

The Evolution and Revolution of Taiwan's Criminal Justice

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Abstract

Taiwan's original Code of Criminal Procedure (CCP) was enacted in 1935. Before 1997, Taiwan did not change much of its CCP. After 1997, Taiwan started to overhaul its criminal justice system and has since amended hundreds of provisions in the CCP. Taiwan's criminal justice system is extremely different today from what it was in 1935 or 1997. There are three important changes in Taiwan's recent reform of criminal justice. Firstly, Taiwan switched its trial procedure from an inquisitorial model to an adversarial one in 2002. Because of this change, prosecutors and defence lawyers now dominate the trial and question witnesses with great enthusiasm. Quarrels between defence lawyers and prosecutors, which were never seen in the past, have become a daily occurrence in the courtroom. In addition, a modified American-style 'plea bargaining' process was codified into the statute. For example, in 2008, 12,132 cases were adjudicated without trial but instead via a bargaining agreement between the parties. Second, the accused is endowed with more rights, and these rights are better protected than before. For example, the new CCP now requires the police to warn the arrestee of his or her right to silence and right to counsel. Failure to do so will lead to the exclusion of confessions obtained thereafter. Other significant human rights protections are rights such as the right to the effective assistance of counsel, the right of confrontation, the exclusionary rule, and the exclusion of evidence illegally obtained (known in the USA as 'fruit of the poisonous tree'). Third, prosecutors' powers are declining. Prosecutors no longer enjoy the power of issuing pre-trial detention orders for up to two months, and issuing search warrants and electronic surveillance orders. Unlike in the past, the decision whether or not to prosecute is also checked by the court. To date, these changes in Taiwan's criminal procedure have been dramatic and significant, although controversial. The paper reports and discusses these major changes in Taiwan's CCP.

Introduction

Taiwan's original Code of Criminal Procedure (CCP) was enacted in 1935. In 1949, when the government retreated from China, it took the CCP with it to Taiwan. Before 1997, Taiwan did not change much of its CCP. After 1997, Taiwan started to overhaul its criminal justice system and has since amended hundreds of

provisions in the CCP. Taiwan's criminal justice system is extremely different from what it was in 1935, 1949 or 1997.

There are three important changes in Taiwan's recent reform of criminal justice. First, Taiwan switched its trial procedure from an inquisitorial model to an adversarial one in 2002. Second, the accused has been endowed with more rights and their rights are better protected than before. Third, prosecutors' powers are declining.

From Non-Adversarial to Adversarial

Trials in Taiwan were non-adversarial prior to 2002. Article 163, Section I of the CCP provided that 'For the necessity to discover the truth, the court must, on its own initiative, investigate evidence.' Bound by this article, the trial court bore the primary duty of investigation and the duty to decide the truth. Even if the parties admitted or did not contest the facts, the court still had an independent duty to discover and decide the material facts. The judge was designated as the principal person questioning the defendant and all witnesses. The judge was also required to raise all factual and legal issues relevant to the charges, and bore the final duty in establishing the defendant's guilt or innocence. The Taiwan Supreme Court used to declare, 'The evidence that shall be investigated and examined at trial is not limited to that motioned by the parties. The trial court must, on its own initiative, investigate whatever evidence is relevant to the elements of the crimes in order to discover the truth.' (Supreme Court, 61 Tai-Sun 2477 [1972]; overruled 4 September 2001). Failure to investigate the evidence adequately was a reversible error (CCP Article 379, Section X).

Consequently, it appeared that the prosecutor and defence lawyer did not truly commit to their case at trial. In the prosecutor's opening statement, s/he normally read the written prosecution word by word, or said only a few words, such as: 'the facts are indicated and detailed in the written prosecution.' In the closing argument, the prosecutor normally did not make any arguments at all. Instead, s/he only stated: 'I request the court to decide the defendant's guilt or innocence and his sentence in accordance with the law.' In fact, the prosecutor appearing at the trial was not normally the one who prosecuted the accused. All prosecutors were scheduled to take turns at appearing at different trials. Moreover, it was extremely common that the prosecutor obtained no information about the case before the trial.

The Taiwanese defence attorney's powerlessness at trial was also a result of the non-adversarial procedure. Taiwanese defence lawyers did not play a dominant role at trial, but only supplemented the court in discovering the truth. Witnesses were extensively examined by the presiding judge or judges in attendance. Only after the judge's examination might the parties and defence attorney examine witnesses, upon notifying the presiding judge (The old CCP Article 166, Section I). The defence attorney's function was limited to bringing evidence or witnesses to the court's attention by submitting briefs or raising questions before or at trial. It was not uncommon for a defence attorney not to say anything at a trial until the closing argument. A defence attorney's closing argument normally lasted for less than five minutes because all competent attorneys knew that trial judges were averse to long and emotional arguments.

In 2002, the Legislative Yuan amended Article 163 of the CCP as follows: 'For the necessity to discover the truth, the court *may*, on its own initiative, investigate evidence. However, in the interest of justice or in matters significant to the defendant's interests, the court *must*, on its own initiative, investigate evidence.' The wording of the article indicates that Taiwan's trial procedure has moved from a non-adversarial one to an adversarial one. Under this article, the parties, not the trial court, bear the primary duty of discovery. Following the above article, the American-style rules of evidence were largely adopted into the CCP in 2003.

The move from a non-adversarial procedure to an adversarial one is significant. Firstly, since the parties now bear the burden of proof, they play a much more active role at trial than before. Under the new system, witnesses are examined first by the parties, and then by the presiding judge. Without sufficient preparation, the parties cannot examine witnesses appropriately. Now, prosecutors never go to court without sufficient knowledge of the cases they are responsible for. For this reason, many prosecutorial offices at the district level have set up a trial prosecutor team, as distinct from an investigative prosecutor team. An investigative prosecutor is in charge of everything before the prosecution has begun, such as the investigation and making the decision to prosecute. A trial prosecutor is in charge of everything after the prosecution, such as attending the motion hearings and trial. The term 'trial prosecutor' was unheard of in the past. Similar to the trial prosecutors, defence lawyers now do not just sit in the court like an observer. Both trial prosecutors and defence lawyers dominate the trial and examine witnesses with great enthusiasm.

Secondly, judges play a more neutral role at trial. In the old system, following the prosecutor's opening statement was the presiding judge's examination of the defendant regarding the facts about the crime with which he was charged (the old CCP Article 287). That is, the defendant was intensively examined before any other witnesses and the presentation of evidence. The practice violated the presumption of innocence and the privilege against self-incrimination. Worst of all, a defendant would normally take the judge to be his enemy instead of a neutral referee at trial. In the new system, the prosecutor presents evidence and witnesses after his opening statement. Only after all witnesses and evidence have been examined can the court examine a defendant (CCP Article 288, Section III).

In the old system, witnesses were firstly and mainly examined by the judge. Tensions, therefore, were naturally present between interrogators (judges) and those who were interrogated (witnesses). In the new system, prosecutors and defence lawyers dominate the trial and, as noted above, question witnesses with great enthusiasm. Quarrels between defence lawyers and prosecutors, which were never seen in the past, have become a daily occurrence in the courtroom. To solve the battles between parties at trial, rules in regulating methods of examining witnesses were introduced into the CCP in 2003. There are very clear and complex provisions in the CCP regarding which party is to conduct direct examination, cross-examination, redirect examination, and re-cross examination of witnesses (CCP Article 166). The new system also provides guidelines for what kind of questions are allowed or prohibited in examining witnesses, on what grounds a party can object to inappropriate questions, and how the court shall decide on objections, etc. Judges no longer play an active role at trial; they are more like referees now, solving disputes between the parties.

Plea Bargaining

Due to the tremendous increase in workload after the adoption of the adversarial system, 'plea bargaining' was introduced in 2004, effective from 9 April, allowing a prosecutor to bargain with a defendant for a plea of guilty. Whether plea-bargaining should be adopted was fiercely debated in 2003. In general, judges, prosecutors, and defence lawyers were in favour of its adoption, but most scholars opposed it. In fact, plea-bargaining did openly happen in some courts even before its adoption. It was observed that some judges frankly told defendants: 'You have the right to silence and right to trial. However, if you confess and plead guilty, a less severe sentence is likely to be considered.' It was also observed that judges in open court sometimes told or even requested defence lawyers or prosecutors to negotiate with the other party. If the parties came back with the defendant's plea of guilty and a prosecutor's recommendation of a less severe sentence, judges would simplify and expedite the whole trial procedure.

Unlike the practice in the United States, Taiwan limits plea bargaining (negotiation procedure) to non-serious offences only. Under Article 455-2 of the CCP, the negotiation procedure is not applicable to the following offences: an offence punishable with the death penalty, life imprisonment, or with a minimum punishment of imprisonment for not less than three years; or in situations where the court of appeal has jurisdiction of the first instance over the case. For example, the offence of murder or kidnapping for ransom is not 'negotiable'. There were almost no arguments about this when the draft of the plea bargaining provisions were debated in the Legislative Yuan.

Whether a judge should or could directly bargain with a defendant or participate in the bargaining process was also a very controversial topic. The official draft provided not only that a judge could bargain with a defendant, but also that a bargaining process could even happen between judges and defence lawyers without notifying the prosecutor or without the prosecutor's appearance. Both the defence lawyers and prosecutors opposed the draft, for different reasons. Prosecutors did not like the 'secret trade' between judges and defence lawyers. Defence lawyers would never want to bargain with a person who would eventually decide his client's fate if the bargaining did not come to a successful conclusion. Under the strong protests of prosecutors and defence lawyers, the Code eventually provided that a judge is allowed neither to bargain with a defendant nor to participate in the bargaining process between the parties.

Under the Code, a prosecutor may bargain with a defendant over the following areas: (1) the severity of the sentence; (2) asking a defendant to apologize to a victim; (3) asking a defendant to pay a victim an appropriate sum as compensation; or (4) asking a defendant to pay a certain sum to a governmental account or a designated non-profit or local self-governing organization (Article 455-2 of the CCP). Under this provision, a prosecutor must get the victim's consent before agreeing with a defendant for Items (1) and (2). The above items (3) and (4) may constitute grounds for civil compulsory enforcement if the parties agree and the defendant's plea is later accepted by the court. The Code does not forbid other items by which a prosecutor could bargain with a defendant. However, the Code does not give such items any legal effect. For example, a prosecutor could bargain with and ask a defendant to testify against other offenders. If, after the court

imposed a less severe sentence, the defendant refused to keep his or her promise and did not testify against other offenders, the Code does not give prosecutors any right to rescind the sentence. In other words, a prosecutor must assume the risk of broken promise and has no legal remedy against the defendant.

In cases where a defendant comes to an agreement with a prosecutor and pleads guilty, the prosecutor may motion to the court for the 'negotiation procedure'. Although the official draft also allowed a defendant the right to motion for a negotiation procedure, this proposal was rejected for the same reason that judicial participation in the bargaining process was opposed. Therefore, a prosecutor enjoys the exclusive right to motion for a negotiation procedure. The motion for negotiation procedure can and must be submitted at any time after the initiation of prosecution and before the conclusion of closing arguments.

Within ten days after accepting the above motion, the court must examine the defendant and inform him or her of the offence pleaded, the statutory scope of sentencing for it, and the rights being waived (Article 455-3 of the CCP). To ensure there is a factual basis for a conviction, the court must examine a defendant and review the files sent by the prosecutor. The court must also warn a defendant that in pleading guilty, he or she is waiving the right to silence, the right to confront witnesses, the right to trial, the right to ask for investigation into favourable evidence, and the right to appeal except otherwise allowed by the law. In practice, the procedure of examination and admonition normally takes less than 30 minutes. To protect defendants and the integrity of the procedure, an unwaivable right to counsel is afforded to defendants who agree to accept a sentence of more than six months of imprisonment, unsuspended (Article 455-5 of the CCP).

The court is not bound by the agreement between the parties, and may dismiss a motion and hold a trial. The Code explicitly provides many reasons for which a court *shall not* accept a motion. This includes very general reasons such as that the agreement is obviously improper or unfair, as well as specific reasons such as the facts determined by the court are obviously different from those asserted in an agreement.¹

If a judge does not find any specific reason not to accept the agreement, he or she must convict a defendant without a trial. Unlike the practice in United States, if the court decides to accept the agreement, it must sentence the defendant within the scope of the parties' agreement (Article 455-4 of CCP). In other words, the court must dismiss the motion for a negotiation procedure if it intends to impose a sentence exceeding the scope of the parties' agreement. However, upon accepting

¹ CCP Article 455-4 provides seven reasons where a court shall not accept the agreement: (1) either party has withdrawn from the agreement, as described in the previous article; (2) the defendant did not negotiate under free will; (3) A negotiated agreement is obviously improper or unfair; (4) the charge is excluded by Article 455-2, Section I; (5) the facts determined by the court are obviously different from those asserted in the negotiated agreement; (6) the defendant committed a more serious offence related to the case than the offence under negotiation; or (7) the court shall make a judgment remitting the punishment, a judgment of 'Exempt from Prosecution', or a judgment of 'Case Not Entertained'.

the agreement, the court may sentence a defendant only to fines, imprisonment of no more than two years, or suspension of imprisonment under the Code.²

If the court does not accept the agreement, the statements of a defendant or his or her representative or attorney during negotiation may not be admissible against the defendant or any co-offenders in the present case or other cases (Article 455-7 of the CCP).

After the negotiation procedure became effective, the numbers of bargained cases increased tremendously. For example, in the nine-month period between its inception in April and the end of 2004, there were 1948 bargained cases which were disposed without trials. From 2005 to 2008, the numbers of bargained cases were 5182, 6174, 8968, and 12132 in each year respectively. This shows that the numbers keep rising significantly every year.

Better Protection of Human Rights

Confessions

In the past, Taiwan's confession law was governed only by Article 156, Section I of the CCP. The Article explicitly prohibits the police from using illegal methods to interrogate an accused. Any violence, threat, inducement, fraud, exhausting interrogation, illegal detention, or other improper means of interrogating an accused is prohibited under Article 98 of the Code. A confession obtained through any of the above illegal methods must be excluded under Article 156 of the Code.³

The law on confessions made a great leap forward beginning from 1997. Although Article 156, Section IV provides that an accused's 'guilt shall not be presumed merely because of his refusing to testify or remaining silent', it was disputed whether this article means the right to silence. At least, it was clear that the CCP did not have any explicit provision regarding a defendant's right to refuse to answer incriminatory questions. In 1997, the Legislative Yuan amended Article 95. It explicitly provides the accused with the right to silence and also requires that the right is made known before interrogation at all stages of criminal procedure.⁴ The intent of the Article is to clear up the question as to whether an accused has the right to silence. However, the Code says nothing about the consequences of the police's failure to warn the accused of his or her right to silence.

In the same year, Article 100-3 was added into the CCP, stating that the police may not interrogate the accused during 'night time' except as otherwise provided

² Penal Code Article 74 states that: 'A punishment of imprisonment for not more than two years, detention, or a fine may be suspended for not less than two, nor more than five, years from the day the decision becomes final if either of the following circumstances exist and temporary suspension is considered appropriate...'

³ It provides that 'If a confession of an accused is not derived from violence, threats, inducement, fraud, exhausting interrogation, illegal detention, or other improper means, and it agrees with the facts, it may be used as evidence.'

⁴ CCP Article 95 provides that 'While being interrogated, the defendant shall be told what act he or she is accused of, which provisions of the criminal law may apply, that he or she does not have to make statements against his or her will, and that he or she may retain his lawyer...'

by law.⁵ The definition of 'night time' under the Code is the time between sunset and sunrise. The legislative intent is to prevent involuntary confessions obtained during the 'night time'. Again, no provision is given for what to do if police fail to comply with the Article, and this was subject to judicial interpretation until 2003.

In 1998, to protect the reliability of confessions, Article 100-1 was amended such that interrogation of the accused shall be tape-recorded during the whole interrogation session. If necessary, interrogation shall be videotaped during the whole session. The minutes of the accused's statements are inadmissible if they are inconsistent with what is in the audio or videotape.

Although Article 95 requires the accused be given notice of his or her rights before interrogation, failure to administer the notices was unlikely to cause the exclusion of confessions obtained. Even before the amendment to Article 95 in 1997, Article 88-1 provided that when the accused is arrested, the police shall advise the accused that he or she may retain an attorney to be present.⁶ However, Taiwan's Supreme Court declared in a 1983 decision that the police violation of Article 88-1 duty to give notice to the accused does not bear any effect on the statements subsequently obtained, as long as the violation does not affect their voluntariness (Supreme Court, 72 Tai-Sun 1332 [1983], overruled 25 March 2003). The above conservative decision strengthened the police practice of not following the Code and not warning the accused of his or her rights.

In order to change police practice, Article 158-2 was added to the CCP in 2003. It provides that the police's failure to warn an arrestee of the right to silence and right to a lawyer leads to the exclusion of any confession thereafter obtained, excepting there is proof that the police's violation of the duty to warn was in good faith and the confession was voluntary. Article 158-2 is very similar to the American Miranda Rule in that it applies only to accused individuals who are arrested. However, it does not require that the police cease questioning when the arrestee asserts the right to silence or right to attorney. Nor does the arrestee have the right to a public-paid lawyer if he or she is indigent. Currently, warning the accused of their rights before interrogation is a common police practice.

Article 158-2 also provides that confession obtained in violation of Article 100-3 (prohibition of police interrogation at night time) shall be excluded except where there is proof that the violation is in good faith and the confession is voluntary. As stated above, when Article 100-3 was added, it did not include provisions concerning the effect of failing to comply with it, and it was subject to judicial interpretation. The newly added Article 158-2 solves this problem.

Another important amendment to the CCP in 2003 was Article 156, Section III. It was not clear prior to this which party bore the burden of proving the voluntariness or involuntariness of confessions. In an early decision, the Supreme Court even held that without sufficient evidence the court could not hold inadmissible the

⁵ The police may interrogate the accused at night only under one of the following conditions: (1) The accused consents to the interrogation; (2) In the case where an arrest takes place at night, the police check whether a wrongful arrest has occurred; (3) A prosecutor or a judge permits the interrogation; (4) In exigent circumstances (CCP Article 100-3, Section I).

⁶ CCP Article 88-1, Section IV states that 'When arresting an accused under Section I of this Article, the prosecutor or judicial police officer shall advise the accused and his or her family that they may retain attorneys to appear at interrogations.'

confessions made in the police record. In practice, the defendant seemed to bear the burden of proving the involuntariness of confessions. Without actual bodily injury, a defendant almost always lost his or her claim of involuntariness of confession in the 'swearing contest' with the police at trial. The newly amended Article 156 Section III provides that the court shall request a prosecutor to prove the voluntariness of a confession whenever a defendant asserts that it was obtained through improper methods.

In short, the law on confessions has been greatly improved in recent years in Taiwan. In the past, there was only one article regarding confessions: confessions obtained through improper methods are not admissible. Now, the CCP has a much better law of confession than before. Interrogation of the accused shall be audio or videotaped. All accused shall be warned of their rights and the nature of the crime before interrogation. Except as otherwise provided by law, police interrogation cannot be conducted at 'night time', violation of which leads to the exclusion of confessions unless a prosecutor proves the police acted in good faith and the confessions were voluntary. The police's failure to warn an arrestee of the right to silence or right to a lawyer leads to the exclusion of a confession except where a prosecutor can prove the police's good faith and the voluntariness of the confession.

In addition to the amendments to the CCP, Taiwan's Supreme Court has also become very liberal in interpreting the 'voluntariness' of confessions. In the past, the Supreme Court would not exclude confessions unless there was actual injury to the defendant's body or actual proof of the police using third degree interrogation methods such as threatening life or bodily injury. In a 2004 decision, the Court reversed a conviction based on a confession made before a prosecutor when the defendant was told: 'If you confess, you will get a lenient sentence; if not, you will be detained again' (Supreme Court, 93 Tai-Sun 5186 [2004]). In 2005, the Court reversed another conviction when the police told the defendant: 'You and your husband will be detained. You may go home after you confess. You may get a lenient sentence if you admit the facts' (Supreme Court, 94 Tai-Sun 5654 [2005]). Similarly in a 2007 decision, the Court reversed a conviction when the police told the defendant: 'One of the co-defendants has been detained. The other has been released without bail because he confessed to the facts. If you deny the facts, you will be detained' (Supreme Court, 96 Tai-Sun 3104 [2007]). The details of the above interrogation methods would never have been revealed to the court without the newly added 'tape-recording' provision in the CCP. More importantly, without the court's new inclination toward the protection of human rights, the above facts would never have been ruled as 'involuntary statements'.

Right to Counsel

(i) Pre-trial stage

Before 1982, only those who were being prosecuted had the right to counsel. For this reason, at the pre-trial investigation stage, the accused's lawyer could not be present at police or prosecutorial interrogations. For the same reason, if a defendant was detained at the investigation stage, his or her lawyer was not allowed to meet or communicate with him. Unfortunately, according to the CCP the detention period could be up to four months. In 1982, Article 27 was amended to

allow the accused to retain a lawyer *before* trial. Relevant provisions were also amended so that an attorney may be present at interrogations. At the investigation stage, an attorney may at any time, except otherwise provided by law, meet or communicate with the accused if the latter is detained.

Although the accused after 1982 had the right to retain attorneys at the pre-trial stage, the police did not have a corresponding duty to advise the accused of this right until 1997. Only when the accused was arrested by the police without a warrant under Article 88-1 did the Code require that the police advise the accused that he or she may retain an attorney to be present (CCP Article 88-1, Section IV). As stated above, a 1983 Supreme Court decision declared that the police violation of this duty did not have any bearing on statements subsequently obtained.

In 1997, the Legislative Yuan amended Article 95, stating that before interrogation and at all stages of the criminal procedure, the accused shall be warned that he or she may retain counsel. In 2003, Article 158-2 was added to reinforce Article 95. It provides that the police's failure to warn the arrestee of the right to silence and right to a lawyer leads to the exclusion of confession obtained thereafter except if there is proof that the police's violation of the duty to warn is in good faith and the confession is voluntary.

However, it does not require that the police cease questioning when the arrestee asserts his or her right to attorney, although the Code provides an incentive for the police to cease questioning when the right is asserted. Under the Code, within 24 hours of arrest an arrestee must be turned over to a competent court for arraignment, excepting there are other circumstances specified by law. In practice, the police will bring the arrestee to a prosecutor within 16 hours of arrest. Article 93-1 provides that when an interrogation is delayed due to the absence of a defence attorney, the waiting period shall not be included within the 24 hours, so long as the waiting period does not exceed four hours. Consequently, some police stop questioning when an attorney is asked for as this allows them to keep an arrestee in custody for this extra period, and the police find this desirable for a number of reasons even though it is not required.

To prevent police manipulation of this provision, the same Article mandates that the police should not interrogate the accused while waiting for a lawyer. Violation of this provision will lead to the exclusion of confessions thereafter obtained except if there is proof that the police's violation was in good faith and the confession was voluntary.

In a 2007 decision, the Supreme Court has been seen by some to have implied that the police have the duty to cease questioning until the lawyer is present. When the police in that case conducted their interrogation, they knew that the accused had a lawyer and that the lawyer would arrive later. After being told this by the police, the accused stopped answering any questions. However, the police resumed the interrogation fifteen minutes later and the accused made incriminating statements. The Court wrote: 'Why didn't the police wait for the accused's lawyer after knowing he has a lawyer? Why did the police question the accused without waiting for his lawyer's presence? The lower court was wrong in admitting the confession without explaining whether the confession was affected by the above fact' (Supreme Court, 96 Tai-Sun 3104 [2007]).

Unfortunately, in some police stations, the accused's right to counsel means nothing more than that the attorney may be present during interrogations.⁷ Even if the accused's attorney appears at the police station, some do not allow the attorney to speak with the accused. They sometimes ask the attorney to sit far behind the table at which they conduct interrogations. The major function of an attorney at the police station is not to consult the accused, but rather to watch for torture or other improper actions by the police.

In a landmark case in 2009, the Supreme Court tried to reform police practice. The accused in this case was arrested and later interrogated at around 6 p.m. The police ceased interrogation after the accused asserted his right not to be interrogated at night. It was not clear when the accused's lawyer appeared at the police station. The record, however, showed that the lawyer left the police station at around 1 a.m., obviously because he could do nothing there. At around 2 a.m. the police started to interrogate the accused after obtaining the consent from the accused for a night interrogation. The accused then made a confession. However, the Court reversed the conviction and declared the substance of the right to counsel. It reasoned that ordinary people are normally overwhelmed by being suddenly arrested by the police, and therefore lose their free will and ability to give informed consent. The purpose of Articles 95 and 158-2 is to endow the accused with 'the right to obtain a lawyer's assistance and consultation', as well as to impose on the police the duty to warn the accused of that right. If the police fail to honour the accused's right to counsel with a lawyer by way of intentionally delaying the interrogation until the lawyer has left, the confession obtained thereafter shall be deemed to have resulted from dodging the law and shall therefore be excluded (Supreme Court, 98 Tai-Sun 4209 [2009]). In this decision, the Court emphasized that the arrestee had the 'right to obtain a lawyer's assistance and consultation' because informed consent was suppressed by the sudden arrest. Based on this rationale, it seemed that the scope of the right to counsel shall include the right to consult with the lawyer before interrogation.

To protect the right to counsel, a proposed amendment to the Code is under consideration now. This proposed amendment provides that the attorney, who is present at the police interrogation, may at any time request to have a conference with the accused or inform him or her of their rights. The attorney has the right to hear the entirety of an interrogation, and the police may not separate the accused and their attorney in any way. The purpose of this amendment is to correct bad practices.

Although an accused has the right to retain an attorney at the investigation stage, before 2006 the government did not have a corresponding duty to appoint a lawyer for the accused in all circumstances. Dramatically, in May 2006 the Legislative Yuan, under the protest of the Ministry of Justice, amended the Code and required a prosecutor to appoint a lawyer for any accused who is unable to make a complete statement due to unsound mind. This is the first time in Taiwan's legal history that the government's duty to appoint a lawyer for the accused has been extended from the trial stage to pre-trial stage, even though it is limited to

⁷ CCP Article 245, Section II states that 'The attorneys for defendants or suspects may be present when prosecutors or judicial police officers interrogate defendants or suspects.'

those of unsound mind. It is not impossible that the same right might be extended to the indigent accused in the future.

(ii) Trial stage

During trial stage, a defendant has the right to retain his or her own attorney. In certain cases, the court even has a duty to appoint an attorney for the defendant. Failure to perform such a duty is a reversible error (Article 379, Section VII of the CCP). Before 2003, the court had such a duty only in the case of very serious crimes or in cases where a defendant is unable to make a complete statement due to unsound mind.⁸ After adopting the adversarial trial system in 2002, the Code provided that the court had such a duty if a defendant with a low income makes a request for an attorney. Further, in 2004, when plea bargaining was adopted in the Code, it was also provided that the court must appoint an attorney for any defendant who agrees to accept a sentence of more than six months unsuspended (Article 455-5 of the CCP).

(iii) Attorney-client privilege

Before 2009, communication between a detainee and defence lawyer was monitored and recorded, and this recorded information could even be admissible against the detainee at trial.

Article 23, Paragraph 3 of the Detention Act used to provide that when counsel visited an accused on remand, the visit should be under surveillance. The Detention Act authorized not only on-site monitoring by the detention facility personnel, but also eavesdropping, and video and audio-recording, among other measures. In practice, visits by counsel were routinely monitored and recorded pursuant to the above statutory provisions. Article 28 of the Detention Act also provided that: 'Any statement, demeanor, or contents of correspondence sent or received by the defendant suitable for references during investigation or on trial, shall be submitted to the prosecutor or the district court.' This enabled the information obtained by surveillance or audio-recording during visitation to be admitted into evidence against the accused during investigation or at trial. In a 2006 case, the Taiwan High Court delivered a conviction based on such evidence, on the grounds that the Detention Act is a well-drafted and justified law and therefore that evidence obtained according to the Act shall not be excluded (Taiwan High Court, 95 Sun-Sue 1610 [2006]).

On 23 January 2009, the Constitutional Court declared the above provisions unconstitutional. The court reasoned that these provisions, which allow a detention facility to conduct surveillance and audio-recording without considering whether they achieve the purpose of ensuring detention or are necessary for maintaining the order of the detention facility, have hindered the exercise of the right to

⁸ CCP Article 31, Section I provides that 'In cases where the minimum punishment is no less than three years imprisonment, where a High Court has jurisdiction over the first instance, or where the accused is unable to make a complete statement due to unsound mind, the presiding judge shall appoint a public defender or a lawyer to defend the accused if no defence attorney has been retained; in other cases, if no defence attorney has been retained by an accused with low income and a request for appointing one has been submitted, or if it is considered necessary, the same rule shall apply.'

defence and that they have exceeded the scope of necessity. They have therefore violated the principle of proportionality under the Constitution, and are inconsistent with the meaning and purpose of the Constitution, which is to protect the right to litigate. However, the Court held constitutional that 'mere visual monitoring' without probing into the content of discussion was allowable, because of the need to maintain order in the detention facility. The Court emphasized that a detainee has the right to exercise free and unrestricted communications with their defence lawyer. Any law intending to limit such a right must be stipulated in a concrete and precise manner and be subject to the determination of the court. In urgent circumstances requiring a restriction, relevant judicial remedies should be considered, along with related procedures, and there should be a review of the necessity, manner, time and disposition of such restrictions. The Court declared that the above provisions shall be ineffective as of 1 May 2009 (Interpretation No. 654 [2009]).

As a result, the Detention Act has been amended to provide that

When a detainee is visited by his defence lawyer, officials of the detention facility may visually monitor the visit, but cannot hear their communication except otherwise provided by laws. To maintain the order and security of the detention facility, mail or materials sent to or from a detainee's defence lawyer may be checked for contraband.

Currently, a detainee enjoys the right to exercise free and unrestricted communication with his or her defence lawyer.

Exclusionary Rule

Before 1998, evidence illegally found or seized was certainly admissible at trial. Except for the exclusion of confessions obtained through torture or other improper methods, the Code did not have any provisions allowing the trial court to exclude physical evidence under any circumstances. Whether the evidence was illegally obtained was always regarded as a separate issue with which a trial judge had no interest or obligation to investigate. Indeed, it might become a reversible error if a trial judge excluded the illegally obtained evidence. However, in a 1998 breakthrough decision, Taiwan's Supreme Court declared that a court may exclude illegally obtained evidence when it believes that the admissibility of the evidence will impair justice and fairness (Supreme Court, 87 Tai-Sun 4025 [1998]). The Court based its decision on constitutional mandates that liberty cannot be abridged without due process of law, and that a defendant has the right to a fair and public trial.

Following the judicial creation of the exclusionary rule, the Legislative Yuan repeatedly reinforced the rule in the CCP after 2001. The 2001 amended Article 416 provides that upon motion by those who have been searched, the court shall review the legality of the search. If a search is revoked by the court, the trial court may exclude the evidence obtained. This was the first legislative recognition of the exclusionary rule in Taiwan's legal history. In 2002, Article 131 was amended to provide and emphasize the exclusionary rule again. Article 131 requires that in searches under exigent circumstances, prosecutors or the police shall report to the

court within three days after the search. The court may revoke the search if it believes the search to have been illegal. If the police or prosecutors do not report to the court within three days, or the search is revoked by the court, the court may exclude the evidence at trial. The exclusionary rule provided in the above two articles is limited to the elements specified in the articles. In 2003, a much broader exclusionary rule was added into the CCP. Article 158-4 provides that the court may exclude evidence obtained in violation of the procedure prescribed by law. In other words, the exclusionary rule is not limited to illegal searches and seizures. Under Article 158-4, the exclusionary rule is not mandatory but discretionary. In deciding the admissibility of evidence, the court shall balance the protection of human rights and the public interest.

The newly adopted exclusionary rule has resulted in a revolution of criminal procedure in Taiwan. Contrary to the past, the legitimacy of evidence now becomes an issue, and sometimes the most important issue, at trial. Many defence lawyers enjoy and wield their new 'weapon' at trial often. The conduct of prosecutors and police is now reviewed and examined in an open court. As a result, prosecutors and the police now pay much more attention to procedural law than before.

After the adoption of the exclusionary rule, some defendants were indeed acquitted due to the exclusion of illegally obtained evidence. In some cases, prosecutors even refused to initiate prosecutions because evidence was obtained illegally. The accused's rights, therefore, not only exist in words, but also are enjoyed in reality.

After the adoption of the exclusionary rule, Taiwan's courts also recognized the US doctrine of 'fruit of the poisonous tree' (*Nardon v. U.S.*, 308 U.S. 338 [1939]), in two High Court decisions.⁹ The High Court, in those two decisions, also applied the American 'purged taint exception'¹⁰ and ruled that when the taint has been purged (by a defendant bringing forward new evidence), derivative evidence shall not be excluded.

Although the Supreme Court did not explicitly use the term 'fruit of the poisonous tree', its decisions, nonetheless reflected this concept. In a 2004 decision, an accused was tortured by Policeman A at one police station, and was then transferred to another station and interrogated by Policeman B, who did not use any illegal methods. The lower court admitted the second confession made to Policeman B. However, the Supreme Court reversed the conviction and asked the lower court to investigate whether the second confession was produced under the influence of the torture of the first interrogation (Supreme Court, 93 Tai-Sun 6018 [2004]). The case means that the second confession, although no illegal method was employed, is still presumed 'tainted' as long as the first confession was obtained through torture or other illegal means. The Court would not accept the confession unless it has been proved to be 'purged' of taint.

In a 2007 decision, the Supreme Court affirmed that a confession would be presumed to be involuntary if it followed from an illegal arrest. The police in the case illegally arrested the accused and sent him to the prosecutor's office for

⁹ These cases were Taiwan High Court, 91 Sun-Gan (1) 197 (2002); Taiwan High Court, 92 Sun-Gan (1) 299 (2003).

¹⁰ See *Wong Sun v. U.S.*, 371 U.S. 471 (1963); *Brown v. IL.*, 422 U.S. 268 (1978).

interrogation. The lower court admitted the confession made before the prosecutor because no illegal methods could be found. The Court indicated that an illegal arrest would cause physical and psychological compulsion on the accused. It therefore concluded that a confession made before a prosecutor was involuntary because it was compulsory due to the influence of the illegal arrest (Supreme Court, 96 Tai-Sun 3102 [2007]). Actually, the Court did not find any evidence to support its conclusion that the disputed confession had been produced under the influence of the previous illegal arrest, nor did it try to explain its reasoning. It seems that any confession after an illegal arrest shall be excluded. In both the above decisions, the Supreme Court almost required the government to prove that the confession was not tainted by the previous illegal interrogation or arrest. The result is no different from the application of the 'fruit of the poisonous tree' doctrine. This is not surprising, because it is the Supreme Court's tradition not to use academic terms, but only the language of the statutes. In this sense, we can also say Taiwan's Supreme Court has indeed adopted the doctrine of 'the fruit of the poisonous tree.'

Right of Confrontation

(i) Establishment of the right

Under the excuse that it did not serve the purpose of finding the truth, a defendant previously did not have the right to cross-examine a witness or even to meet a witness face-to-face. A judge might examine a witness without a defendant or a defence lawyer present. Any witness's in-court statements were admissible against the defendant as long as the judge read to the defendant the contents of statements and showed him or her the records of statements.

A witness's out-of-court statements made before a prosecutor or at a police station were *per se* admissible against a defendant at trial. In many cases, the Supreme Court held that a defendant did not have the right to confront a witness, and it was at the court's discretion (Supreme Court, 26 Sun 1907 [1937]; 78 Tai-Sun 1488 [1989]; 76 Tai-Sun 6679 [1987]; 72 Tai-Sun 7770 [1983]). However, in 1995 the Constitutional Court in Taiwan declared that an accused does have the constitutional right to confront witnesses (Interpretation 384 of the Grand Justice Committee [1995]). The decision was aimed at the Anti-Hoodlum Act, Article 12 of which provides that 'In handling a hoodlum case, the police or the court shall examine a witness separately in secret if the accuser, victims, or witnesses ask that their names and identities remain confidential... The accused and his retained lawyer may not request to confront or cross-examine secret witnesses.' The Court reasoned that without considering the circumstances of the case, the Act prevents the accused and his lawyer from confronting or cross-examining secret witnesses simply because the accuser, victims, or witnesses request that their names and identities remain confidential. It deprives the accused of the right to defence, and hampers the court's truth-finding function. The significance of this decision is the declaration that a defendant has the right to confront witnesses, and that the right has a constitutional origin.

In 2003, Article 159 of the CCP was amended to recognize the hearsay rule and to reinforce the defendant's right of confrontation. It provides that out-of-court statements of any person other than the defendant are inadmissible except as

otherwise provided by law. Under the new provision, witnesses' statements at the police station are not admissible unless they comply with certain exceptions. However, under Article 159-1, a witness's statements made before other judges are *per se* admissible, with no exceptions. A witness's statements made before a prosecutor are also admissible unless they fall under some exceptions. Of course, the above hearsay exceptions attract great criticism from scholars and defence lawyers.

However, in several 2003 decisions, the Supreme Court declared that although some out-of-court statements are admissible under the Code, courts shall still give a defendant the chance to cross-examine witnesses. It reasoned that the defendant's right to cross-examine witnesses is protected by the Constitution. The fact a court has shown a defendant the minute of a witness's out-of-court statement does comply with the Code.¹¹ Nonetheless, if a defendant at trial can do nothing but deny or admit that statement, the admissibility of the statement not only hinders the search for the truth, but also violates the defendant's right to confront his witness (Supreme Court, 91 Tai-Sun 7369 [2002], 92 Tai-Sun 3421 [2003], 92 Tai-Sun 5415 [2003], 92 Tai-Sun 4540 [2003], 92 Tai-Sun 3824 [2003]). These decisions offset the impacts improperly created by the hearsay rule in the Code.

(ii) Oath Taking

Before 2003, certain witnesses enjoyed the right to lie at trial even though they had the capacity to understand the penalty of perjury. For example, a conspirator with or an employee of the defendant could be a witness but was not allowed to take the oath. Their unsworn statements could be admissible against a defendant, but they could not be charged with perjury if they had lied because they had not taken the oath. The law covered several categories of person: (1) those under sixteen years old; (2) those unable, because of mental disability, to understand the meaning and effect of an affidavit; (3) those are suspected of having a connection with the case as a co-offender, concealing an offender, destroying or falsifying evidence, or receiving stolen property; (4) those who are related to the accused or to the private prosecutor to a certain degree;¹² (5) those whose statements may subject them or related people to a certain degree to criminal prosecution or

¹¹ CCP Article 165 states that: 'Notes and other documents in the record which may be used as evidence shall be read to an accused or their essential points explained.'

¹² CCP Article 180 states that: 'A witness may refuse to testify under one of the following circumstances: (1) The witness is or was the spouse, lineal blood relative, blood relative within the third degree of kinship, relative by marriage within the second degree of relationship, family head, or family member of the accused or private prosecutor; (2) The witness is betrothed to the accused or private prosecutor; (3) The witness is or was the statutory agent of the accused or private prosecutor or the accused or private prosecutor is or was the statutory agent of such witness; (4) A person who has a relationship to one or more accused or private prosecutors specified in the preceding section may not refuse to testify on matters which relate only to the other accused or private prosecutors.'

punishment;¹³ and (6) those who are employees of or who live with the accused or the private prosecutor (Article 186 of the CCP).

Although both the accused and victims kept expressing their great abhorrence of the admissibility of witnesses' unsworn statements, the Legislative Yuan allowed the law to stand for more than half a century. In 2002, after the Code adopted the adversarial system, prosecutors who appeared at trial believed that some witnesses were lying, but could do nothing to stop the 'obstruction of justice'. For this reason, with the support of judges, prosecutors and defence lawyers, the Legislative Yuan did not take much time in 2003 to amend the above law. Now, all witnesses, except minors or persons with mental disability, have to take the oath when testifying at trial. If not, their statement is not admissible.¹⁴

Of course, witnesses still have different privileges when refusing to testify. For example, a doctor may refuse to disclose information about his patient.¹⁵ A defendant's parent may refuse to testify for anything related to their son or daughter. However, if they do not refuse to testify, they must take the oath and could be punished for perjury if they lie.

(iii) Co-defendants

Before revision, the Code did not specifically provide whether a co-defendant's statements should be treated like those of a witness or of a defendant. However, the Supreme Court held that a co-defendant's out-of-court or in-court statement was admissible against a defendant even though the defendant had not had a chance to perform a cross-examination or the co-defendant did not take an oath (Supreme Court, 30 Sun 3038 [1941], 31 Sun 2423 [1942], 46 Tai-Sun 419 [1957]). In this regard, the Court treated a co-defendant more like a defendant than a witness. This was the practice in Taiwan for more than half a century.

As noted above, the Code recognized the hearsay rule in 2003. Under this rule, a co-defendant's out-of-court statements are inadmissible against a defendant except where otherwise provided by law. In the same year, another article was added into the Code providing that a co-defendant's statement at trial is inadmissible against a defendant unless the co-defendant is under oath and the defendant may cross-examine him or her (Article 287-2 of the CCP). In this sense, it is very clear that a co-defendant's statement is no different from that of a witness. However, a co-defendant still keeps his or her privilege against self-incrimination.

¹³ CCP Article 181 states that 'A witness may refuse to testify if their testimony may subject them or a person related to them as specified in section I of the preceding article to criminal prosecution or punishment.'

¹⁴ CCP Article 158-3 states that: 'If a witness or expert witness fails to sign an affidavit to tell the truth, as required by law, his or her testimony or expert opinion shall not be admitted as evidence.'

¹⁵ CCP Article 182 states that: 'A witness who is or was a medical doctor, pharmacist, obstetrician, clergy, lawyer, defence attorney, notary public, accountant, or one who is or was an assistant of one of such persons and who because of his occupation has learned confidential matters relating to another may refuse to testify when he or she is questioned unless the permission of such other person is obtained.'

In 2004, Taiwan's Constitutional Court held unconstitutional the Supreme Court's previous decisions, which established the admissibility of a co-defendant's out-of-court or in-court statement against a defendant. The Justices held unconstitutional that a trial court could admit against a defendant a statement whose declarant was not under oath and who could not be cross-examined by a defendant (Interpretation 582 of the Grand Justice Committee [2004]).

The Decline Of The Prosecutor's Powers

A prosecutor in Taiwan has the same background and qualifications as a judge. They both must pass the same Judicial Officer (Judges and Prosecutors) Examination, and then are trained in the same Judicial Officers Training Institute for the same period. During the training period, they are assigned to courts and prosecutors' offices to get practical experience, as well as taking lectures at the Institute. After training, they become prosecutors or judges according to their own choices and scores at the Institute. A prosecutor may later request to be reassigned as a judge and *vice versa* because they share the same background and qualifications. Therefore, a prosecutor generally thinks of her/himself as no different from a judge except that they play different roles at criminal proceedings.

Detention

Prosecutors used to assume the power of 'arraignment' in Taiwan. Under Article 8 of the Constitution, the police must, within 24 hours after arrest, turn the arrestee over to a competent court for arraignment.¹⁶ Although the Constitution requests that the police turn the arrestee over to a 'court', the CCP provided that the police turn the arrestee over to a 'prosecutor's office'. A prosecutor had very broad authority to detain an accused.¹⁷ Whenever a prosecutor found it necessary and in accordance with one of the listed reasons specified by the law,¹⁸ he or she might detain the accused for up to two months without obtaining the court's approval.¹⁹

In 1995, Taiwan's Constitutional Court held these provisions in the CCP to be unconstitutional. This further established that the prosecutor shall not necessarily share the same authority as the court. Due to the great complexity and importance of the issue, the Constitutional Court gave the Legislative Yuan two years to amend the CCP in this regard. On 19 December 1997, the prosecutor's authority to detain the accused finally came to an end. A prosecutor must apply to the court for detaining an accused.

¹⁶ Article 8, Section II of the Taiwan Constitution states that 'When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall... within 24 hours, turn the person over to a competent court for arraignment.'

¹⁷ The old CCP Article 102, Section III states that a writ of detention shall be signed by a prosecutor during investigation.

¹⁸ The old CCP Article 101 states that: 'An accused may be detained if necessary after examination, and if one of the conditions specified in Article 76 exists.'

¹⁹ CCP Article, 108 Section I states that: 'Detention of an accused may not exceed two months during investigation...'

Right now, within 24 hours after arrest, an arrestee must be turned over to a competent 'court' for arraignment except where there are other circumstances specified by law. In practice, the police will bring an arrestee to a prosecutor within 16 hours after arrest. Then, a prosecutor normally examines the accused and decides whether the arrestee should be released. Prosecutors still have the authority to set up the conditions for release. If a prosecutor intends to detain an arrestee, however, s/he must apply to the court for a detention order. If the court approves the application of a detention order, the arrestee will be detained for up to two months. After this period, a prosecutor may apply to the court for an extension of the detention. However, only one extension is allowed, and it is limited to two months.²⁰

The abridgement of the prosecutor's authority of detention is in practice significant. In 1997, when prosecutors had the authority to issue detention orders, the number of detainees in Taiwan was 21,457. In 1998, the year when prosecutors lost the power to issue detention orders, the number dropped to 7508, about one third of the previous year.

Searches and Seizures

Before 2001, it was to a prosecutor, not the court, whom the police applied for search and seizure warrants.²¹ If a prosecutor conducted a search or seizure, a warrant was not needed even when there were no exigent circumstances.²²

In 2000, prosecutors ordered the searching of a legislator's office and that of a well-known newspaper. These two incidents shocked society and aroused the Legislative Yuan to re-think whether a prosecutor should have the authority to issue a search warrant. It did not take much time for the Legislative Yuan to abridge the prosecutor's power to issue search warrants in 2001, even under prosecutors' strongest protests.

Currently, except in exigent circumstances or as otherwise provided by the law,²³ a prosecutor may not conduct searches or seizures without a court-issued warrant, nor authorize the police to conduct searches or seizures. Violation of the requirements could lead to the exclusion of evidence as described above.

The authority to issue an electronic surveillance order is not governed by the CCP, but by the Code of Protection and Surveillance of Communications (CPSC). In 2001 when the Legislative Yuan amended the CCP regarding the prosecutor's authority to issue warrants, it actually faced the strongest protests from prosecutors who argued that such prosecutorial powers were necessary for effective crime control. For this reason, the Legislative Yuan simply did not want to deal with the issue of electronic surveillance at the same time. Six years later, in 2007, the Legislative Yuan eventually followed the step of the CCP and amended

²⁰ CCP Article 108, Section II states that: 'Each extension of the period of detention may not exceed two months. Only one extension is allowed during investigation...'

²¹ Before 2001, CCP Article 128, Section III stated that: 'A search warrant shall be signed by a prosecutor during investigation...'

²² The old CCP Article 129 states that: 'A prosecutor or judge may personally conduct a search without a search warrant. *But* he shall show his identification card.'

²³ Such as searches incidental to a lawful arrest or consent search.

the CPSC so that prosecutors do not have the authority to issue electronic surveillance orders, but had to apply to the court.

Decision to Prosecute

After the conclusion of an investigation, a prosecutor must issue a decision not to prosecute if he has found that the evidence of the accused's guilt is insufficient.²⁴ Even if the evidence of the accused's guilt is sufficient to prosecute, a prosecutor still has the discretion to issue a ruling not to prosecute²⁵ or a ruling of deferred prosecution²⁶ in the case of less serious crimes.

Before 2002, a prosecutor's non-prosecution decision was not checked by an 'outsider'. A complainant may apply for reconsideration of a non-prosecution decision (CCP Article 255, Section II; CCP Article 256, Section I), and if a prosecutor finds an application for reconsideration to be well grounded, either the investigation must continue or a prosecution must be filed with the court (CCP Article 257, Section I). If the application is dismissed as groundless, the whole file must be sent to the chief prosecutor at a higher court (CCP Article 257, Section II). If the chief prosecutor at the higher court finds the application for reconsideration well-grounded, he may order the prosecutor at the lower court either to continue the investigation or to file a prosecution with the court (CCP Article 258). If the chief prosecutor at the higher court also finds the application groundless, it must be dismissed. Before 2002, non-prosecution decisions became final at this time, and the complainant could not apply for additional reconsideration.

In 2002, Article 258-1 was added to the CCP to give the complainant another channel to challenge a prosecutor's non-prosecution decision.²⁷ Under Article 258-

²⁴ CCP Article 252 states that: 'If one of the following circumstances exists, a ruling not to prosecute shall be made...The suspicion of an offence having been committed is insufficient.'

²⁵ CCP Article 253 states that: 'If a public prosecutor considers it appropriate not to prosecute a case specified in Article 376 after having taken into consideration the provisions of Article 57 of the Criminal Code, he may make a ruling not to prosecute.' Penal Code Article 57 states that: 'When a sentence is imposed, all circumstances of the case shall be considered, and special attention shall be given to the following factors to determine the sentence: (1) The accused's motive; (2) The accused's purpose; (3) Provocation at the time of the offence; (4) Means employed to commit the offence; (5) Living conditions of the offender; (6) Conduct of the offender; (7) General knowledge and intelligence of the offender; (8) Ordinary relations between the offender and the victim; (9) Dangers or damage caused by the offender; (10) Attitude of the offender after committing the offence.'

²⁶ CCP Article 253-1, Section I states that: 'If an accused has committed an offence other than those punishable with death penalty, life imprisonment, or with a minimum punishment of imprisonment for not less than three years, the public prosecutor, after considering the matters specified in Article 57 of the Criminal Code and the maintenance and protection of public interest, deems that a deferred prosecution is appropriate, he may make a ruling to render a deferred prosecution by setting up a period not more than three years and not less than one year thereof, starting from the date the ruling of deferred prosecution is finalized.'

²⁷ CCP Article 258-1 states that: 'If the complainant disagrees with the ruling of dismissal specified in the preceding article, he may, within ten days after receipt of written ruling of

1, after exhausting the remedy procedure within the prosecutorial system, a complainant may apply to the court to open a trial. If the court finds the application for opening a trial groundless, it shall dismiss it. At this time, the non-prosecution decision becomes final and the accused can never be prosecuted except for reasons specified by law.²⁸ If the court finds the application well-grounded, it shall order the opening of a trial. The order is, therefore, deemed as a prosecution. As a matter of course, the accused is deemed as being prosecuted. However, the defendant may appeal the order to a higher court.

The purpose of Article 258-1 is to impose an 'outsider' to check the prosecutor's non-prosecution decision. This Article has also attracted a lot of criticism from prosecutors and scholars. Scholars believe the Article confuses the nature of the court. A court shall not be a supervisor of a prosecutor, and shall not be involved in investigation. Interestingly, in 2003, there were 1,948 applications for opening a trial under Article 258-1, but the court approved only five of them.

Before 2002, there was no mechanism for checking whether a prosecutor had abused the discretion to prosecute. When a prosecutor files a prosecution, the whole file must be sent, including all exhibits and evidence, to the court.²⁹ The transferral of the file means the completion and the end of the prosecutor's investigation. Before 2002, even if a court found that a prosecution case was not supported by sufficient evidence, it still had to open the trial and find out the truth. Since there was no mechanism to check a prosecutor's decision to prosecute, the conviction rate was very low. For example, in bribery cases, the conviction rate was as low as 42 per cent in 1999 and 41.4 per cent in 2000.

In 2002, under strong protests from prosecutors, Article 161, Section II was added to

prevent hasty, malicious, improvident, and oppressive prosecutions, and to protect the person charged from open and public accusation of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.³⁰

Under the new Article, before the first day of trial, a court shall order the prosecutor to supply new evidence within a certain period if it finds the prosecutor's evidence is 'obviously insufficient to support a conviction'. If the prosecutor fails to supply new evidence within the period, the court may dismiss the prosecution. The Article has a very good justification for existing, but most scholars believe it was drafted

dismissal, retain an attorney to make an application in writing, to the concerned court in first instance, for setting the case for trial.'

²⁸ CCP Article 260 states that: 'If a ruling not to prosecute has become final... no prosecution of the same case shall be initiated except under one of the following conditions: (1) New facts or evidence is discovered; (2) Any one of the circumstances for retrial exists as specified in Article 420, Section I, Section II, Section IV, or Section V.'

²⁹ CCP Article 264, Section III states that: 'When a prosecution is initiated, the file and exhibits shall be sent to a court.'

³⁰ This adopted the language of J. Rosenberry, in *Thies v. State*, 189 N.W. 539 (Wis. 1922).

very poorly. First, the time of the review is after the prosecution, not before the prosecution. At this time, a defendant has already suffered humiliation and anxiety from an open accusation. Second, if the court found that the prosecutor's evidence is 'obviously insufficient to support a conviction' it should have dismissed the prosecution directly. On the contrary, the new Article does not give the court the authority to dismiss the prosecution, but requires it to order the prosecutor to supply new evidence. In 'helping' the prosecutor, the court does not play a neutral role.

Conclusion

What are the reasons and forces behind Taiwan's judicial reform? Three major reasons are frequently given. First, abuse of power by law enforcement officials prompted legislators to curtail their powers, and to endow defendants with more rights. For example, defendants at the pre-trial stage had no right to counsel before 1982. In 1982, the police victoriously announced they had a suspect's confession to the first bank robbery case in Taiwan. However, the confessed suspect jumped over a bridge and drowned himself while being escorted by the police in the search for the bank notes. The case was simply closed, the bank notes left undiscovered. Several days later, a civilian, unrelated to the previous suspect, found that a bag his friend had left in his house was full of bank notes. This led to the arrest of the real perpetrator. He confessed. As to the previous suspect, the investigation found that he had been beaten to make a full confession and had killed himself because he could not bear the torture anymore. Society was outraged. The accused's right to a lawyer at a pre-trial stage was therefore established. Another example of abuse of power was regarding the prosecutor's authority to issue search warrants. In 2000, prosecutors searched a well-known newspaper's office and a legislator's office. The legislators and press reacted harshly to the prosecutor's actions. In 2001, the Legislative Yuan took away the prosecutor's power to issue search warrants.

Second, democracy in Taiwan has aided reform of the criminal justice system. In a mature democratic society, people's strong dissatisfaction with the criminal justice system is voiced to the government easily and quickly. Unlike under the earlier dictatorial government, Taiwan's recent democratic government has paid a lot of attention to overhauling the criminal justice system. Moreover, most of the changes in the CCP occurred after 2000, the first year in which the ruling party did not hold a majority in the Legislative Yuan. The ruling party could pass almost no laws without compromising with the opposition party. Generally, the opposition party prefers to limit the powers vested in the police and prosecutors, and to protect human rights. For this reason, more provisions for protecting human rights were added to the CCP.

Third, recent developments in the criminal justice system are very closely related to the judiciary's awakening to its role. In 1994, Taiwan's Constitutional Court held as unconstitutional the secret witness provision in the Anti-Hoodlum Act on the grounds that it violated a defendant's right to confront his witness (Interpretation 384 of the Grand Justice Committee [1995]). Although the CCP explicitly provided that prosecutors had the authority to issue detention orders, the Constitutional Court declared the provision unconstitutional in 1995. In 1998, the Supreme Court

created the exclusionary rule in Taiwan. The Judiciary now plays a more liberal role in protecting human rights than before.

As a result of the three forces above, Taiwan has made great progress in reforming its criminal justice system. The reform in Taiwan is still going on: the Judicial Yuan has sent to the Legislative Yuan a bill regarding the reform of the appellate procedure. It might take two years to complete the legislative process. Even after that, there is still a lot of work to do in Taiwan's criminal justice system, especially in examining and adjusting the implementation of many new provisions in the CCP.

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