Article

The Right to Counsel of in Custody Suspects in Taiwan

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ABSTRACT

In response to the development of protection of human rights, Judicial Yuan, Taiwan R.O.C. [hereinafter J.Y.]) Interpretation No. 654 (January 23rd, 2009) changed Taiwan's criminal proceedings. It held that Article 23 Paragraph 3, and Article 28 of the Detention Act in Taiwan, which provided that when a counsel visits the accused in custody, the visitation shall be under surveillance and audio-recording without considering whether such surveillance complies with the purpose of detention or is necessary in maintaining the order of the detention facility or not, violated the principle of proportionality under Article 23 of the Constitution in Taiwan and was inconsistent with the meaning and purpose to protect the right to litigate under Article 16 of the Constitution, and therefore shall be ineffective.

Based on the above-mentioned judicial interpretations and J.Y. Interpretation No. 720 (May 16th, 2014), this article analyzes the right of visitation and correspondence between the defendant attorney and the accused in custody (e.g., the right to counsel of in custody suspects) under the Detention Act and the Code of Criminal Procedure in Taiwan through comparative law perspectives. By exploring problems in practice, this article will provide solutions as future legislative and amending proposals.

Keywords: *the Right to Counsel, Interview or Correspond with Counsel, Restrictions Writ, Custodial Interrogation, Admissibility of the Evidence, Counter Appeal*

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I. PREFACE

A. *Origin*

The Code of Criminal Procedure in Taiwan[1] [hereinafter CCP] allows a counsel to obtain access to files and evidences, communicate with the suspect or defendant, be present during witness examinations and other occasions, state opinions, provide defense in court, investigate evidence, lodge objections, cross examine and appeal, etc.[2] From the above-mentioned, functions which have recently been the center of attention among legal professionals is the counsel's right of visitation and correspondence (also called the suspect's right to counsel) with the suspect (not under detention) and the defendant under detention. This has often been ignored in previous academic discussions, leading to the unfamiliarity of prosecutors and police and resulting in conflicts between attorneys, prosecutors, police or detention centers while interviewing a suspect or a defendant.[3] Based on practical observation, this article introduces and provides recommendations for this unsolved controversial issue.

B. *Background and Research Motivation*

Before the amendment made on May 13th, 2009, the Detention Act[4] Article 23 and 28 in Taiwan provided that:

> Article 23:
>
> A person, who applies to grant a visitation with a defendant, shall state clearly their full name, occupation, age, and residential address, the main content of interview, the name of defendant and the relationship with defendant.
>
> Officials of the detention house shall supervise the visitation when it is granted to process.
>
> Lawyer who applies to grant a visitation with a defendant, shall also

1. Xingshi Susong Fa (刑事訴訟法) [The Code of Criminal Procedure] (promulgated Jul. 28, 1928, effective Sept. 1, 1928, as amended Feb. 4, 2015) (Taiwan).

2. *See e.g.,* LIN YU-HSIUNG (林鈺雄), XINGSHI SUSONG FA: SHANG CE (刑事訴訟法(上冊)) [CODE OF CRIMINAL PROCEDURE, VOL.1] 221 (2010); WU JUN-YI (吳俊毅), BIANHUREN LUN (辯護人論) [A STUDY OF THE ROLE OF COUNSEL] 25-29, 44-48, 83-177 (2009).

3. Criminal procedure in Taiwan classifies the accused as "suspect" under investigation in police station and "defendant" under investigation in prosecutors' office or in court. This classification is different from in the US and Japan. To avoid confusion and be in conformity with American and Japanese criminal procedures, this article will classify "suspect" and "defendant" by the time of prosecution.

4. Jiya Fa (羈押法) [Detention Act] (promulgated Jan. 19, 1946, effective Jun. 10, 1947, as amended May 26, 2010) (Taiwan).

apply in the preceding paragraph.

Article 28:

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.

Despite the rights of defendants, the law did not authorize the suspects to have rights to freely interview or correspond with their counsels unrestrictedly and privately. However, along with expanding right to defense of attorneys, procedural questions have arisen at three stages in recent years:

1. If a suspect was arrested under investigation and hired an attorney, could the counsel interview the suspect immediately other than be present and state opinion during investigation? (CCP Article 95, 245)[5]
2. If the case was sent to a competent prosecutor, could the counsel privately interview the suspect?
3. If the suspect or defendant is under custody in a detention center, could the counsel privately interview with the suspect?

In Taiwan, the power of the Justices of the Constitutional Court consists of providing rulings on Interpretation of the Constitution and Uniform Interpretation of Statutes and Regulations of cases. J.Y. (Judicial Yuan, Taiwan R.O.C.) Interpretation No. 654[6] made by Honorable Justices (January 23rd, 2009) aroused attention on suspects' right to counsel; nevertheless, this interpretation only solved the problem at stage 3, which is the suspects or defendants' right to counsel while in a detention center or prison. The Legislative Yuan passed an amendment of the Detention Act by third reading on April 28th, 2009 and put it into effect on May 15th, 2009; it also passed an amendment of the CCP by third reading on June 1st and put it into effect on June 25th, 2010, which included the right to counsel of the suspect (not under detention) and the defendant under detention. Even so, the interpretation conflicts with procedures in practice. This issue and its remedies are strongly connected with human rights protection.

In addition, J.Y. Interpretation No. 653 (December 28th, 2008)[7] held that: "Article 6 of the Detention Act, and Article 14, Paragraph 1, of the

5. The Code of Criminal Procedure §§ 95, 245 (Taiwan).

6. Sifa Yuan Dafaguan Jieshi No. 654 (司法院大法官解釋第654號解釋) [Judicial Yuan Interpretation No. 654] (Jan. 23, 2009) (Taiwan).

7. Sifa Yuan Dafaguan Jieshi No. 653 (司法院大法官解釋第653號解釋) [Judicial Yuan Interpretation No. 653] (Dec. 28, 2008) (Taiwan).

Enforcement Rules for Detention Act[8] denying a detainee opportunity to litigate in court for judicial remedies is contradictory to the intent of Article 16 of the Constitution of R.O.C.[9] guaranteeing people the right of instituting legal proceedings. The government shall study and revise the Detention Act and relevant regulations within two years from the date of publication of this Interpretation to provide the detainee a timely, effective remedy in accordance with the intention of this Interpretation." J.Y. Interpretation No. 720 (May 16th, 2014)[10] made an additional interpretation that during the two-year period the detainee could apply *mutatis mutandis* Article 416 of the CCP about the regulations of quasi interlocutory appeal to look for remedy. It brought out the research motivation of this article.

II. COMPARATIVE LAW

To provide a broader and deeper analysis of this issue, this article will first simply introduce relevant international conventions and similar regulations in Japanese and American criminal procedures, then analyzes the academic and practical aspects.

A. *Regulations in International Conventions*

International conventions which have general regulations about suspects' right to counsel, such as:

1. International Covenant on Civil and Political Rights, UN.[11]
   Paragraph 3(b) of Article 14:
   In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.
2. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, UN.[12]

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8. Jiya Fa Shixing Xize (羈押法施行細則) [Enforcement Rules of the Detention Act] (promulgated Jan. 19, 1946, effective Nov. 27, 1976, as amended Sept. 23, 2005) (Taiwan).

9. ZHONGHUA MINGUO XIANFA (中華民國憲法) [CONSTITUTION OF R.O.C.] § 16 (1947) (Taiwan).

10. Sifa Yuan Dafaguan Jieshi No. 720 (司法院大法官解釋第720號解釋) [Judicial Yuan Interpretation No. 720] (May 16, 2014) (Taiwan).

11. International Covenant on Civil and Political Rights § 14 (b), Dec. 16, 1966, 999 U.N.T.S. 171.

12. G.A. Res. 43/173, annex, U.N. GAOR Supp. No. 49, U.N. Doc. A/43/49, at 298 (Dec. 8, 1988).

Principle 18:

(a) A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

(b) A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

(c) The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

(d) Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

(e) Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

3. Standard Minimum Rules for the Treatment of Prisoners, UN.[13]
Article 93:
For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

4. Basic Principles on the Role of Lawyers, UN.[14]
Article 8:
All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception

13. First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August-3 September 1955: report prepared by the Secretariat (United Nations publication, Sales No. 1956.IV.4), annex I.A; and Economic and Social Council resolution 2076 (LXII); On 17 December 2015 a revised version of the Standard Minimum Rules were adopted unanimously by the 70th session of the UN General Assembly (G.A. Res. 70/175, §§ 119, 120, U.N. Doc. A/70/490 DR II (Jan. 8, 2016)).

14. The Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

> or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.
>
> Article 16 (a):
> Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
>
> Article 22:
> Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

United Nation conventions described above provide that the imprisoned has the right to interview with his counsel along with monitoring; such consultations may be within sight, but not within hearing. The imprisoned and his counsel also have the right to request for a meeting without tapping, checking and complete secrecy. However, in exceptional situations when social safety and public order are involved, limitations and prohibitions of right to counsel are allowed under legal reservation principle, in order to reach a balance between human rights protection and public interests.

Following are brief introductions about source of receptions of Taiwanese law: Japanese and American legal systems, to further elaborate on relevant problems and solutions.

B. *Japanese and American Criminal Procedures*

1. *Introduction of the Japanese System*

Practically, the counsel of a suspect can neither be present during investigation by police or by prosecutors. Firstly, Article 39 Paragraph 1 of the Code of Criminal Procedure of Japan[15] is only a supplementary regulation for the suspect to interview or correspond with the counsel without guards. Secondly, Paragraph 2 of the same article indicates that in order to avoid escape, evidence spoliation or interference of detention's safety, necessary court limitation or regulations regarding restrictions and prohibitions are needed when a suspect interviews with the counsel. Lastly, Paragraph 3 provides that prosecutors, public prosecuting affairs officials, judicial police officers, and judicial policemen may designate date, place and

15. Keiji soshō hō [Keisohō] [C. Crim. Pro.] 2014 (Japan), http://www.ron.gr.jp/law/law/keiji_s1.htm (last visited Feb. 24, 2015).

time of interview and correspondence between suspect and counsel during investigation. Accordingly, Act on Penal Detention Facilities and Treatment of Inmates and Detainees[16] Article 116 regulates that the staff of detention center can make video or audio recordings when the defendant interviews with people other than counsel; Article 117 (applies *mutatis mutandis* Article 113) provides specific limitation regarding interview and correspondence between suspect and counsel, and allows the authorities to discontinue the interview when the interview "endangers the order and safety of criminal facilities" and "perish evidence;" Article 118 stipulates time and location limitation of interview in a situation which "endangers the order and safety of criminal facilities". However, video or audio recording permission is not included.

Practically and theoretically, the right to counsel is not free of limitations in Japan; under "necessary situations" to interrogation, for example, when an interview will interrupt the interrogation (including during interrogation or just prior to starting an interrogation) [17] or will obstruct investigation significantly (such as during inspection or body examination), the investigating authorities can designate date, place and time of interview between suspect and counsel.[18] On the other hand, the Supreme Court of Japan once delivered an opinion that when the counsel applies for interview with a suspect for the first time, regarding the protection of the suspect's right to counsel, the interrogating authorities shall suspend interrogation in order to fulfill interview requirements.[19] The interrogating authorities can appoint specific time and place for interview by phone calls, oral conversations or in written forms.[20] To conclude, on the legal balance,

16. Keiji shūyō shisetsu oyobi hi shūyō sha tō no shogū nikansuru hōritsu [Act on Penal Detention Facilities and Treatment of Inmates and Detainees], Act No. 50 of 2005 (Japan), http://law.e-gov.go.jp/htmldata/H17/H17HO050.html (last visited Feb. 24, 2015).

17. *E.g.* Sendai Kōtō Saibansho [Sendai High Ct.] Apr. 14, 1993, Hira 4 (kudari ke) no. 228 (Japan) & Saiko Saibansho [Sup. Ct.] Feb. 22, 2000, Hira 5 (o) no. 1189 (Japan).

18. *See* IKEDA OSAMU & MAEDA MASAHIDE (池田修 & 前田雅英), KEIJI SOSHŌ HŌ KŌGI DAI 3 HAN (刑事訴訟法講義 第3版) [CODE OF CRIMINAL PROCEDURE LECTURE 3rd ed.] 183 (2010); TAGUCHI MORIKAZU (田口守一), KEIJI SOSHŌ HŌ DAI 5 HAN (刑事訴訟法 第5版) [CODE OF CRIMINAL PROCEDURE 5th ed.] 140 (2010); SHIRATORI YUJI (白取祐司), KEIJI SOSHŌ HŌ DAI 5 HAN (刑事訴訟法 第5版) [CODE OF CRIMINAL PROCEDURE 5th ed.] 185 (2008); YASUTOMI KIYOSI (安冨潔), KEIJI SOSHŌ HŌ (刑事訴訟法) [CODE OF CRIMINAL PROCEDURE] 216-17 (2009); Suzuki Hideyuki (鈴木秀行), *Sekken Kōtsū Shitei no Yōken* (*接見交通指定の要件*) [*The Conditions of Assign Interview or Correspond with Counsel*], *in* Keisatsu Kihon Hanrei Jitsumu 200 Bessatsu Harei Taimuzu 26 Gō (警察基本判例・実務200 別冊 判例タイムズ26号) [Precedent Times No. 26: 200 Basic Precedents and Practice of Police Officers] 326, 326-27 (2010); Itō Eiji (伊藤栄二), *Kiso Go no Yozai Sōsa to Sekken Shitei* (*起訴後の余罪捜査と接見指定*) [*Another Criminal Investigation After Prosecution and Assign Interview*], *in* KEISATSU KIHON HANREI JITSUMU 200 BESSATSU HAREI TAIMUZU 26 GŌ (警察基本判例・実務200 別冊 判例タイムズ26号) [PRECEDENT TIMES NO. 26: 200 BASIC PRECEDENTS AND PRACTICE OF POLICE OFFICERS] 330, 330-31 (2010).

19. Saiko Saibansho [Sup. Ct.] June 13, 2000, Hira 7 (o) no. 105 (Japan).

20. Saiko Saibansho [Sup. Ct.] May 10, 1991, Akira 58 (o) no. 379, Akira 58 (o) no. 381 (Japan).

governmental powers to investigate or penalize the suspect have absolute priority over the suspect's right to counsel. [21]

The suspect who appears by his free will can freely interview or correspond with counsel because his body is unbounded; however, if he is under interrogation, practically, the counsel is not allowed to accompany or state opinions for the suspect; they can meet only after interrogation thereof. Due to *mutatis mutandis* application of the concept "to avoid significant obstacles to interrogation," this limitation is deemed within the scope of "reasonable extent in society's common sense."[22]

With respect to interview after prosecution (the defendant is under detention), in former cases, the Supreme Court of Japan provided that the prosecutor has the right to assign interview, this right is covered by the scope of the Code of Criminal Procedure of Japan Article 39. Nonetheless, the Supreme Court had overruled their opinion that Article 39 of the Code of Criminal Procedure of Japan applies only "before prosecution"; some scholars even claim that the application of the article shall be more limited, only under circumstances when the suspect is arrested with or without warrant and his body is bounded; because the case is not under the control of the prosecutor anymore after prosecution, the prosecutor no longer has the power of investigation, and interview will not interrupt interrogation or obstruct investigation (strictly separate, suspect in pre-prosecution stage and defendant after prosecution). Therefore the suspect's right to counsel shall be "freely exercised," and investigation authorities have no right to assign or appoint interview.[23]

If the limitation of the defendant's right to counsel violates the right to defend, Japanese courts tend not to deny the admissibility of the suspect's confession directly, but evaluate background situations case-by-case (which

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21. *See* Shībashi Takayuki (椎橋隆幸), *Sekken Kōtsū Ken Shitei no Gōken Sei* (*接見交通権指定の合憲性*) [*Constitutionality of Assign Interview*], *in* KEISATSU KIHON HANREI JITSUMU 200 BESSATSU HAREI TAIMUZU 26 GŌ (警察基本判例・実務200 別冊 判例タイムズ26号) [PRECEDENT TIMES NO. 26: 200 BASIC PRECEDENTS AND PRACTICE OF POLICE OFFICERS] 322, 322-25 (2010).

22. Hisakimoto Shin (久木元伸), *Nini Dōkō Chū no Bengo Jin to no Menkai* (*任意同行中の弁護人との面会*) [*The Suspect Who Appears by His Free and Interview or Correspond with Counsel*], in KEISATSU KIHON HANREI JITSUMU 200 BESSATSU HAREI TAIMUZU 26 GŌ (警察基本判例・実務200 別冊 判例タイムズ26号) [PRECEDENT TIMES NO. 26: 200 BASIC PRECEDENTS AND PRACTICE OF POLICE OFFICERS] 328, 328-29 (2010) (The dissenting opinion states that, when a counsel apply for an interview, the investigation organization has the obligation to deliver this application to the suspect, the voluntary investigation must be suspended; it depends on the suspect whether to accept the interview or not, because he is unbounded and still keeps his free will); *See* Fukuoka Koto Saibansho [Fukuoka High Ct.] Nov. 16, 1993, Hira 4 (ne) no. 3567, Hira 4 (ne) no. 3564 (Japan).

23. *See* Itō, *supra* note 18 (Japanese academics who advocated this claim for example: Kifuji Shigeo (木藤繁夫), Idei Yoshio (出射義夫), Aoki Eigorō (青木英五郎), Yukio Shimomura (下村幸雄), Kawamura Sumio (河村澄夫), Furukawa Minoru (古川実), Ishimatsu Takeo (石松竹雄), *ect.*).

is different from direct denial of the confession's admissibility by U.S. courts). In other words, Japanese courts consider the violation of right to counsel and the admissibility of confession to be unrelated, most judgments have held such confessions still admissible; thus urging the counsels to bring litigations of state compensation, so as to emphasize the degree of illegal violations of peoples' right, arouse public pressure and to force investigation authorities to be more cautious in future similar cases at the same time.[24]

2. *Introduction of the American System*

Under U.S. regulations, if a man is facing police interrogation as a "suspect," his lawyer can be present under Miranda Warning authorized by the Fifth Amendment to the U.S. Constitution, the privilege against self-incrimination;[25] if he is under interrogation as a "defendant," then his lawyer can be present pursuant to the right to counsel as authorized by the Sixth Amendment to the U.S. Constitution.[26]

The application of *Miranda v. Arizona* under U.S. law distinguishes whether the police interrogate the suspect under custody or not.[27] If it is custodial police interrogation, Miranda requires the police to appoint a counsel to a suspect who asks for one if the police want to interrogate him due to the suspect's privilege against self-incrimination under the oppressive atmosphere to his free will; as to operating the privilege, the suspect has the right to counsel. Therefore, if the suspect requests to be accompanied and assisted by a counsel, police shall suspend the interrogation immediately, continue after the counsel arrives and accompanies the suspect during the entire process, and ensures the suspect has been entitled to communicate or consult with the counsel; if the interrogation has not been suspended and occurs against the suspect's will, the confession obtained has no admissibility (different from Japanese courts who emphasize convenience of investigation).[28]

On the other hand, if the suspect accepts the interrogation voluntarily with the right to interrupt interrogation at any time while his body is not bounded, then the police need not to inform the suspect about the Miranda Warning, therefore the suspect's right to counsel (in regards to appointing a

24. *See* FUJINAGA KŌJI (藤永幸治) ET AL., DAI KONMENTĀRU KEIJI SOSHŌ HŌ DAI ICHI KAN (大コンメンタール刑事訴訟法　第一巻) [LARGE KONMENTARU CODE OF CRIMINAL PROCEDURE, VOL.1] 423 (2003); *see also* Suzuki, *supra* note 18; Hisakimoto, *supra* note 22.

25. DAVID W. NEUBAUER & HENRY F. FRADELLA, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 289 (2011).

26. Gideon v. Wainwright, 372 U.S. 335 (1963); *see also id.* at 162-63.

27. Miranda v. Arizona, 384 U.S. 436 (1966).

28. *Id.* at 469-74; Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); *see also* JEFFERSON L. INGRAM, CRIMINAL PROCEDURE: THEORY AND PRACTICE 310-36 (2009).

counsel to a suspect) will not be an issue.[29] The right to counsel, derived from the privilege against self-incrimination provided by the Fifth Amendment, applied only to the federal government in the beginning; after *Malloy v. Hogan* in 1964, the Supreme Court held that it applies to every state government.[30]

The right to counsel as provided in the Sixth Amendment to the U.S. Constitution is applicable to all states as held by the U.S. Supreme Court in *Gideon v. Wainwright*.[31] Another important question derived from this case is the timing of the right to counsel in criminal procedures. In the Sixth Amendment the right to counsel applies "in all criminal prosecutions," namely, during all investigations, prosecutions and trials. The Supreme Court adopts the "critical stages test" to determine where substantial rights of the accused may be affected, and the suspect needs the "guiding hand of counsel."[32] The reason is to protect the defendant from a guilty sentence resulting from his ignorance of legal and constitutional rights (especially in rules of evidence).[33] According to academic description, "a critical stages is when the suspect or defendant is requested to make a decision which may lead to unfavorable situation to him."[34]

Specifically, the suspect or defendant's right to counsel as protected by the Fifth and Sixth Amendments to the U.S. Constitution applies as follows to criminal procedures before sentencing:[35]

(a) Commit a crime, arrest, charge laid, lineup identification (pre-indictment), identification procedure, and photographic array for identification: no lawyer required.
(b) Initial appearance before judge and bail interrogation: lawyer required if it is critical stage.
(c) Preliminary hearing, arraignment, interrogation (post-indictment), lineup identification (post-indictment), plea bargaining, at trial and sentencing: lawyer required.
(d) Custodial Interrogation (pre-indictment): according to *Miranda* case, lawyer required if requested.

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29. Escobedo v. State of Illinois, 378 U.S. 478, 497 (1964); *see also* NEUBAUER & FRADELLA, *supra* note 25, at 288; INGRAM, *id*. at 311.

30. Malloy v. Hogan, 378 U.S. 1 (1964); *see also* INGRAM, *id*. at 17, 311.

31. *Wainwright*, 372 U.S. 335; *see also* NEUBAUER & FRADELLA, *supra* note 25, at 162-63; INGRAM, *id*. at 24.

32. Mempa v. Rhay, 389 U.S. 128 (1967); *see also* NEUBAUER & FRADELLA, *supra* note 25, at 164; INGRAM, *id*. at 24, 373, 383.

33. Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

34. STEVEN L. EMANUEL & STEVEN KNOWLES, EMANUEL LAW OUTLINE: CRIMINAL PROCEDURE 321 (1998-99).

35. *See* NEUBAUER & FRADELLA, *supra* note 25, at 166. INGRAM, *supra* note 28, at 310-36, 372-85, 435-38.

If the police disobey the above legal protections of right to counsel, the suspect or defendant can bring objection forward immediately, and any confession made will be inadmissible unless the police can prove that the suspect or defendant competently, intelligently and voluntarily abandoned his right to counsel.[36] Principally, the interview between the suspect or defendant and the lawyer shall not be recorded or monitored in order to assure the essence of effective defense.

III. INTRODUCTION OF THE TAIWANESE SYSTEM

A. *Before the Amendment*

It is necessary to introduce related legal regulations and practical developments in order to enhance reader understanding. In response to the development of the above issue in the practice of Taiwan criminal procedure, so as to ensure the visit between the suspect and the counsel is undisturbed, the Ministry of Justice notified the agencies of corrections, such as prisons, detention centers, reform schools, skill training institutes and juvenile detention houses, the rule of inmate-lawyer interview in January 1995.[37] However, due to upsurge of public concern toward human right protection, the conduct that correction agencies were undertaking such as audio taping, video recording, hearing or supervising the progress of interview has been deemed as a violation of the right to counsel.[38] Therefore, in January 2008,

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36. *See Zerbst*, 304 U.S. at 468-69; *Arizona*, 451 U.S. at 485; North Carolina v. Butler, 441 U.S. 369, 373-74 (1979).

37. Zhonghua Ninguo Fawu Bu (中華民國法務部) [The Ministry of Justice of Republic of China], 84 Fa-Jian (法監) [Law-Prison Doc.] No. 01613 (1995) (*translated by* author: 1. inmates who are prohibited from visiting: (1) supervising: at the position which could be seen and heard; (2) written recording: record the content of conversation behind the defendant; (3) audio taping: record the whole process and storage the tape for a certain period of time; (4) instruments of recording: hidden; (5) inform the counsel in advance: "the conversation will be recorded since the inmate is prohibited from visiting." 2. Other inmates: (1) supervising: at the position which could be seen but could not be heard; (2) written recording: record the situation of interview).

38. *See e.g.,* Lin Yu-Hsiung (林鈺雄), *Zaiya Beigao Yu Lushi Jiejian Tongxin Zhi Quanli: Ouzhou Fa Yu Woguo Fa Fazhan Zhi Bijiao Yu Ping*xi (*在押被告與律師接見通信之權利－歐洲法與我國法發展之比較與評析*) [*The Defendant in Custody Right to Communicate with Counsel: Comparison and Evaluation of the Development of Law of European and Taiwan*], 102 TAIWAN BENTU FAXUE ZAZHI (台灣本土法學雜誌) [TAIWAN L.J.] 58, 58-84 (2008); Wang Chao-Peng (王兆鵬), *Guanche Pingdeng Yu Shizhi Zhi Bianhu Taidu* (貫徹平等與實質之辯護態度) [*Implementing Equality and Real Defense System*] 137 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [THE TAIWAN L. REV.] 104, 104-19 (2006); Wang Chao-Peng (王兆鵬), *Lushi Yu Dangshiren Zhi Mini Tequan* (*律師與當事人之秘匿特權*) [*Secrets Privilege of Lawyer and Client*], 50 XINGSHIFA ZAZHI (刑事法雜誌) [CRIM. L.J.] 1, 1-18 (2006); Wu Chun-Yi (吳俊毅), *Bianhuren Yu Beigao Jiaoliuquan Zhi Tantao—Touguo Jiejian Yiji Shiyong Shuxin Fangshi De Qingxing* (*辯護人與被告交流權之探討－透過接見以及使用書信方式的情形*) [*Discussion the Right to Counsel: Through the Circumstances of Received and Manner of Use of Letters*], 137 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [THE TAIWAN L. REV.] 133, 133-51

the Ministry of Justice notified subordinate prosecutor offices and agencies of corrections to follow due process while restricting interviews.[39] But this official document allows the prosecutors to assign staff to supervise, tape or record as a last resort. A defendant claimed that his constitutional right had been infringed, hence petitioning the Justices for constitutional interpretation.

B. *J.Y. Interpretation No. 654*

The aforementioned Article 23, Paragraphs 3, and Article 28 of the Detention Act are not in conformity with J.Y. Interpretation No. 654, and was therefore rendered ineffective as of May 1st, 2009.

According to the interpretation, principally, the essence for counsel to assist the criminal defendant in exercising the right to defend lies in their free and unrestricted communications, and is subject to constitutional protection. However, while exercising the aforementioned right of free and unrestricted communications may, under certain circumstances, be limited by law, such limitations must comply with the principle of proportionality under Article 23 of the Constitution.[40]

Based on this interpretation, this article found that:

1. When necessary to maintain order of detention centers and assure the purpose of detention, the mere visual monitoring without probing into the contents while interviewing is in conformity with the constitution.
2. Consistent with the interpretation, a detention center is allowed to examine the "appearance situation" of documents delivered between the suspect and the counsel to check whether any contraband is included when it is necessary to maintain the order of detention center.
3. Whether the right of the suspect or the defendant to freely communicate with their counsel shall be limited exceptionally, according to this interpretation, is "strictly internal supervisions within the administrative agency, not stipulation on the authorization

(2006); Tsai Chiu-Ming (蔡秋明), *Beigao Zhi Jiya Qijian Yu Zaiya Beigao Zhi Lushi Tongxunquan Ouzhou Renquan Fayuan Erdem v. Germany an Panjue Pingjie* (*被告之羈押期間與在押被告之律師通訊權歐洲人權法院Erdem v. Germany案判決評介*) [*Defendant in Custody and the Right to Counsel—Review the Case of Erdem v. Germany by the European Court of Human Rights*], 71 TAIWAN BENTU FAXUE ZAZHI (台灣本土法學雜誌) [TAIWAN L.J.] 125, 125-42 (2005).

39. *See* Zhonghua Ninguo Fawu Bu (中華民國法務部) [The Ministry of Justice of Republic of China], 97 Fa-Jian (法檢) [Law-Prosecutorial Doc.] No. 0970800236 (2008).

40. *See also Judicial Yuan Interpretation No. 654* (Yeh Pai-Hsiu (葉百修), Li Chen-Shan (李震山), Hsu Yu-Shiu (許玉秀), Hsu Tzong-Li (許宗力), Chen Shin-Min (陳新民), concurring) (Taiwan).

of eavesdropping or audio-recording, and, therefore, does not incur any issue on its constitutionality." However, the limitation of the suspect's right to counsel is connected with the right to defense in criminal procedure, which is broader than the relationship between the inmate and the detention center, and therefore shall be regulated by the CCP instead of the Detention Act.[41]

C. *After the Amendment*

In order to solve the above problems the Legislative Yuan passed the amendment on the Detention Act by third reading on April 28th, 2009 (in effect on May 15th, 2009), and also passed the amendment on the CCP on June 1st, 2010 (in effect on June 25th, 2010). The amendments include:

1. Detention Act Article 23 Paragraph 3 discarded
   Article 23 Paragraph 3, "lawyers who applies to grant a visitation with a defendant, shall also apply in the Paragraph 2." was discarded due to Interpretation No. 654, and has been transplanted to Article 23-1 for legal system completion.
   Paragraph 1 and 2 in the same article are unchanged, Paragraph 1 "A person, who applies to grant a visitation with a defendant, shall state clearly their full name, occupation, age, residential address, the main content of interview, the name of defendant and the relationship with defendant." This is a necessary management measure for detention centers, not a limitation to the right to counsel, and therefore applies to any visitation and interview. Paragraph 2, "Officials of the detention house shall supervise the visitation when it is granted to process." includes not only supervision but also taping, audio-recording and written recording (according to Interpretation No. 654). However, it applies only to normal visitation, interview between the defendant and the lawyer shall follow the updated Article 23-1.
2. Detention Act Article 23-1 updated
   The content of the article is: "During the visitation between a criminal lawyer and a defendant, Officers only can watch over but cannot listen, except for other specific regulations. (Paragraph 1) For

41. *See* Zhonghua Ninguo Fawu Bu (中華民國法務部) [The Ministry of Justice of Republic of China], *Guanyu Jiyazhong Beigao Wuzhangai Jiejian, Tongxin Wenti Zhi Huiying* (*關於羈押中被告無障礙接見、通信問題之回應*) [*Respond on the Right to Counsel of in Custody Suspects*], FAWU BU QUANQIU ZIXUN WANG (法務部全球資訊網) [THE WEB SITE OF MINISTRY OF JUSTICE] (Feb. 17, 2009), http://www.moj.gov.tw/ct.asp?xItem=148611&ctNode=27518&mp=001 (last visited Feb. 24, 2015).

maintaining the order and safety, all correspondence and documents between a criminal lawyer and a defendant will be examined except for other specific regulations. (Paragraph 2) The Paragraph 1 of Article 23 can be applied mutatis mutandis to a criminal lawyer's visitation with a defendant. (Paragraph 3)"[42] Reason[43] for this updated article are:

(a) Based on Interpretation No. 654 (including the opinions of the justices), so as to maintain the order in detention centers and the purpose of detention, during interview between the defendant and the lawyer, such consultations may be within sight, but not within the hearing, of law enforcement officials. The mere visual monitoring without probing into the contents is not in inconformity with people's right to litigation as protected by the constitution, and thus is updated in Paragraph 1.

(b) In line with the essence "may be within sight, but not within the hearing/ the mere visual monitoring without probing into the contents," the letters and communication documents "may be opened but not read" as regulated in Paragraph 2. Namely, for maintaining the order and safety of detention center, law enforcement officials are allowed to open and examine the letter and documents delivered between the defendant and the lawyer to check if contrabands are entrained. Here, the scope of contraband is wider than the Criminal Code in Taiwan[44], and refers to anything that may endanger the order and safety, such as needles, drugs, knifes, saws, ropes, guns, mobiles, alcohols, money and gambling instruments.

(c) Whether the right of the suspect or the defendant to freely communicate with their counsel shall be limited exceptionally, according to the interpretation, is "strictly internal supervisions within the administrative agency, not stipulation on the authorization of eavesdropping or audio-recording, and, therefore, does not incur any issue on its constitutionality." However, the limitation of the suspect's right to counsel is connected with the right to defense in criminal procedure,

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42. Detention Act § 23-1 *translated by* author.

43. *See also* Lifa Yuan (立法院) [The Legislative Yuan of Republic of China], *Jiya Fa Di 23 Tiao Zhi Yi Lifa Liyou* (*羈押法第二十三條之一立法理由*) [*Reason of the Amendment of Detention Act § 23-1*], LIFA YUAN FALU XITONG (立法院法律系統) [THE LAW DATA SYSTEM OF THE LEGISLATIVE YUAN] (2009), http://lis.ly.gov.tw/lglawc/lawsingle?005F5B1C71D10000000000000000140000000400FFFFFD00^018140980428^000A6002001 (last visited Mar. 31, 2016).

44. Zhonghua Minguo Xing Fa (中華民國刑法) [Criminal Code] (promulgated Jan. 1, 1935, effective Jul. 1, 1935, as amended Jun. 18, 2014) (Taiwan).

boarder than the relationship between the inmate and the detention center, therefore shall be regulated by CCP instead of the Detention Act.

(d) Detention Act Article 23 Paragraph 1 regulates normal visitation, lawyers shall also "state clearly their full name, occupation, age, residential address, the main content of interview, the name of defendant and the relationship with defendant." In Paragraph 3 of Article 23-1 repeats as a reminder and avoid misconceptions.

3. Article 28 of Detention Act discarded
   Article 28, "whatever the defendant said, did and the content of communications in detention center has reference value for trial shall be reported to the prosecutor or the judge." was discarded because it is beyond the Detention Act's regulating field of the managing relationship between the detention center and the suspect or defendant. It shall refer back to the CCP, and therefore the discussed article was discarded.
4. Article 34 of Detention Act amended and updated Article 34-1
   CCP Article 34 was amended into: "A defense attorney may interview and correspond with a suspect or an accused under detention, provided that if facts exist sufficient to justify an apprehension that such defense attorney may destroy, fabricate, or alter evidence or form a conspiracy with a co-offender or witness, such interviews or correspondence may be limited. (Paragraph 1) A defense attorney interview or correspond with a suspect or an accused under investigation shall not be limited; but the time of interview shall be within one hour, up to one time. Time spent in interview or correspondence shall not be counted against the twenty-four-hour limitation in Article 91 and Paragraph 2 of Article 93, provided that there is no unnecessary delay: (Paragraph 2) Under emergency situations and with reasonable considerations, the prosecutor may suspend it while appointing time and place of interview. The appointment shall not infringe the suspect and the attorney's right to defense protected by Article 245 Paragraph 2. (Paragraph 3)" In contrast to the limitation of interview with an "arrested suspect during investigation" which can be done by prosecutors, Article 34-1 formulates that limitation writ by judge is needed to limit interview with the "defendant under detention."
5. Remedies updated (counterappeal and quasi-counterappeal)
   Based on "where there is a right, there is a remedy," CCP Article 404 Subparagraph 3 and Article 416 Paragraph 1 Subparagraphs 3 and 4 updated that the defendant or suspect could seek remedy through counterappeal or quasi-counterappeal when he disagrees with the

ruling made by the court, judge or prosecutor to restrict his right to interview or correspondence with the counsel. This article agrees with this amendment, but it should be noted that the prosecutor is not qualified to bring a counterappeal or quasi-counterappeal to the court; since this system is designed for the defendant, suspect or lawyer to remedy for right infringements, a prosecutor has no right to be infringed, and therefore can only apply again but cannot seek a remedy. CCP Article 34-1 Paragraph 6 provides that the rulings are not appealable to the prosecutor, which is a special provision to CCP Article 403 Paragraph 1.

IV. ISSUES OF THE TAIWANESE SYSTEM AND RECOMMENDATIONS

The amendment basically imitates Japanese regulations. However, the Code of Criminal Procedure in Japan allows investigation authorities to apply limitation of interview without authority from the judge, while the Taiwanese prosecutor only has the authority during the period between arrest of the suspect until he is under custody, or a restriction writ signed by the judge is needed. Since some of the related problems are discussed as follows, this article suggests Taiwan legislative and judicial authorities to take Japanese and American approaches described above as references.

A. *Conflict of CCP Related Articles Applications*

CCP Article 245 Paragraph 2 contains the right for the defense attorney of an accused or suspect to be present and state his opinion when a public prosecutor, public prosecuting affairs official, judicial police officer, judicial policeman examines the accused or suspect; this may conflict with Article 34 Paragraph 2 and 3 (*i.e.*, when the defense attorney requests to interview or correspond with the suspect or defendant, such interview could be suspended but not limited principally). For example, if the defense attorney requests to interview with the suspect "immediately" while investigation authorities are asking key questions, does the rejection made by investigation authorities due to "litigation instruction" [45] constitute a violation of the suspect's right to counsel and the defense attorney's right to present an opinion statement as protected by Article 245 Paragraph 2 ?

According to this article, an investigation will be disturbed if too much technical issues were allowed, making the investigation process more

45. Investigation also plays an important part in criminal procedure, therefore prosecutor's instruction according to investigation sequence or strategy also belongs to "litigation instruction;" as the core issue of investigation, it is the prosecutor's inherent tight and shall be without any interference.

complicated and tedious, therefore investigation authorities will miss some crucial opportunities without effectiveness, and fail to reach the target of "crime control" in the end. In practice, investigation processes involves consideration of concerns such as the period of statute of limitation, urgency, orders, strategy and so on to make the investigation appropriate.[46] Hence, the Taiwan CCP referenced Japan's CCP Article 39 Paragraph 3 as introduced earlier, which allows the prosecutor to suspend and appoint the manner of interview under emergency situation with good cause. It is necessary to clarify that, here, the suspension or appointment are not ways of limitation (but could be remedied through counterappeal or quasi-counterappeal).[47]

B. *The Right to Counsel Shall Not Be Prohibited*

If facts exist sufficient to justify an apprehension that such defense attorney may destroy, fabricate, or alter evidence or form a conspiracy with a co-offender or witness, such interviews or correspondence may be limited according to Article 34 Paragraph 1. It should be noted that if the writ of detention is annotated "interview and correspondence prohibited" after the custody hearing, it refers to normal visitation in Article 105, not including the defense attorney; the defense attorney's right to interview can only be limited by Article 34.

Specific limitations regulated in the statutes, such as appointment of a detention center staff member to supervise, record or tape "openly,"[48] firstly, should be specifically stated in the limitation writ.[49] Secondly, supervising without hearing or opening letters without reading, are necessary management actions to ensure safety and order of the detention center, do not infringe the suspect or defendant's right to counsel, and therefore need not to be authorized by the court.

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46. *See* Yang Yun-Hua (楊雲驊), *"Bianhu Yu Renquan" Gongtinghui Xilie Yi, Yang Yun-Hua Jiaoshou Huiying Bufen* (*「辯護與人權」公聽會系列－楊雲驊教授回應部分*) [*"Defense and Human Rights" Public Hearings Series 1, Professor Yang Yun-Hua Comments*], organized by Sifa Yuan (司法院) [Judicial Yuan of Taiwan R.O.C.] (15, Dec., 2008).

47. When the suspect appears due to summon, voluntary surrender or voluntarily appearance, his physical freedom is not restrained, thus there is no need to concern problems of limitation of interview or correspondence.

48. Here the limitation refers to "openly" ones, that is, under the situation that the defendant and counsel know about the supervision; if it was "privately" recording or taping, according to Tongxun Baozhang Ji Jiancha Fa (通訊保障及監察法) [Communication Security and Surveillance Act] (promulgated and effective Jul. 14, 1999, as amended Jan. 29, 2014) (Taiwan), an interception warrant issued by the court is needed.

49. Interviews or correspondence between the counsel and the defendant may be limited by limitation writ issued by the court at trail or issued by the prosecutor during investigation. Practically, judicial police officials could only apply the writ through the prosecutor instead of apply to the court directly (critique will be described below).

Lay people may have difficulty understanding the reason why lawyers require private interviews since they are doing nothing illegal. In fact, interviews between the lawyer and the defendant includes discussion of defense strategy and interrogation skill; if the discussion was recorded or taped (the record may even be handed to the prosecutor), this would not only obstruct the right to counsel, but also violates the principle of equality of arms. Furthermore, an expectation of privacy is human nature, it should be considered reasonable.

C. *Communication, Action and Letters of the Accused in Detention Center*

Even though Article 28 of the Detention Act was discarded, there needs to be further elaboration on the question of whether evidence collected legally as agreed by the court (writ issued in advance or approval granted afterwards) such as the suspect or defendant's talks, behavior and content of communication, can be provided as support to prove the defendant's guilt in the present case. Or can they only be used to report crime committed in other cases[50] or as reference for period and scope of limitation for competent authorities?[51]

According to this article, this problem may not be solved by examining the provisions, since principally, "information legally gathered after acquired a writ issued by the court may be admitted as evidence." However, even if the provision stipulates that "if the supervision conducted has been canceled by the court, the court at trial may declare the information recorded inadmissible as evidence," admitting information obtained from supervision not concealed as evidence is still inappropriate because it may infringe on the defendant's right against self-incrimination and right to silence.[52] It may

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50. *See* Yang Yun-Hua (楊雲驊), *"Bianhu Yu Renquan" Gongtinghui Xilie Er, Yang Yun-Hua Jiaoshou Huiying Bufen* (*「辯護與人權」公聽會系列二－楊雲驊教授回應部分*) [*"Defense and Human Rights" Public Hearings Series 2, Professor Yang Yun-Hua Comments*], organized by Sifa Yuan (司法院) [Judicial Yuan of Taiwan R.O.C.] (10, Feb., 2009).

51. If there are facts sufficient to justify an apprehension that the accused may destroy, forge, or alter evidence, or conspire with a co-offender or witness, the prosecutor (when emergency) or the judge could limit the interview whether the facts are sufficient or not depend on what had the staffs found during the supervision. Furthermore, the counsel is allowed to interview with the defendant due to the defendant's right to defense "in the present case," thus the scope of interview should be focused on litigation procedure of the present case. If the purpose of interview is not for litigation preparation but for delivering information unrelated to the current case, intend to interfere justice in judicial proceeding, then it already exceeds legal responsibilities of a mandated counsel, hence the detention center is permitted to report supervision result in such situation to the prosecutor or judge as a reference of future interview limitations.

52. *See* Chen Yun-Tsai (陳運財), *"Bianhu Yu Renquan" Gongtinghui Xilie Er, Chen Yun-Tsai Jiaoshou Huiying Bufen* (*「辯護與人權」公聽會系列二－陳運財教授回應部分*) [*"Defense and Human Rights" Public Hearings Series 2, Professor Chen Yun-Tsai Comments*], organized by Sifa Yuan (司法院) [Judicial Yuan of Taiwan R.O.C.] (6, Feb., 2009).

be better to decide its legal effect case-by-case by the "relative exclusionary rule" in Article 158-4: "The admissibility of the evidence, obtained in violation of the procedure prescribed by the law by an official in execution of criminal procedure, shall be determined by balancing the protection of human rights and the preservation of public interests, unless otherwise provided by law."

The above amendments not only leave many problems unsolved,[53] but also results in some interview requests being obstructed or rejected because investigation authorities were unfamiliar with the operation of the new system. This article will discuss major issues and propose solutions as below.

D. *The Right to Counsel during Judicial Police (Officer) Investigation: Authorizing the Judicial Police Officers to Appoint Limitations while Offering Remedy Mechanism in CCP*

After the suspect is arrested with or without warrant, he will initially face investigation by the judicial police (officer). However, CCP Article 34 Paragraph 2 and 3 do not provide any regulations regarding interview and correspondence during judicial police (officer) investigation, only simply explains in *ratio legis* that "If there is need for judicial police (officer) to make such decision of suspension or appointment (of interview), it should be reported to prosecutor." Due to this being a suggestion without binding force, the counsel's request for private interview with the suspect based on CCP Article 34 Paragraph 2 in the police bureau is often rejected or delayed due to excuses such as investigation interruption,[54] even leading to outbursts

53. *See* Lin Yu-Shun (林裕順), *Cong Dafaguan Shizi Liuwusi Hao Jieshi Lun "Jiejian Jiaotongquan" Jianping Xingsu Fa Di Sansi Tiao Zengxiu Caoan* (*從大法官釋字六五四號解釋論「接見交通權」兼評刑訴法第三四條增修草案*) [*Review "Received Communication Rights" from J.Y. Interpretation No. 654—and Comments on the CCP Upgrading Draft Article 34*], 139 TAIWAN BENTU FAXUE ZAZHI (台灣本土法學雜誌) [TAIWAN L.J.] 49, 49-64 (2009); Lin Yu-Shun (林裕順), *"Gongfei Bianhu" Lunli Yu Yunyong Zhi Yanjiu: Jianping "Jiejian Tongxin" Xiufa Xinzhi* (*「公費辯護」論理與運用之研究－兼評「接見通信」修法新制*) [*A Study of "Publicly Funded Defense" Theory and Application: and Review the New Amending Law "Received & Communication" System*], 14 QUANGUO LUSHI (全國律師) [TAIWAN B. J.] 48, 48-61 (2010); Lin Yu-Shun (林裕順), *Jiejian Jiaotong "Yingran" "Shiran" Tantao: "Jingxun Bianhu" Shizheng Fenxi Yanjiu* (*接見交通「應然」「實然」探討－「警詢辯護」實證分析研究*) [*To Explore the Ideal and Factual of Received & Communication: Empirical Research and Analysis of Defense of Police Officer Examination*], 192 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [THE TAIWAN L. REV.] 29, 29-44 (2011).

54. CHEN YUN-TSAI (陳運財), XINGZHENG YUAN GUOJIA KEXUE WEIYUANHUI BUZHU ZHUANTI YANJIU JIHUA: ZHENCHA BIANHU ZHIDU ZHI YANJIU: YI JIEJIAN TONGXIN QUAN YU ZHENXUN ZAICHANG QUAN WEI ZHONGXIN (行政院國家科學委員會補助專題研究計畫：偵查辯護制度之研究－以接見通信權與偵訊在場權爲中心) [RESEARCH REPORT SPONSORED BY NATIONAL SCIENCE COUNCIL, ADMINISTRATIVE YUAN: THE RESEARCH OF THE DEFENSE SYSTEM DURING INVESTIGATION: THE RIGHT TO COMMUNICATION AND THE RIGHT TO PRESENT] 31-32 (2011) (according to the empirical study made in the report, in the period of February to May 2011, a

of physical and verbal violence;[55] but judicial police (officer) rarely follow the *ratio legis* to report to the prosecutor when they decide on suspension or appointment.

This situation leads to results unfavorable to the suspect and lawyer since the lawyer is not able to confirm the case fact and providing psychological or legal assistance at the first instance,[56] thus failing to achieve the *legis* purpose of the system. Moreover, behaviors of judicial police (officer) are not measures made by prosecutor, thus no remedy is available.[57] Even though the denial of evidence admissibility like in the American system described above is a possible way to address this issue, nevertheless, it falls under the evidence exclusionary rule at the trial proceeding, but problems in investigation proceedings still exist.

For the questions arising in relation to the fact that requests of physically bounded suspects for interview with counsel are often being refused for no reason and without remedies, due to cultural similarities between Taiwan and Japan, this article suggests that Japan's CCP Article 39 Paragraph 3 could be a good model: it allows judicial police officers to have the same authority to suspend the interview while appointing time and place of interview under emergency situations during investigation. However, since the prosecutor is responsible for the investigation, the prosecutor shall be informed through phone call, fax or in written form. The right to counsel of the suspect can be fully ensured while fulfillment of investigation can also be practiced at the same time in this way.

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questionnaire was sent out to 626 lawyers, 116 effective responses received. The analysis shows that, before the amendment, 54.3% of the respond lawyers had "asked" for interview with the suspect or defendant, but only 8% had been immediately permitted for interview; if rejected, the main reasons are "conspire with a co-offender or witness" (44.4%) and "jeopardize the efficiency of investigation" (25.6%). After amendment, on the other hand, lawyers permitted for interview only increase into 17.8%, still 54.8% had been rejected under reasons like "conspire with a co-offender or witness" (36.4%) and "jeopardize the efficiency of investigation" (30.3%)).

55. *See* Pan Pei-Ru & Tu Feng-Jun (潘姵如、塗豐駿), *Jingjunei Biao "Gan Ni Niang" Lushi Rujing, Yu Dangshiren Tong Shangkao* (*警局內飆「幹你娘」律師辱警　與當事人同上銬*) [*In the Police Office, Lawyer was Cuffed Next to His Client, after Cursing Police Officers "Fxxk You"*], PINGGUO RIBAO (蘋果日報) [APPLE DAILY], Jan. 30, 2011, http://www.appledaily.com.tw/appledaily/article/headline/20110130/33150645/ (last visited Feb. 24, 2015) (On January 29, 2011, something unbelievable happened in Taiwan: lawyer Hun-hi Chen requested the police to permit one-hour private interview with the suspect based on the right to counsel under amended CCP and had been refused, the lawyer unexpectedly used his mobile for video recording and argued with the police; he even roared "fxxk you!" out loudly, hence was arrested in flagrante delicto of obstructing governmental operation. The ridiculous result is that the lawyer and the suspect were both sent to the prosecutor).

56. *See* SHIRATORI, *supra* note 18, at 184; WU, *supra* note 2, at 92-94.

57. *See* Su Su-E (蘇素娥), *Zhencha Zhong Bianhu Zhidu Zhi Yanjiu* (*偵查中辯護制度之研究*) [*A Study of Advocacy System in the Investigation Stage*], 30 SIFA YANJIU NIANBAO (司法研究年報) [ANNUAL REPORT OF RESEARCH OF JUDICIAL], XINGSHI LEI (刑事類) [PART OF CRIMINAL], DI 3 PIAN (第3篇) [CHAPTER 3] 76 (2013).

For the limitation measure suggested above, the CCP of Taiwan does not provide remedies for measures made by judicial police officers since they are only investigation authorities who assist the prosecutor;[58] if the suspect disagrees with the measure, he may only file an objection through an administrative approach instead of criminal procedure. Even though the measures taken by the prosecutor and the judicial police officers are at different stages, they are all made during criminal procedures; thus, applying different remedies will cause inconformity and inefficiency in separate procedures. What is more, J.Y. Interpretation No. 720 (May 16th, 2014) clearly provides that: for effective and immediate remedy for the defendant under detention, the defendant may apply *mutatis mutandis* quasi-counterappeal as provided in CCP Article 416 to the court in charge of detention before the *Detention Act* is amended.

This article suggests that referencing Japan CCP Article 430(2),[59] which provides the suspect and defendant means to remedy the limitation measure made by judicial police officers through quasi-counterappeal mechanism.[60] Furthermore, according to J.Y. Interpretation 720, CCP Article 416 also applies *mutatis mutandis* to defendants under detention before the *Detention Act* is properly amended in accordance with J.Y. Interpretation 654.

The crux of the above suggestion for amendment of the Taiwanese system of "take a prosecutor as a director of investigation, police as assistance agencies" is limited because firstly, it is not the only situation where police are endowed with the power to apply. For example, CCP Article 128-1 Paragraph 2 regulates police application for search warrant (which is different from The Communication Security and Surveillance Act which allows only prosecutors to apply for the warrant); similar to Paragraph 1, infringement of prosecutor's status as the key investigator does not happen in practice.

Secondly, the condition to motion for a retrial in CCP Article 420 Paragraph 1 Subparagraph 5 applies only when "a judge participating in the original judgment, judgment before the trial or investigations before the judgment, or prosecutor participating in the investigation or the prosecution commits offenses in his/her post out of the case and the offenses have been proved; or he/she neglect the duties out of the case and has been 'administrative punished' but the behaviors are sufficient to affect the

58. *See* The Code of Criminal Procedure §§ 229-31.

59. Keisohō § 430(2) (Japan) (a person who is dissatisfied with measures as prescribed in the preceding paragraph undertaken by a judicial police officer may file request with the district court or summary court which has jurisdiction over the place where such judicial police officer executes his/her duties for such measures to be rescinded or altered),
http://law.e-gov.go.jp/htmldata/S23/S23HO131.html (last visited Feb. 24, 2015).

60. In fact, Keisohō provides double-track remedies through quasi-counterappeal and state compensation. *See supra* note 24.

original judgment," and does not include illegal offenses of the police since they are not the subject during trial or investigation; however, this was overruled by the amendment published on February 4th, 2015, which broadens conditions for the motion of a retrial to crime or illegal offenses based on certain cases conducted by police or police officers. The reason for amendment is that despite the status of assistance agencies of police (officers), due to their duty to search, seize, arrest, and interrogate, evidence they acquire form the foundation on which judgment is based. This amendment clearly divides "director of investigation" and "available remedies;" this article supports the same point of view.

In addition, this article suggests that the exercise of the right to appoint by police (officers) should be conveyed to the prosecutor to avoid unwitting and overhead? situations; moreover, J.Y. Interpretation No. 720 allows defendants under detention to file a quasi-counterappeal against the decision of a detention center, thus offering opportunities for remedies during investigation, trial or detention, but lack of remedy for police appointment. To sum up, under the premise of the investigator status of prosecutors, the first priority is protection of the suspect's right to counsel. Besides, according to of the attitude of police, they are afraid of having no rules to obey rather than obeying certain rules; if a definite regulation permits them to appoint time and place of interview exists, they would be glad to comply.

E. *Remedies toward Limitation Measures Made by the Prosecutor: Established Instant Quasi-Counterappeal Mechanism in CCP*

When the prosecutor's limitation measures based on CCP Article 34 Paragraph 3 for interview or correspondence which appoints time and place of the interview between the counsel and the suspect or defendant under detention violates the suspect's right to defense or the counsel's right to be present as protected by Article 245 Paragraph 2, quasi-counterappeal based on Article 416 Paragraph 1 Subparagraph 4 is a possible way to obtain remedy, as introduced in the previous section. Nevertheless, a quasi-counterappeal does not have the effect of suspending the investigation procedure in practice. Namely, even if the quasi-counterappeal is supported by good reason and lead to cancellation or alteration of the measure afterwards; the counsel has still lost his chance of interview because investigation actions and infringements of right to defense has already occurred. Hence, it is important to make the protections be effective "on time" in order to ensure the suspect's right to counsel.

According to CCP Article 416 Paragraph 1, the suspect or counsel affected by a limitation measure made by the prosecutor may file a quasi-counterappeal if they disagree with the measure, however the article

does not provide when the ruling of quasi-counterappeal shall be made. Consequently, this article suggests the establishment of an instant quasi-counterappeal mechanism by amending the CCP, requiring the court to make prompt rulings within a short period of time (4 hours for example).[61] Pending the ruling, any interrogation should be suspended, in order to avoid judicial police (officers) or the prosecutor obstructing the suspect's right to defense and rendering the system of quasi-counterappeal in vain. Furthermore, the waiting period for a ruling should be one of the situations listed in CCP Article 93-1 Paragraph 1 which shall not be counted against the twenty-four-hour limitation in Article 91, since the prosecutor or judicial police (officers) are not able to investigate during this period.

F. *Treatment when Investigation Authorities Violate the Right to Counsel with Bad Faith: Evidence Obtained Violated the Right to Counsel in Bad Faith Shall Not Have Admissibility in CCP*

Under current regulations, if the quasi-counterappeal brought by counsel and the suspect under detention against the prosecutor's measure of limitation successfully makes the measure deemed "improper" thus violating *ratio legis* of CCP Article 34 on due process, the admissibility of the evidence collected during the period, in accordance with Article 158-4 on the relative exclusionary rule, shall be determined by balancing the protection of human rights and the preservation of public interests. However, if the investigation authorities violate the right to counsel in "bad faith", that is, not only without limitation appointment but completely cut off chances for counsel to access the suspect. Here the admissibility of confession is not stipulated in CCP amendments, the admissibility of evidence shall also be stricter.

According to this article, if investigation authorities violate the right to counsel in bad faith by intentionally limiting private interview or correspondence between the physically bonded defendant and the lawyer, this violation is deemed more severe than inappropriate appointment based on two reasons: first, it completely deprives the suspect's right to counsel, violates the Principle of Equality of Arms, hinders fair trial, thus not complying with due process; second, to achieve the goal of disciplinary of investigation and effectively eliminate the incentive for illegal evidence acquirement, the admissibility of evidence should be stricter. This article suggests not to follow the approach of Japanese courts which gives more weight to the convenience of investigation, but rather to echo the approach

61. This period of time references to The Code of Criminal Code § 93-1, most of the situations listed in the article are 4 hours, so that the process of investigation and the protection of the defendant's human right could be balanced.

of the American courts described above in holding that the information obtained shall not be admitted as evidence unless the prosecutor can prove that the suspect gave up the right to counsel competently, intelligently and voluntarily, in order to ensure the suspect receives legal assistance from a lawyer.

The American approach described above may also be applied to evidence exclusionary rule in litigation procedures before judgment. On the contrary, if the suspect or defendant is not physically restrained, and voluntarily talks to investigation authorities with freedom to break off the conversation, then there is no need to specifically provide a chance for him to privately interview with a lawyer.

G. *The Admissibility of Evidences Obtained while Limitation Measures Were Dismissed by the Court: The Admissibility of Evidence Obtained under Limitation Measure without Limitation Writ Shall Follow CCP Article 158-4*

According to CCP Article 34-1 Paragraph 3, if the prosecutor is unable to apply for a limitation writ in advance under emergency situations, the prosecutor is allowed to take necessary measures, and report to the court for reissue of the writ within 24 hours. However, if the court dismisses the application while the prosecutor discovers facts sufficient to justify an apprehension that the suspect or counsel may destroy, forge, or alter evidence, or conspire with a co-offender or witness, could such evidence be admissible to prove guilt of the suspect in the case concerned, be reported as evidence in another case, or be referenced for further limitation? Answers to these questions are not provided by the amendments.

CCP Article 34-1 Paragraph 1 adopts writ principle, which articulates the necessity of a prosecutor to acquire a limitation writ before or after investigation in order to limit the suspect's right to counsel. If the prosecutor restricts the right to interview of the suspect without a limitation writ, the limitation measure is in violation of due process of law; the admissibility of evidence shall be determined by following relative exclusionary rule provided in Article 158-4 while balancing the protection of human rights and the preservation of public interests.[62] The admissibility of each evidence should be determined case-by-case; evidence obtained under the prosecutor's misidentification of emergency, based on the following factors,

62. *See ratio legis* of The Code of Criminal Code § 158-4 (specific standards are as follow: 1. Situation of violation, 2. Intent of violation, 3. Type and level of the defendant's rights violated, 4. Danger or infringement made by violation, 5. Effect of inadmissibility of illegally obtained evidence to prevent future violation, 6, Whether the evidence could still be obtained through due process, and 7. Unfavorable degree of the violation to infringe the defendant's right to defense on litigation).

should be admitted as evidence while excluding those obtained under the prosecutor's knowing disobedience:

(1) Even though the emergency situation is denied by the court in retrospect, the prosecutor cannot be deemed to have purposely violated due process to obtain evidence; (2) the content of the measure is to limit interview and correspondence between the suspect and the counsel, not to block it completely; (3) in view of the suspect and counsel being able to continue interviewing without limit after the court turns down the application for a limitation writ, the violation of due process and infringement of the suspect's right to defense is slight; (4) it could not prevent future violations if the court decides the evidence is inadmissible (the prosecutor misidentified an emergency situation, he will not repeat the misidentification); and (5) evidence will not be obtained in time if due process of application is followed.

In addition, if the illegally obtained evidence is just used as a reference on deciding whether to further limit the suspect's right to counsel or not, the standard does not need to be as strict as examining the admissibility of evidence because it is not used to prove the defendant's guilt, therefore the evidence should be accepted as a basis to determine whether or not to further limit the right to counsel.

H. *Auditing Elements of Limitation for Counsel to Communicate with Physically Bounded Defendant: The Court Should Not Be Overly Strict When Verifying Interview between the Defendant and Counsel*

There is a tense relationship between the protection of the right to counsel of physically bounded suspect or defendant, and the exploration of truth and justice, i. e., the more opportunities allowing communication between a suspect and defendant with his counsel, the higher risk of conspiracy with a co-offender or witness. Hence it is an important issue to reach a balance between both the protection of right to counsel and ensure the exploration of truth at the same time. In accordance, CCP Article 34 Paragraph 1 stipulates that if there are no "facts exist sufficient to justify an apprehension that such defense attorney may destroy, fabricate, or alter evidence or form a conspiracy with a co-offender or witness," such interviews or correspondence shall not be limited. Is the standard of "specific facts," nevertheless, sufficient enough to balance the tension?

When the suspect or defendant is involves in felony, white-collar crime or violent organization crime, for example, the counsel is not appointed by the suspect himself, but by the crime manipulator "independently retains

defense attorneys for the accused or suspect."[63] This arouses suspicion that whether the mission of the counsel is simply to provide legal assistance, or to supervise the suspect or defendants confession and betrayal of the information of co-offender or accomplices. Co-defendants may retain the same counsel, and conspire through different interviews and communications between each defendant and counsel. The examples above may not constitute "specific facts" enough to prove that conspiracy exists, however, does this not place a higher value on the protection of right to counsel at the expense of truth and justice if application of the limitation writ is thus denied? It is worthy of more considerations.

CCP Article 34 Paragraph 1 provides that: "if facts exist sufficient to justify an apprehension that such defense attorney may destroy, fabricate, or alter evidence or form a conspiracy with a co-offender or witness", although the constitutive elements are roughly the same as those stipulated in Article 101 Paragraph 1 Subparagraph 2: "There are facts sufficient to justify an apprehension that he may destroy, forge, or alter evidence, or conspire with a co-offender or witness," whereas the latter is about detention which severely limits personal freedom, therefore the facts should be "sufficient" rather than merely "exist' to prove that the defendant may destroy, forge, or alter evidence in order to put the defendant under detention.

However, on the other hand, the former just slightly "limits" the suspect and the counsel's right to interview or correspond instead of "prohibiting." It makes a major difference on this aspect of human rights protection; hence the court should not take an overly strict standard when verifying the prosecutor's application for a limitation writ, namely, the requirement is satisfied when there is a "risk" of evidence being destroyed, fabricated, or altered or the formation of a conspiracy with a co-offender or witness, because after these events have occurred, the real evidence vanishes, and the scope for limitation has lost its function and purpose. Consequently, in situations where commanders of white-collar crime or violent organization crime appoints an attorney for the suspect or defendant, or when co-offenders or co-defendants hire the same attorney, where the evidence is at risk, the court may agree to apply the necessary limitations. It should be noted that the "limitation" here refers to prosecutor's right to apply for limitation with related evidence to persuade the court, while the court provides chances for the defendant and the attorney to object pursuant to Article 34-1 in order to reduce the risk of prosecutors abusing this power.

63. That is, under the authority of The Code of Criminal Code § 27(2), allowing the suspect's or defendant's legal representative, spouse or relative of a certain relationship to hire a lawyer for the defendant or suspect. About the actual case, *see also* Gongsu Xiaojian (公訴小檢), *Dage Bang Xiaodi Weiren De Bianhuren* (*大哥幫小弟委任的辯護人*) [*Mob Boss Hire Lawyer for Gang Members*], 89 JIANXIE HUIXUN (檢協會訊) [PROS. ASSOC. J.] 14, 14-15 (2013).

The possibility that the appointment made by the prosecutor is inappropriate or illegal, may be solved addressed by recommendations introduced in earlier sections of this article.

V. CONCLUSION

After J.Y. Interpretation No. 654 (January 23rd 2009) made by the Taiwan Judicial Yuan, the *Detention Act* Article 23 Paragraph 3 has been deleted while Article 23-1 added; likewise, CCP Article 34 has been amended while Article 34-1 has been added. Mechanisms such as counterappeal and quasi-counterappeal have been introduced for situations where there is disagreement with a limitation writ made by the court or when there is disagreement with a limitation measure made by the prosecutor or single judge respectively. In summary, there has been much progress in the procedural aspect. However, on the other hand, the question of how to fully ensure the right to counsel of physically restrained suspects or defendants during judicial police (officer) investigation procedures and establish an instant and effective mechanism for disagreement with limitations needs to be addressed by further amendments following suggestions provided by this article.

In relation to whether the right to counsel should be protected during procedures before judgment and whether to apply the evidence exclusionary rule after a violation, this article suggests legislative and judicial authorities take the American system as a reference. Moreover, more elaboration is required to reach a balance between right to defense and right to investigate in order to avoid the abuse of the right to interview and correspondence by physically restrained suspects or defendants and the risk of counsels destroying, fabricating, or altering evidence or forming a conspiracy with co-offenders or witnesses.

This article hopes to encourage more consideration and understanding of these issues which concern not only the protection of human rights but also public interest. It is worth reminding that if the suspect or defendant is not physically restrained, and voluntarily talks to investigation authorities with freedom to break off the conversation, then there is no need to specifically provide a chance for him to privately interview with the lawyer.

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臺灣刑事程序中身體受拘束犯罪嫌疑人律師依賴權之研究

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摘 要

伴隨著人權保障思潮的演進，臺灣刑事程序的制度及實務也必須有相稱的回應，在特定時空背景下，司法院大法官解釋第654號乃應運而生，宣告羈押法不當限制被告或犯罪嫌疑人與其辯護人接見通信之規定違憲。然除了羈押中被告與辯護人的接見通信權外，實務上更值得關注者，乃司法院大法官解釋第654號所未提及的尚未羈押之受拘捕犯罪嫌疑人在第一時間的律師接見通信問題，本文乃奠基於此，並參酌司法院大法官解釋第720號之精神，從比較法的觀察中，剖析臺灣刑事程序中嫌疑人之接見通信權（本文稱律師依賴權）制度的來龍去脈，並從中探索該制度之實然運作及檢討應然問題，並務實地提出解決應然問題的有效方法，以及給予第二波立法之參考建議。

關鍵詞：律師依賴權、接見通信、限制書、拘押訊問、證據能力、抗告