that under Miranda, since violation of it does not necessarily and automatically result in exclusion of the alleged confession[74] and the law does not prohibit the police from

[68]See: Jaw-Perng Wang, Taiwan's Proposed Adoption of the Right to Silence, 14（an unpublished S.J.D. Dissertation of the University of Chicago School of Law, 1995, 12）.

[69]See Article 95 of the ROC Criminal Procedure Code.

[70]See Paragraph 2 of Article 158-2 of the ROC Criminal Procedure Code. Also, see ‘’'Big Brother' makes way for due process of law'', Taipei Times, 18 November, 1999, http://th.gio.gov.tw/show.cfm?news_id=3358（last visited: 10 November, 2010）.

[71]See Paragraph 1 of Article 100-3 of the ROC Criminal Procedure Code.

[72]See: 89 Tai Sun 1133（a Taiwan Supreme Court decision, 2000）.

[73]See Article 156 of Paragraph 3 of the ROC Criminal Procedure Code.

[74]Under the American concept of Miranda Rights, when suspects are arrested, the police have to advise them about their rights, including the right to remain silent during police interrogation and the right to retain a lawyer. Otherwise, the statements of the parties involved cannot be used as evidence. See Miranda v. Arizona, 384 U.S. 436（1966）.

continuously interrogating, even if the right to remain silent is invoked.

5.2 Right to Counsel

While old Chinese people had a deeply entrenched mistrust of lawyers since ancient times, Chinese society was averse to those who made a living on vexation litigation.[75] In fact, the Chinese word "lawyer" did not exist until the late Ching Dynasty.[76] The first proposal to create criminal procedure shocked the Chinese people,[77] because the title and the substance of "attorney" were unknown at that time.[78]

Although both the 1935 and 1967 Criminal Procedure Code provided the accused with the right to retain a lawyer, it was not until 1982 that a counsel was allowed to be present while the police or procurator examined the suspect.[79] While an accused has the right to retain a lawyer, that does not require the police or a public prosecutor to advise the accused of the right without the amended Article 95 of Criminal Procedure Code. In practice, before 1997, one could rarely find an ordinary occurrence that the police should warn the accused of the right to retain a lawyer under 72 Tai Sun 1332, a Taiwanese Supreme Court decision, even though Paragraph 5 of Article 88-1 has required the police to inform the arrestee of the right to retain a lawyer to be present since 1982.

In December 1997, significant amendments to the Criminal Procedure Code passed the legislature, as a further guarantee for civil rights during due process of criminal justice.[80] The Supreme Court in Taiwan thereafter overruled this ruling with a declaration, saying that: "In order to secure a fair trial, the accused is entitled to retain a defense attorney, which equates the defendant with a public

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[75]See: Todd D. Epp, The New Code of Criminal Procedure in the People's Republic of China: Protection, Problems, and Predictions, 8 Int'l J. Comp. & Applied Crim. Just. 43, 50（1984）.

[76]See: Jaw-Perng Wang, Taiwan's Proposed Adoption of the Right to Silence, 6（an unpublished S.J.D. Dissertation of the University of Chicago School of Law, 1995, 12）.

[77]It is worth mentioning that: "The concept of a lawyer in China is quite different from that found in the United States. A lawyer in the United States will generally have a four-year baccalaureate degree, a three-year law degree, and will have passed a bar exam. In China, no comparable preparation is required. A typical lawyer must at least be a high school graduate and may have taken some college law courses, or may have even earned a baccalaureate degree. The one prerequisite to the practice of law is to pass a civil service exam for the law. There are no mandated educational requirements for the practice of law." See Pamella A. Seay, Law, Crime, and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China, 9 Indiana International and Comparative Law Review 143, 152（1998）.

[78]See: Yi-Perng Chang, History of Judicial Reform in China, 1 The China L. Rev. 18, 19（1924）.

[79]See: Article 27 and 88-1 of the ROC Criminal Procedure Code.

[80]See: 'Big Brother' makes way for due process of law, Taipei Times, November 18, 1999, http://th.gio.gov.tw/show.cfm?news_id=3358（last visited, Nov. 10, 2010）.

prosecutor throughout the whole proceeding. If the right to retain a defense lawyer is ignored, especially in cases of failure to notify the defense attorney of the date of trial, it is impossible to secure a fair trial."[81] Thus, whenever an accused has retained a lawyer, the public officer should inform the attorney of the time for interrogation. Without observing this ruling, any proceeding will be treated as unfair and illegal, in violation of due process.[82] Nevertheless, it is still difficult to predict if the evidence will be subsequently excluded.

Different from the U.S. practice, although the ROC criminal justice system is equipped with the public defender system, public defenders are only available and free in trials where the minimum punishment is not less than three years, where a high court takes jurisdiction over the first instance and no defense attorney has been retained or where the court considers if necessary.[83] There is no legal requirement that indigent persons should be provided a counsel during police interrogation, although such counsel is provided during trials. In other words, a defense attorney is not required during police and public prosecutor's investigation if the accused can not afford one. The law allows the police, public prosecutors and the court to continue questioning or examining the accused even if he/she retains no lawyer, after he has been informed of it and he has invoked this right. Even when a public defender is retained, the public defense counsels do not provide effective defense assistance, because they seldom spend a significant amount of time discussing the case with their clients.[84]

It is worth mentioning that there exists nothing in the ROC Criminal Procedure Code addressing the claims on "Ineffective Assistance of Counsel" on appeal. It is reasonable under the traditional inquisitorial framework, because the court is presumed to discover the truth even if assistance of counsel is really ineffective. However, since the new legislation increases the role of the defense counsel at trial, whether this situation will change in future is worth being observed, especially when the court still has the power to investigate on its own initiative, according to Paragraph 2 of Article 163 of the ROC Criminal Procedure Code.

5.3 Right of Confrontation

Neither the ROC Constitution, nor the 1967 Criminal Procedure Code provided the accused the absolute right of confrontation. Even Grand Justices in Taiwan asserted that it is not necessary to recognize confrontation right as a fundamental constitutional protected human right under continental inquisitorial criminal justice tradition, since the court has discretionary power to determine if it is necessary to provide

[81]See 87 Tai Sun 644（a Supreme Court decision, 1998）.
[82]See 88 Tai Sun 2282（a Supreme Court decision, 1999）.
[83]See Article 31, Paragraph 1 of the ROC Criminal Procedure Code.
[84]Before 2003, in practice, public defense counsels typically do not appear until the final hearing of the trial. However, this situation has changed since the newly enacted law requires that the defense attorney, if retained, be present at trial all the time. For more detailed description about defense attorney's new role, see the following subsection.

the defendant with the right of confrontation.[85] In practice, when the confession derives from any person（including the co-defendant） other than the accused against the accused, there is no confrontation if the judge or the public prosecutor considers that such a confrontation between the accused and the witness is unnecessary or improper.[86] Besides, usually the witness who has been legally examined by a public prosecutor during the stage of investigation should not be called to testify again.[87] Even the witness's statement made by the police during the police interrogation was admissible in evidence at trial.[88]

It is noteworthy that, unlike in the United States, the co-defendant was not considered a witness in the other co-defendant's case. Also, the accused had no right to confront to the co-defendants or co-conspirators as a witness, since the Supreme Court declared that: "co-defendant's statement against the other co-defendant is admissible in evidence at trial to secure conviction for the other co-defendant."[89] As shown in the controversial murder case, merely confession derivative from a co-defendant was sufficient to secure conviction. While a co-defendant is prone to shirk and shift responsibility to the other co-defender falsely, the past practice was unfair to the so-called "other co-defendant" in that he had no opportunity to prove the lying, if possible.

This situation did not change until 1995 when the Grand Justice Council recognized in its Interpretation No. 384 that demanding the courts to examine a witness separately in secret as a secret witness and preventing the accused and his retained lawyer from confronting or cross examine secret witness would definitely abridge the accused the right to defense and hamper the court's truth finding function is, of course, not permitted by the ROC Constitution.[90] Thus, in 2003, Legislative Yuan passed a new article providing that: "Confession of either an accused or a co-defendant shall not be used as the sole basis of conviction and other necessary evidence shall still be investigated to see if the confession coincides with facts."[91] Under this statute, confession derivative from a co-defendant is no more sufficient to secure conviction and a co-defendant should be confronted by the accused, although not being treated as a witness.

In addition, in order to make the trial more accusatorial, the new legislated Paragraph 1 of Article 166 provides the defendant and defense attorney the right to cross-examine witness and expert witness, presented by a public/private prosecutor. While the defendant is indigent and retains no counsel, the court should notice the defendant the right to cross-examine and ask the defendant whether to

[85]See Concurring Opinions in Interpretation No. 384 by Justice Mr. Yun-Mo Lin and Justice Mr. Son-Yen Sun.
[86]See Paragraph 3 of Article 97 and Paragraph 2 of Article 184 of the ROC Criminal Procedure Code.
[87]See former Article 196 of the ROC Criminal Procedure Code.
[88]See 72 Tai Sun 1203（1983）.
[89]See 46 Tai Sun 419（1957）.
[90]See the reasoning of Interpretation No. 384 of the Grand Justice Council（1995）.
[91]See Paragraph 2 of Article 156 of the ROC Criminal Procedure Code.

cross-examine or not. Regarding statements or confessions from co-defendant, although the new law does not change its status into witness, Paragraph 1 of Article 159 provides that: "Unless otherwise provided by law, out of court verbal and written statements deriving from anyone other than the defendant are inadmissible." It provides the defendant with the right of confrontation. Thus, confession or statement resulted from co-defendant is no more sufficient to secure conviction without confrontation. The new legislation provides the accused with a right to examine co-defendants and lay witnesses against him.

5.4 Exclusionary Rule

5.4.1 All-in Legacy

As in Germany, there was no general statutory exclusionary rule which would make illegally obtained evidence inadmissible under the 1967 ROC Criminal Procedure Code. However, Paragraph 1 of the Article 156 does provide for inadmissibility of statements elicited by certain forbidden means, e.g., violence, threat, inducement, fraud, unlawful detention and other improper devices. Despite this provision, since the Supreme Court did not care about the manner in which the evidence was obtained,[92] any evidence related to proving the truth was admissible in the past. As the Hsichih case presented, the police usually neglected warrant requirement to search and seize, let alone the regulation with regard to coercing the suspect to confess through torture.

5.4.2 Practical Developments before the Legislation in 2003

Under the influence of the United States, an exclusionary rule emerged in practice for its first time in 1998. For the first time in 1998, the Supreme Court, based on judicial integrity and fairness, recognized that an exclusionary rule is applicable in Taiwan's criminal justice system, so that any evidence obtained through illegal wiretaps could not be allowed in a criminal trial.[93] However, under what circumstances evidence should be excluded remained to be developed by trial courts. What follows are the Taipei High Court cases addressing exclusionary rule in practice since 1998.[94]

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[92]See 72 Tai Sun 1332（1983）.

[93]See 87 Tai Sun 4025（1998）. It held that illegally wiretapped communication by police should be excluded or it would prejudice the judicial integrity and fairness according to Article 8 and 16 of the ROC Constitution and Interpretation No. 384, 396, and 418 of the Grand Justice Council. Therefore, it is necessary to investigate if there existed illegal wiretapping.

[94]It is worth mentioning that before 1998, there existed some district court rulings addressing exclusionary rule. A decision by the Taipei district court over the inadmissibility of illegally-obtained evidence was being perceived as a critical ruling that embodied the due process of law. In compliance with the so-called exclusionary rule, under which the use of any illegally-obtained evidence is disallowed, the district court acquitted a suspected robber on the grounds that the suspect's confession was extracted during a nighttime interrogation, which is now against the law. In fact, the Taipei District Court ruling is not the only one in the island's criminal system that complies with

In a fornication case,[95] a victim wife hired someone to wiretap telephone conversations between her husband and his new lover and recorded it. After wiretapping a conversation regarding a sexual intercourse, the victim wife accused both of them and a public prosecution was later filed. While the district court convicted two of them, the Taipei High Court acquitted them and declared that: "Since wiretapping other's telephone conversation is a criminal offense, it violates the defendants' privacy protection if the tape is admitted as evidence at trial. In addition, admitting the tape in evidence at trial would prejudice judicial integrity and fairness and encourage others to do the same. Therefore, the wiretapped tape is inadmissible."[96] In short, any evidence secured in violation of the criminal law is not admissible, even if it is carried out by ordinary people instead of police officers. This is dramatically different from the U.S. exclusionary rule practice, which provides no exclusion remedy for evidence obtained unlawfully by private persons.[97]

In another case involving investigation of corruption, the police wiretapped telephone conversation of the suspect and recorded it. The defendant was bribed over the phone. Although the defendant was convicted by the district court, the Taipei High Court again acquitted the defendant by declaring: "The court would become a conspirator in the invasion of privacy, contrary to the right of correspondence guaranteed by Article 12 of Constitution, if it admits the wiretapped tape in evidence at trial. In addition, in this case, wiretapping did not coincide with the requirements in the recently adopted 'Correspondence Protection Act,' which regulates wiretapping, even though it was conducted before its legislation."[98] Under this ruling, it is fair to say that any wiretapping obtained in violation of any statutory privacy protection would be inadmissible.

While the cases mentioned above excluded wiretapping due to privacy violations and concerns of judicial integrity, the Taipei High Court presented a different viewpoint in a drug producing case. In this

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the exclusionary rule. Over the last few years, there have been a series of court rulings that manifest the inadmissibility of illegally obtained evidence. In 1996, during deliberations over the trial of a suspected drug addict, the Hualien district court dismissed both the prosecution's physical evidence and the defendant's confessions, on the grounds that they were obtained through illegal search and arrest. The court then decided to acquit the defendant and, most importantly, the police officer then investigating the case became the subject of a criminal investigation himself. However, in comparison to the results of court rulings, due process is often given less emphasis in Taiwan society. This is due in part to the result of public doubt, namely, whether ensuring defendants get their due process in criminal procedures actually gives too much protection to the presumed "bad guys." See: 'Big Brother' makes way for due process of law, Taipei Times, November 18, 1999, http://th.gio.gov.tw/show.cfm?news_id=3358（last visited: Nov. 10, 2010）.

[95]It is a criminal offense in Taiwan. Article 239 of Criminal Code provides that: ''A married person who commits adultery with another shall be punished with imprisonment for not more than 1 year; the other party to the adultery shall be subject to the same punishment.''

[96]See 88 Sun E 1953（1999）.

[97]See Burdeau v. McDowell, 256 U.S. 465（1921）.

[98]See 90 Sun E 1085（2002）.

case it held that: "Wiretapping conducted before the enactment of the Correspondence Protection Act in July, 14, 1988 is admissible. The requirement of wiretapping according to that Act could not be violated before its promulgation. Since laws in effect when police conducted wiretapping did not expressively prohibit wiretapping, it is not fair to say that wiretapping is inadmissible under no law."[99] In this ruling, the court did not address the issue whether privacy protection would be violated or whether evidence deriving from wiretapping would prejudice the judicial integrity and fairness. It merely declared that when there was no law regulating wiretapping, no law would be violated from which no "fruit of poison tree" would result.

In addition to wiretapping, in a fraud case, the police interrogated the defendant in violation of a procedure rule which prohibits the police from interrogation during nighttime. The Taipei High Court then declared: "Whether the resulting confession should be excluded depends on a balancing test requiring the court to weigh the seriousness of the violation against the public interest. Since this illegal interrogation stopped at nine o'clock p.m. which did not constitute serious violation and the police did not intend to coerce the defendant to confess by conducting fearful methods, confession resulting from procedure violation should not be excluded in this case."[100] In other words, exclusion depends on the seriousness of the violation, the relevance of the piece of evidence for the resolution of the case and the seriousness of the offense. Violation of procedure rule does not necessarily lead to exclusion of evidence. Thus, for the first time the High Court in Taiwan indicated that application of Taiwan's exclusionary rule should be a discretionary matter in which the court balanced the factors listed above. This stands in contrast to the American exclusionary rule which requires mandatory exclusion, if any police activity is found to be unlawful.[101]

Concerning search, in a handgun possession case, while the police intentionally conducted a search while knowing that the address to be searched was incorrectly recorded which made it an invalid warrant, the Taipei High Court did not exclude evidence derived from the search by announcing: "Although the police would eventually secure another valid search warrant with a correctly written address in advance in this case, while it is necessary and important to seize those handguns as soon as possible lest the defendant should pass them to the others which might break societal order, it is improper to exclude those handguns as evidence if the offense is serious."[102] Again, the court applied the balancing test in determining whether to exclude evidence. Given the exigency of the situation, such as when the defendant possesses handguns or something else which might seriously prejudice the societal peaceful order, even though the police conduct, is unlawful, the balancing test should result in no suppression. However, if the illegal search resulted in financial records or commercial statements which might not prejudice the societal peaceful order, the balancing test would favor the defendant

[99]See 90 Sun Gum Two 1112（2002）.
[100]See 90 Sun E 2046（2002）.
[101]See Mapp v. Ohio, 367 U.S. 643（1961）.
[102]See 90 Sun Su 2229（2002）.

and therefore evidence derived from illegal search should be excluded.[103]

6. Conclusion

Over the past decades, Taiwan's criminal justice system has been criticized in terms of insufficient human rights protection, especially for the alleged criminal offenders. From 1947 to 1987, Taiwan enforced martial law and was in a state of siege. In this era of martial law rule, ordinary citizens in Taiwan lived for four decades with little anticipation of any recognition of their inherent human rights, not to mention the rights of the accused. To some extent, it was considered a privilege for an ordinary Taiwanese citizen to claim any right to an impartial trial. The guarantee of due process in the criminal justice system which is today widely perceived as essential to civil rights in any modern democracy was virtually non-existent in any ordinary criminal proceeding in Taiwan.

Following Taiwan's development of democratic institutions beginning in 1987, with numerous interpretative pronouncements of the Grand Justice Council, as well as extensive knowledge accumulated from the introduction and comparison of various modern foreign criminal justice systems（such as United States, Japan and Germany）, the people of Taiwan gave particular focus to its criminal justice system（including the police power） which influenced people's daily life. They gradually reached the conclusion that Taiwan's Criminal Procedure Code, based mainly on the continental German system and enacted in 1967 was clearly out of date. To prevent miscarriage of justice, as a result, the design of criminal procedures must be focused on the protection of the rights of the accused. In fact, the degree to which the rights of the accused are protected during criminal proceedings has been regarded as one of the indexes of a nation's civil developments. In order to improve human rights protection, critical drafts of the Criminal Procedure Code had been passed since 1990 and the 2003 amendment, including the exclusionary rule and the hearsay rule is adopted.

From the viewpoint of comparative legal study, the 2003 legislation of Taiwan which might reshape the ROC criminal procedure has given rise to a controversy regarding whether Taiwan's "new" criminal justice system retains its "Inquisitorial Tradition" or has become "Pro-Accusatorial" since the former Criminal Procedure Code was promulgated, based upon continental inquisitorial models and those 2003 effective amendments are derived mainly from the U.S. accusatorial model, the accused is allowed to allege fair trial by challenging illegal-obtained evidence and out-of-court statements. Under the 2003 legislation, the accused becomes more active at trial than in the past. While the Judicial Yuan and the Judicial Subcommittee of the Legislative Yuan both declared in the 2003 Revising Note that these newly enacted articles of Criminal Procedure Code are based on the so-called "Improved-Accusatorial Principle," similar to the Italian model, a traditional civil law country, which adopted a Code of Criminal Procedure in 1989 dramatically moved away from its historically inquisitorial system of criminal justice to a

[103]See 91 Sun Gum One 197（2003）.

system infused with accusatorial elements and therefore resulted in a mixed system. What this "Improved-Accusatorial Principle" actually contains and what kind of approach Taiwan's new criminal justice system looks like needs to be disclosed, identified and defined by further comparative studies in future.

Nonetheless, at least reforms designed to provide the criminal trials with more morality, immediacy and publicity, as well as the devices created to dispose of cases with greater efficiency by either moving a case to trial quickly or allowing cases to be resolved by the public prosecutor at his discretion, eliminating the need for a trial[104] improve the human rights protection and avoid unnecessary prolongation of the trial to a meaningful extent. With or without an intention to follow Italy's model, the criminal justice system of Taiwan has changed its continental tradition by adopting accusatorial characteristics, the exclusionary rule and the hearsay rule in order to improve human rights protection. Although it is hard to say whether the change is successful, the experiences from Taiwan and Italy may be a very good lesson for those continental jurisdictions which consider adopting the pro-accusatorial elements in criminal justice system. Unfortunately, rarely have researches done thorough studies in English literature indicating the whole picture of developments of the criminal justice practice before 2003, so that the Taiwanese reform experience attracts very little foreign attention.[105] Since it is difficult to evaluate any legal transplantation and begin any meaningful comparative study without understanding its legal and historical background, this study provides the necessary information of the pre-2003 criminal justice practice of Taiwan. Thus, any further comparative study could be done more easily and thoroughly.

[104]See: Rachel VanCleave, Chapter 8, Italy, in Criminal Procedure: A Worldwide Study, Craig M. Bradley ed., 245（1999）.

[105]The author of this study published individually in 2006 two articles introducing the 2003 exclusionary rule and hearsay rule of Taiwan. See: Ming-woei Chang, The Exclusionary Rule in Taiwan: Lessons from the United States, 8 The Australian Journal of Asian Law 68, The University of Melbourne, Australia (2006.10) and Adoption of the Common Law Hearsay Rule in a Civil Law Jurisdiction: a Comparative Study of the Hearsay Rule in Taiwan and the United States, vol 10.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (October 2006), <http://www.ejcl.org/102/art102-1.pdf>. Althought Margaret K. Lewis discussed the new adversarial criminal justice system of Taiwan, she only spent four pages on "Legal Awakening in the Post-Martial Law Years: 1987–1999" which did not show the whole picture of the criminal practice in the past. See: Margaret K. Lewis, Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms, 49 VIRGINIA JOURNAL OF INTERNATIONAL LAW 651, 658-662（2009）.

Abstract

Taiwan adopted the exclusionary rule and the hearsay rule in 2003. Since the criminal justice system is quite adversarial and accusatorial under the 2003 amendments, it is interesting to locate what it looked like before 2003, which might explain why Taiwan adopted a more adversarial and accusatorial approach for law and order in 2003. After Italy amended its continental criminal procedure code by adopting special procedures and an adversarial model in 1988, Taiwan might be the second jurisdiction with similar continental background to adopt an adversarial and accusatorial model of criminal procedure in the world. In order to understand the reason why Taiwan changed its traditional approach in criminal justice, it is desirable to see the past inquisitorial practices. This study is aimed to introduce the background behind the official explanation why Taiwan adopted the exclusionary approach in its criminal justice system.

Bibliography

BOOKS

Craig M. Bradley, Criminal Procedure: A Worldwide Study（Carolina Press, 1999）.

Thomas Weigend, Chapter 6, Germany, in Craig M. Bradley ed., Criminal Procedure: A Worldwide Study（Carolina Press, 1999）.

Rachel VanCleave, Chapter 8, Italy, in Craig M. Bradley ed., Criminal Procedure: A Worldwide Study（1999）.

Tay-sheng Wang, Chapter 4: Taiwan, in Poh-Ling Tan ed., ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA（1997).

Tay-sheng Wang, Legal Reform in Taiwan under Japanese Colonial Rule: 1895-1945, The Reception of Western Law（University of Washington Press, 2000）.

Dan F. Henderson, in Robert E. Ward ed., Law and Political Modernization in Japan, in Political development in modern Japan（1968）.

Jaw-Perng Wang, Taiwan's Proposed Adoption of the Right to Silence, 5（an unpublished S.J.D. Dissertation of University of Chicago School of Law, 1995, 12）.

Tsung-fu Chen, THE RULE OF LAW IN TAIWAN, in L. Gordon Flake ed., THE RULE OF LAW: Perspectives from the Pacific Rim（2000).

LAW REVIEW ARTICLES

Ennio Amodio and Eugenio Selvaggi, An accusatorial system in a civil law country: the 1988 Italian Code of Criminal Procedure, 62 Temple Law Review 1211（1989）.

Pamella A. Seay, Law, Crime, and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China, 9 Indiana International and Comparative Law Review 143（1998）.

Todd D. Epp, The New Code of Criminal Procedure in the People's Republic of China: Protection, Problems, and Predictions, 8 Int'l J. Comp. & Applied Crim. Just. 43（1984）.

Yi-Perng Chang, History of Judicial Reform in China, 1 The China L. Rev. 18（1924）.

Margaret K. Lewis, Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms, 49 VIRGINIA JOURNAL OF INTERNATIONAL LAW 651（2009）

Ming-woei Chang, The Exclusionary Rule in Taiwan: Lessons from the United States, 8 The Australian Journal of Asian Law 68 (2006)

Adoption of the Common Law Hearsay Rule in a Civil Law Jurisdiction: a Comparative Study of the Hearsay Rule in Taiwan and the United States, vol 10.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (2006), <http://www.ejcl.org/102/art102-1.pdf>

INTERNET RESOURCES

Tay-sheng Wang, The legal development of Taiwan in the 20th century: toward a liberal and democratic country, available at : http://www.law.ntu.edu.tw/faculty/prof/tswang/Wang%203.0.doc

Criminal Justice Centralization Versus Decentralization in the Republic of China, available at: http://www.llcc.cc.il.us/gtruitt/SCJ290spring2002/china%20cjs%20central.htm

Taiwan Headline, January 14, 2003, http://th.gio.gov.tw/show.cfm?news_id=16526

'Big Brother' makes way for due process of law, Taipei Times, November 18, 1999, available at: http://th.gio.gov.tw/show.cfm?news_id=3358