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# THE RULE OF LAW IN TAIWAN

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The English jurist, A.V. Dicey, once formulated a famous definition of the Rule of Law that included three principles: first, the law has absolute supremacy over arbitrary power, including the wide discretionary powers of government; second, all classes of people are equally subject to the ordinary law of the nation administered in the ordinary courts; and third, constitutional law is not the source but the consequence of the rights of individuals, as defined and enforced by the courts.<sup>1</sup>

In a modern welfare state, the discretionary powers of government are inevitable. As a result, the crucial issue is the extent to which the government is entitled to exercise this power. Although in a continental law system an administrative court is established in addition to ordinary courts, it can follow the principle of the Rule of Law by carrying out the due process of law. Even if a constitution is the result of legislation, constitutional rights must be “the fruit of contests carried on in the courts on behalf of the rights of individuals.”<sup>2</sup> Therefore, Dicey’s concept of the Rule of Law means in modern society that (1) no arbitrary exercise of governmental power in excess of its authorization is permitted; (2) both the government and private citizens are subject to the law, with all classes of people entitled to a fair and equal procedure in any court of law; and (3) the courts shall be strengthened to enforce constitutional rights; otherwise abstract constitutional statements are merely a bill of rights in a book.

The American jurist, Franz Michael, provides a Western notion of the “Rule of Law,” which we may use to compare the Chinese concept of legality, stating:

Rule of law is the very foundation of human rights. In the Western legal tradition, law is applied equally to all; it is binding

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<sup>1</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 184-203, (London: MacMillan & Co., 10<sup>th</sup> ed., 1959), in J.C. Smith & David N. Weisstub eds., *The Western Idea of Law*, 446-452 (London: Butterworths, 1983). Dicey’s conception of the Rule of Law is widely discussed. i.e., Roger Cotterrell, *The Sociology of Law*, 157 (London: Butterworths, 2nd ed., 1992); Masami Ito, *The Rule of Law: Constitutional Development*, in Arthur Taylor von Mehren ed., *Law in Japan*, 203 (Cambridge: Harvard University Press, 1963).

<sup>2</sup> Dicey, *supra* note, at 450.

on the lawgiver and is meant to prevent arbitrary action by the ruler. Law guarantees a realm of freedom for the members of a political community that is essential to the protection of life and human dignity against tyrannical oppression and to the regulation of human relations within the community.<sup>3</sup>

Accordingly, the state of Rule of Law in Taiwan can be examined through such issues as strengthening judiciary power, protecting human rights, and ensuring equal justice for all under the law. After concisely depicting Taiwan's transition, this paper first examines the way in which the Taiwanese judiciary exercises its authority to bring the government under its control so as to curtail the state's wide discretionary powers. It further investigates the extent to which individual rights are reinforced through court decisions. With respect to equality before the law, however, the paper demonstrates that equal access to the justice system in Taiwan has not been fully realized.

## TAIWAN'S TRANSITION

Prior to exploring the current state of the Rule of Law in Taiwan, it is desirable to skim through Taiwan's political and legal transformation from an authoritarian regime to a liberal democratic country. The Kuomintang ("KMT") took over Taiwan following the Japanese defeat marking the conclusion of the War World II in 1945. As the local government in Taiwan, the Republic of China (ROC) modeled itself after the Japanese government-general in colonial Taiwan and continued the latter's authoritarian rule. In late 1949, when the KMT government moved to Taiwan from mainland China, these Mainlanders inflicted their harsh rule on the local Taiwanese and continued to function under the framework of the ROC Constitution established in 1946. In spite of Chiang Kai-shek's constant declaration of the Rule of Law, his regime promulgated a large number of special laws to consolidate the power of Chiang and its party. These special laws invariably infringed upon the rights of the people in the name of public security, rendering the protection of individual rights under the Constitution nothing more than words on paper.

In the early 1980s, the political situation in Taiwan changed. The KMT regime lost its status in the international arena as the legitimate government of China. It then had to turn to the people of Taiwan to establish its legitimacy.

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<sup>3</sup> Franz Michael, "Law: A Tool of Power," *Human Rights in the People's Republic of China*, 33 (Boulder & London: Westview Press, 1988).

Meanwhile, a new generation of Taiwan intellectuals, who were influenced by Western liberal ideas, began to demand political and legal reforms. These new, diversified social movements forced the KMT leader at that time, Chiang Ching-kuo, to gradually shift his agenda to build a democratic state. Martial law was lifted, and the people on Taiwan were allowed to visit China in 1987.

From the late 1980s to the early 1990s, a series of political reforms transformed Taiwan into a democratic country. In 1986, the first Taiwanese opposition party, the Democratic Progressive Party (“DPP”), was successfully established to challenge the KMT-imposed political order. With the trend toward democracy, the “Temporary Provisions for the Period of Mobilization and Suppression of (the Communist) Rebellion of 1948” were repealed. The Constitution of 1946 was repeatedly and extensively amended in 1991, 1992, 1994, 1997, 1999 and 2000, effectively resulting in a new constitution. In 1996, the president of Taiwan was elected through popular election, and in 2000 the former opposition party, DPP, won the presidential election and became Taiwan’s ruling party.

Recently, along with political democratization, legal reform is taking place and individual rights are being improved. While the Constitution of 1946 provided extensive political, economic and social freedoms, the newly passed constitutional amendments have further enhanced other civil rights such as the elimination of gender discrimination and the promotion of aboriginal interests.<sup>4</sup> It should be emphasized again that abstract constitutional provisions are not a real guarantee of individual rights. The old Constitution purported to protect a large number of individual rights, while in reality the KMT regime issued numerous statutes and regulations that oppressed individual rights in the name of anti-communism.

In Taiwan’s past, the KMT ruling group had omnipotent power throughout all corners of society. The lawmakers, mostly Mainlanders, were not subject to re-election prior to 1992, and the Legislative Yuan, exercising general legislative power, was taunted as “a legislative bureau of the Executive Yuan,” the executive branch that exercises power with respect to the administration of the state, in that it was entirely controlled by the KMT party. As a result, any statutes promoted by the executive were rubber stamped by lawmakers. With respect to the judiciary, a high-ranking KMT official once publicly asserted that

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<sup>4</sup> Article 10 of the Constitutional Amendments 2000.

“the courts belong to the KMT.” The separation of powers delineated under the Constitution was nonsense. There was no rule of law, but rather rule of the KMT party.

These regrettable experiences, nonetheless, have been changed to a large degree through Taiwanese democratization and social pluralization. Taiwan is no longer “rule of men” but rather “rule of law.” In Taiwan today, the judiciary is able to exercise independent authority; the political power is subordinate to the law; and human rights are proclaimed to be the ultimate value of Taiwanese society. Meanwhile, the government endeavors to devise a court system convenient for the people and to recruit more attorneys to provide legal services, with the intent to reinforce common access to the law. Nevertheless, some problems still remain, particularly with respect to the quality of legal services available to the common citizen.

It is worth noting the dynamics of political and legal change during the last two decades in Taiwan. From the mid-1980s on, the opposition party, DPP, successfully instigated a large number of social and political movements, which functioned as an outside force to push the KMT to gradually change its role into that of a reformer. Within the KMT party, however, a division formed between old, conservative members and new reformers, rendering the KMT unable to undertake a full-fledged reform scheme. In the course of acting as a reformer, the KMT could not fully relinquish the power of its old members. Consequently, as it initiated its reform program, some old KMT ideology remained in the statutes and regulations, which were constantly challenged by the Constitutional Court. The Constitutional Court was established by the KMT regime and was once a tool of the KMT party. Nonetheless, the Court built itself into a powerful judicial organ that used the law to eradicate KMT ideology. This development was accompanied by recent fierce social change in Taiwan.

## THE POWERFUL JUDICIARY

In Taiwan, the highest judicial organ of the state is the Judicial Yuan, comprising 15 Grand Justices with a president and a vice-president appointed among them. The Grand Justices constitute the Council of Grand Justices, as well as the Constitutional Court.<sup>5</sup> The Constitutional Court is the sole organ

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<sup>5</sup> For the Taiwanese legal system, see Tay-sheng Wang, *Taiwan*, in Poh-Ling Tan ed., *Asian Legal Systems: Law, Society and Pluralism in East Asia*, 124-161 (Sydney: Butterworth, 1997).

with judicial review power in Taiwan. It is entrusted to protect the rights of the people and is theoretically “the guarantor of the Constitution.” This Court, however, like other courts, was once the tool of the party-state regime. In the course of Taiwan’s democratization, the Constitutional Court has become the most important organ for carrying out the Rule of Law in Taiwan. It established requirements for the administrative agencies to issue regulations, demanded that the legislature implement its decisions and declared the constitutional amendment of 1999 unconstitutional. The people admire the Court’s prowess as the defender of the law, with a clear message that the government itself is subjected to the law.

The German principle of legality (*Rechtsstaatsprinzip*) requires that administrative power be exercised in accordance with laws enacted by the legislature. This principle is embodied in the Taiwanese Constitution. Chapter II of the Taiwanese Constitution provides for comprehensive rights and freedoms, which Taiwan’s citizens theoretically enjoy. Article 23 of this chapter further insists that all these rights and freedoms may be restricted only by *statute laws* “to prevent infringement upon the freedom of other persons, to avert an imminent crisis, to maintain social order, and to advance public welfare.” That is, the power to restrict individual freedoms is solely entrusted to the legislature based on constitutional requirements.

The principle of legality, however, was not enforced by the KMT regime. Because most lawmakers were KMT members, the legislature usually endorsed the executive’s proposed laws. Further, the legislature mostly vested a large amount of its power in the executive through the delegation of power to the administrative agencies. Laws enacted by the legislature typically included such provisions as “the promulgation of an enforcement rule is entrusted to (specific agencies).” Under such broad delegation, the executive branch enjoyed wide discretionary power, empowered to issue any regulations it preferred. As a result, individual rights were infringed upon whenever it was deemed necessary.

The Constitutional Court was determined to curtail the broad discretion of administrative actions. In the 1995 case of *The Factory Closing-Down*, for instance, the petitioner and his family produced bean products at their home. The local government decided that their setup was equivalent to a factory, which was required to apply for registration under an administrative rule. The local government thus ordered the petitioner to close down his business because of his failure to register. The Constitutional Court declared the administrative rule null and void, observing that under the Constitution, the

administrative act of closing down a factory constituted a limitation on civil rights, which could be governed only by statutes. The Court found further that an executive order would be valid “only if *it was delegated by a statute that provided clear and specific purposes, contents, and scopes*. Without such clear legislative delegation, any executive order shall be void.”<sup>6</sup>

The Court not only put the executive branch under its control, but also demanded that the legislature follow its decisions. The most salient examples are the cases of *Educators*. Under the Constitution, no one can serve as a public official without passing a public competitive examination. The Statute of the Employment of Educators provided, however, that incumbent school personnel who did not pass public examination could continuously serve their offices. The Court held in 1991 that the statute was intended to protect the vested interests of incumbent school personnel, but they could only work for the schools they already were serving unless they passed specific examinations.<sup>7</sup>

The holding, however, was overruled by the legislature, which revised the challenged statute in 1994. The revised statute provided that incumbent school personnel were permitted to transfer among different schools, a provision apparently in contravention of the Court’s decision. The Court did not hesitate in 1996 to insist that the legislative power could not transgress the Constitution and the Court’s decisions. According to the Court, the legislative revision of this statute would have conferred special status on incumbent personnel without requiring them to pass specific examinations and to demonstrate the same qualifications as other applicants. Such a distinction violated the principle of equality enunciated in the Constitution and ran afoul of the tenor of the Court’s prior decision. The article of the challenged statute was thus held void.<sup>8</sup>

The Court instigated a fierce controversy over its authority when declaring the constitutional amendments of 1999 unconstitutional. Before that time, under the Constitution, the National Assembly was the sole parliamentary organ entrusted with the power to amend the Constitution. In 1999, the National Assembly voted anonymously to amend the Constitution in order to prolong the terms of its members and legislators, as well as to change the election

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<sup>6</sup> The Court’s interpretation No. 390 (1995).

<sup>7</sup> The Court’s Interpretation No. 279 (1991).

<sup>8</sup> The Court’s Interpretation No. 405 (1996).

procedure of its members. These amendments provoked strong opposition in society because the members of the National Assembly had amended the Constitution for their own benefit. With the petition of legislators, in 2000, the Court held these amendments unconstitutional and null and void. The Court asserted that the procedure to amend the Constitution shall be publicly known, and that the principle of a republic, the principle of citizens' sovereign powers, and the principles concerning the protection of individual rights and the separation of powers were all of essential importance. These essential principles constituted the basis for the constitutional order of a liberal republic, without possibility of amendment; otherwise the constitutional order could be destroyed.<sup>9</sup>

Given that constitutional amendments become incorporated in the Constitution, the Court's decision raised the issue as to whether the interpreters of the Constitution had the power to review these amendments. In spite of intensive debates, the National Assembly re-amended the Constitution accordingly one month after the decision, with the result that most of its powers were rescinded, reducing the National Assembly to a meaningless organ.

Since the Court was able to declare constitutional amendments unconstitutional, it was hard to identify any governmental actions not subject to judicial review. The Court's brave decisions to fight the executive, the legislature and the National Assembly demonstrated the judiciary's powerful authority and its independence. Political power in no way retained an influence on the judiciary.

## **THE PROTECTION OF INDIVIDUAL RIGHTS**

The KMT regime deprived the people of their individual rights to consolidate power and to maintain social order. Its measures included arresting any potential dissidents and criminals, as well as undertaking so-called "mind-control" activities. Those measures had a substantial impact on the people's lives and property and greatly inhibited social progress. The KMT's power to manipulate social activities, however, has been strictly confined by the Constitutional Court since the late 1980s, thereby strengthening Taiwanese human rights.

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<sup>9</sup> The Court's Interpretation No. 499 (2000).

## The Rights of the Accused

The efficient way to maintain social order is to arrest, under no reasonable legal procedure, any potential criminals, even those who commit misdemeanors. The most effective method to deter crime is to severely and immediately punish the accused with no chance of appeal. And the best way to obtain a confession is to detain the accused as soon as he is arrested. These strategies were widely employed by the KMT state during its authoritarian rule.

Article 8 of the Constitution guarantees individual freedom, and no trials or punishments are allowed except by a court after due process of law. Nonetheless, a police law enacted in the 1950s to punish minor misdemeanors authorized police officers to arrest, prosecute and punish offenders without judicial surveillance. Punishment included detention for up to two weeks, forced labor up to 16 hours and reformatory education. The misdemeanors punishable under this police law included 136 ambiguous offenses, rendering people vulnerable to unwarranted arrests. While the Constitution required that the accused be sent to a court within 24 hours of arrest, the police usually charged the accused with an offense under the police law in case they were unable to investigate the charge within the timeframe. With this maneuver, the police could easily detain the accused for seven days. About 18 percent of Taiwan's population was punished under this police law, and over 15 percent of all offenders were detained from 1969 on.<sup>10</sup>

Although the KMT state effectively used the police law to fight gangsters in order to maintain social order, detention, forced labor, and reformatory education were declared null and void in 1990 because they imposed confinement in violation of the Constitution.<sup>11</sup>

While the intent of the police law was to punish minor misdemeanors, the Anti-Hoodlum Law of 1985 was designed to incarcerate violent hoodlums. The accused were forced to work and deprived of nearly all civil rights. The decision to charge an individual as a hoodlum depended solely upon police discretion, because the magistrates responsible for imposing reformatory education served as mere rubber stamps. The accused under this act were often

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<sup>10</sup> See Rui-Zhi Xie, *Weijing Fafa Xinzheng Fangaxiang zhi Tanta* (A Research on the Revision Approach of the Law Governing Offenses Punished by the Police), in vol. 8, n.8 Zhongguo Luntan (China Tribune) 18, 19 (1979); Rui-Tong Chen, *Weijing Fafa zhi Yanju* (A Research on the Law Governing Offenses Punished by the Police), 87-8, figure 2 (1975).

<sup>11</sup> The Court's Interpretation No. 205 (1990).

subject to double jeopardy—sentenced to jail in addition to reformatory education. Moreover, the decision to convict most suspects accused of being hoodlums was based on confidential testimony of three secret witnesses, thereby offering police a chance to “produce” fake witnesses. In practice, therefore, many suspects were confined because of the police’s administrative maneuvers.

To invalidate the Anti-Hoodlum Law, the Constitutional Court invoked the American doctrine of due process of law. According to the Court, it was unconstitutional for the law under challenge to empower the police to arrest an accused without a warrant, to use secret witnesses without cross-examination, to impose reformatory education without a prior hearing, and to impose both reformatory education and imprisonment where an individual was convicted of a crime. All these provisions of the law were inconsistent with the constitutional guarantees of physical freedom and due process of law.<sup>12</sup>

After police power was delimited, the protection of the rights of the accused extended to the detention initiated by prosecutors. Under the Code of Criminal Procedure, prosecutors had the authority to detain an accused for up to four months during the investigation phase prior to filing a formal indictment. Since prosecutors were responsible for investigating and indicting criminal defendants, they were inclined to detain first and seek evidence later. Detention became a tool to coerce the accused into confession. Further, while the prosecutor and defendants ideally should carry equal weight before a court, the prosecutor’s power of detention resulted in substantial inequalities between the prosecutor and the accused.

Taiwanese prosecutors were viewed by both the government and the public as equivalent to judges. When the prosecutor’s power was challenged, the government was shocked and embarrassed. Article 8 of the Constitution provides that individuals may be tried or punished merely by a court of law in accordance with legal procedure, and that any individual arrested or detained for committing a crime has to be transferred to a court for trial within 24 hours. The prosecutor’s power of detention was declared unconstitutional under this article, even though the government strongly argued that for the prosecutor to share these 24 hours with the police was insufficient to investigate a criminal case, and that to deprive a prosecutor of the power of detention would impair social order.

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<sup>12</sup> The Court’s Interpretation No. 284 (1995).

In this case, the Court concluded that “the protection of human rights is the highest standard of our contemporary cultural system and the common principle of advanced civilized societies.... Physical freedom is the basis of all freedoms, and other freedoms will be destroyed if physical freedom cannot be rigidly protected.”<sup>13</sup>

As crime rates were still high and maintaining social order remained the government’s main objective, the due process of law took precedence over all other concerns. Human rights have been declared to be a part of Taiwan’s cultural system. Arguably, any law infringing upon individual physical freedom will be declared unconstitutional regardless of any grounds to support that law. Indeed, while the Taiwanese military fell furthest from the judiciary’s jurisdiction because of the special status of soldiers, the military court system was recruited into the judiciary jurisdiction in 1997 under the consideration of the protection of physical freedom. That is, even a soldier is entitled to appeal his case to the civil court after his military trial.<sup>14</sup>

### **The Freedom of Expression**

In addition to rigid control over people’s physical freedom, the KMT state intended to control the people’s thoughts and to hinder all discourses that challenged its ideology. According to the original Taiwanese Constitution, freedom of speech, teaching, writing, publishing, and freedom of assembly and association are all given to citizens, subject to restriction for the sake of public welfare and social order. To fully allow these rights, however, would have ruined the KMT regime’s ideology and its dominance.

After relocating to Taiwan, the KMT regime still claimed its legitimate sovereignty over mainland China and was determined to restore its rule there. Thus, anti-communism was a national policy, and Taiwan independence was a remote idea. Any support for either communism or Taiwanese independence was banned. Those who defied these policies were arrested. To reinforce the KMT’s ideology, the Assembly and Parade Law of 1988 decreed that people were not allowed to proclaim support for communism or territorial division when assembling or parading in public. Meanwhile, under an executive order, any nationwide associations were required to put “China” ahead of their names. That is, the word “Taiwan” was not permitted to form any part of an

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<sup>13</sup> The Court’s Interpretation No. 392 (1995).

<sup>14</sup> The Court’s Interpretation No. 436 (1997).

association's name.

Both laws were challenged in the Constitutional Court. In 1998, the Court, based on the clear and present danger test of American constitutional law, declared the prior-check on speech unconstitutional, saying:

Both article 14 of the Constitution providing freedom of assembly and article 11 providing freedom of speech, teaching, writing and publishing are freedoms of expression, which are the most important fundamental rights in carrying out democratic politics.... To restrict the rights of assembly and parade, the law has to conform to the principle of clarity and meet the requirements of article 23 of the Constitution.... The Assembly and Parade Law [...] that [bans public assembly and parade] based on their discourses about supporting communism or territorial division empowers the authority to investigate people's political opinions prior to assembly and parade. This infringes upon the freedom of expression provided for under the Constitution.<sup>15</sup>

The Assembly and Parade Law contained two additional restrictions: that "it can be recognized from the fact that the assembly or parade may endanger national security, social order, or public welfare," and that "it may endanger other's lives, bodies, liberty, or severely impair other's property." The Court overruled these two restrictions because of their ambiguity, stating that it is unconstitutional for the governing authority to forbid assembly or parade merely based on possible occurrence of risks with *no clear and present danger*.<sup>16</sup>

This case took account only of the protection of freedom to express oneself, disregarding government's state policy. It makes clear that the protection of individual rights is preferable to political ideology. In the same vein, when the Taiwan Law Society (*Taiwan Faxue Hui*) challenged the constitutionality of the executive order requiring "China" instead of "Taiwan" in its name, the Court found the order unconstitutional, arguing that the selection of a name for an association was protected as freedom of assembly, and that restrictions on this selection had to meet the requirements of article 23 of the Constitution, which allowed statute law alone to make such restrictions.<sup>17</sup> Since then, a variety of

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<sup>15</sup> The Court's Interpretation No. 445 (1998).

<sup>16</sup> The Court's Interpretation No. 445 (1998).

<sup>17</sup> The Court's Interpretation No. 479 (1999).

nationwide associations have used “Taiwan” in their names, suggesting that “Taiwan” is identified as a nation as a whole.

To socialize the people of Taiwan with the KMT ideology, the party-state regime assumed tight control over the education system. Under KMT party-style education the main educational objectives included instilling nationalism, patriotism and morality. Political issues comprised the major contents of textbooks in primary and secondary schools. Courses such as “Three Principles of People” and “Thought of our National Father (Dr. Sun Yat-sen),” which dealt only with KMT political ideology, were included in the upper grade school curricula. A military training program was incorporated into the national curriculum, and military officials served as staff in senior high schools and colleges from 1952 on. The main purpose of military training was not to teach military skills, but to educate students in KMT ideology and maintain campus security.

With Taiwan’s democratization, the KMT began moving its party offices out of university campuses in 1987. A new University Law was enacted to implement academic freedom and school self-governance. Nonetheless, the use of education as a mechanism for ideological control did not diminish with the promulgation of the new law. The KMT government maintained those political ideology courses as requirements for college students under an enforcement rule of the University Law. This requirement was evidently devised to maintain the KMT’s ideological hegemony. On the grounds of protecting academic freedom, this enforcement rule was held unconstitutional. The Court ruled that freedoms of academic research, teaching and learning were guaranteed by the Constitution and the University Law. Government restrictions on the college’s self-governance had to conform to the principle of legality provided by article 23 of the Constitution. The enforcement rule imposed a limitation on the college’s self-governance not addressed by the University Law, thereby unduly interfering with freedom of teaching, and therefore rendering it unconstitutional.<sup>18</sup>

The enforcement rule of University Law also required colleges to institute military training offices staffed by military officers. These military training offices were to carry out KMT ideology and maintain campus security, but would not be concerned with academics. Based on the freedom of teaching

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<sup>18</sup> The Court’s Interpretation No. 380 (1995).

guaranteed under the Constitution, the Court held the enforcement rule void because it ran afoul of the principle of college self-governance.<sup>19</sup>

When the KMT government made every effort to facilitate ideological socialization among the people and students through restrictions on individual rights, these relevant statutes and regulations have been consistently repealed because of their unconstitutionality. The KMT ideology no longer prevails over individual rights. People are allowed to air their opinions on communism or territorial division through free assembly and parades. The term “China” is no longer symbolic of Taiwan as a nation. School courses for the sole purpose of education in political ideology are not required for college students; and military officers for KMT’s ideological training are banned. The “mind-cleaning” measures initiated by the KMT government have gradually been eliminated through court decisions. These developments make clear that human rights prevail over government policy, and that the government has to exercise its power under the Rule of Law.

## ACCESS TO THE LAW

The principle of Rule of Law means that our relations and actions are governed by codified, impersonal and impartial procedures and rules that are applied equally and fairly to all people.<sup>20</sup> Nonetheless, laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted so as to be fully intelligible only to the legally trained. Court regulations and court schedules, even courthouse architecture, are designed around the needs of the legal profession. The denial of legal services is in reality a denial of access to the legal system.<sup>21</sup> By the same token, without competent courts to deal with case processing, even an ideal justice system and well-established legal concepts would nevertheless be futile.

Legal reforms continue to be a constant undertaking for every head of the judiciary in Taiwan. To encourage the people to bring their cases before courts, the judiciary revised the Code of Civil Procedure several times, making it easier for citizens to use the courts and expanding the scope of small claims cases. A large number of small claims courts have been set up in almost every town

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<sup>19</sup> The Court’s Interpretation No. 450 (1998).

<sup>20</sup> Gerald Turkel, *Law and Society: Critical Approaches*, 46 (Boston: Allyn and Bacon, 1996).

<sup>21</sup> David Luban, *Lawyers and Justice: An Ethical Study*, 244 (Princeton: Princeton University Press, 1988).

since 1991. Judges in small claims courts even work at night, preparing to serve citizens at any time. The presence of so many small claims courts makes civil procedures expeditious, economical and convenient. The people are encouraged to resolve their disputes in courts. In this regard, the government has demonstrated its determination to carry out the Rule of Law among society.

Nonetheless, Taiwanese court caseloads are tremendously heavy. In 1999, each district court judge had to deal with an average of 545 litigation cases.<sup>22</sup> There were fewer than six judges per 100,000 persons in 1998.<sup>23</sup> As a result, the quality of court decisions is declining, delays in processing cases are multiplying, and the expenditure necessary to sue is increasing. Those litigants with little knowledge or wealth may be overlooked by the court system.

Even worse, it is expensive to hire a lawyer in Taiwan, making it difficult to obtain competent legal aid. In Taiwan, the bar examination is notorious for how difficult it is to pass. Although the government endeavored to raise the passing rates, only 5.6 percent of applicants passed the bar examination in 1998. According to a rough estimate, about 3,200 attorneys were practicing in Taiwan in the same year, reflecting a ratio of 14.6 attorneys per 100,000 persons.<sup>24</sup> Overall, the service of an attorney is still a rare product in the Taiwanese legal market.

Expensive attorney service fees in Taiwan result from the low rate of attorney representation in courts. In December 1999, for instance, the percentage of all civil lawsuits in which both parties had attorney representation was only 4.6 percent, and 19.1 percent in which only one party was represented in district courts. In the high courts, however, the ratios increased to 40 percent and 26 percent, respectively. The attorney representation rates were even lower in criminal courts, with 12.5 percent in district courts and 32.9 percent in high courts, respectively.<sup>25</sup> That is, the parties were inclined not to hire attorneys until their cases were appealed to the high courts, still with a low rate of attorney representation. With such meager attorney assistance, the rights of the people are hardly adequately ensured. Due to expensive legal services, those

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<sup>22</sup> See Judicial Yuan's network service, address: <http://www.judicial.gov.tw/juds/1-source5.htm>.

<sup>23</sup> In 1998, Taiwan, with a population of almost 22 million, had only 1,275 judges.

<sup>24</sup> The estimated number of attorneys in Taiwan was provided by Taiwan's National Bar Association.

<sup>25</sup> See Judicial Yuan's network service, address: <http://www.judicial.gov.tw/juds/1-source5.htm>.

litigants with the greatest resources of knowledge, wealth and influence are most likely to be able to make use of the courts. In this way, the Rule of Law is available to the “haves” to a far greater extent than to the “have-nots.”<sup>26</sup>

While attorney services are rare in the courts, legal aid for criminals who cannot afford representation is in short supply. Few public offenders are provided with legal aid, despite the government’s 1999 policy decision to support a legal aid system. No specific legal-aid organizations, like the American Services Corporation, have ever been established. Legal aid in Taiwanese society is offered by law schools, charity organizations and social activists groups. Their legal services, however, are not comprehensive. Mostly, they provide only consultation with no further paperwork or legal services in the courts, which citizens need most. In the end, citizens have to find and hire lawyers, which many cannot afford.

## CONCLUSION

The Rule of Law suggests no arbitrary governmental power, no infringement on human rights, and the courts’ determination to carry out constitutionality based on the principle of equal access to the law. In Taiwan, the judiciary has been an active organ in reviewing decrees, regulations, statutes and even constitutional amendments. The government’s power is strictly checked by the principle of legality and constitutionalism. Individual rights such as physical freedom and freedom of expression are highly appreciated over any other concerns. While the government tries to encourage the people to use the courts to resolve their disputes, however, legal services, in terms both of their quality and quantity, are not yet efficient and available. Under the Rule of Law, people are equal before the law. The legal system signifies justice to all. While the people in Taiwan recently have enjoyed a higher standard of legal procedures at the upper levels of the judicial system (i.e., the Constitutional Court), the remaining issue is the way in which the ideal of the Rule of Law can be carried on throughout the lower courts. If only those litigants with great resources of knowledge, wealth and influence are able to make use of courts, then the Rule of Law is available merely to the “haves” rather than the “have-nots.” The Taiwanese issue concerning the Rule of Law is that there is in effect a two-tier legal system; there is a high standard of the Rule of Law at the highest court with insufficient support for access to the law. This two-tier

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<sup>26</sup> Cotterrell, *supra* note 1, at 159.

system may amount to a systematic denial of justice to the poor. It is therefore imperative for Taiwan to develop a legal aid system that enables the poor to use the courts, which will be an indication that the Rule of Law is equally available for all.

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