THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS IN CRIMINAL PROCES. NATIONAL REPORT ON TAIWAN

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1. INTRODUCTION

Since 1997, Taiwan has started to overhaul its criminal justice system and has amended hundreds of provisions in the Code of Criminal Procedure (CCP). In essence, there are three important changes in criminal procedure. First of all, Taiwan switched its trial procedure from an inquisitorial model to an adversarial one in 2002. Due to the tremendous increase in workload after adopting the adversarial system, "plea-bargaining" came to life in 2004. Effective from April 9, 2004, a prosecutor may bargain with a defendant for a guilty plea. Unlike the practice in the United States, Taiwan's Code limits plea-bargaining (negotiation procedure) to non-serious offences only. Negotiation procedure is not applicable to the following: an offence punishable by death, life imprisonment, or with a minimum punishment of imprisonment for no less than three years, or an offence with regard to which the court of appeal has jurisdiction of the first instance. For example, murder or kidnapping for ransom is not "negotiable."

Secondly, the accused have been endowed with more rights, and these rights are better protected than before. For example, in 1997, CCP was amended so that before interrogation, at all stages of criminal procedure, the accused shall be informed that he may retain his lawyer. In 2003, Article 158-2 was added to CCP, ruling that the police's failure to inform the *arrestee* of his right to remain silent and right to a lawyer leads to the exclusion of the confession obtained thereafter, except if there is proof that the police's violation of the duty to inform is in good faith and the confession is voluntary.

Thirdly, the prosecutor's powers are declining. Taiwan's prosecutors lost the power to issue a detention order in 1997, as well as the power to issue a search warrant in 2001. To date, the changes in Taiwan's criminal procedure are dramatic and significant, although controversial.

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2. APPLICABLE INTERNATIONAL LAW

Taiwan is a contracting party to International Covenant on Civil and Political Rights and recognizes the Universal Declaration of Human Rights. Unfortunately, Taiwan is not a member of the United Nations, nor recognized as an independent country by most of the countries in the world. For this reason, Taiwanese citizens do not have a right of complaint to an international judicial body.

3. GENERAL QUESTIONS ON THE NATURE OF DOMESTIC CRIMINAL PROCESS

A. General

Taiwan has a Constitution with a Bill of rights from which citizens can derive rights pertaining to fair trial and criminal process.

Article 8 of the Constitution provides "Personal freedom shall be guaranteed to the people. Except in cases of *flagrante delicto* as provided by law, no person shall be arrested or otherwise detained than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or otherwise punished unless by a law court in accordance with the procedure prescribed by law. Any arrest, detention, trial, or punishment which is not in accordance with the procedure prescribed by law may be resisted. When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall inform, in writing, 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 for a writ to be served within 24 hours on the organ making the arrest for the surrender of the said person for trial. The court shall not reject the previously mentioned petition, nor shall it order the organ concerned to make an investigation and report first. The organ concerned shall not refuse to execute, or delay in executing, the writ of the court for the surrender of the said person for trial. When a person is unlawfully arrested or detained by any organ, he, or any other person, may petition the court for an investigation. The court shall not reject such a petition, and shall, within 24

hours, investigate the action of the organ concerned and deal with the matter in accordance with law."

Article 9 of the Constitution provides "Except those in active military service, no person shall be subject to trial by a military tribunal." Article 11 provides "The people shall have freedom of speech, teaching, writing and publication." Article 12 provides "The people shall have freedom of privacy of correspondence." Article 16 provides "The people shall have the right of presenting petitions, lodging complaints, or instituting legal proceedings."

Taiwan's criminal process is governed by statute. It has a uniform Code of Criminal Procedure. There are three major authorities involved in criminal justice: the police, the prosecution service and the judiciary. The head of the National Police Agency within the Ministry of Interior is politically accountable for the police's decisions and the actions of the criminal justice authorities. The head of police is responsible for social order. If the crime rates rise, the head of police will be criticized and, in very serious cases, be requested to step down.

In theory, and in general, the minister of Ministry of Justice is politically accountable for all prosecutorial decisions and actions in criminal procedure. The minister is appointed by Taiwan's President. In practice, there is a chief-prosecutor in each jurisdiction. The chief-prosecutor is in fact accountable for his prosecutor's decisions and actions in concrete cases. The term of chief-prosecutor is normally three years. He will be removed from his position if the performance of his prosecutors is not acceptable.

B. Judiciary

In Taiwan, the highest judicial administration authority is Judicial Yuan, which is different from the Supreme Court. The president of Judicial Yuan is appointed by Taiwan's President. There is no fixed term for his tenure. In theory, the president of Judicial Yuan shall be accountable for the judges' decisions and actions. However, this has not happened because of the independence of judiciary.

A criminal investigation may be instigated as a result of a simple accusation by any person. No reasonable suspicion is required. However, probable cause is required for searches and seizures. In general, the police may do anything an ordinary citizen may do unless the action is expressly forbidden or involves a substantial infringement of fundamental rights.

Article 9 of the Act of Judicial Officer Personnel requires that a judge shall have one of the following qualifications: 1. he has passed the Judicial Officer Examination, 2. he has been a judge or a prosecutor, 3. he has passed the Bar Examination and practiced law for three years with good credit, 4. he has graduated from a law school of an accredited university, and has been a professor or an associate professor for three years or an assistant professor for 5 years, has taught major law subjects for 2 years, has professional publications, and approval by Judicial Yuan.

Judges are trained in a special Training Institute organized by the Ministry of Justice for a term for 18-24 months. Their training includes in-class lessons and internship in different executive offices, prosecutorial offices, and courts. The judiciary is a "career judiciary."

In serious offences, unless a defendant admits his guilt, the tribunal of fact is a panel of three judges (Article 284-1, Code of Criminal Procedure). In less serious offences, the tribunal of fact is a single judge (Article 284-1, Code of Criminal Procedure). Taiwan does not have the figure of the investigative judge.

Taiwan switched its trial procedure from an inquisitorial model to an adversarial one in 2002. Traditionally, the judge has always been very active in finding the truth. The current Article 163, Code of Criminal Procedure provides that "the court, for finding the truth, may *ex officio* investigate evidence; for the purpose of maintaining justice or discovering facts that are critical to the interest of the accused, the court shall *ex officio* investigate evidence." Interpreting this Article differently, some courts are very active and some are not. Because of the tradition, it should be said that most courts are still very active in truth-finding.

C. Prosecution

Taiwan has a Public Prosecution Service. Prosecutors are accountable to the Ministry of Justice, which is accountable through the executive. The prosecution service is a hierarchical organization. There is a chief-prosecutor in each jurisdiction, appointed by the Ministry of Justice. The Ministry of Justice is also in charge of the appointment, removal and promotion of all prosecutors.

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Both the prosecutor and the victim of an offence can bring about a prosecution. Under Article 319 of CCP, a victim may institute a private prosecution. Before 2002, a prosecutor's non-prosecution decision was not checked by an "outsider." The complainant could apply for the reconsideration of a decision not to prosecute.[2] If the prosecutor found the application for reconsideration well grounded, he either continued the investigation or filed a prosecution with the court.[3] If he found the application groundless, he sent his whole file to the chief-prosecutor at a higher court.[4] If the chief-prosecutor at the higher court found the application for reconsideration well-grounded, he could order the prosecutor at the lower court either to continue the investigation or to file a prosecution with the court.[5] If the chief-prosecutor at the higher court also found the application groundless, he dismissed it. Before 2002, the non-prosecution decision 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 the prosecutor's non-prosecution decision.[6] Under Article 258-1, after exhausting the remedy procedure within the prosecutorial system, the 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.[7] If the court finds the application

[2] CCP Article 255, Section II; CCP Article 256, Section I.
[3] CCP Article 257, section I.
[4] CCP Article 257, Section II.
[5] CCP Article 258.
[6] Article 258-1: 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 dismissal, retain an attorney to make an application in writing to the concerned court in first instance, for setting the case for trial.
[7] CCP Article 260: "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."

well-grounded, it shall order the opening of a trial. The order is, therefore, deemed to be 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.

If the evidence is sufficient to show that an accused is suspected of having committed an offence, a prosecution *must* be initiated under Article 251 of CCP. However, 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 prosecute[8] or a ruling of deferred prosecution[9] in less serious crimes. In deferred prosecution, prosecutors can "settle" the cases with defendants.

Due to the tremendous increase in workload after adopting the adversarial system, "plea-bargaining" came to life in 2004. Effective from April 9, 2004, a prosecutor may bargain with a defendant for a plea of guilt. Unlike the practice in the United States, Taiwan limits plea-bargaining (negotiation procedure) to non-serious offences only. Under Article 455-2 of CCP, negotiation procedure is not applicable to the following: an offence punishable with by death, life imprisonment, or with a minimum punishment of imprisonment for not less than three years or an offence for which the court of appeal has jurisdiction of the first instance.

The prosecutor is required to insist on the protection of human rights and fulfilment of justice. He shall devote himself to the healthy development of the judicial system without regard to his personal position, reputation and interest. Prosecutorial decisions are monitored by the chief-prosecutor in each jurisdiction.

The police are independent and formulate the original criminal charge. The police normally investigate independently, but the prosecutor also possesses the discretion to direct the police to investigate. There are some other agencies which might gather evidence.

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[8] CCP Article 253: 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: "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 damages caused by the offender;
10. Attitude of the offender after committing the offence."

[9] Section I, Article 253-1 of CCP: If an accused has committed an offence other than those punishable by death, life imprisonment, or with a minimum punishment of imprisonment for not less than three years, and 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.

However, they do not have coercive measures at their disposal. For example, they may not search and seize evidence without consent. If these non-police agencies believe an action constitutes an offence, they have to send the evidence to prosecutors to consider prosecution.

D. Defence

Defence lawyers need to pass the Bar Examination. After passing the examination, they take a one month course held by the Taiwan Bar Association and complete a six month internship. All lawyers have rights of audience in the courts. However, the court has the discretion not to try the case in public when it involves national security, public order or morality.

Taiwan's Bar Association has a criminal law division and its membership is mandatory. Taiwan also has a Public Defender's Office. There is a Code of Conduct for defence lawyers. The defence lawyer is regarded as the inseparable and partisan representative of the client, not as an officer of the court. Defence lawyers have a duty to actively gather and introduce evidence to support their client's case.

If a case is brought to the court, the pre-trial procedure would normally produce the facts of the offence. The pre-trial procedure would produce more unfavourable evidence against the defendant. However, the trial procedure might produce more favourable evidence for the defendant. This is because prosecutors, under the law, must pay attention to evidence for and against the defendant, but in practice they produce more unfavourable evidence when a person is prosecuted. For this reason, the defence lawyer produces only favourable evidence for the defendant.

Introduction/examination of the evidence at trial is based on a "dossier" compiled by the prosecution, although there is a proposal to abolish it. The tribunal of fact is acquainted with the case before the trial starts. In prosecuting a person, a prosecutor sends his whole dossier and all of the evidence to the court with the indictment. The court is very well acquainted with the case by reading the dossier. Everything in the dossier will be seen by the court. However, the court may find a defendant guilty on the basis of legally admissible evidence only.

Taiwan switched its trial procedure from an inquisitorial model to an adversarial one in 2002. Traditionally, the judge was always very active in finding the truth. The current Article 163, Code of Criminal Procedure provides that "the court, for finding the truth, may *ex officio* investigate evidence; for the purpose of maintaining justice or discovering facts that are critical to the interest of the accused, the court shall *ex officio* investigate evidence." Interpreting this Article differently, some courts are very active and some are not. Most courts stick to tradition and are still very active in truth-finding.

The legal system always allows for a retrial by a higher court on appeal with regard to the facts of the case. Both prosecution and defence have the right to request a retrial. Retrial on appeal is a regular feature. The parties may appeal the case for factual or legal reasons. An acquitted defendant may be convicted at a higher court. Taiwan allows for a final appeal to a Constitutional Court on the grounds that rights safeguarded by the Constitution have been violated. The Constitutional Court in Taiwan has the name of Grand Justice Committee, which is different from the Supreme Court.

4. HUMAN RIGHTS IN DOMESTIC CRIMINAL PROCESS

A. Fundamental Rights Independent of Fair Trial

a. The right to life

There are about 52 provisions that provide for the death penalty in the Penal Code or other different Codes. Most of them are homicides and drugs offences. In the last two years, Taiwan has not executed any death-row inmates. Taiwan's President has publicly announced that abolition of death penalty is the new policy. Unfortunately, there are no special procedures/special guarantees in capital cases.

There is no special rule which imposes positive obligations on the state to instigate criminal investigations if reliable information points to a life threatening situation.

b. The right to be protected against cruel and humiliating treatment

Cruel and humiliating treatment is against the law. It is not a recognized legal right in Taiwan and not explicitly declared in the Constitution or statutes. Since it is not a right, the statute does not provide for positive obligations.

In the past, Taiwan's confession law was governed only by Section I, Article 156 of the CCP. The Article explicitly prohibits the police from using illegal methods to interrogate the accused. Any violence, threat, inducement, fraud, exhausting interrogation, illegal detention, or other improper means of interrogating the accused is prohibited under the Code.[10] A confession obtained through any of the above illegal methods must be excluded under Article 156 of the Code.[11]

Although Section IV, Article 156 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 remain silent. 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 remain silent and also requires the admonition of the right before interrogation at all stages of criminal procedure.[12] The intent of the Article is to clear up the question as to whether an accused has the right to remain silent. However, the Code then said nothing about the effect of the police's failure to inform the accused of his right to remain silent.

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 otherwise provided by law.[13] 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, the effect of the police's failure to comply with the Article was not provided, and was subject to judicial interpretation until 2003. In 1998, to protect the reliability of confessions, Article 100-1 was amended so that the interrogation session of the accused shall be tape-recorded. If necessary, the whole session may be videotaped. The accused's statements in minutes are inadmissible if they are inconsistent with what is on the audio or videotape.

Although Article 95 requires that the accused be informed of his rights before interrogation, failure to administer the information was unlikely to cause the exclusion of confessions

[10] CCP Article 98.
[11] 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."
[12] CCP Article 95 provides that "While being interrogated, the defendant shall be told what act he is accused of, which provisions of the criminal law may apply, that he does not have to make statements against his will, and that he may retain his lawyer…"
[13] The police may interrogate the accused at night time in one of the following situations only: 1.The accused consents to the interrogation. 2. In the case of the accused being arrested at night time, 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).

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 may retain an attorney to be present.[14] However, in a 1983 decision Taiwan's Supreme Court declared that the police violation of Article 88-1 duty to inform the accused does not bear any effect on the statements subsequently obtained as long as the violation does not affect its voluntariness.[15] This conservative decision strengthened the police practice in not following the Code and not informing the accused of his rights.

In order to change police practice, Article 158-2 was added into the CCP in 2003. It provides that the police's failure to inform the *arrestee* of his right to remain silent and right to a lawyer leads to the exclusion of confession thereafter obtained, unless there is proof that the police's violation of the duty to inform 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 who have been arrested, but not to those who have not. However, it does not require that the police cease questioning when the arrestee asserts his right to remain silent or right to attorney. Nor does the arrestee have the right to a public defender if he is indigent. Currently, informing the accused of his rights before interrogation is a common police practice.

Article 158-2 also provides that a confession obtained in violation of Article 100-3 (prohibition of police interrogation at night time) shall be excluded unless there is proof that the violation was in good faith and the confession is voluntary. As stated above, when Article 100-3 was added, it did not provide for the effect of failing to comply with it, and 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 before 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 confessions made on the police record. In practice, the defendant seemed to bear the burden of proving the involuntariness of confessions. Without actual injury to his body, a defendant almost always lost his claim of involuntariness in a "swearing contest" with the police at trial. The newly amended Article

[14] CCP Article 88-1, Section 4: "When arresting an accused under Section 1 of this Article, the prosecutor, judicial police officer, or judicial policeman shall advise the accused and his family that they may retain attorneys to appear at interrogations."
[15] Supreme Court, 72 Tai Sun 1332, *overruled* in March 25, 2003.

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.

There is a Detention Act which explicitly provides the material conditions and the rights. Article 6 provides that a complaint can be made to the visiting prosecutors, judges or officers. However, breaches of pre-trial detention rights cannot be raised during trial.

c. Habeas Corpus

The defendant has a right to be heard and the right to a lawyer when he is deprived of his liberty. Under Article 99 of CCP, if an accused is deaf or dumb, or not conversant with the language, an interpreter may be used; such accused may also be examined in writing or ordered to make a statement in writing.

The maximum time that the police can hold a person for questioning is 24 hours. Prosecutors used to assume the power of "arraignment" in Taiwan. Under Article 8 of the Constitution, the police must, within 24 hours after the arrest, turn the arrestee over to a competent court for arraignment.[16] Although the Constitution states 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 the accused.[17] Whenever a prosecutor found it necessary and one of the listed reasons specified by the law applied,[18] he might detain the accused for up to two months without obtaining the court's approval.[19]

In 1995, Taiwan's Constitutional Court held that the provisions in the CCP granting prosecutors the authority to detain the accused were unconstitutional. The significance of the decision was not only the unconstitutionality of the prosecutor's authority of detention, but also the declaration 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 December 19,

[16] Article 8, Section II of the Taiwan Constitution provides 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 him over to a competent court for arraignment."
[17] The old CCP Article 102, Section III: a writ of detention shall be signed by a prosecutor during investigation.
[18] The old CCP Article 101: "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: "Detention of an accused may not exceed two months during investigation..."

1997, the prosecutor's authority to detain the accused finally came to an end. A prosecutor must now apply to the court before detaining an accused.

At present, within 24 hours after the arrest, an arrestee must be turned over to a competent "court" for arraignment unless there are other circumstances specified by law. In practice, the police will bring the arrestee to a prosecutor within 16 hours after the 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, 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 two months, a prosecutor may still apply to the court for an extension of detention. However, he is allowed only one extension and the period of extension is limited to two months.[20]

A defendant may be released on bail on the condition that he will appear at the court hearing. The custody is subject to regular monitoring/review by prosecutors. After been detained, a defendant may petition the court for release at any time. There is no limitation on the times of application for such proceedings.

B. Rights of Fair Trial

Under Article 95 of CCP, the police, prosecutor, or judge must, before interrogation, inform the suspect/defendant as follows: "That he is suspected of committing an offence and all of the offences charged." If the charge is changed after an accused has been informed of the offence charged, he shall be informed of such change.

a. Negotiation procedures

There was, and is, no "pleading" procedure in the whole CCP. This is due to the inquisitorial trial system that is firmly rooted in its history. In 2002 when the adversarial trial was adopted, the CCP did not adopt a "pleading" procedure. In principle, even if a defendant "pleads guilty" to or "confesses or admits" to all of the indicted facts, the court

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

could not dispose of a case without a trial.[21] In such non-contested cases, a trial might be simplified, hasty, and nothing more than a ritual, but it was still indispensable.

Taiwan's adoption of plea-bargaining was carried out by creating a totally new Chapter in the CCP, entitled "Negotiation Procedures." This Chapter sets forth the judicial procedures for when and how a court may dispose of an indicted case without trial. Before the enactment of the Negotiation Procedures, all indicted cases were, in principle, required to go through a relatively complex trial procedure, even if a defendant admitted guilt.[22]

The new Negotiation Procedures explicitly provide that a prosecutor may, after indictment, bargain with a defendant regarding the sentence, or ask a defendant to apologize to or compensate victims. After a defendant admits his guilt and reaches an agreement with the prosecutor, the prosecutor may motion to the court to be Negotiation Procedures. This motion can and must be submitted at any time after the initiation of prosecution and before the conclusion of closing arguments.

Within ten days of receiving the above motion, the court must examine the defendant and inform him of the offence to which he pleaded, its statutory scope of sentences, and the rights he is waiving.[23] To protect defendants and the integrity of the procedure, an unwaivable right to counsel is afforded to defendants who agree to accept sentences of more than six-months in prison and who do not get a suspended sentence.[24]

The court is not bound by the agreement between the parties and may dismiss the motion and hold the case for trial. If the court accepts the agreement, it must convict the defendant without a trial. Unlike the practice in the United States, if the court decides to accept the agreement, it must sentence the defendant within the scope of the parties' agreement.[25] Upon accepting the agreement, the court may sentence a defendant only to fines, imprisonment of no more than two years, or suspension of imprisonment under the CCP. As long as the court disposes of the case in accordance with the Negotiation Procedures, the

[21] The only exception is Summary Procedures. Under Summary Procedures, the court may convict a defendant without holding a trial at all. Summary Procedures are used if the offence is minor and the defendant has confessed to the offence or the offence is clearly supported by the evidence in the prosecutor's file. Sentences under Summary Procedures are limited to a suspended sentence, imprisonment which may be commuted to a fine, detention, or a fine. Article 449 of the CCP.

[22] The only exception is Simplified Trial Procedures. Under Simplified Trial Procedures, a trial is still necessary, but the examination of witnesses and evidence is simplified. The prerequisite elements of for use of Simplified Trial Procedures are as follows: (1) the defendant must admit guilt before the trial and (2) the offence charged is not punishable by death, life imprisonment, or with a minimum punishment of imprisonment of not less than three years, or if the high court has jurisdiction in the first instance over the case. Articles 273-1 & 273-2 of the CCP. The difference between Simplified Trial Procedures and Summary Procedures, as described in footnote 21, is that the former still requires a trial, but the latter does not.

[23] Article 455-3 of the CCP.

[24] Article 455-5 of the CCP.

[25] Article 455-4 of the CCP.

case becomes final and cannot be appealed.[26] To protect the defendant's rights and integrity of the Negotiation Procedures, the court must appoint lawyers for all defendants who agree to accept sentences of more than six-months in prison and those who do not receive a suspended sentence.[27]

b. Impartiality

Article 17 of CCP provides: "In one of the following circumstances, a judge shall disqualify himself from the case concerned on his own motion and may not exercise his functions:

The judge is the victim;

The judge is or was the spouse, blood relative within the eighth degree of kinship, relative by marriage within the fifth degree of relationship, family head, or family member of the accused or victim;

The judge has been betrothed to the accused or victim;

The judge is or was the statutory agent of the accused or victim;

The judge has acted as the agent, defence attorney, or assistant of the accused or as the agent or assistant of the private prosecutor or a party in the supplementary civil action;

The judge has acted as the complainant, informer, witness or expert witness;

The judge has exercised the functions of the public prosecutor or judicial police officer;

The judge has participated in the decision at a previous trial."

Article 18 of CCP provides: "A party may motion to disqualify a judge in one of the following circumstances:

Circumstances specified in the preceding article exist and the judge has not disqualified himself from the case concerned on his own motion;

Circumstances other than those specified in the preceding article exist which are sufficient to justify the apprehension that the judge may be prejudiced in the exercise of his functions."

A judge who has given a decision in a pre-trial procedure could also act as a trial judge. There is no jury or lay participants in Taiwan's trial. Under Article 86 of the Court

[26] Article 455-10 of the CCP. The exceptions are when the court does not follow the relevant and important Articles in the Negotiation Procedures, such as Article 455-4 paragraph 1, items 1,2,4,6,7 and Article 455-4 paragraph 2.
[27] Article 455-5 of the CCP.

Organization Act, the trials/hearings shall be open to the public. The court may decide not to be open to the public if it has the risk of interfering with national security, public order or morality.

c. Defence rights

Article 95 provides that a suspect/defendant has the right to remain silent. He is cautioned about the right to silence before being interrogated by the police, prosecutor, or judges. Any confession or other unfavourable statements obtained will be excluded in principle if the public prosecuting official, judicial police officer or judicial policeman fails to administer the caution before interrogation. No adverse inferences can be drawn at trial if a suspect/defendant chooses to remain silent. The burden of proof rests with the prosecution in principle. There is no sanction against third parties, especially politicians and/or public officials for making public statements about a person's guilt before the verdict has been reached by the court.

A defendant has the right to retain a lawyer at any time. He does not have the right to appointed counsel until he is indicted, unless he is mentally retarded. This right applies to any stage of the criminal proceeding. There is a Legal Aid Act in Taiwan for indigent defendants. Those who are certified as a low income family by Ministry of Interior may apply for legal aid. There are sufficient lawyers, but they are not paid well.

Article 150 of CCP provides "During the trial stage, the parties and the defence attorney may be present at a search or seizure unless an accused is detained, or it is considered that his presence would interfere with the search or seizure." In ordinary cases, the Code requires a minimum of seven days before a trial begins and the defence is fully informed of the charges and the evidence brought against the defendant. For minor offence cases, the minimum requirement is five days.

After a defendant is indicted and the dossier has been sent to the court, the defence has a right to access the prosecution case and file. This access cannot be restricted or refused. Everything in the dossier can be accessed by the defence. The defence has the right to seek and introduce evidence on behalf of the defendant and to petition the court to call experts and to have expert evidence re-examined by another expert. In other words, they may not call experts without the court's permission.

A witness's out-of-court statements made before a prosecutor or at the police station used to be *per se* admissible against the defendant at trial. In 1995, the Constitutional Court in Taiwan declared that the accused has the constitutional right to confront witnesses.[28] In 2003, Article 159 of the CCP was amended to regulate the hearsay rule and reinforce the defendant's right of confrontation. It provides that out-of-court statements by any person other than the defendant are inadmissible unless otherwise provided by law. Under the new provision, witness statements at the police station are not admissible unless they comply with certain exceptions. However, under Article 159-1, statements by a witness 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.

d. The right to privacy

Before 2001, a prosecutor had the authority to issue search and seizure warrants.[29] It was a prosecutor, not the court, to whom the police applied for search and seizure warrants. If a prosecutor himself conducted a search or seizure, he did not need a warrant even when there were no exigent circumstances.[30] The Legislature reduced the prosecutor's power to issue search warrants in 2001.

At present, except in exigent circumstances or otherwise provided by law,[31] a prosecutor may not conduct searches or seizures without a warrant from the court, nor authorize the police to conduct searches or seizures. No warrant shall be issued without a probable cause. Violation of the requirements could lead to the exclusion of evidence as described above.

C. Consequences of Misuse or Abuse of Power and/or Infringement of Fundamental Rights

Before 1998, evidence that was the result of an illegal search or seizure was certainly admissible at trial. Except for the exclusion of confessions obtained through torture or other improper methods, the Code did not have provisions allowing the trial court to exclude physical evidence under any circumstances. Whether the evidence was illegally obtained was always a different issue in which a trial judge had no interest or obligation to investigate as long as he could find out the truth of the case.

[28] The Interpretation 384 of Grand Justice.
[29] Before 2001, CCP Article 128, Section III provided: "A search warrant shall be signed by a prosecutor during investigation...."
[30] The old CCP Article 129: "A prosecutor or judge may personally conduct a search without a search warrant. *But* he shall show his identification card."
[31] Such as searches incident to a lawful arrest or searches with consent.

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.[32] The Court based its decision on constitutional mandates that liberty cannot be infringed without due process of law, and that the 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. Article 416, amended in 2001, provides that upon petition by those who were 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, requiring 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 it is 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 provisions. 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 public interest.

Before 2002, there was no mechanism to check whether a prosecutor had abused his discretion to prosecute. When a prosecutor files a prosecution, he must send his whole file, including all exhibits and evidence, to the court.[33] The transferral of the file means the completion and end of the prosecutor's investigation. Before 2002, even if a court found that a prosecuted case was not supported by sufficient evidence, it still had to open the trial and find out the truth.

In 2002, under strong protests from prosecutors, Article 161 Section 2 was added to "prevent hasty, malicious, improvident, and oppressive prosecutions, and to protect the

[32] Supreme Court, 87 Tai Sun 4025.
[33] CCP Article 264, Section III: "When a prosecution is initiated, the file and exhibits shall be sent to a court."

person charged from open and public accusation of crime, to avoid, for both the defendant and the public, the expense of a public trial, 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."[34] 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 existence of this provision is certainly justified, but most scholars believe it was very poorly drafted. Firstly, 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. Secondly, 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.

D. State of Emergency and Derogation from Obligations under Human Rights Treaties

Under Article 39 of the Constitution, the President may declare martial order according to the Martial Law. The President's martial order has to be passed or approved by the Legislative Authority. The Military court has jurisdiction over civil servants for many offences. People's freedom of speech, communication, and physical freedom could be restricted.

5. RECENT LEGAL CHANGES AFFECTING HUMAN RIGHTS

Several laws were passed in the past few years to protect the safety of victims and to prevent their dignity from being infringed in public by the defendant's vigorous cross-examination at trial.

The *Sexual Assault Crime Prevention Act* has taken many measures to protect victims of sexual offences from being humiliated or re-victimised at trial. Trials are required to be

[34] Rosenberry, J. in *Thies v. State*, 189 N.W. 539 (Wis. 1922).

open to the public except in situations where they will interfere with national security, public order or morality. Since its promulgation in 1997, the Sexual Assault Crime Prevention Act has provided that trials of sexual assault crimes are not open to the public unless victims agree.[35]

Under the *Sexual Assault Crime Prevention Act*, a trial judge has the discretion to order the examination of the victim to be carried out outside the courtroom. The defendant can still hear or see the examination of the victim via technical equipment, such as audio or video transmission or any other suitable means. However, a trial judge *must*, under the Act, take the above measure if a victim is unable to speak freely or completely at trial due to mental disability or (the risk of) physical or psychological injury.

Other Taiwanese laws aimed at protecting witnesses have the same effect of protecting victims. For example, the *Organized Crime Prevention Act* of 1996 provides two major protections for witnesses at trial. Firstly, a defendant is denied knowledge of the identity of the witness. Under the CCP, a defendant, after being prosecuted, has the right of access to the whole file and evidence of the investigation. This right allows a defendant to know the identity and address of every witness. To protect a witness's safety, the *Organized Crime Prevention Act* requires that any information containing the name, sex, date or place of birth, or any other information capable of identifying the witness shall be sealed by prosecutors or judges. Defendants have no access to the above information. In practice, witnesses' real names normally will be replaced with the letters A, B, or C. Secondly, a defendant is sometimes denied the right of confrontation. As stated above, a defendant has the constitutional right to confrontation. However, the *Organized Crime Prevention Act* provides that a trial judge, upon his own motion or petition by a witness or victim, may deny a defendant's request to confront his witness when there are facts sufficient to justify an apprehension that the victim or witness may be subject to violence, coercion, intimidation or other retaliatory actions. In such a situation, a trial judge may also deny a defence lawyer's reviewing, copying, or video taping any information or documents capable of identifying the said victim or witness.[36] The constitutionality of the above provisions in the *Organized Crime Prevention Act* is unknown yet, though the practice is commonly followed in Taiwan.

[35] Article 18 of the *Sexual Assault Crime Protection Act*.
[36] Article 12 of the *Organized Crime Prevention Act*.

The *Witness Protection Act* of 2000 gives witnesses/victims positive and concrete protections. Under the Act, if the life, body, freedom or property of a witness/victim, or a person who is closely related to such a witness/victim, is in jeopardy due to his or her testifying before the prosecutor or the court, the witness or victim may apply to the prosecutor or the court for a protective order. A prosecutor or a trial judge may, upon his own motion, also issue a protective order. In an emergency, a prosecutor or a judge may even take necessary preliminary measures to protect a witness if the protective order is cannot be issued in time.