

## **Adopting cross-examination in Taiwan: An investigation into the right to judicial protection<sup>1</sup>**

*September 1, 2003 saw the amendments of the Code of Criminal Procedure to include cross-examination, transforming the judicial system from inquisitional to adversarial. Despite efforts to customize the system, questions remain on the applicability of cross examination, which not only overturns existing institution but also potentially threatens the litigation right of the parties involved. Control Yuan Members launched a special investigation into the adversarial and found the following infringements on the right of judicial protection.*

Prior to the 2003 amendments, all trials were based on an inquisitional system, in which prosecutors indict and the judges gather evidence. With the inquisitional system, the judge was presented materials that were mostly against the defendant; thereby instilling in him or her negative presumption towards the defendant. Decisions were made to introduce an adversarial system. The new system, sometimes called an “improved adversarial system”, is a hybrid that mixes elements of both inquisitional and adversarial systems. Under the hybrid system, the prosecutor gathers and submits evidence for cross-examination, while the presiding judge sits as an impartial observer before giving the verdict. In theory, the adversarial system serves to uphold the rights of both the prosecutor and the defendant by allowing them to gather evidence to their own advantage. In practice, however, the judge frequently resumes the role of a fact-finder by engaging in cross-examination and even summoning witnesses during trial. As such, the hybrid system becomes a three-party process involving the prosecutor, the judge, and the defendant (witness), departing from a simple adversarial system.

Currently, all trials in Taiwan are divided into two parts: investigation and court appearance, due to manpower shortage. The process begins with Prosecutor A, who, upon concluding the investigation, submits an indictment with relevant materials, including argument, testimony and evidence to Prosecutor B who will appear in court. However, Prosecutor B is subject to reasonable doubts of being less knowledgeable about the case, because he or she has not taken part in the investigation. Questions arise as to Prosecutor B’s competence to conduct cross-examination, along with inefficient use of prosecution forces. The process may also encourage Prosecutor A to rush into indictment, undermining his or her role as a fact finder.

Cross-examination could also affect defendants’ litigation right and witnesses’ safety. A case in point is sexual assault trials, where witness and defendant protection is subject to Sexual Assault Crime Prevention Act, thereby independent of the Code of Criminal Procedure. The

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question lies in how to uphold the defendant's right to litigate without compromising witness safety both physically and psychologically. The rights protection is particularly crucial when the defendant stands trial without an attorney, which is often the case in Taiwan. Reasons for lack of legal representation in court range from not meeting the low-income criteria to not qualifying for a publicly assigned attorney. Also problematic is court reporting. A fast-paced interrogation poses some difficulties for court reporters to document the proceedings in writing. Speed aside, the issue of translation for cases involving non-Chinese speakers and the complexity of the case per se could also undermine the desired effect of cross-examination. Suggestions have been made to outsource court reporting to third parties or to adopt stenography commonly used in arbitration.

Upon concluding the investigation, the Control Yuan issued an official letter urging the Judicial Yuan and the Executive Yuan to deliberate on the issues at hand. The Judicial Yuan has held meetings with experts to discuss the "Principal of a Single Indictment". One of the meetings focused on the potential problems of adopting the principle in Taiwan, while the other compared the Taiwanese and the Japanese judicial system based on feedback given by government officials back from a business trip to Japan. However, no consensus has been derived from the meetings; therefore further deliberation is called for. In the meantime, new regulations have been introduced to better protect the rights of sexual assault victims, who may now request the court for special protections before and during trial. As for legal representation, the Judicial Yuan has set up remuneration standard for lawyers working pro bono. People may apply for legal representation at Legal Aid Foundation, a non-government organization sponsored by the Judicial Yuan. As lawyers are obligated to provide legal aid, the Judicial Yuan has urged the Foundation to draft reasons that exempt lawyers from such provision if need be. The draft is pending review by the board. In addition to upgrading their word processors to include joint-editing and reporting by at least two court reporters, the Judicial Yuan has also promised to provide ongoing trainings for court reporters.