

## **Developments in the Law in 2018: Criminal Procedure Law**

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### **Abstract**

This article reviews developments in Taiwan's criminal procedures in 2018. Among other topics, this review covers the dynamics between: constitutional interpretation, legal policy, and the resolution made by the criminal tribunal meeting of the Highest Court (the Highest Court resolution).

First, with regards to constitutional interpretation, i.e. Taiwan's constitutional court decision, Interpretation No. 762 clarifies that the right of defense is a fundamental right for and belonging to the criminal defendant. All the other mechanisms that facilitate the defense of criminal defendants, such as the assistance provided by defense lawyers, should not change the nature of the right. As a result, Article 33 of Taiwan's Code of Criminal Procedure (CCP) which was the contested issue leading to this constitutional interpretation, provided that defendants with the assistance of defense lawyers are not allowed to review evidence related to their cases, was unconstitutional. It is because even though the defendant has a defense lawyer, it is still the defendant, rather than the lawyer, who can exercise the right of defense.

Second, in terms of the legal policy, the new Article 31-1 of CCP, which became effective on January 1st, 2018, allows defendants and their lawyers to review evidence when they prepare to litigate at a pre-trial detention hearing. However, the constitutionality of this Article has come to question, because the Article in principle deprives criminal defendants the right of self-representation at the pre-trial hearing. That is, criminal defendants facing this hearing are not allowed to personally defend themselves, even if they request self-representation.

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Instead, they must accept a lawyer appointed by the court. Following the constitutional principle expressed by the Interpretation No. 762, this new Article 31-1 may be found to be unconstitutional in the future, because the Article fails to respect defendants' right of defense as their own right, which should allow defendants to represent themselves.

Third, the Highest Court resolution 107-1, which is formed to unify different perspectives on a hearsay exception—the out-of-court statement recorded by foreign police, may also be unconstitutional and infeasible. The resolution requires courts to admit this kind of out-of-court statement, as long as the statement was made under a “particularly trustworthy circumstance”. Nonetheless, the resolution may be found unconstitutional, because Taiwan's lawmakers don't expressly authorize courts to expand hearsay exceptions. The resolution may also be infeasible. It is hard to imagine how a Taiwan's court can reasonably find an out-of-court statement like this made under a “particularly trustworthy circumstance”. After all, the out-of-court statement was made abroad, and Taiwan's courts have little knowledge of the practices of foreign police, let alone whether the statement was recorded under a “particularly trustworthy circumstance”.

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