



An Overview of the Development of the Right to Access to Dossier Information in the Taiwanese Criminal Justice System

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Abstract

Article 10 of the Universal Declaration of Human Rights recognizes the right to a fair trial as a basic human right. Besides, the European Court of Human Rights has acknowledged the Principle of Equality of Arms a part of the right to fair trial. Hence, the right to access to dossier information in the criminal justice system is fundamental. While paragraph 1 of the Article 33 of the ROC Criminal Procedure Code, passed in 1967, and did not provide the defendant with the right to access to dossier information in the pretrial detention proceeding, the Grand Justice Council held it unconstitutional in Interpretation No. 737 in 2016. According to the 2007-amended paragraph 2 of Article 33, the right to access to dossier information was provided with the pro se defendant only. This provision has been treated by lower courts as a general restriction on the access right of the defendant with counsel. In 2018, the Grand Justice Council held this general restriction unconstitutional in Interpretation No. 762. As a result, the defendant, with or without a counsel, should be entitled to access to dossier information. This study provides an overview of the recent development of the right to access to dossier information in the Taiwanese criminal justice system.

Keywords: Fair Trial; Right to Access to dossier information; Brady Rule; The principle of equality of Arms; Right to Counsel

Abbreviations: ROC: Republic of China; PRC: People's Republic of China.

Introduction

The right of a defendant to a fair trial has long been recognized as a basic human right. For instance, Article 10 of the Universal Declaration of Human Rights provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the

determination of his rights and obligations and of any criminal charge against him." The Sixth Amendment to the United States Constitution also guarantees the right to a fair trial.

In addition, based on the first paragraph of Article 6 of the European Convention on Human Rights, the European Court of Human Rights since 1970 has recognized the Principle of Equality of Arms a part of the right to fair trial. As "fairness is a relative, not an absolute concept,"

and “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,” the right to a fair trial would be easily manipulated and denied by preventing the defendant from accessing to necessary information in his defense. As a result, a miscarriage of justice occurs and the innocent people get convicted and imprisoned.

Taiwan, Republic of China (R.O.C.), was one of the founding members of the United Nations in 1945 although it lost this seat to the People’s Republic of China (P.R.C.) in 1971. Under Article 10 of the Universal Declaration of Human Rights, an accused is supposed to claim the right to fair trial after December 10th, 1948. However, people in Taiwan lived with little hope of any recognition of their inherent human right because Taiwan enforced martial law and was in a state of siege from 1947 to 1987. The right to access dossier information in the criminal proceeding had long been ignored in the Taiwanese criminal justice system. While the current Criminal Procedure Code already allows the defendant, with or without counsel, to access to information for his defense, this study aims to provide a brief overview of the recent development of the right to access information in Taiwan.

The Law and Practices in Controversy

The right to access to dossier information at investigatory stage

The ROC Criminal Procedure Code only entitled the right to counsel to the defendant at the trial stage before 2007. Although paragraph 1 of Article 27, amended in 1982, extended the right to counsel to the pre-trial investigatory stage, the criminal suspect had to defend blindly. A criminal suspect, with or without counsel, was prohibited not only from reviewing the dossier and exhibits but transcribing minutes and making copies and photographs thereof before prosecution. This practice would become even worse at detention hearing because the suspect knew almost nothing about what the motion for detention was based on [1]. This unfair practice had remained unchanged till 2013. A former Taipei City councilor and her appointed counsel requested to examine the investigatory dossiers at her pre-trial detention hearing in a corruption case. After her request was denied by the Taiwan High Court in a final ruling, she claimed the ruling unconstitutional for wrongfully applying Paragraph 1 of Article 33 of the Criminal Procedure Code and thus requested a constitutional review. Whether the criminal suspect at investigatory stage only had access to factual issues cited in the detention motion under Articles 33 and

101 of the ROC Criminal Procedure Code, for the first time, became a constitutional issue.

The right to access to dossier information of the pro se defendant

The 1967 Criminal Procedure Code did not allow the pro se defendant to review the dossier during the trial phase. It had been criticized for its violation of the principle of equality of arms because the pro se defendant would have had to blindly defend for himself without accessing to dossier information. In order to better human rights protection, Congress in Taiwan, the Legislative Yuan, in 2007 added Paragraph 2 to Article 33 of the Criminal Procedure Code. However, this paragraph only permitted a pro se defendant at trial stage to pay the required fees in advance to request only copies of minutes in the dossier. In a word, the 2007 amendment failed to provide the same access right to the defendant with counsel [2].

Under the 2007 legislation, the right to access dossier information of the pro se defendant was limited to copies of minutes in the dossier, so the pro se defendant should not be allowed to inspect and examine crime scene photos and other exhibits necessary for preparing the defense in the dossier. While evidence other than copies of minutes might be material and necessary for preparing the defense at both trial and appeal levels, the 2007 amendment, preventing a defendant from gaining timely access to all evidence in the case, became another constitutional issue regarding the right to access dossier information in 2017.

Official Responses with Constitutional Challenges

Judicial responses

The Grand Justice Council of the Judicial Yuan, the Constitutional Court of Taiwan, held parts of Articles 33 and 101 unconstitutional because the defense party should only be entitled to access to factual issues cited in the detention motion in J. Y. Interpretation No. 737 on April 29, 2016. According to this Interpretation, it is necessary to timely inform the suspect and his counsel in appropriate manners of the reason and evidence for detention so that the right of defense can be exercised effectively. The reason and evidence presented by the prosecution in a detention motion would be critical for a judge to decide whether or not to detain. Moreover, because dossiers may include important clues about what actually happened during the investigatory stage, it would almost be impossible to successfully fight against the motion for pretrial detention without timely accessing to

dossiers. As a result, denying access to dossier information as a general rule at the pretrial detention stage should be considered the due process violation and unconstitutional [3,4].

Concerning the right to access to dossier information for all defendants, the Grand Justice Council, in J. Y. Interpretation No. 762 on March 9, 2018, held that the related part of the 2007 amendment in Paragraph 2 of Article 33 would be in contravention of the constitutional guarantees of due process because the right to defend should include the right to access to all dossier information necessary for the defense. The 2007 legislation at issue not only excludes a defendant with counsel from requesting all dossier information necessary for the defense by himself only, it also limits the scope of access to information in the dossier to the acquisition of copies of the minutes, rather than any other necessary information in the dossier. Interpretation No. 762 ruled that allowing the defendant to pay fees in advance to request only copies of minutes would violate the concept of due process. Besides, this Interpretation mandates all courts give all copies of dossiers and exhibits to a defendant who requests them after the necessary costs have been paid in advance at trial should the related amendment not be completed in time. According to this mandate, a defendant, with or without a counsel, is entitled to obtain all necessary defense information in the dossier since March 9, 2019 [5].

Legislative responses

In response to J. Y. Interpretation No. 737, the Legislative Yuan then in 2017 revised Articles 93 and 101 of the Criminal Procedure Code, and added Articles 31-1 and 33-1 to it as well. Afterwards, the court is obliged to appoint a public defender or a mandatory attorney for the accused if he is not represented at the detention hearing. In addition, the defense attorney may inspect all necessary evidence in the dossier at the detention hearing. Moreover, at the detention hearing, the court should present a pro se defendant with all material and necessary information in the dossier in appropriate methods [6].

From March 9, 2019, one year after the announcement of the J. Y. Interpretation No. 762, the accused already have access to all necessary information in the dossier. The Legislative Yuan then in July 17, 2019 passed a new version of Article 33 of the Criminal Procedure Code in order to comply with this Interpretation. According to this new legislation, the defense counsel at trial may inspect the dossier and the exhibits, as well as transcribe, reproduce, and photograph them. And the accused is

entitled to request for copies of dossiers and exhibits by appropriate means. However, the court may restrict the access to dossier information if it is not necessary for the defense or it relates to the privacy as well as the commercial secrets.

Conclusion

It is well recognized that everyone is entitled to timely and properly prepare for his defense in criminal proceedings, and under the Brady rule, the prosecution must disclose all relevant, material and exculpatory evidence in its possession. Restrictions on the disclosure of information obtained by the prosecution may violate the due process of law should the accused be prohibited from prepare for his defense properly and necessarily. Under this viewpoint, the 1967 ROC Criminal Procedure Code provided little protection for the suspect at the pretrial detention stage. And the right to a fair trial of the pro se defendant would also be infringed when the accused was not allowed to access to the material and necessary dossier information. In order to better the right to a fair trial, therefore, J. Y. Interpretation Nos. 737 and 762 properly demand the Legislative Yuan to revise the out-of-date parts of the ROC Criminal Procedure Code.

However, while abuse of the dossier information received by the accused is not punished under the ROC Criminal Code, it is questionable about how to effectively protect the privacy and the commercial secret in the dossier. Because the investigatory secrecy is only protected before filing prosecution according to Article 245 of the Criminal Procedure Code, the ROC Legislative Yuan has to provide more protections for those whose legal interests be infringed upon by the accused. To sum up, the right to access to dossier information is fundamental in the criminal justice system, any unnecessary restriction on it results in due process violation under the principle of equality of arms. Nonetheless, it remains to be observed if the right to access to information in the dossier be prejudiced by the abuse of the defendant in the coming future.

References

1. Delcourt V (1970) Judgment. ECHR.
2. Snyder V, Massachusetts (1934) United States Supreme Court. JUSTIA pp: 291.
3. Brady V, Maryland (1963) Supreme Court of the United States. JUSTIA pp: 373.

4. Chang M (2006) The Exclusionary Rule in Taiwan: Lessons from the United States. *Aust J Asian Law* 8(1): 68-103.
5. United Nations Human Rights Office of the High Commissioner (2011) Trial Observation and Monitoring the Administration of Justice. *Manual Hum Rig Monit*.
6. United Nations Human Rights Office of the High Commissioner (2014) Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism. UUCCT.