



Adoption of the Common Law Hearsay Rule in a Civil Law Jurisdiction: a Comparative Study of the Hearsay Rule in Taiwan and the United States

Ming-woei Chang¹

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¹ Assistant Professor of Law, Aletheia University Department of Financial Economic of Law, Tamsui, Taipei, Taiwan, ROC; Areas of Specialization: Criminal Law, Criminal Procedure, Evidence Law, and Latin-Notary Law. S.J.D., Golden Gate University School of Law, San Francisco, CA, USA; LL.M.(I.P.), Franklin Pierce Law Center, Concord, NH, USA; LL.M. & LL.B., National Taiwan University College of Law, Taipei, Taiwan, ROC. Email: mwconqueror@yahoo.com.tw.

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1. Introduction

Over the past decades, the criminal justice system of the Republic of China on Taiwan (ROC) has long been criticized for its insufficient human rights protection, especially for the alleged criminal offenders. From 1947 to 1987, Taiwan enforced martial law and was in a state of siege. In this era of martial law rule, ordinary citizens in Taiwan lived for four decades with little anticipation of any recognition of their inherent human rights, not to mention the rights of the accused; to some extent, it was considered a privilege for an ordinary Taiwanese citizen to claim any right to an impartial trial. The guarantee of due process in the criminal justice system—which is today widely perceived as essential to civil rights in any modern democracy—was virtually non-existent in ordinary criminal proceedings in Taiwan.

Following Taiwan's development of democratic institutions, which began in 1987, with numerous interpretative pronouncements of the Grand Justice Council² as well as extensive knowledge accumulated from the introduction and comparison of various modern foreign criminal justice systems (such as the United States, Japan and Germany), the people of Taiwan started to review their legal system. They gave particular focus to its criminal justice system as well as to the police power that influenced the daily life of people most. They gradually reached the conclusion that the ROC CPC (CPC), based mainly on the continental German system and enacted in 1967,³ was clearly out of date.

To prevent miscarriage of justice, the design of criminal procedures must be focused on the protection of the rights of the alleged offenders. In fact, the degree to which the rights of the alleged offenders are protected during criminal proceedings has been regarded as one of the indexes of a nation's civil developments. In order to improve human rights protection both of the citizens and alleged offenders in Taiwan, the Taiwanese government decided to amend its Criminal Procedure Code (CPC). Critical drafts of the CPC were passed by Taiwan's Legislative Yuan⁴ in 1990, 1993, 1995, 1997, 1998, 1999, 2000, 2001, 2002, and 2003, corresponding to the demand for human rights protection.

² Within the framework of the Constitution of the Republic of China, the Grand Justices en masse ensure the Constitution's effectiveness by actively guarding it from violations, and resolving disputes rising from its application. See the ROC Judicial Yuan and its Grand Justice Council, at <http://www.judicial.gov.tw> (last visited Sep. 18, 2004).

³ As reported, "In the late Qing dynasty there was a concerted effort to establish legal codes based on European models. Because of the German victory in the Franco-Prussian War and because Japan was used as the model for political and legal reform, the law codes which were adopted were modeled closely after that of Germany. The existing German-based legal codes were then adopted by the new Republic of China government, but they were not immediately put into practice - following the overthrow of the Qing dynasty in 1911, China came under the control of rival warlords and had no government strong enough to establish a legal code to replace the Qing code. Finally, in 1927, Chiang Kai-shek's Kuomintang forces were able to suppress the warlords and gain control of most of the country. Established in Nanjing, the KMT government attempted to develop Western-style legal and penal systems. Few of the KMT codes, however, were implemented nationwide. Although government leaders were striving for a Western-inspired system of codified law, the traditional Chinese preference for collective social sanctions over impersonal legalism hindered constitutional and legal development. The spirit of the new laws never penetrated to the grass-roots level or provided hoped-for stability. Ideally, individuals were to be equal before the law, but this premise proved to be more rhetorical than substantive. In the end, most of the new laws were discarded as the Kuomintang became preoccupied with fighting the Chinese Communists and the invading Japanese. Law in the Republic of China on Taiwan is based on the German-based legal system which carried to Taiwan by the Kuomintang. In the area of constitutional law, the Republic of China uses the 1947 Constitution which was promulgated for both Mainland China and Taiwan although numerous changes have been made to take into account the fact that the Republic of China only controls Taiwan and two counties of Fujian." See Wikipedia, Chinese Law, at http://en.wikipedia.org/wiki/Chinese_Law (last modified, Dec. 6, 2004).

⁴ According to the ideas of Dr. Sun Yet-sen, who framed the Five-Power Constitution, enacted and promulgated in 1947, the Legislative Yuan shall be the supreme legislative organization of the State, to be constituted of members elected by the people, and it shall exercise legislative power on behalf of the people. In terms of its competence, power, and function, Taiwan's Legislative Yuan is equivalent to a parliament in other western democracies (such as the Congress in U.S.). See Introduction to the ROC Legislative Yuan, at <http://www.ly.gov.tw> (last visited Sep. 18, 2004).

From the viewpoint of comparative legal study, the recent legislation of Taiwan which might reshape the ROC criminal procedure has given rise to a controversy regarding whether Taiwan's criminal justice system retains its inquisitorial tradition or has become pro-accusatorial since the former CPC was based upon continental inquisitorial models and those current effective amendments are derived mainly from the American accusatorial model. However, this comparative study does not intend to solve the problem whether the new Taiwanese criminal justice system remains inquisitorial, but focuses merely on the newly enacted hearsay rule in the ROC CPC and its counterpart in the United States. After offering a brief overview of the developments of the hearsay rule in Taiwan and its counterpart in the States, this study compares and analyzes why the developments of the hearsay rule in Taiwan differs from those in the United States.

2. Adoption of the Hearsay Rule in Taiwan

Before examining this topic, it is desirable to introduce the historical background of Taiwan, especially for those not familiar with this jurisdiction.

2.1 An Overview

Taiwan had been a neglected island before the 17th century. Before 1662, Taiwan was partly colonized by the Dutch (the Dutch East India Company from 1624) and by Spain (from 1628 to 1642, ousted by the Dutch). After Jheng Cheng-gong defeated the Dutch in 1662 and set up the Ming Dynasty Government, Taiwan was governed by the Chinese for the first time, and there were about 40,000 Chinese people living in Taiwan then.

Twenty-one years later, the then ruler, Jheng's grandson, surrendered control of the island to the Ching Dynasty, and the Ching Dynasty ruled Taiwan for the next 212 years until 1895. After Japan won the Sino-Japanese war, Taiwan was ceded to Japan in 1895 pursuant to the Treaty of Shimonoseki. From 1895 to 1945, Taiwan was controlled by the Japanese Government. Following Japan's defeat and surrender in August 1945 at the end of World War II, Taiwan was retroceded to the Chinese people (then the Republic of China) on October 25th and again placed under Chinese governance.⁵

Before resuming sovereignty over Taiwan in 1945, the ROC government, under the administration of the Chinese Nationalist Party (i.e., the Koumintang, KMT), established its legal system following the example of Japan by enacting Western style, especially German-style, codes from the late 1920s to mid-1930s. In 1935, the ROC government enacted its first Chinese Criminal Procedure Code. Although the ROC legal system was based mostly on the German civil law system and was as such influenced by and modeled on the old

⁵ See Taiwan Yearbook 2003, at <http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/chpt03.htm> (last visited Apr. 8, 2004).

Japanese and German codes, those individualist and liberal legal norms had not been practically enforced in China due to the chaos caused by continuous hostilities during the period after their promulgation. As an independent jurisdiction, Taiwan started its legal development under both Chinese and Japanese legal legacies, at that time principally civil law, even after the establishment of the People's Republic of China (PRC) on October 1st, 1949, but especially so after the KMT-led ROC central government retreated to Taiwan in December of 1949.

Generally speaking, the Republic of China on Taiwan has a codified system of law, of which the contents are mainly transplanted from abroad, and borrowed heavily from the laws of other countries with similar codified systems⁶ as well as traditional Chinese laws. The ROC Court system follows the continental civil law model. Procedures are inquisitorial rather than accusatorial, and judges are active trial participants. The supreme law of Taiwan is the ROC Constitution. The judicial system is composed of three tiers: the Supreme Court, the High Court, and the District Court. Professional judges decide all cases, including facts and legal issues. Appeals to the High Court are as a matter of right in Taiwan.⁷ Appeals to the Supreme Court are limited and specified by statute, but are generally available for all except the smallest or most localized of cases.⁸ Since the Supreme Court reviews only issues of law, an appeal may be made to the Supreme Court only on the ground that the original judgment is in violation of a law or an order.⁹ While the Supreme Court does not determine issues of fact, documentary proceedings are the rule while oral proceedings are the exception.¹⁰ As the legal system in the ROC is based on the civil law and code-based legal traditions, legal matters are decided by reference to the Codes and to the writings of scholars and judges who interpret the Codes. There is comparatively little judge-made law in Taiwan. Similar to the German criminal justice system, the main source of Taiwan's criminal procedure law is its CPC.¹¹ While some of the individual's rights guaranteed by the ROC Constitution have special relevance in the context of the criminal process, the jurisprudence of the Grand Justice Council has great relevance for the interpretation of criminal procedure law, although the interpretation of the CPC is the task of ordinary courts.¹²

As in Germany, there was no general statutory exclusionary rule that would make illegally obtained evidence inadmissible under the 1935 Chinese Criminal Procedure Code or the 1967 re-enacted ROC CPC. Only Paragraph 1 of Article 156 of the former ROC CPC did

⁶ See Kenneth Robert Redden, ed., *Modern Legal Systems Cyclopedia*, Volume 2A, 40.12 (1984).

⁷ See Article 344 of the ROC CPC.

⁸ See Articles 376 to 382 of the ROC CPC.

⁹ See Article 377 of the ROC CPC.

¹⁰ See Article 372 of the ROC CPC.

¹¹ Different from the highly constitutionalized criminal justice system in the USA, in Taiwan most issues of criminal procedure in the continental tradition are governed by detailed provisions of the CPC.

¹² See Thomas Weigend, Chapter 6, "Germany", in Craig M. Bradley, ed., *Criminal Procedure: A Worldwide Study*, 187 (1999).

provide for inadmissibility of statements elicited by certain forbidden means, including violence, threat, inducement, fraud, unlawful detention, and other improper devices. Despite this provision, since the ROC Supreme Court did not care about how evidence was obtained, any evidence related to proving the truth of the matter at issue was admissible in the past.¹³ In other words, the exclusionary approach of evidentiary hearsay rule did not exist in the ROC jurisdiction until 2003.

2.2 Pre-2003 Practice without Hearsay: Continental Direct Inquisition

In the continental inquisitorial tradition, virtually no scholars and judges recognized there was an American-style hearsay rule in Taiwan.¹⁴ Since former Article 159 of the ROC CPC provided that “statements made by a witness outside the court shall be inadmissible unless otherwise provided by law,” which looked like the definition of hearsay in the United States Federal Rules of Evidence (FRE),¹⁵ and Articles 157, 158, and 206 of the ROC CPC¹⁶ might be treated as exceptions to hearsay, it was questionable whether the 1967 ROC CPC adopted the American style hearsay rule while the minority opinion claimed those provisions constituted hearsay rule.¹⁷

In practice, based on the 1967 Advisory Committee Note, Article 159 of the ROC CPC had long been considered as deriving from the continental principles of “Direct Inquisition” and “Verbal Inquisition” instead of the common law hearsay rule. Hence, courts in Taiwan were bound by very few legal restrictions on the nature of evidence they received as explained by the ROC Supreme Court.¹⁸ Generally speaking, any out-of-court verbal statement made by a witness other than an accused is inadmissible.¹⁹ An out-of-court document made by a witness is inadmissible.²⁰ Interestingly, even though an out-of-court verbal statements should be inadmissible under former Article 159 of the ROC CPC, if it was “made by a co-defendant

¹³ See 72 Tai Sun 1332 (1983). It should be noted that Taiwan’s legal professionals do not cite a case using the parties’ names. Instead, they cite case numbers.

¹⁴ It is noteworthy that the late Professor Pu-Shen Chen, a former Grand Justice and leading Professor of Law at National Taiwan University and National Chen Chi University, asserted that there was no hearsay rule in the ROC CPC. And statements made by a witness outside the court shall be admitted in evidence according to Article 165 and 166. See Pu-Shen Chen, *Criminal Evidence Rule*, 413 (Taipei, 1995) (in Chinese).

¹⁵ Rule 801 (c) of the Federal Rule of Evidence provides: “Hearsay is a statement, other than one made by the declarant while testifying at the trial of hearing, offered in evidence to prove the truth of the matter asserted.”

¹⁶ Article 157 of the ROC CPC provides: “No evidence need be adduced to prove facts commonly known to the public.” Article 158 provides: “No evidence need be adduced to prove such facts as are obvious to the court or have become known to it in performing its function.” And Paragraph 1 of Article 206 provides: “An expert shall be ordered to make a report of his or her findings and results verbally or in writing.”

¹⁷ Only Professor Tung-Sheung Huang, Professor of Law and a former President of National Chun-Shin University, asserted the hearsay rule had existed in the ROC CPC before. See Tung-Sheung Huang, “Discussing the Hearsay Rule”, *Military Law Journal*, Vol. 35-1, 16 (Taipei, 1989) (in Chinese).

¹⁸ See the following ROC Supreme Court decisions: 70 Tai Sun 3864 (1981), 72 Tai Sun 1203 (1983), 77 Tai Sun 848 (1988), 79 Tai Sun 5140 (1990), 81 Tai Sun 4352 (1992), 82 Tai Sun 622 (1993), 83 Tai Sun 2785 (1994), 84 Tai Sun 2819 (1995), and 91 Tai Sun 2363 (2002).

¹⁹ See 79 Tai Sun 5140 (1990).

²⁰ See 77 Tai Sun 848 (1988).

or a victim” and “recorded by law-enforcement-officers” and the court performed its duty to read related notes and other documents in the dossier which might be used as evidence against an accused at trial under former Paragraph 1 of Article 165 of the ROC CPC, without directly questioning the declarant, any out-of-court verbal statement made by a co-defendant or a victim during interrogation by law-enforcement-officers was not only admissible but also sufficient to secure conviction.²¹ For example, in 72 Tai Sun 1203 (1983), the ROC Supreme Court held that

[u]nder the ‘Doctrine of Discretionary Evaluation of Evidence’, there is no limitation regarding the admissibility of the stereotype of evidence in the ROC criminal justice system. Victim’s deposition made during police interrogation is not prohibited from being in evidence by Article 159 of the ROC CPC. The court has the discretionary power to decide whether the ‘victim’s deposition’ would prove guilt or innocence of the accused.

In other words, according to this decision, the victim’s deposition was not excluded by former Article 159 of the ROC CPC. While this article mentioned “witness statements” only, it did not apply to out-of-court statements made by co-defendants or victims since they were not considered witnesses.

Even though former Article 159 of the ROC CPC excluded an out-of-court verbal statement made by a witness, in 91 Tai Sun 2363 (2002), the Supreme Court ruled that “the statement recorded in private-made tape or video should be admissible if the defendant merely intended to prove what the witness had told before the court or a public prosecutor previously was not true.” As a result, an out-of-court verbal statement was admissible for the purpose of impeaching the witness. In general, out-of-court verbal statements made by non-victim and non-co-defendant witnesses were inadmissible in the pre-2003 practice. Nonetheless, if an out-of-court verbal statement was made by a victim or a co-defendant and recorded by a government officer, only when the court fulfilled its obligation to investigate these statements under former Paragraph 1 of Article 165 of the ROC CPC would they be admissible as evidence. Under this practice, an out-of-court statement made by a co-defendant or a victim before any government officer sufficed to secure conviction. This practice resulted in unfairness especially when a defendant had no opportunity to respond to an out-of-court statement fully prepared, because he would only be confronted with this kind of information at the trial. While commentators began to sense that this kind of injustice was mainly caused by the absence of a hearsay rule, of meaningful protection of the right to confrontation, and of other procedural protection in Taiwan, claims to reform Taiwan’s criminal justice system emerged, which eventually resulted in the adoption of the American-style hearsay rule.

²¹ See the following ROC Supreme Court decisions: 71 Tai Sun 5946 (1982), 72 Tai Sun 1203 (1983), 77 Tai Sun 4249 (1988), 86 Tai Sun 4242 (1997), and 90 Tai Sun 6517 (2001).

2.3 The 2003 Hearsay Rule

2.3.1 Definition

In 2003, in order to better the defendant's protection at trial, after years of debate on the adoption of the hearsay rule, the ROC Legislative Yuan finally revised its CPC by adding the hearsay rule. Unlike former Article 159 of the ROC CPC, the current Paragraph 1 of Article 159, providing that "[u]nless otherwise provided by law, any out-of-court verbal statement derivative from anyone other than the defendant himself shall be inadmissible," clearly delimits inadmissible hearsay in principle. Under this new provision, out-of-court statements made by co-defendants or victims are inadmissible hearsay. Only out-of-court statements made by the defendant himself are not hearsay. In addition, compared to former Article 159 of the ROC CPC which did not provide any hearsay exception, not all out-of-court statements made by witnesses are absolutely inadmissible because some hearsay exceptions were enacted in 2003. In short, as a civil law jurisdiction, Taiwan is currently using the common law hearsay rule.

2.3.2 Exceptions to Hearsay

In addition to the adoption of the hearsay rule, exceptions to Paragraph 1 of Article 159 of the ROC CPC have also been adopted. For instance, if an out-of-court verbal statement derived from anyone other than the defendant is made before a judge, it is admissible because of its reliable voluntariness.²² If they do not contain obviously implausible circumstances, out-of-court verbal statements derived from anyone other than the defendant made before a public prosecutor are also admissible.²³ In addition, while an out-of-court verbal statement derived from anyone other than the defendant made before any law-enforcement-officer is inconsistent with the same declarant's statement at trial, the former statement is admissible if the court finds the previous statement is more reliable and deems it necessary to use the previous statement to prove the truth of the asserted matters.²⁴ If the declarant is unavailable to stand trial in that he is dead, has a mental disorder, has lost his memory, is incapable of talking, is living abroad, lost, or refuses to make a statement without justification, the former out-of-court verbal statement derived from anyone other than the defendant made before any law-enforcement-officer is admissible too when the court finds the out-of-court statement is more reliable and deems it necessary to use the out-of-court statement to prove the truth of the asserted matters.²⁵

²² See Paragraph 1 of Article 159-1 of the ROC CPC and the Advisory Committee Note.

²³ See Paragraph 2 of Article 159-1 of the ROC CPC.

²⁴ See Article 159-2 of the ROC CPC.

²⁵ See Article 159-3 of the ROC CPC.

Besides the out-of-court verbal statements, public records and reports, and business records of regular activities are admissible in evidence unless obviously implausible circumstances exist.²⁶ Accordingly, a residual clause admitting any other document made in reliable circumstances is also adopted.²⁷ Within the scope of inadmissible hearsay, while both parties accept out-of-court statement in evidence at trial, hearsay is admissible only if the court finds it proper after considering the given context of the hearsay evidence.²⁸ In other words, the newly passed Article 159-5 of the ROC CPC allows both parties to dispose hearsay statements. Whether to object to the opponent's hearsay evidence depends on the party's own discretion. Nonetheless, the court remains entitled to make a final decision about the admissibility of hearsay evidence accepted by the parties. As a consequence, some pre-2003 admissible out-of-court statements²⁹ become inadmissible hearsay evidence because of Paragraph 1 of Article 159 and Article 159-2 of the current ROC CPC; some pre-2003 inadmissible out-of-court statements³⁰ today are admissible at trial according to Articles 159-3, 159-4 and 159-5 of the ROC CPC.

2.4 Problems Caused by the 2003 Legislation

Although the American-style hearsay rule was initially adopted to improve human rights protection, the 2003 legislation also caused legal problems. For example, while there are more than twenty exceptions to hearsay in the United States Federal Rules of Evidence, only five articles in the 2003 legislation provide exceptions to hearsay in the ROC CPC. Why the ROC CPC merely provides five hearsay exceptions and whether these provisions provide enough hearsay exceptions have become important issues. Do Articles 159-1 to 159-5 of the ROC CPC cover all hearsay exceptions under the Federal Rules of Evidence of the United States? If not, why not? In addition, without any limitation, Article 159-1 of the ROC CPC admits out-of-court statements made before a judge or a public prosecutor. What is the rationale behind this article? Since the current hearsay rule excludes some previously admissible out-of-court statements, why does it accordingly admit some formerly inadmissible out-of-court statements made by private persons at trial? Compared to Articles 159-2, 159-3, and 159-4 of the ROC CPC requiring the court to find previous out-of-court statements reliable and necessary in order to admit them as evidence, it is unclear and even questionable why merely "stating" instead of "testifying" before a judge or a public prosecutor without requiring necessity and reliability would itself result in admissibility. While the Advisory Committee Note in 2003 declared that the purpose of adopting the American-style hearsay

²⁶ See Subparagraphs 1 and 2 of Article 159-4 of the ROC CPC.

²⁷ See Subparagraph 3 of Article 159-4 of the ROC CPC.

²⁸ See Paragraph 1 of Article 159-5 of the ROC CPC.

²⁹ Such as: out-of-court statements were made by co-defendants or victims before government officers.

³⁰ Such as: the out-of-court declarant (witness) is dead, has a mental disorder, has lost his memory, is incapable of talking, is living abroad, lost, or refuses to make a statement without justification.

rule was to protect the defendant's right to confront witnesses, it is unclear whether Article 159-1 of the ROC CPC admitting out-of-court statements violates this right. What the standard for deciding the admissibility of out-of-court statements should be thus emerges as a core legal problem regarding the hearsay rule in Taiwan.

Moreover, since 91 Tai Sun 2363 admitted an out-of-court statement for the purpose of impeaching the witness, it is unclear whether the 2003 legislation recognized this practice. It is also ambiguous about the scope of exclusionary hearsay adopted in Taiwan. Before looking at United States legislation for potential solutions to these problems, the development of exclusionary hearsay in the United States will be briefly described.

3. Exclusionary Hearsay and the Confrontation Clause in the United States

3.1 The Pre-Mattox Practice of the Sixth Amendment in the United States

While, before the nineteenth century, English common law did not guarantee the assistance of counsel in all prosecutions, the Sixth Amendment, in granting a full right to counsel in all cases, did not constitutionalize English law.³¹ Regardless of its origins, as noted by Professor Akhil Reed Amar, the Bill of Rights "was not simply an enactment of We the People as the Sovereign Legislature bringing new rights into existence, but a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed."³² Thus, the Framers' concerns about federal encroachment and their desire to provide a check on federal judges³³ resulted in an attempt to constitutionalize the criminal procedure that had been developed in the colonies and the states.³⁴ As a result, since confrontation came to be the guarantee to allow an accused to challenge the information against him, and defense cross-examination had become the chief procedure for challenging such evidence, the right to confrontation guaranteed an accused the right to cross-examine witnesses as part of the newly emerging adversary system.³⁵

As already mentioned, there was no federal case law totally focusing on the confrontation issue before the end of the nineteenth century. However, a few judicial opinions had mentioned this topic since 1791. For instance, in 1807, Chief Justice Marshall, in United States v. Burr, reasoned that the Confrontation Clause was adopted to restrict the admission of hearsay.³⁶ Since Justice Marshall did not explain why hearsay should be restricted, some constitutional-era opinions interpreting state provisions indicated that the purpose of

³¹ See Randolph N. Jonakait, *supra* note 31, 109.

³² See Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment", 101 *Yale Law Journal*. J. 1193, 1206 (1992).

³³ See Akhil Reed Amar, "Fourth Amendment Principles", 107 *Harvard Law Review* 757, 773 (1994).

³⁴ See Randolph N. Jonakait, *supra* note 31, 113.

³⁵ *Id.*, at 115.

³⁶ See 25 F. Cas. 187, 193 (1807).

confrontation was to guarantee the accused the opportunity to cross-examine witnesses at trial.³⁷ These opinions held cross-examination to be at the core of the right to confrontation.³⁸ In State v. Webb, a North Carolina case, the court rejected a South Carolinian's deposition that the absent accused had sold him the stolen horse by reasoning that "it is a rule of common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not had the liberty to cross examine ..."³⁹ In State v. Atkins, a Tennessee case, the court also rejected the former testimony as evidence, holding that

frequent deaths may take place between the trial there and here, and it seems to us, that it would be dangerous to liberty to admit such evidence. It would go a great length in overthrowing this wise provision of the constitution. An inconvenience which could not exist in England, where there is no appeal as to matter of fact, as here. The evidence cannot be received.⁴⁰

Even though North Carolina's confrontation guarantee was worded differently from Tennessee's, each, according to the Tennessee court,⁴¹ signified the same.⁴² Moreover, in State v. Campbell, a South Carolina case, for the purpose of pursuing a fair trial, the court rejected the testimony of a then-dead witness, who had testified at a coroner's inquest in the absence of the accused.⁴³ The court stated:

[O]ne of the indispensable conditions of such due course of law is, that prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination.... it is only in the examination and cross-examination, that the knave can be detected, errors of fact exposed, or false imaginations expunged⁴⁴

In short, the Pre-Mattox development of the Confrontation Clause in the United States appeared mainly on the state level, with a focus on cross-examination. As proposed by Professor Randolph N. Jonakait,

the Confrontation Clause, and other Sixth Amendment provisions, constitutionalized procedures already used in the states. These procedures allowed effective advocacy on behalf of the accused. Defense cross-examination was central to this. In trying to make sure that federal trials would use the procedures

³⁷ See Randolph N. Jonakait, *supra* note 31, 122.

³⁸ *Id.*

³⁹ See 2 N. C. (1 Hayw.) 77, 77 (1794).

⁴⁰ See 1 Tenn. (1 Overt.) 229, 229 (1807).

⁴¹ See 10 Tenn. (2 Yer.) 58, 59-60 (1821).

⁴² See Randolph N. Jonakait, *supra* note 31, 123.

⁴³ See 30 S.C.L. (1 Rich 124, 125) 51 (1844).

⁴⁴ *Id.*, at 51-2.

already developed by the Americans, the Sixth Amendment sought to guarantee defense cross-examination in the Confrontation Clause.⁴⁵

3.2 Under the Confrontation Clause: the Post-Mattox Practice

When the Supreme Court started to review the Confrontation Clause, it focused on the admissibility of hearsay. To some extent, both the right to confrontation⁴⁶ and the rule against hearsay⁴⁷ are directed at accurate fact finding. It was not necessary to clarify the relationship between the right of confrontation and the hearsay rule before 1965 in that the Court in Krulewitch v. United States reasoned its supervisory power over the inferior federal courts permitted it to control the admission of hearsay.⁴⁸ Moreover, on the basis of the Confrontation Clause, the Court in Motes v. United States had concluded that evidence given at a preliminary hearing could not be used as a hearsay exception at the trial if the absence of the witness was attributable to the negligence of the prosecution.⁴⁹ In addition to recognizing the admissibility of “testimony given at a former trial by a witness since deceased” in Mattox v. United States,⁵⁰ the Court also permitted “dying declarations” in Kirby v. United States.⁵¹ The Court even seemed to equate the Confrontation Clause with the hearsay rule.⁵²

Nonetheless, even though these two issues might look similar, they are not identical. The Court in Barber v. Page held the right to confrontation should be a trial right which allows the accused to cross-examine an important witness at trial, and, unless the witness is unavailable, only granting the defendant the opportunity to cross-examine a crucial witness at a preliminary hearing would violate the Confrontation Clause.⁵³ Hence, the protection provided by the Confrontation Clause is broader than that provided by the hearsay rule. Besides seeking the truth, the right to confrontation should incorporate an element of fairness, of affording the defendant an opportunity to test the evidence against him, no matter how reliable that evidence may seem.⁵⁴

⁴⁵ See Randolph N. Jonakait, *supra* note 123, 124.

⁴⁶ In Ohio v. Roberts, the Court held that the purpose of the Confrontation Clause is to augment accuracy in the fact-finding process. See 448 U.S. 56, 65 (1980).

⁴⁷ See G. Michael Fenner, *The Hearsay Rule*, 4 (Carolina Academic Press, 2003).

⁴⁸ See 366 U.S. 440 (1949); see also FindLaw, Confrontation, available at <http://caselaw.lp.findlaw.com/data/constitution/amendment06/08.html> (last visited, Oct. 20, 2004). In addition, the Court in Delaney v. United States concluded that the co-conspirator exception to the hearsay rule was consistent with the Confrontation Clause. See 263 U.S. 586, 590 (1924).

⁴⁹ See 178 U.S. 458 (1900). However, if a witness’s absence had been procured by the defendant, testimony given at a previous trial on a different indictment could be used at the subsequent trial. See Reynolds v. United States, 98 U.S. 145 (1879).

⁵⁰ See 156 U.S. 237, 240 (1895).

⁵¹ The prosecution was not permitted to use a judgment of conviction against other defendants on charges of theft in order to prove that the property found in the possession of defendant now on trial was stolen. See 174 U.S. 47, 61 (1899).

⁵² See FindLaw, Confrontation, available at <http://caselaw.lp.findlaw.com/data/constitution/amendment06/08.html> (last visited, Oct. 20, 2004).

⁵³ See 390 U.S. 719, 725-26 (1968).

⁵⁴ See “Note, Confrontation, Cross-Examination, and the Right to Prepare a Defense”, 56 *Georgetown Law*

According to these decisions, a rooted hearsay exception might be considered a violation of the Confrontation Clause. Thus, whenever a witness is available, he is required by the Confrontation Clause to be subjected to cross-examination by the defense at trial even though his prior testimony did bear indicia of reliability. In other words, to comport with the defendant's right to confrontation, the unavailability of the witness must be shown if his prior out-of-court statement is to be introduced as non-hearsay at trial.

However, in Dutton v. Evans,⁵⁵ under Snyder v. Massachusetts,⁵⁶ the Court seemed to abandon this strict requirement.⁵⁷ Therefore, presentation of a statement by a witness who was under oath, in the presence of the jury, and subject to cross-examination by the defendant was considered the only way of complying with the Confrontation Clause.⁵⁸ Ten years later, the Court in Ohio v. Roberts⁵⁹ established a two-pronged test for deciding whether the Confrontation Clause was violated. Roberts held that

[i]n sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.⁶⁰

Journal 939, 940 (1968). For instance, in California v. Green, the Court noted: "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception... Given the similarity of the values protected, however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation. Such questions require attention to the reasons for, and the basic scope of, the protections offered by the Confrontation Clause." See 399 U.S. 149, 155-56 (1970).

⁵⁵ See 400 U.S. 74, 76 (1970).

⁵⁶ See 291 U.S. 97, 122 (1934).

⁵⁷ The Court noted: "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' Evans exercised, and exercised effectively, his right to confrontation on the factual question whether Shaw had actually heard Williams make the statement Shaw related. And the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal." See 400 U.S. 74, 89 (1970).

⁵⁸ "At least in the absence of prosecutorial misconduct or negligence and where the evidence is not crucial or devastating, the Confrontation Clause is satisfied if the circumstances of presentation of out-of-court statements are such that the trier of fact has a satisfactory basis for evaluating the truth of the hearsay statement, and this is to be ascertained in each case by focusing on the reliability of the proffered hearsay statement, that is, by an inquiry into the likelihood that cross-examination of the declarant at trial could successfully call into question the declaration's apparent meaning or the declarant's sincerity, perception, or memory." See FindLaw, Confrontation, available at <http://caselaw.lp.findlaw.com/data/constitution/amendment06/08.html> (last visited, Oct. 20, 2004).

⁵⁹ See 448 U.S. 56 (1980).

⁶⁰ The Court ruled: "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment

In summary, the Confrontation Clause did not exclude out-of-court statements of an unavailable declarant if they bore sufficient indicia of reliability. Moreover, evidence should be considered reliable if it fell within a firmly rooted hearsay exception or if it showed particularized guarantees of trustworthiness. While many hearsay exceptions provided in Federal Rules of Evidence 803 do not require a showing of unavailability, the question arose whether this requirement could be waived after Roberts. By citing Dutton v. Evans, the Court in a footnote to Ohio v. Roberts noted that a demonstration of unavailability was not always required, especially when the utility of trial confrontation seemed so remote.⁶¹ As a result, since the prosecution was not always required to produce a seemingly available witness,⁶² only the reliability prong should be met in any given case. Hence, Roberts did not establish a real two-pronged test.

Nonetheless, the Court later, in United States v. Inadi,⁶³ addressed the question left by Roberts: when should the prosecutor show the unavailability of the witness? Although the Court in Inadi affirmed Roberts by ruling that the Confrontation Clause did not require showing the unavailability of the declarant,⁶⁴ since the better evidence referred to the conspirator's out-of-court testimony made during conspiracy in this case, Inadi in fact narrowed Roberts by holding that "the rule of 'necessity' is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements."⁶⁵ Subsequently, in addition to co-conspiratorial out-of-court statements made during conspiracy, under Inadi, only in the case of out-of-court statements made during prior judicial proceedings could the prosecutor waive the requirement of producing or demonstrating the unavailability of the declarant.

On the basis of Roberts, the Court in Coy v. Iowa outlawed an Iowa statute that authorized placing a one-way screen between a child victim and a defendant at trial, because "the exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted."⁶⁶ However, two years later, the Court in Maryland v. Craig upheld Maryland's law allowing the use of a one-way and closed circuit television to prevent a child victim in a sex crime from "facing" the defendant at trial.⁶⁷ While Coy's interpretation of the

establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Id.*, at 65-6.

⁶¹ *Id.*, at 65 note 7.

⁶² *Id.*

⁶³ See 475 U.S. 387 (1985).

⁶⁴ *Id.*, 394-6.

⁶⁵ See FindLaw, Confrontation, available at

<http://caselaw.lp.findlaw.com/data/constitution/amendment06/08.html> (last visited, Oct. 20, 2004).

⁶⁶ See 487 U.S. 1012, 1021 (1988).

⁶⁷ See 497 U.S. 836 (1990).

Confrontation Clause focused mainly on protecting the defendant's trial right to confront his accuser,⁶⁸ Craig adopted a different view, since "hearsay statements of nontestifying co-conspirators may be admitted against a defendant despite the lack of any face-to-face encounter with the accused."⁶⁹ Thus, as evidenced by hearsay exceptions, even though the precedents have established that the Confrontation Clause reflects a preference for face-to-face confrontation at trial,⁷⁰ this preference must occasionally give way to considerations of public policy and the necessities of the case.⁷¹ As suggested in Coy, precedents confirming "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."⁷² The word "confronted" provided in the Sixth Amendment does not "simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant --- a declarant who is undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial."⁷³

In 2004, in Crawford v. Washington, the Supreme Court again injected new vitality into the Confrontation Clause,⁷⁴ which had already been described as a revolutionary bombshell and an important paradigm shift in confrontation clause analysis.⁷⁵ Roberts and Inadi established the two-pronged test for determining whether admitting an out-of-court statement would violate the Confrontation Clause. The Crawford Court, however, realizing that the Confrontation Clause "commands not that the evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross-examination,"⁷⁶ discarded this test and reshaped the legal framework for the admission of testimonial hearsay. Under Crawford, there are two types of hearsay evidence: testimonial and non-testimonial. As a result,

[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law --- as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at

⁶⁸ See 487 U.S. 1012, 1021 (1988).

⁶⁹ See 497 U.S. 836, 849 (1990).

⁷⁰ See Ohio v. Roberts, 448 U.S. 56, 63 (1980).

⁷¹ See Mattox v. United States, 156 U.S. 237, 243 (1895).

⁷² See 497 U.S. 836, 850 (1990).

⁷³ See Coy v. Iowa, 497 U.S. 836, 849 (1990).

⁷⁴ See 124 S. Ct. 1354 (2004).

⁷⁵ See People v. Cage, 15 Cal. Rptr. 3d 846, 851 (Cal. Ct. App. 2004); United States v. Manfre, 368 F. 3d 832, 833 (8th Cir. 2004); Also see Neil P. Cohen, et al., "Crawford v. Washington: Confrontation Revolution", 40 *Tennessee Bar Journal* 22 (2004).

⁷⁶ See 124 S Ct. 1354, 1370 (2004).

issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.⁷⁷

In other words, if the statement is testimonial hearsay, Crawford supplements Roberts by subjecting the prior out-of-court statement made during judicial process to previous cross-examination, which also extends the requirement of demonstrating the unavailability of the witness to those beyond the limitation of Inadi. Hence, Roberts and Inadi will no longer apply if the prior out-of-court statement made during judicial process was not previously subjected to cross-examination. Nevertheless, while the Court intentionally declined to define the precise parameters of a testimonial statement in Crawford, it leaves an open question as to what statements are testimonial. Due to legislation of federal or state rules of evidence and court decisions, some of which interpret constitutional provisions, the rules for obtaining and weighing evidence are now more restrictive in the United States than in England.⁷⁸

3.3 Modern Evidential Hearsay: Definition and Exceptions

3.3.1 An Overview

Non-lawyers have for centuries used the term hearsay to signify that information is second-hand and therefore possibly unreliable.⁷⁹ However, as a legal concept, the common law courts created the term hearsay.⁸⁰ In fact, there was no need for a hearsay rule before the sixteenth century when juries were permitted to obtain evidence by consulting non-witness persons, and where jurors were chosen because they knew something about the case.⁸¹ Chief Justice Marshall in 1813 justified the hearsay rule by stating that

[a]ll questions upon the rules of evidence are of vast importance to all orders and degrees of men: our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now reversed from their antiquity and the good sense in which they are founded. One of these rules is, that hearsay evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony that might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.⁸²

⁷⁷ Id.

⁷⁸ See John C. Klotter, *supra* note 1, 8.

⁷⁹ See Steven I. Friedland, et al., *Evidence Law and Practice*, 308 (LexisNexis, 2000).

⁸⁰ See G. Michael Fenner, *supra* note 222, 8.

⁸¹ See John C. Klotter, *supra* note 1, 280.

⁸² See Mima Queen and Child v. Hepburn, 11 U.S. 290, 295-6 (1813).

Therefore, the Court in Hickory v. United States recognized that “[h]earsay is the prior out-of-court statements of a person, offered affirmatively for the truth of the matters asserted, presented at trial either orally by another person or in written form.”⁸³ Consequently, when the statement is hearsay, the trier of fact is not in a position to assess the proper weight to be accorded the out-of-court statement.⁸⁴ Currently, Rule 802 of the Federal Rules of Evidence (FRE 802) states that “[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” Hearsay is the legal equivalent of the common expression “tell it to the judge or jury.”⁸⁵ The hearsay rule is a general rule of inadmissibility that must be considered whenever a witness testifies to a statement made outside of the courtroom.⁸⁶ Notwithstanding, hearsay itself is not an easy issue, as described by Professor Arthur Best: “The myth of hearsay is that no one understands it, and students and practicing lawyers always make mistakes about it. It does seem sometimes that the people who understand the hearsay doctrines are a kind of secret society.”⁸⁷

Generally speaking, four main risks are associated with out-of-court statements that would be substantially reduced by the safeguards of the trial process: the risk of misperception; the risk of faulty memory; the risk of misstatement; and the risk of distortion.⁸⁸ The provisions of FRE 102⁸⁹ explain that the purpose be construed to secure fairness in administration and elimination of unjustifiable construction of the Federal Rules of Evidence. Except for the privilege rules, the rules of evidence aim at the truth so that only relevant evidence is admissible.⁹⁰ There are many concerns about why hearsay statements should be excluded.⁹¹ As shown in Crawford, most importantly, hearsay is excluded because the out-of-court declarant has not been cross-examined meaningfully by the adverse party,⁹² which creates an unacceptable danger that the trier of fact will give too much value to the declarant’s statement.⁹³ In other words, the reliability problems of out-of-court statements are thought to be so great that common law decisions and the Federal Rules of Evidence take the position that a rule of exclusion will produce the fairest results overall.⁹⁴ However, while a

⁸³ See 151 U.S. 303, 309 (1894).

⁸⁴ See Michael H. Graham, “*Stickperson Hearsay: A Simplified Approach to Understanding the Rule Against Hearsay*”, 1982 *University of Illinois Law Review* 887, 888 (1982).

⁸⁵ See Steven I. Friedland, *supra* note 255, 312.

⁸⁶ See G. Michael Fenner, *supra* note 222, 5.

⁸⁷ See Arthur Best, *Evidence*, 61 (New York Aspen Law & Business, 2001).

⁸⁸ See Christopher B. Mueller, *supra* note 29, 125.

⁸⁹ It provides: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”

⁹⁰ See *supra* note 222, 4.

⁹¹ See John C. Klotter, *supra* note 1, 275.

⁹² See Steven I. Friedland, *supra* note 255, 312.

⁹³ See Roger C. Park, *supra* note 4, 241.

⁹⁴ See Arthur Best, *supra* note 263, 65.

party could usually try to prove its case with any kind of evidence it can find, subject only to the requirement that the material be relevant, the hearsay rule contradicts the general freedom that evidence law gives parties to select their own kinds of proof.⁹⁵

Of course, it is obvious that some hearsay evidence is more reliable than others, or that there is some particular need which is worth risking unreliable evidence in order to allow hearsay into court.⁹⁶ In seeking to allow as much evidence into court as possible while sifting out unreliable evidence, including a degree of justification to assure trustworthiness of the hearsay evidence, the courts have developed many exceptions to the hearsay rule.⁹⁷ In a sense, the hearsay rules are based on some intuitive assumptions about what kinds of communications are likely to be the most accurate.⁹⁸ No matter what exceptions to the hearsay rule are adopted, fairness and judicial effectiveness are major concerns. For instance, as stated in the Commission Report, “[a]n inquiry into the performance of America’s criminal courts, therefore, must of necessity examine both their effectiveness and their fairness, and proposals for improving their operations must aim at maintaining or redressing the essential equilibrium between these two qualities.”⁹⁹ Accordingly, it should be emphasized that the goal of the hearsay rule is to assist the trier of fact in the search for the truth by keeping the unreliable evidence away from the trier of fact.¹⁰⁰

3.3.2 The Definition of Hearsay

FRE 801(c) defines hearsay as a “statement,¹⁰¹ other than one made by the declarant¹⁰² while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted.” Under this provision, the term hearsay is a statement, oral, written, or nonverbal conduct of a person intended as a statement by that person, and not the witness, who has not seen, heard, or known of the fact by himself, but who has heard that statement and later testified what he has heard to the court.¹⁰³ Although hearsay is itself defined in this article, the language employed here is criticized as having turned a basically simple idea into a tangle of language and ideas so obscure that it becomes truly difficult to think or talk about that idea with clarity and simplicity.¹⁰⁴ To put it as simply as possible, hearsay is an out-of-court statement offered to

⁹⁵ *Id.*

⁹⁶ See G. Michael Fenner, *supra* note 222, 9.

⁹⁷ See John C. Klotter, *supra* note 1, 276.

⁹⁸ See Arthur Best, *supra* note 263, 61.

⁹⁹ See Advisory Committee Report on Rules of Evidence, Revised Draft, 51 F.R.D. 315 (1971).

¹⁰⁰ See G. Michael Fenner, *supra* note 222, 8.

¹⁰¹ Rule 801(a) of Federal Rules of Evidence provides: “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”

¹⁰² Rule 801(b) of Federal Rules of Evidence provides: “A ‘declarant’ is a person who makes a statement.”

¹⁰³ See Watchara Neitivanich, “Securing Online Commercial Transactions by Digital Signatures: A Comparative Analysis of the U.S. E-Sign Act and Thai E-Transactions Act”, 224 (an unpublished S.J.D. Dissertation of the Golden Gate University School of Law, 2003, 12).

¹⁰⁴ See James W. McElhaney, “The Heart of the Matter”, 89 *American Bar Association Journal* 50, 52 (2003).

prove the truth of the matter asserted.¹⁰⁵ While this plain definition is much easier to follow, it still does not explain “what an out-of-court statement is” or “whether the statement is offered to prove the truth.”¹⁰⁶

Nonetheless, under FRE 801(d), both “prior statement by witness” and “admission by party-opponent” are defined as nonhearsay.¹⁰⁷ Opposing exceptions in FRE 803 and FRE 804, FRE 801(d) (2) have often been referred to as exemptions or exclusions from the hearsay rule. It seems conflicting since admission by party-opponent, nonhearsay, under FRE 801(d) (2) fits the definition of FRE 801(c) that defines hearsay as an out-of-court statement offered for its truth. Whether Rule 801(d) (2) is hearsay or not becomes confusing and troubling at this point. In fact, instead of treating admissions and statements of co-conspirators as nonhearsay,¹⁰⁸ the traditional common law treated what has now been adopted in Rule 801(d) (2) as admissible exceptions to hearsay, which is followed by a number of state versions of evidence rules.¹⁰⁹ To some extent, the theory behind saying that admissions are not hearsay at all, as opposed to saying that they are hearsay falling within an exception, is rather abstruse and perhaps over-refined.¹¹⁰ Probably because Dean John Henry Wigmore suggested it would be easier to deal with admissions if they could no more be treated as hearsay, the drafters of the federal rules then adopted Wigmore’s suggestion and called admissions nonhearsay.¹¹¹ The advisory committee eventually adopted admission by a party-opponent as nonhearsay in that simple notions of fairness require a party to be stuck with his or her own statement, by noting that “[a]dmission[s] by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”¹¹² As a result, no matter what it is called, the nonhearsay admission under FRE 801(d)(2), which refers to anything said or done by a party-opponent that is inconsistent with the position now taken at trial, should be admissible to prove its truth.¹¹³ Moreover, after Crawford, if a statement fits the co-conspirator rule under FRE 801(d) (2) (E),¹¹⁴ whether the defendant may claim that his constitutional right to

¹⁰⁵ See Christopher B. Mueller, *supra* note 29, 123.

¹⁰⁶ See James W. McElhaney, *supra* note 280, 52.

¹⁰⁷ It provides: “A statement is not hearsay if — (1) Prior statement by witness. (2) Admission by party-opponent.”

¹⁰⁸ See Roger C. Park, *supra* note 4, 267.

¹⁰⁹ See James W. McElhaney, *supra* note 280, 54.

¹¹⁰ See Roger C. Park, *supra* note 4, 254.

¹¹¹ See James W. McElhaney, *supra* note 280, 54.

¹¹² See FRE 801 (d) (2) Advisory Committee’s note, cited in Roger C. Park, et al., *Evidence Law: A Student’s Guide to the Law of Evidence as Applied in American Trials*, 254 n 58 (West, 1998).

¹¹³ See James W. McElhaney, *supra* note 280, 56.

¹¹⁴ The statements have to be made in furtherance of the conspiracy and during the course of the conspiracy. See United States v. Tombrello, 666 F. 2d 485, 490 (11th Cir.), cert. denied, 456 U.S. 994 (1982). However, mere conversations between conspirators, merely narrative declarations, and causal admissions of culpability are not statements in furtherance of the conspiracy. See United States v. Tille, 729 F. 2d 615 (9th Cir. 1984). There must be independent evidence of the conspiracy. See United States v. Jannotti, 729 F. 2d 213 (3rd Cir. 1984). Also, see Patrick J. Sullivan, “Bootstrapping of Hearsay under Federal Rule of Evidence 801(d)(2)(E): Further Erosion of

confrontation was violated in federal courts becomes unclear; however, this argument should still be available at least under the confrontation clause of state constitutions.¹¹⁵

There are two types of definitions of hearsay according to Professor Roger C. Park's description:

Definitions of hearsay are usually either assertion-centered or declarant-centered. Under an assertion-centered definition, an out-of-court statement is hearsay when it is offered in evidence to prove the truth of the matter asserted. Under a declarant-centered definition, an out-of-court statement is hearsay when it depends for value upon the credibility of the declarant.¹¹⁶

The core idea against hearsay complies with the Confrontation Clause; however, after Crawford, the definition of hearsay should be both assertion-centered, seeking the truth, and declarant-centered, providing the defendant with an opportunity to challenge the declarant's testimonial qualities of sincerity, narrative ability, memory, and perception.¹¹⁷ Hence, to better understand the definition of hearsay, if the testifying witness is not the same person the defendant wants to cross-examine, the testifying witness is not the real witness and the statement at issue is an out-of-court statement.¹¹⁸ When an out-of-court statement is relevant without regard to whether it conveys accurate information, then the hearsay prohibition does not operate, and testimony about the statement is allowed.¹¹⁹ Basically, there is no need to cross-examine the out-of-court declarant especially when the trier of fact can use the declarant's out-of-court statement in deciding issues other than the truth of the declarant's out-of-court statement.¹²⁰ While testimony that a witness heard a person say, "Look out!" is just like testimony that a witness saw a person wearing a blue sweater or running across a street, non-hearsay statements are not offered to prove the truth of what they assert.¹²¹

In general, the answer to "who the defendant wants to cross-examine to test what is being said or observed" depends on "whether the truth of the out-of-court statement matters."¹²² Therefore, on the one hand, if the truth of the out-of-court statement does not make any difference and the declarant, the actual witness, is on the stand, the statement is not hearsay;¹²³ on the other hand, if the truth of the out-of-court statement matters and the

the Coconspirator Exemption", 74 *Iowa Law Review* 467 (1989).

¹¹⁵ See Arnold v. State, 751 P. 2d 494, 504-05 (Alaska App. 1988); Nunez v. People, 737 P. 2d 422, 424-26 (Colo. 1987); cited in Roger C. Park, *supra* note 4, 266 n 106.

¹¹⁶ See Roger C. Park, "I Didn't Tell Them Anything About You: Implied Assertions as Hearsay Under the Federal Rules of Evidence", 74 *Minnesota Law Review* 783, 783 (1990).

¹¹⁷ See Christopher B. Mueller, *supra* note 29, 126.

¹¹⁸ See James W. McElhaney, *supra* note 280, 52.

¹¹⁹ See Arthur Best, *supra* note 263, 65.

¹²⁰ See Roger C. Park, *supra* note 4, 241.

¹²¹ See Arthur Best, *supra* note 263, 68.

¹²² See James W. McElhaney, *supra* note 280, 53.

¹²³ *Id.*

testifying witness is not the real witness, the statement is hearsay. Obviously, the preference implied by the hearsay rule for having the actual speaker present in court and available to answer clarifying questions has no application where the proponent's effort is to prove that words were said rather than prove that words were true.¹²⁴ Under this analysis, only a few out-of-court statements might constitute hearsay, for example: verbal acts, when something is done with words; verbal parts of acts, when an act and its accompanying words constitute a whole; and knowledge whether someone knows something.¹²⁵

3.3.3 Exceptions to Hearsay

As jurors began to be chosen only if they had no knowledge of the case that would influence their decision, the hearsay rule began its development.¹²⁶ While the hearsay rule's primary purpose is to exclude testimony about out-of-court statements unless the adverse party has the opportunity for meaningful cross-examination,¹²⁷ the supreme irony of the hearsay doctrine is that a vast amount of hearsay is admissible at common law¹²⁸ and under the Federal Rules of Evidence.¹²⁹ Despite the strong policy grounds for excluding hearsay, and despite the fact that Justice Marshall argued that hearsay evidence should not be admitted because of its intrinsic weakness and incompetency,¹³⁰ and where the risks inherent in admitting some types of hearsay are less than those connected with others, the Federal Rules of Evidence and common law allow hearsay to be admitted in many circumstances covered by exceptions to the general principle of exclusion.¹³¹ In general, the exceptions to the hearsay rule apply when surrounding circumstances provide guarantees of reliability.¹³² Thus, if the purpose of the hearsay rule is not present in a specific case and if the interests of justice will be best served by admission of the statement into evidence, then the evidence should be admitted as an exception to the hearsay rule.¹³³

The Federal Rules of Evidence divide their 28 exceptions to the hearsay rule into two categories. In the first are those that apply only when the declarant is unavailable under FRE 804.¹³⁴ The second category includes those where the risks inherent in admitting some types of hearsay are minimal;¹³⁵ the exceptions of the second set apply whether or not the declarant is available under FRE 803¹³⁶ and by far includes the larger number of exceptions.¹³⁷

¹²⁴ See Arthur Best, *supra* note 263, 68.

¹²⁵ See James W. McElhaney, *supra* note 280, 54.

¹²⁶ See John C. Klotter, *supra* note 1, 280.

¹²⁷ See Steven I. Friedland, *supra* note 255, 312.

¹²⁸ See Roger C. Park, *supra* note 4, 266.

¹²⁹ See Arthur Best, *supra* note 263, 89.

¹³⁰ See John C. Klotter, *supra* note 1, 280.

¹³¹ See Arthur Best, *supra* note 263, 65, 102.

¹³² See Roger C. Park, *supra* note 4, 254.

¹³³ See John C. Klotter, *supra* note 1, 281.

¹³⁴ It provides: "(a) Definition of unavailability. (b) Hearsay exceptions."

¹³⁵ See Arthur Best, *supra* note 263, 102.

¹³⁶ Sub-Provisions omitted.

According to FRE 805, hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. Additionally, there is a catch-all exception¹³⁸ that allows admission of hearsay in circumstances that are not covered in any of the other twenty-eight exceptions.¹³⁹ Although one might expect a more widespread use of the idea that the declarant should be called if available,¹⁴⁰ more than twenty exceptions in FRE 803 do not have this requirement.¹⁴¹ The only exceptions requiring unavailability in FRE 804 are those for dying declarations, for statements against interest, for former testimony, and for statements of personal and family history.¹⁴² In summary, even though the rule prohibiting the admission of hearsay statements was formulated in criminal cases by AD 1700, exceptions to the hearsay rule have developed through centuries because of the strict exclusionary nature of the rule.¹⁴³ Nonetheless, where the arguments supporting the exceptions are based on the necessity to use the out-of-court statements rather than on the likely truthfulness of the out-of-court declarant, the exception is allowed only if there is proof that the declarant is unavailable.¹⁴⁴

4. Comparative Analysis of the Hearsay Rule in Taiwan and the United States

In this section, this study intends to make a comparative analysis of the legal foundations discussed above. While adopting accusatorial elements in a civil-law-based jurisdiction may unavoidably result in unpredictable problems, tentative resolutions to these problems will be submitted by this study if possible. In principle, this study tries to provide resolutions to problems arising from the 2003 enactments of the hearsay rule in the ROC CPC. Before comparing between Taiwan and the United States, it is worth mentioning that in Taiwan the defendant is not considered a witness if he testifies. In other words, the defendant does not testify under oath. This practice is much different from that in the United States.

¹³⁷ See Roger C. Park, *supra* note 4, 268.

¹³⁸ FRE 807 provides: "A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

¹³⁹ See Arthur Best, *supra* note 263, 102.

¹⁴⁰ See Daniel Stewart, Jr., "Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence", 1 *Utah Law Review* 1 (1970).

¹⁴¹ See Roger C. Park, *supra* note 4, 268.

¹⁴² *Id.*

¹⁴³ See John C. Klotter, *supra* note 1, 280.

¹⁴⁴ See Arthur Best, *supra* note 263, 102.

4.1 Hearsay Definition

While Paragraph 1 of Article 159 of the ROC CPC simply defines inadmissible hearsay, the Federal Rules of Evidence of the United States provides a much more complicated definition of it. In a fashion similar to Paragraph 1 of Article 159 of the ROC CPC, FRE 802 provides: “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” Even though there is no provision in the ROC CPC providing the definitions similar to FRE 801 (a) and (b), such as the definitions applied in FRE 801 (a) and (b), a “statement” referred to in the ROC CPC should include (1) an oral or written assertion, or (2) nonverbal conduct of a person, if it is intended by the person as an assertion; and the term “anyone other than the defendant” means a person who makes a statement. Nevertheless, while FRE 801(c) provides that “[h]earsay” is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted,” which focuses mainly on “if it is an out-of-court statement” and “if it is offered to prove the truth of the matter asserted,” inadmissible hearsay under Paragraph 1 of Article 159 of the ROC CPC merely refers to an out-of-court statement “made by anyone other than the defendant.” In other words, according to the hearsay definition provided by Paragraph 1 of Article 159 of the ROC CPC, an out-of-court statement made by a defendant is not hearsay whether or not he testifies at trial in Taiwan. Similarly, whether or not the defendant testifies at trial, although what he previously stated constitutes inadmissible hearsay under FRE 801 (c) and FRE 802, according to FRE 801 (d) (2)¹⁴⁵ excluding admissions from being hearsay, the defendant’s prior out-of-court statement is not hearsay even if it is offered against the defendant. While common law defined these admissions as exceptions to inadmissible hearsay,¹⁴⁶ the Federal Rules of Evidence patently do not follow the common law approach.

¹⁴⁵ It provides: “A statement is not hearsay if the statement is offered against a party and is (A) the party’s own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant’s authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).”

¹⁴⁶ See Arthur Best, *supra* note, 90.

Notwithstanding, while FRE 801 (d) (1)¹⁴⁷ provides that a “prior statement by witness” is not hearsay, according to Paragraph 1 of Article 159 of the ROC CPC, this out-of-court statement is hearsay because the declarant is not the defendant. Thus, although a prior statement by a witness is admissible at trial in the United States,¹⁴⁸ whether it is admissible at trial in Taiwan depends on its compliance with any hearsay exception provided in Articles 159-1 to 159-5 of the ROC CPC. In addition, since hearsay in the United States means a statement offered to prove the truth of the matter asserted under FRE 801 (c), if the statement is not offered to prove the truth, it is not hearsay.¹⁴⁹ In other words, the out-of-court verbal statement is admissible in evidence for another purpose than that of proving the truth in the United States. For example, if the out-of-court statement “I want to kill John” is offered to prove “the declarant did intend to kill John,” then it is inadmissible hearsay, because the fact finder has to rely on the credibility of the declarant to decide if he really intended to kill John. But if it is offered merely to prove the declarant was alive at the time of making this statement, since nothing will be lost by the fact that the out-of-court declarant was not subject to cross-examination, it is not necessary to exclude it as hearsay.¹⁵⁰ Moreover, FRE 806 admits any inconsistent evidence of a statement or conduct made by the declarant of a hearsay exception to attack the credibility of the declarant.¹⁵¹ On the contrary, while Paragraph 1 of Article 159-1 of the ROC CPC does not provide the purpose of the out-of-court statement for defining inadmissible hearsay, therefore, even if it is not offered to prove the truth of the matter asserted, it seems to fall within the scope of inadmissible hearsay provided by Paragraph 1 of Article 159-1 of the ROC CPC. Under this viewpoint, the pre-2003 ROC Supreme Court decision 91 Tai Sun 2363 admitting an out-of-court statement for the purpose of impeaching the witness should be reversed. However, this 2003 legislation differs much from the hearsay practice in the United States. It is questionable whether Paragraph 1 of

¹⁴⁷ It provides: “A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceedings, or in a deposition, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.”

¹⁴⁸ In fact, FRE 801 (d) (1) treats selected types of statements by witnesses as falling outside the hearsay definition, under particular circumstances. Not all prior statements are defined as non-hearsay by FRE 801 (d) (1). See Arthur Best, *supra* note, 93.

¹⁴⁹ See Roger C. Park, et al., *Evidence Law: A Student’s Guide to the Law of Evidence as Applied in American Trials*, 241 (West, 1998).

¹⁵⁰ *Id.*

¹⁵¹ It provides: “When a hearsay statement, or a statement defined in rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant’s hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.”

Article 159-1 of the ROC CPC should exclude an out-of-court statement provided mainly for impeachment purposes from inadmissible hearsay.

As mentioned in the Advisory Committee Note, hearsay was adopted to protect the accused's right to confront witnesses. This is identical to its counterpart in the United States. In general, hearsay is excluded mainly because the out-of-court declarant has not been subject to the test of cross-examination, which creates an unacceptable danger that the fact finder will put too much weight on the non-testifying declarant's statement.¹⁵² When there is no need to cross-examine the out-of-court declarant because the fact finder can use the out-of-court statement without relying on the credibility of the declarant, the out-of-court statement should not be excluded from evidence.¹⁵³ In other words, admitting an out-of-court statement in evidence for another purpose than that of proving the truth of the matter asserted will not infringe the accused's rights. Accepting it in evidence will not result in any violation of constitutionally protected rights. Thus, even though the 2003 legislation does not recognize the ROC Supreme Court decision 91 Tai Sun 2363, affirming this decision afterwards will not conflict with the legislative purpose of adopting the hearsay rule. Since any relevant and probative evidence is important to finding the fact, if an out-of-court statement is not used to prove the truth of the matter asserted, it should not be excluded from evidence merely because it happens to fall within the scope of the definition of inadmissible hearsay. Courts in Taiwan should feel free to follow 91 Tai Sun 2363 in admitting out-of-court statements as evidence. Moreover, this study suggests the ROC Legislative Yuan delimits the applicability of inadmissible hearsay by adding "an out-of-court statement is not hearsay if the purpose for offering it is other than proving the truth of the matter asserted" to Paragraph 1 of Article 159-1 of the ROC CPC.

4.2 Hearsay Exceptions

The issue of hearsay exceptions is both questionable and interesting because the 2003 legislation only has five provisions that include eleven types of hearsay exceptions,¹⁵⁴ whereas FRE 803, 804 and 807 provide a total of twenty-nine types of hearsay exceptions.¹⁵⁵ As a result, some hearsay exceptions provided in FRE are not adopted by the 2003 ROC legislation; some ROC hearsay exceptions are not found in the Federal Rules of Evidence. This study will compare those hearsay exceptions in this section and discuss whether the 2003

¹⁵² See Roger C. Park, et al., *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials*, 241 (West, 1998).

¹⁵³ That is without relying on the sincerity, perception, memory, or narrative ability of the declarant. *Id.*

¹⁵⁴ Those are: (1) Paragraph 1 of Article 159-1; (2) Paragraph 2 of Article 159-1; (3) Article 159-2; (4) Subparagraph 1 of Article 159-3; (5) Subparagraph 2 of Article 159-3; (6) Subparagraph 3 of Article 159-3; (7) Subparagraph 4 of Article 159-3; (8) Subparagraph 1 of Article 159-4; (9) Subparagraph 2 of Article 159-4; (10) Subparagraph 3 of Article 159-4; and (11) Article 159-5.

¹⁵⁵ FRE 803 provides 23 exceptions, FRE 804 provides 5 exceptions, and FRE 807 provides 1 residual exception.

ROC legislation provides enough hearsay exceptions. The following comparative analyses are based on the classifications of the ROC hearsay exceptions.

4.2.1 Out-of-Court Statements Made before a Judge or a Public Prosecutor

Article 159-1 of the ROC CPC deals with out-of-court statements made before a judge or a public prosecutor. According to the Advisory Committee Note, this kind of out-of-court statement is admissible in that neither a judge nor a public prosecutor will coerce a witness to make a statement. Under this provision, any out-of-court statement made before a judge or a public prosecutor, whether in criminal or civil proceedings, and whether or not the declarant was under oath, is admissible because a witness is free to make a statement or to testify. For example, if witness X testified in civil proceedings that Y was hit by Z, in criminal proceedings charging Z with injuring Y, the civil testimony of X would be admissible at the criminal trial whether or not X is available as a witness. Moreover, if judge or public prosecutor K heard L say he saw M kill N in person, even if L never testified in any criminal proceedings, what L said is admissible in M's trial according to this article.

This legislation admitting any out-of-court statement made before a judge or a public prosecutor is quite particular. No similar hearsay exception will be found in the Federal Rules of Evidence. It is unclear where this article originated. The rationale behind this provision is merely based on the voluntariness of the witness's statement of testimony, which might result from the continental tradition of trusting judges and public prosecutors. It is quite controversial, however, because these two hearsay exceptions do not protect the defendant's right to confront the witness. While this article provides no protection of the right to confrontation, the core value of the ROC hearsay rule is obscure even though the Advisory Committee Note clearly stated that the ROC hearsay rule had been adopted to protect the right to confrontation. Is it possible for the ROC criminal justice system to develop a unique hearsay system based on other than American sources? Since it is impossible to answer this question on the basis of the United States hearsay practice, this problem will be discussed in the next section.

4.2.2 Prior Inconsistent Out-of-Court Statements Made before Law-Enforcement-Officers under More Reliable Circumstances

As mentioned above, under FRE 801 (c), a witness's own out-of-court words are hearsay even if they are quoted at trial by the same witness while their relevance depends on the truth of the matter asserted.¹⁵⁶ Since the fact finder can observe the declarant's in-court behavior and hear responses to cross-examination regarding the out-of-court statement, and the lack of these opportunities to observe and to hear is the basis for excluding hearsay, it is not necessary to

¹⁵⁶ See Arthur Best, *supra* note, 93.

exclude an out-of-court statement made by a declarant who also testifies at trial.¹⁵⁷ This is why FRE 801 (d) (1) excludes prior statements by witnesses from inadmissible hearsay.

Contrary to this approach of the United States, under Paragraph 1 of Article 159-2 of the ROC CPC, even if the witness testifies at trial, his prior out-of-court statement still falls within the scope of inadmissible hearsay. Without any provision similar to FRE 801 (d) (1) excluding prior statements by witnesses from hearsay, it is necessary for the ROC CPC to create a hearsay exception to admit prior witness statements because there is no need to exclude this kind of out-of-court statement in general. Thus, Article 159-2 of the ROC CPC was adopted to provide grounds for admitting the same declarant's prior inconsistent out-of-court statement. Although it does not exclude the prior witness statement from the definition of hearsay, it still admits a prior inconsistent out-of-court witness statement in evidence at trial.

In addition, Article 159-2 of the ROC CPC only admits the prior inconsistent out-of-court witness statement when he testifies at trial and when the court finds the prior out-of-court statement more reliable and also necessary to prove the truth of the alleged offense. This means not every prior inconsistent out-of-court witness statement is admissible. It is arguable, however, under what circumstances the court should find the prior out-of-court statement more reliable and also necessary to prove the truth of the alleged offense. FRE 801 (d) (1) (A) excludes prior inconsistent statement made by witness from hearsay only when "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," and "inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceedings, or in a deposition." These requirements result from the following concerns. While some scholars claimed the hearsay rule should be completely withdrawn from past statements of a person who is currently a witness at trial, others believed that the hearsay exclusion might be applied to out-of-court statements by someone who is presently a witness at trial.¹⁵⁸ To some extent, cross-examination at trial may be less effective than it would have been at the time the speaker made the statement.¹⁵⁹ To prevent well-organized parties from developing a practice of making records of interviews with prospective witness, which may result in no cross-examination at the time obtaining these statements, as well as subsequent introduction of these prior statements at a later trial,¹⁶⁰ the Federal Rules of Evidence thus require these prior statement to be "given under oath subject to the penalty of perjury" in addition to asking the declarant to be available for cross-examination. In other words, according to FRE 801 (d) (1) (A), if the prior inconsistent testimony was not under oath and not subject to the penalty of

¹⁵⁷ Id.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Id.

perjury, it is still hearsay. Even though Article 159-2 of the ROC CPC requires the prior inconsistent out-of-court statement to be made before law-enforcement-officers, it does not clearly set out similar requirements under which a prior inconsistent out-of-court statement can become admissible in evidence at trial. While judges are fact finders in Taiwan, whether it is necessary to exclude a prior inconsistent out-of-court statement without being under oath subject to the penalty of perjury from admissible hearsay in the ROC criminal justice system remains unclear. Thus, unless the ROC court adopts a viewpoint referring to FRE 801 (d) (1) (A) to interpret “when the court finds the prior out-of-court statement more reliable which is necessary to prove the truth of the alleged offense asserted,” the scope of the admissibility of a prior inconsistent out-of-court statement looks broader than that in the United States.

4.2.3 Out-of-Court Statements Made before Law-Enforcement-Officers by Currently Unavailable Defendants as Trial Witnesses

While Article 159-2 of the ROC CPC requires the declarant of the prior out-of-court statement to testify at trial, Article 159-3 of the ROC CPC then creates a hearsay exception without this requirement. As a result, when the declarant is not available as a witness at trial, whether his prior out-of-court statement is admissible falls within the scope of Article 159-3 of the ROC CPC. Similar to Article 159-2, Article 159-3 of the ROC CPC admits prior out-of-court witness statement only “when the court finds the prior out-of-court statement more reliable which is necessary to prove the truth of the alleged offense asserted.” According to this provision, a prior out-of-court witness statement should be made before law-enforcement-officers. It then creates four circumstances either of which would result in admissible hearsay. In general, a prior out-of-court witness statement made before law-enforcement-officers is admissible when the declarant is unable to make a statement at trial because of death,¹⁶¹ loss of memory, or physical or mental illness or infirmity at the time of the trial,¹⁶² when the declarant’s attendance at trial cannot be produced by judicial process or other reasonable means,¹⁶³ and when the declarant refuses to testify at trial without reasonable justification.¹⁶⁴ These hearsay exceptions have very identical counterparts in the Federal Rules of Evidence.

First of all, FRE 804 (a) defines “Unavailability as a witness.” In a sense, “imposing the requirement of unavailability in connection with certain hearsay exceptions is partly a result of tradition.”¹⁶⁵ Generally speaking, this rule applies only when the in-court testimony of the out-of-court declarant is unavailable: “testimony unavailable.”¹⁶⁶ If the declarant’s

¹⁶¹ See Subparagraph 1 of Article 159-3 of the ROC CPC.

¹⁶² See Subparagraph 2 of Article 159-3 of the ROC CPC.

¹⁶³ See Subparagraph 3 of Article 159-3 of the ROC CPC.

¹⁶⁴ See Subparagraph 4 of Article 159-3 of the ROC CPC.

¹⁶⁵ See Arthur Best, *supra* note, 122.

¹⁶⁶ See G. Michael Fenner, *The Hearsay Rule*, 282 (Carolina Press, 2002).

in-court testimony of the out-of-court statement is available, then the hearsay exceptions in FRE 804 do not apply.¹⁶⁷ It is fair to say that FRE 804 (a) (2) is identical to Subparagraph 4 of Article 159-3 of the ROC CPC; FRE 804 (a) (3) and (4) are identical to Subparagraphs 1 and 2 of Article 159-3 of the ROC CPC; and FRE 804 (a) (5) is identical to Subparagraph 3 of Article 159-3 of the ROC CPC.¹⁶⁸ Secondly, as a hearsay exception, while “former testimony” in FRE 804 (b) (1) should be made before a government officer in charge of legal proceedings,¹⁶⁹ it is similar to Article 159-3 of the ROC CPC which also requires the prior out-of-court statement to be made before law-enforcement-officers.

Nevertheless, on the issue of unavailability, Taiwan and the United States show different characteristics. FRE 804 (b) (1) provides that the witness making a prior out-of-court statement should have “an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Article 159-3 of the ROC CPC, on the other hand, does not mention the same requirement. In other words, a prior out-of-court statement not subject to cross-examination might be admissible at trial in the ROC jurisdiction. Moreover, while FRE 804 (b) (1) also requires a prior out-of-court statement to be given under oath, Article 159-3 of the ROC CPC does not have this prerequisite. Any prior out-of-court statement not made under oath thus might be admissible according to this provision. While Article 159-3 of the ROC CPC requires the declarant to be unavailable at trial, it does suggest that these exceptions in this provision are less reliable than those in Article 159-4 of the ROC CPC where there is no such requirement. These less reliable prior out-of-court statements are tolerated as evidence “because they involve situations where the out-of-court statements have some claim to reliability and there is a strong need for the information they contain.”¹⁷⁰ Of course, if courts in Taiwan adopted a viewpoint referring to FRE 804 (b) (1) requiring a prior

¹⁶⁷ *Id.*

¹⁶⁸ FRE 804 (a) provides: “Unavailability as a witness’ includes situations in which the declarant—
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision b(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.”

¹⁶⁹ It provides: “Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”

¹⁷⁰ See Arthur Best, *supra* note, 122.

out-of-court statement to be given under oath and subject to cross-examination¹⁷¹ to interpret “when the court finds the prior out-of-court statement more reliable which is necessary to prove the truth of the alleged offense asserted,” the scope of the admissibility of a prior out-of-court statement when the declarant is unavailable as a witness at trial might look similar to that in the United States.

4.2.4 Admissible Out-of-court Statements in Writing

In addition to Articles 159-1 to 159-3 of the ROC CPC, Article 159-4 of the ROC CPC also provides hearsay exceptions focusing on out-of-court statements made in writing. It is worth mentioning that this article imposes the requirement of “in writing” in connection with certain hearsay exceptions. As a result, if out-of-court statements are not in writing, they will not be admissible at trial under this provision. Unlike Article 159-3, Article 159-4 of the ROC CPC does not require the unavailability of the declarant as a witness at trial. While the drafters of the Federal Rules of Evidence believed the risk inherent in admitting hearsay exceptions in FRE 803 is less than those in FRE 804,¹⁷² it is fair to say situations provided in Article 159-4 of the ROC CPC are more reliable than those in Article 159-3 of the ROC CPC. In general, hearsay exceptions in Article 159-4 of the ROC CPC are based on the likely truthfulness of statements; when the arguments supporting the exceptions are based on the necessity to use the out-of-court statements, hearsay exceptions are allowed only if the declarant is unavailable,¹⁷³ as is the case with the exceptions in Article 159-3 of the ROC CPC.

Article 159-4 of the ROC CPC creates three types of hearsay exceptions. Usually, documents made by government officers other than law-enforcement-officers are admissible unless they were made under unreliable circumstances.¹⁷⁴ And a document, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the document, of regular activity made by someone in charge of making this document is admissible unless it was made under unreliable circumstances, too.¹⁷⁵ In addition to these two types, there is a residual provision admitting other documents made under reliable circumstances in evidence at trial.¹⁷⁶ While the 2003 Advisory Committee Note on the ROC CPC clearly refers to FRE 803 which also provides hearsay exceptions not imposing the requirement of availability of the declarant as a witness at trial, it is desirable to understand the rationales behind those hearsay exceptions in FRE 803.

¹⁷¹ *Id.*, at 123.

¹⁷² *Id.*, at 102.

¹⁷³ *Id.*

¹⁷⁴ See Subparagraph 1 of Article 159-4 of the ROC CPC.

¹⁷⁵ See Subparagraph 2 of Article 159-4 of the ROC CPC.

¹⁷⁶ See Subparagraph 3 of Article 159-4 of the ROC CPC.

FRE 803 (4) excludes statements for purposes of medical diagnosis or treatment from inadmissible hearsay.¹⁷⁷ This exception consists of two foundational elements: (1) “the declarant believed that the out-of-court statement would result in medical diagnosis or treatment,” and (2) “a doctor would reasonably rely upon the out-of-court statement in diagnosing or treating a patient.”¹⁷⁸ Since it is reasonable to believe the declarant to tell the truth when he is seeking medical diagnosis or treatment, this highly likely truthfulness results in statements for purposes of medical diagnosis or treatment being admissible hearsay. In Taiwan, under this rationale, statements for purposes of medical diagnosis or treatment are excluded from inadmissible hearsay according to Article 159-4 of the ROC CPC. It is clear they are admissible under Subparagraph 2 of this article if medical doctors work in private hospitals. It is questionable, however, under which subparagraph they are admissible when medical doctors are considered non-law-enforcement-government-officers; if they work for public hospitals, this might invoke Subparagraph 1 of this article. However, this question has no bearing on the issue whether “statements for purposes of medical diagnosis or treatment” are admissible hearsay.

FRE 803 (5) excludes recorded recollection from inadmissible hearsay.¹⁷⁹ There are six foundational elements: (1) “the out-of-court statement must be recorded somewhere, in some way;” (2) “the out-of-court statement must have been made or adopted by the testifying witness;” (3) “at the time the testifying witness made or adopted the statement, she must have had knowledge of the matter recorded and that knowledge must have been fresh in her memory;” (4) “at the time of the trial, the testifying witness must no longer have no sufficient memory of the matter recorded to allow her to testify fully or accurately;” (5) “at trial, the witness must remember that record is accurate;” and (6) it “may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.”¹⁸⁰ In a sense, this exception results from the fact that “the witness has forgotten something relevant.”¹⁸¹ Meanwhile, this exception is accepted because of its highly likely truthfulness, too. While FRE 803 (5) admits recorded recollection in evidence only when the testifying witness was the recorder of the out-of-court statement,¹⁸² Subparagraph 2 of Article 159-4 of the ROC

¹⁷⁷ It provides: “(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

¹⁷⁸ See G. Michael Fenner, *The Hearsay Rule*, 194 (Carolina Press, 2002).

¹⁷⁹ It provides: “(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.”

¹⁸⁰ See G. Michael Fenner, *The Hearsay Rule*, 211 (Carolina Press, 2002).

¹⁸¹ *Id.*, at 213.

¹⁸² It should be noted that FRE 612 provides additional safeguards against the misleading use of the refreshed recollection procedure which is different from FRE 803 (5). See Arthur Best, *supra* note, 108. FRE 612 provides:

CPC does not impose a similar requirement. Unlike FRE 803 (5), even if no witness testifying at trial adopts this kind of out-of-court statement, it is admissible in evidence in Taiwan if it is already in the dossier.¹⁸³ Furthermore, while FRE 803 (5) ends with the following: “the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party,” it seems unnecessary to impose a similar requirement on Subparagraph 2 of Article 159-4 of the ROC CPC because there is no jury trial, and the fact finders, the judges, already have full access to each of those documents in Taiwan.¹⁸⁴ Thus, it is fair to say Subparagraph 2 of Article 159-4 of the ROC CPC does not conflict with FRE 803 (5) in nature.

FRE 803 (6) and (7) deal with records as well as absence of records of a regularly conducted activity as hearsay exceptions.¹⁸⁵ There are four fundamental elements: (1) “the out-of-court statement must be a record (or an absence of an entry in a record) that was made in the course of a regularly conducted business activity;” (2) “the record must have been made at or near the time of the event recorded;” (3) “the record must be made by someone who

“Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either— (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.”

¹⁸³ Of course, the court has to inform the accused of this kind of record under Paragraph 1 of Article 165 of the ROC CPC.

¹⁸⁴ There are two reasons why FRE 803 (5) ends in this way, as explained by Professor G. Michael Fenner: “First, viva voce evidence is not physically in the jury room. It is not transcribed and sent into the jury room. Exhibits are physically presented in the jury room. If the record of the witness’s recollection received into evidence, then it would go into the jury room, and would be a physical presence there the whole time the jurors were deliberating. Its presence in the room would give the recorded recollection more significance than it deserves. It would make the evidence easier to remember, and perhaps more prominent than it would otherwise be. Second, if there is a tendency to believe more readily things we read than things we hear, then giving the jury the statement in writing makes it more likely the jury will find it credible.” See G. Michael Fenner, *The Hearsay Rule*, 212 (Carolina Press, 2002).

¹⁸⁵ FRE 803 (6) provides: “A memorandum, report, record, or data compilation in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ‘business’ as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.” And FRE 803 (7) provides: “Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.”

either: (a) had personal knowledge of what is recorded; or (b) based the record on information provided by someone who both had personal knowledge and provided the information in the regular course of the particular activity involved;” and (4) “a trustworthiness clause [...] allows the judge to keep the evidence out, even if the foundational elements are satisfied, if the judge is suspicious of the evidence.”¹⁸⁶

These two exceptions come from the fact that no one will have a current memory of the details recorded in the documents covered by FRE 803 (6) and (7).¹⁸⁷ Since business records are mainly “made for the purpose of running an enterprise rather than for some purpose in litigation,”¹⁸⁸ excluding them from inadmissible hearsay is persuasive. As explained in United States v. Baker, “business records have a high degree of accuracy because the nation’s business demands it, because the records are customarily checked for correctness, and because recordkeepers are trained in habits of precision.”¹⁸⁹ In short, these records in FRE 803 (6) and (7) are considered reliable not only because they are important to the business, but also because “they are kept with regularity and someone’s job depends on keeping them and keeping them accurately.”¹⁹⁰ Although these records are generally considered reliable, in order to bar unreliable records when there is a problem with the particular record, the final clause in FRE 803 (7) allows the trial judge to deny this hearsay exception.¹⁹¹ Generally speaking, these two exceptions come from the reliability of these business records. Since Subparagraph 2 of Article 159-4 of the ROC CPC does not mention ‘absence of entry in records kept in accordance with records of regularly conducted activity’ at all, and there is already a similar trustworthiness clause in it, whether it is admissible is entirely up to the court. It is not necessary to have a provision focusing especially on ‘absence of entry in records kept in accordance with records of regularly conducted activity.’

FRE 803 (8) excludes public records and reports from inadmissible hearsay.¹⁹² This exception has three foundational elements: (1) “the out-of-court statement must be a public record or report;” (2) “it must set forth one of the following three kinds of things: (a) the activities of the office or agency that prepared the report; (b) matters the agency had a legal duty to observe and a legal duty to report upon; (c) factual findings resulting from an investigation made pursuant to authority granted by law;” and (3) “once the foundation for the

¹⁸⁶ See G. Michael Fenner, *The Hearsay Rule*, 225-6 (Carolina Press, 2002).

¹⁸⁷ *Id.*, at 226.

¹⁸⁸ See Arthur Best, *supra* note, 109.

¹⁸⁹ See 693 F. 2d 183, 188 (D.C. Cir., 1982).

¹⁹⁰ See G. Michael Fenner, *The Hearsay Rule*, 227 (Carolina Press, 2002).

¹⁹¹ *Id.*

¹⁹² It provides: “(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.”

exception is established the court can still decide that the evidence does not seem trustworthy and sustain the hearsay objection.”¹⁹³ While it is almost impossible for the declarant who prepared public records and reports to remember the information recorded, and this kind of information might not be available elsewhere, any out-of-court statement in public records or reports will not be admissible at trial without this exception.¹⁹⁴ In addition, public records and reports are more reliable than live testimony because public officers are assumed to “perform their jobs properly and, therefore, that public records can be trusted.”¹⁹⁵ Nonetheless, there is also a trustworthiness clause authorizing the trial court to deny the reliability of evidence admitted under this exception.¹⁹⁶ According to Subparagraph 1 of Article 159-4 of the ROC CPC, documents made by government officers other than law-enforcement-officers are admissible unless they were made under unreliable circumstances. This provision is quite identical to FRE 803 (8); they both admit almost all public records and reports but those made by law-enforcement-officers. Besides, the reliability clause of Subparagraph 1 of Article 159-4 of the ROC CPC, “unless they were made under unreliable circumstances,” is similar to the trustworthiness clause in FRE 803 (8). Similarly, FRE 803 (9) and (14) admit “records of vital statistics” and “records of documents affecting an interest in property” in evidence.¹⁹⁷ Since both these records required to be made under law will be considered public records or reports in Taiwan, FRE 803 (9) and (14) are also covered by Subparagraph 1 of Article 159-4 of the ROC CPC. Moreover, under this analysis, out-of-court statements adopted in previous judgments concerning previous conviction and personal, family, or general history, or boundaries, such as those in FRE 803 (22) and (23),¹⁹⁸ are admissible under Subparagraph 1 of Article 159-4 of the ROC CPC.

¹⁹³ See G. Michael Fenner, *The Hearsay Rule*, 239-40 (Carolina Press, 2002).

¹⁹⁴ Usually, the declarant is unlikely to have firsthand knowledge of the information recorded in the report. *Id.*, at 241.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*, at 242.

¹⁹⁷ FRE 803 (9) provides: “Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.” FRE 803 (14) provides: “(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.”

¹⁹⁸ FRE 803 (22) provides: “(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.” FRE 803 (23) provides: “(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence at trial.”

As does FRE 803(7), FRE 803 (10) excludes absence of public record or entry.¹⁹⁹ There are two fundamental elements of this exception: (1) “there must be evidence that the public official or agency in question regularly made and preserved such records or entries,” and (2) “there must be either testimony or a Rule 902 (4) certification that a diligent search failed to uncover such a record or such an entry.”²⁰⁰ The need to admit this evidence is brought about by the fact that no public officer will remember what he did not make a particular entry about.²⁰¹ Since having a public officer testify what he did not make a particular entry about at trial is usually less reliable, admitting the absence of public record or entry in evidence is thus acceptable. Nonetheless, while Subparagraph 1 of Article 159-4 of the ROC CPC does not mention ‘absence of public record or entry,’ and contains a similar trustworthiness clause, whether this evidence is admissible is entirely up to the court. It is not necessary to have a provision focusing especially on ‘absence of public record or entry.’

Similar to FRE 803 (6), FRE 803 (11) excludes records of religious organizations from inadmissible hearsay.²⁰² Although there is no equivalent article in Taiwan, FRE 803 (11) is covered by Subparagraph 2 of Article 159-4 of the ROC CPC, because religious records are usually made in regularly conducted activities. While FRE 803 (12) admits marriage, baptismal, and similar certificates in evidence at trial,²⁰³ its counterpart is unseen in Taiwan. These marriage, baptismal, and similar certificates, however, can be admissible in evidence at trial through Subparagraphs 1 or 2 of Article 159-4 of the ROC CPC, depending on whether the recorder is authorized by public branches. If a certificate is made by a public officer or the recorder is authorized by law, then Subparagraph 1 of Article 159-4 of the ROC CPC applies. Otherwise Subparagraph 2 of Article 159-4 of the ROC CPC is applicable.

Unlike FRE 803 (13), which clearly admits family records in evidence,²⁰⁴ there is no provision excluding these records from inadmissible hearsay in the ROC CPC. Nevertheless, there is a residual subparagraph, Subparagraph 3 of Article 159-4, allowing the court to admit

¹⁹⁹ It provides: “(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.”

²⁰⁰ See G. Michael Fenner, *The Hearsay Rule*, 253 (Carolina Press, 2002).

²⁰¹ *Id.*

²⁰² It provides: “(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.”

²⁰³ It provides: “(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.”

²⁰⁴ It provides: “(13) Family records. Statements of act concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.”

other kinds of reliable out-of-court statements in writing at trial. Although the 2003 Advisory Committee Note on the ROC CPC does not clearly indicate what this subparagraph includes, based on the highly likely truthfulness, while “records of family history kept in family Bibles have by long tradition been received in evidence,”²⁰⁵ family records in FRE 803 (13) may be admissible in evidence under Subparagraph 3 of Article 159-4 of the ROC CPC. Moreover, under this analysis, the other out-of-court statements similar to those in FRE 803 (15), (16), (17), or (18) may also be admissible in evidence at trial in Taiwan.²⁰⁶ In short, while there is

²⁰⁵ In addition, “opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings.” See Advisory Committee Note to Original Rule 803, Exception (13), in Steven I. Friedland, et al., *Evidence Law and Practice*, 2001 Supplement, Appendices: Federal Rules of Evidence, 109 (LexisNexis, 2001).

²⁰⁶ FRE 803 (15), (16), (17), and (18) provide: “(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth or the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.”

Moreover, Advisory Committee Note to Original Rule 803 provides the rationales behind these exceptions: “Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the non-applicability of the rule if dealings with the property have been inconsistent with the documents. The age of the document is of no significance, though in practical application the document will most often be an ancient one;” “Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception;” “Exception (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore’s text is narrowly oriented to lists, etc., prepared for the use a trade or profession, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate;” and “Exception (18). The writers have generally favored the admissibility of learned treatises, [...] but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the

no category that needs to have as many exceptions as FRE 803 does,²⁰⁷ Subparagraph 3 of Article 159-4 of the ROC CPC might be considered useful legislation.

Similar to Subparagraph 3 of Article 159-4 of the ROC CPC, FRE 807 also provides a residual exception to inadmissible hearsay.²⁰⁸ In order to be admissible under this rule, FRE 807 requires the statement to be “more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effects,”²⁰⁹ “no other evidence is reasonably available and is as probative as that offered under this exception.”²¹⁰ In a sense, this exception meets the need for flexibility in the hearsay rules since common law rules allow judges to create hearsay exceptions when necessary.²¹¹ If an offering party does not give notice of his intention to offer the evidence in question to the opposing party, this exception will not apply.²¹² This exception has five foundational elements: (1) “trustworthiness;” (2) “relevance;” (3) “relative probative value;” (4) “application of the exception will serve the general purposes of these rules and the interests of justice;” and (5) “proponent’s advance notice of his or her intention to use the rule.”²¹³ While Subparagraph 3 of Article 159-4 of the ROC CPC does not mention the requirement to invoke the residual exception, referring to FRE 807 might be a proper approach when deciding whether Subparagraph 3 of Article 159-4 of the ROC CPC applies.

4.2.5 Admissible Under Parties Agreement

Although Articles 159-1 to 159-4 of the ROC CPC create many hearsay exceptions, parties are not allowed to invoke any of them because these exceptions only authorize courts to decide the admissibility of out-of-court statements. In fact, while parties agree to accept an out-of-court statement, admitting it in evidence at trial should not invade the right to confrontation because the accused gives it up. As a result, Article 159-5 of the ROC CPC creates another hearsay exception allowing parties to admit an out-of-court statement not

application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.” Citations omitted. See Advisory Committee Note to Original Rule 803, Exception (15), (16), (17), and (18), in Steven I. Friedland, et al., *Evidence Law and Practice*, 2001 Supplement, Appendices: Federal Rules of Evidence, 110-1 (LexisNexis, 2001).

²⁰⁷ See G. Michael Fenner, *The Hearsay Rule*, 256 (Carolina Press, 2002).

²⁰⁸ FRE 807 provides: “A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.”

²⁰⁹ *Id.*

²¹⁰ See G. Michael Fenner, *The Hearsay Rule*, 347 (Carolina Press, 2002).

²¹¹ *Id.*

²¹² *Id.*, at 345.

²¹³ *Id.*, at 346.

included in Articles 159-1 to 159-4 of the ROC CPC. If allowing an out-of-court statement agreed on by parties results in an unfair trial, however, the court can deny admissibility. This fair trial clause is meaningful, especially so in a private prosecution where there is no government participation and parties might agree to accept an obviously false out-of-court statement for an unjust reason; for example, to impute the criminal or civil blame to another. In other words, under this fair trial clause, not all out-of-court statements agreed on by parties are admissible. The court can also deny the admissibility of this evidence even if the opposing party does not object to the out-of-court statement proffered.

There is no rule similar to Article 159-5 of the ROC CPC in the Federal Rules of Evidence. The practice in the United States adversarial criminal justice system, however, might be similar because the trial judge will not exclude inadmissible hearsay from evidence either if the opponent accepts it or does not object to it in time. As a public prosecutor is assumed to play his role without prejudice, a fair trial issue will not result from an exclusively adversarial trial system where there is no private prosecution. In other words, it is not necessary to provide a similar fair trial clause in the Federal Rules of Evidence while a district attorney should not make an agreement with the defense party admitting obviously false out-of-court statements in evidence at trial. A legal basis allowing the ROC courts to deny the admissibility of out-of-court statements agreed on by parties, however, might be necessary under the civil law tradition requiring the courts to apply enacted law, especially so when the ROC CPC admits the out-of-court statements agreed on by parties in evidence. Without this fair trial clause, courts in Taiwan have to admit obviously false out-of-court statements accepted by parties in evidence. This practice is improper, all the more so when these out-of-court statements are admitted by parties to impute the criminal or civil blame to another.

4.2.6 Other FRE Admissible Hearsay Exceptions Not Found in the 2003 Legislation

Although many hearsay exceptions provided in the Federal Rules of Evidence can be available in Taiwan through directly interpreting Articles 159-1 to 159-4 of the ROC CPC, there are still many FRE hearsay exceptions unavailable because none of the Articles 159-1 to 159-5 of the ROC CPC will cover them through direct interpretation, and courts in Taiwan are not allowed to admit them in evidence without reasonable justifications under the civil law tradition. Nonetheless, it is questionable whether some FRE hearsay exceptions not mentioned above might be implied in the ROC hearsay exceptions. In this subsection, this study will explore how many of hearsay exceptions in the Federal Rules of Evidence are not available in the ROC CPC.

First of all, hearsay exceptions similar to FRE 803 (1), (2), (3), (19), (20), and (21) are not provided in the ROC CPC. Although Articles 159-1 to 159-3 of the ROC CPC admit out-of-court statements in evidence at trial, these articles apply only when these out-of-court

statements are made before a judge, a public prosecutor, or another law-enforcement-officer. Nevertheless, these FRE 803 hearsay exceptions do not require these statements to be made before government officers. For example, when an out-of-court statement similar to FRE 803 (1) is made before a judge, a public prosecutor, or another law-enforcement-officer, it might be admissible according to Articles 159-1 to 159-3 of the ROC CPC. Otherwise, its admissibility depends on whether Articles 159-4 to 159-5 of the ROC CPC apply. In fact, Article 159-5 of the ROC CPC usually does not apply to public prosecution. As a consequence, if the declarant of a FRE 803 (1), (2), (3), (19), (20) or (21) out-of-court statement does not make the statement before a judge, a public prosecutor, or another law-enforcement-officer, the admissibility of each of these statements at trial under Article 159-4 of the ROC CPC is questionable since this ROC law requires all admissible out-of-court statements to be in writing.

FRE 803 (1) excludes present sense impression from inadmissible hearsay.²¹⁴ This exception consists of two foundational elements: (1) “the out-of-court statement must have been made while the declarant was perceiving an event or a condition, or immediately thereafter,” and (2) “the out-of-court statement must describe or explain the thing being perceived.”²¹⁵ In fact, there is no categorical need for this exception.²¹⁶ While spontaneity may replace cross-examination which provides a way to probe for testimonial infirmities, including faulty perception, bad memory, lack of sincerity, dishonesty, and ambiguity, reliability is the only rationale behind this exception in that spontaneity is reflexive.²¹⁷ In other words, present sense impression is admissible because of its reliability. Based on this reliability test, it is reasonable to admit a FRE 803 (1) out-of-court statement not in writing, even if the declarant is not available as a witness at trial. While Article 159-4 of the ROC CPC only admits out-of-court statements in writing in evidence at trial, the admissibility in evidence of an out-of-court statement similar to FRE 803 (1) under this legislation is problematic. It is also questionable how an out-of-court statement similar to FRE 803 (2), (3), (19), (20) or (21)²¹⁸ can be admissible in evidence at trial according to Article 159-4 of the

²¹⁴ It provides: “(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter;”

²¹⁵ See G. Michael Fenner, *The Hearsay Rule*, 142 (Carolina Press, 2002).

²¹⁶ *Id.*

²¹⁷ *Id.*, at 143.

²¹⁸ These FRE 803 exceptions provide: “(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;” “(3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will;” “(19) Reputation concerning personal or family history. Reputation among members of a person’s family by blood, adoption, or marriage, or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history;” “(20) Reputation concerning boundaries or general history. Reputation is a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to

ROC CPC.

Secondly, when the declarant is unavailable, FRE 804 (b) creates some hearsay exceptions. In order to apply these exceptions, FRE 804 (a) defines the unavailability for these hearsay exceptions.²¹⁹ It is accepted that FRE 804 (a) (1) includes “any of the evidentiary privileges²²⁰ and the constitutional privilege against self-incrimination.”²²¹ Although Article 159-3 of the ROC CPC also admits some out-of-court statements made before law-enforcement-officers in evidence when the declarant is unavailable to testify as a witness at trial, it does not provide a definition of the unavailability similar to FRE 804 (a) (1). As a result, even if the out-of-court declarant “is exempted by ruling of the court on the ground of privilege”²²² from testifying at trial, his prior out-of-court statement should be inadmissible since Article 159-3 of the ROC CPC does not create a hearsay exception similar to FRE 804 (a) (1). The ROC Supreme Court decision admitting an out-of-court statement after the declarant invoked his privilege at trial, 90 Sun Zon Gum One 17, where the witness made a statement against the defendant during police interrogation but refused to testify at trial by invoking his privilege,²²³ thus will be reversed under this legislation. Nonetheless, it is unclear why the 2003 legislation does not incorporate an FRE 804 (a) (1)-style exception into Article 159-3 of the ROC CPC. Generally speaking, FRE 804 (a) (1) upholds the unavailability of the declarant who invoked the privilege to refuse to testify and admits the prior out-of-court statement in evidence because of its reliability and a strong need for this kind of information.²²⁴ Based on the highly likely truthfulness of the statement, pre-2003 ROC Supreme Court decision 90 Sun Zon Gum One 17 should be affirmed. Hence, the

events of general history important to the community or State or nation in which located;” and “(21) Reputation as to character. Reputation of a person’s character among associates or in the community.”

²¹⁹ FRE 804 (a) provides: “Unavailability as a witness’ includes situations in which the declarant — (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or (2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of the declarant’s statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision b(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.”

²²⁰ See FRE 501. It provides: “Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.”

²²¹ See G. Michael Fenner, *The Hearsay Rule*, 283 (Carolina Press, 2002).

²²² See FRE 804 (a) (1).

²²³ In this pre-2003 legislation murder case, the out-of-court statement against the defendant is similar to that provided in FRE 804 (b) (1).

²²⁴ See Arthur Best, *supra* note, 123.

admissibility in evidence of an out-of-court statement similar to FRE 804 (a) (1) under the 2003 legislation demands further discussion.

Besides FRE 804 (b) (1), hearsay exceptions similar to FRE 804 (2), (3), (4), and (6)²²⁵ are not provided in the ROC CPC. As discussed above, if these out-of-court statements are made before a judge, a public prosecutor, or another law-enforcement-officer, they might be admissible in evidence at trial through Articles 159-1 to 159-3 of the ROC CPC. If they are in writing, they might also be admissible under Article 159-4 of the ROC CPC. The admissibility of these out-of-court statements is problematic when they are neither in writing nor made in front of law-enforcement-officers. While these hearsay exceptions similar to FRE 804 (b) are also based on the reliability of these out-of-court statements,²²⁶ courts in Taiwan face a real problem if they need to admit these out-of-court statements in evidence without a statutory basis.

After examining the hearsay rule in both the Federal Rules of Evidence and the ROC CPC, it is obvious that the ROC CPC omits some important reliability-based hearsay exceptions as provided in FRE 803 and 804. While courts in Taiwan have to apply an enacted statute, they are not allowed to create hearsay exceptions other than those provided in Articles 159-1 to 159-5 under civil law traditions. It is difficult and unreasonable for the Taiwanese courts to admit an out-of-court statement in violation of an enacted law. When these out-of-court statements are neither in writing nor made in front of law-enforcement-officers, the question of the admissibility of these out-of-court statements is particularly salient in Taiwan as these statements are considered extremely reliable. Since the hearsay rule of the ROC CPC itself does not provide enough exceptions to admit almost all kinds of reliable and trustworthy out-of-court statements contained in the Federal Rules of Evidence, which are considered necessary to find the truth, “how to admit these out-of-court statements not provided as hearsay exceptions in the ROC CPC” depends on “whether they could be admitted in evidence by other non-hearsay provisions in the ROC CPC.” An analysis of the

²²⁵ These FRE 804 (b) exceptions include: “(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death. (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. (4) Statement of personal or family history. (A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared. (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”

²²⁶ For the rationales behind FRE 804 (b), see Arthur Best, *supra* note, 123-7.

latter question will be necessary and meaningful in a civil-law-based criminal justice system where the court is still entitled to collect and investigate evidence without any party participation.

4.3 The Trial Court

The most striking difference between adjudication proceedings in Taiwan and the United States is jury trial. As mentioned before, historically, evidence law became necessary only when a passive and neutral fact finder was needed. This development resulted in Anglo-American law being devoted to determining which facts constitute evidence and which evidence is admissible.²²⁷ In continental criminal justice systems where the judge decides both the law and the facts, “strict enforcement of hearsay [...] is less practicable.”²²⁸ While there is no jury trial in Taiwan, and the judge decides both the law and the facts, it seems reasonable that there was no hearsay rule in the ROC CPC. Nonetheless, while the 2003 Advisory Committee Note clearly stated that the 2003 hearsay rule legislation derives mainly from the Federal Rules of Evidence of the United States, it is interesting why the drafters of the 2003 hearsay rule did not adopt all or most of the FRE hearsay rules. On the contrary, for example, the 2003 ROC legislation omits some hearsay exceptions provided in FRE 803 and 804, but creates Article 159-1 of the ROC CPC unseen in the Federal Rules of Evidence. It is also interesting whether the Taiwanese drafters were aware of these differences and what they might result in. If they created these differences intentionally, why so? If not, how can the unprovided hearsay exceptions be admitted in evidence under the current framework of the ROC CPC? Since the hearsay doctrine exists largely because a lay jury cannot properly evaluate statements made outside of its presence, and the rules governing character evidence assume that lay juries usually place too much weight on such proof or often employ it improperly for punitive purposes,²²⁹ mistrust of lay juries is the single overriding reason for the law of evidence.²³⁰ Thus, it is obvious common law hearsay rule will not play the same role in a non-jury trial system. It is then interesting what the common law hearsay rule means in a non-jury trial jurisdiction. In this subsection, this study will explain why it was almost impossible for continental criminal justice systems to develop a common law trial system which supports common law rules of evidence.²³¹

²²⁷ See Thomas P. Gallanis, “The Rise of Modern Evidence Law”, 84 *Iowa Law Review* 499, 500 (1999).

²²⁸ See Gordon Van Kessel, “A Summary of Mirjan R. Damaska’s Evidence Law Adrift”, 49 *Hastings Law Journal* 359, 359 (1998).

²²⁹ See Christopher B. Mueller, et al., *Evidence Under the Rules*, 1 (New York Aspen Law & Business, 2000).

²³⁰ See Stephan Landsman, “The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England”, 75 *Cornell Law Review* 497, 565 (1990).

²³¹ *Id.*

Also, this study will explore the institutional limitations of the hearsay rule in a civil-law-based legal framework and suggest potential resolutions to hearsay-related problems arising from the 2003 hearsay legislation in Taiwan.

4.3.1 Trial Court Obligations in Fact-Finding

The United States Supreme Court in Faretta v. California found the Sixth Amendment to

guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice --- through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversarial criminal trial to make a defense.²³²

As Professor Stephan Landsman pointed out, there are three essential elements in an adversarial criminal trial: “utilization of a neutral and passive fact finder, reliance on party presentation of evidence, and use of a highly structured forensic procedure.”²³³ Under this approach, the trial court reviews evidence for the fact finder, the jury. Nonetheless, the trial court is not responsible for collecting evidence for the jury. In a criminal case, the prosecutor has to present evidence in order to see the defendant convicted. Similarly, the defendant also has to produce evidence when necessary. In other words, both fact investigation and presentation of evidence are controlled by parties.²³⁴ The trial court merely decides whether the presented evidence is admissible so that the fact finder can consider it. As described in Daubert v. Merrel Dow Pharmaceuticals Inc., the trial court just plays the role of “gate keeper” because it merely determines which evidence should be admitted.²³⁵

The situation in a civil law country is quite different. First of all, there is no common law jury trial. The trial court itself is fact finder. Instead of having parties produce satisfying evidence to the trial court, the court has to study all circumstances of the case so that it pronounce judgment on the basis of all necessary information.²³⁶ While the parties and their attorneys are not in charge of gathering and presenting evidence,²³⁷ and the court has to make a written judgment explaining the conviction or acquittal, continental criminal justice systems usually allow the judge to collect and investigate evidence in addition to that presented by the trial parties.²³⁸ This procedural aspect concerning the court as fact finder distinguishes an

²³² See 422 U.S. 806, 818 (1975).

²³³ Stephan Landsman, *Adversarial Justice: The American Approach to Adjudication*, 2 (West, 1988).

²³⁴ See Renee Lettow Lerner, “The Intersection of Two Systems: An American on Trial for An American Murder in the French Cour d’Assises”, 2001 *University of Illinois Law Review* 791, 797 (2001).

²³⁵ See 509 U.S. 579 (1993).

²³⁶ See Renee Lettow Lerner, “The Intersection of Two Systems: An American on Trial for An American Murder in the French Cour d’Assises”, 2001 *University of Illinois Law Review* 791, 797 (2001).

²³⁷ See Gordon Van Kessel, “A Summary of Mirjan R. Damaska’s Evidence Law Adrift”, 49 *Hastings Law Journal* 359, 360 (1998).

²³⁸ For example, former Paragraph 1 of Article 163 of the ROC CPC provided: “The court shall, for the sake of

inquisitorial adjudication process from an accusatorial (or adversarial) one. Nevertheless, it itself is not enough to justify why there could not emerge a common-law-like practice of parties-controlled fact investigation and presentation of evidence in the developments of continental criminal justice systems.

In addition to this procedural viewpoint, there is another important factor why continental criminal justice systems would not develop common law rules of evidence. This factor concerns substantive criminal law. For instance, in Taiwan, Article 55 of the ROC Criminal Law, which is derived from a civil law tradition, provides; “If one act constitutes several unlike offenses or the means employed or the results of the commission of one offense constitute another unlike offense, only the most severe of the prescribed punishments shall be imposed.” This means that the court is required to investigate and consider the other offense not charged by the public or private prosecutor because otherwise the uncharged offense could not be punished or indicted anymore. Moreover, while Article 56 of the ROC Criminal Law provides: “If several successive acts constitute like offenses, such successive acts may be considered to be one offense, but the punishment prescribed for such offense may be increased up to one half,” and treats several successive offenses as a single one, the court is also required to discover “how many like offenses in the world” the defendant has committed lest the defendant should benefit from an incomplete investigation.²³⁹ In a sense, the defendant is subject to only one criminal punishment if all of his misconducts fall within the scope of Articles 55 and 56 of the ROC Criminal Law. These articles are all the more decisive when the defendant continues to make related or successive offenses after having been indicted.²⁴⁰ Under these continental criminal law provisions, it is understandable why common law rules of evidence focusing mainly on the presentation of evidence by the parties would not emerge: the court is expected to investigate all related crimes in addition to those the defendant is charged with.²⁴¹ In other words, allowing parties to control the collection and presentation of evidence would inevitably discard these criminal law provisions, which might eventually impair the fact-finding function of the trial court that is required to convict the defendant of all of his punishable misconducts.

discovering the truth, ex officio investigate evidence.”

²³⁹ In fact, Articles 55 and 56 of the ROC Criminal Law stem from the 1871 German Criminal Law. Although the current German Criminal Law does not have provisions similar to the second half of Articles 55 and 56 of the ROC Criminal Code, while the German Criminal Procedure Code has not adopted common law evidence rules at all, the abolition of these provisions after World War II was not preceded by considerations as to whether these provisions would result in a common law style criminal trial.

²⁴⁰ In these circumstances, it is impossible for the prosecutor (public or private) to indict all misconducts subject to one punishable power of the defendant.

²⁴¹ Once the 2005 legislation will have entered into effect on July 1st 2006, only the following paragraph of the current Article 55 of the ROC Criminal Law will survive: “If one act constitutes several unlike offenses, only the most severe of the prescribed punishments shall be imposed.” In other words, the court is still required to investigate if other offenses fall within the scope of the newly enacted provision. Of course, the scope requiring the court to investigate ex officio will be much smaller than it was in the past.

These criminal law provisions not only make the past ROC criminal justice practice merely nominally adversarial, but also make the current pro-accusatorial reforms of the ROC CPC appear more pro-inquisitorial.²⁴² The court is still required and entitled to investigate whether the scope of the prosecution completely covers all misconducts under one category of punishable acts.²⁴³ In short, whenever the court has a duty to look into all of the defendant's punishable misconducts rather than to focus merely on the original charges, criminal practice in Taiwan or any other civil-law-based jurisdictions with similar criminal law provisions would still be similar to the traditional inquisitorial model since the court still has to play an active role in fact investigation at trial. Professor Mirjan R. Damaska clearly notices there are three important pillars supporting common law rules of evidence²⁴⁴ and justifying the Anglo-American fact-finding process: "the peculiar organization of the trial court; the temporal concentration of proceedings; and the prominent roles of the parties and their counsel in legal proceedings."²⁴⁵ The above-mentioned viewpoint derived from continental substantive criminal law mentioned might supplement his claims by explaining why continental criminal justice systems did not evolve the common law evidence rules in the late eighteenth and the nineteenth centuries.²⁴⁶

Although the 2003 Advisory Committee Note on the ROC CPC did not unambiguously address this issue as to why to adopt Article 159-1 of the ROC CPC admitting the out-of-court statement made in front of a judge or a public prosecutor in evidence at trial, the fact that the court still plays a role as fact finder and the need to discover all material evidence to prove all offenses falling within the scope of Articles 55 and 56 of the ROC Criminal Law might partly justify it. In other words, Paragraph 2 of Article 163 of the ROC CPC still allows the court to investigate evidence ex officio, and especially so when it is necessary to discover the truth and conduct a fair trial. An inquisitorial approach to the fact-finding process emphasizing "official inquiry"²⁴⁷ has survived the 2003 pro-accusatorial reforms of the ROC CPC. It seems fair to say that the adoption of Article 159-1 of the ROC CPC signifies that the 2003 legislation with regard to the hearsay rule tolerates non-adversarial fact-finding proceedings, which are very different from their counterpart in the United States. While the hearsay rule was initially adopted to prevent lay jurors from

²⁴² As mentioned before, a fundamental difference between the inquisitorial system and the accusatorial system concerns the investigation and presentation of evidence: party control versus judicial control. See Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for An American Murder in the French Cour d'Assises*, 2001 U. Ill. L. Rev. 791, 797 (2001).

²⁴³ See Article 267 of the ROC CPC. See also 88 Tai Sun 2576 (1999) and 26 U Sun 1435 (1937).

²⁴⁴ See Gordon Van Kessel, "A Summary of Mirjan R. Damaska's Evidence Law Adrift", 49 *Hastings Law Journal* 359, 359 (1998).

²⁴⁵ See Mirjan R. Damaska, *Evidence Law Adrift*, 4 (Yale University Press, 1997).

²⁴⁶ *Id.*

²⁴⁷ See Renee Lettow Lerner, "The Intersection of Two Systems: An American on Trial for An American Murder in the French Cour d'Assises", 2001 *University of Illinois Law Review* 791, 797 (2001).

hearing unreliable hearsay,²⁴⁸ deriving from the bifurcated trial structure, it is not designed for a civil-law-based inquisitorial criminal justice system. In a sense, adoption of the common-law-based hearsay rule conflicts with the civil-law-based fact-finding process. Nonetheless, since the ROC lawmakers intended to build a more continentally-based accusatorial trial system, it was considered necessary to introduce some accusatorial elements, including the hearsay rule, in the ROC CPC. To prevent the court from playing its past active role at trial, the 2003 hearsay rule provides the defendant with a procedural right to challenge the admissibility of the out-of-court statements and requires the prosecutor to respond to this challenge. The 2003 legislation has indeed resulted in a criminal process that is less inquisitorial. Consequently, there is room for the adoption of the hearsay rule, which is not at odds with the current ROC trial system. While the trial process in Taiwan is not strictly accusatorial, some inquisitorial characteristics remain. As a result, there are two types of hearsay exceptions in the ROC CPC: one is based on the inquisitorial tradition,²⁴⁹ the other on the adversarial or accusatorial tradition.²⁵⁰

Even though some hearsay exceptions provided in the Federal Rules of Evidence are not found in the ROC CPC, they might be admissible under an inquisitorial hearsay exception according to Article 159-1 of the ROC CPC, and especially so when an adversarial and accusatorial approach of fact-finding is unavailable and impossible. For example, if the prosecutor seeks to admit an out-of-court statement similar to FRE 803 (2), he may ask the court to apply an inquisitorial hearsay exception according to Article 159-1 of the ROC CPC. Furthermore, the court can invoke its inquisitorial powers to investigate evidence ex officio according to Paragraph 2 of Article 163, even if the parties do not require the court to do so. When the court collects evidence ex officio, no hearsay rule applies, not only because it is not designed for an inquisitorial process but also because hearsay evidence is admissible under the inquisitorial evidential tradition.²⁵¹ Hearsay evidence is considered by the fact finder in continental criminal justice systems mainly because “there is enough time to seek out the declarant when available or to collect information regarding the declarant’s credibility when unavailable.”²⁵² Thus, if a judge or a public prosecutor interrogated the witness who heard the excited utterance during a pretrial stage or investigation, it may be admissible. In addition, if the court tends to admit this out-of-court statement, it can then borrow the dossier of another case, in which an out-of-court statement was made before a judge or a public prosecutor. It is clear that Article 159-1 of the ROC CPC was not designed to protect the defendant’s right to

²⁴⁸ See Christopher B. Mueller, et al., *Evidence Under the Rules*, 1 (New York Aspen Law & Business, 2000).

²⁴⁹ See Article 159-1 of the ROC CPC.

²⁵⁰ See Articles 159-2 to 159-4 of the ROC CPC.

²⁵¹ See Renee Lettow Lerner, “The Intersection of Two Systems: An American on Trial for An American Murder in the French Cour d’Assises”, 2001 *University of Illinois Law Review* 791, 831 (2001).

²⁵² See Gordon Van Kessel, “A Summary of Mirjan R. Damaska’s Evidence Law Adrift”, 49 *Hastings Law Journal* 359, 359 (1998).

confront the witness. In fact, it is basically an enactment stemming from the inquisitorial evidential legacy even though no jurisdiction has adopted an article similar to Article 159-1 of the ROC CPC.

Even though the 2003 legislation adopts two types of hearsay exceptions, it is not clear if the framers intentionally created this entirely new style of distinguishing hearsay exceptions and there is no clue of this intention in the 2003 Advisory Committee Note. Nonetheless, Article 159-1 and Paragraph 2 of Article 163 of the ROC CPC really provide inquisitorial fact-finding proceedings to assist the court in determining the truth when these 2003 adversarial and accusatorial hearsay exceptions are not available for fact-finding. This might be why the 2003 reforms of the ROC CPC is merely entitled pro-accusatorial instead of accusatorial and no one really thinks it proper and necessary to establish a strictly accusatorial and adversarial trial system in Taiwan.

If the purpose of the 2003 reforms of the ROC CPC includes establishing a more accusatorial model of its criminal justice system as well as responding to demands of human rights protection, it is necessary to consider abandoning, or at least revising, Articles 55 and 56 of the ROC Criminal Law in order to release the court of its duty to investigate whether any other offenses fall within the scope of Articles 55 and 56 of the ROC Criminal Law, which might make the court less active and more neutral at trial.²⁵³ It is interesting that scholars or experts in the field of comparative criminal procedure rarely mention the reason why merely revising the civil-law-based criminal procedure code is not enough to establish an accusatorial model of criminal trial from the viewpoint of substantive criminal law. Even those scholars from civil-law-based jurisdictions that have already adopted some accusatorial elements into their criminal justice systems²⁵⁴ do not address this issue. Nevertheless, the accusatorial nature of the ROC criminal justice system depends partly on the extent to which the court is required to investigate and collect evidence *ex officio* under Articles 55 and 56 of the ROC Criminal Law.²⁵⁵ The less the court is required to investigate *ex officio*, the more accusatorial the ROC trial process will be. Of course, even without these criminal law problems, if the court still plays its role of fact finder, it is questionable to what extent the ROC criminal justice system should become accusatorial and adversarial.

²⁵³ The author of this study is glad to note that partly based on the author's suggestions to abolish or revise Articles 55 and 56 of the ROC Criminal Law, the ROC Legislative Yuan in January 2005 revised the ROC Criminal Law, including the abolition of the second half of Articles 55 and 56 of the ROC Criminal Law. See Ming-woei Chang, "Articles 55 and 56 of the ROC Criminal Law and the Pro-Accusatorial Reforms of the ROC Criminal Procedure Code", in the *ROC Judicial Yuan Anniversary Review of the Pro-Accusatorial Reforms of the ROC Criminal Procedure Code*, 39-63 (Taipei, Sep. 2004) (in Chinese).

²⁵⁴ These jurisdictions include Japan and Italy.

²⁵⁵ Only Article 55 of the ROC Criminal Law will govern this issue after July 1st 2006.

4.3.2 Correlations of Jury Trial and Evidence Law

While some scholars and judges describe evidence law as the “child of the jury system,”²⁵⁶ exclusionary hearsay rules are necessary “to protect the jury against cognitive shortcomings.”²⁵⁷ As a result, the jury, the fact finder, can only consider admissible evidence.²⁵⁸ The admissibility of evidence refers to the jury’s contact with evidence. In general, the jury will not be in contact with inadmissible evidence, so that the fact finder is not in danger of deciding a case on the basis of unreliable hearsay. While the parties are responsible for the investigation of facts and the presentation of evidence, the adversarial and accusatorial evidence law including the hearsay rule focuses on this fact investigation process controlled by parties. In other words, the common law hearsay rule is applicable to evidence presented by the parties.

In the ROC criminal justice system, however, the court, instead of the jury, is the fact finder. In addition to evidence presented by the parties, the court also collects evidence for fact investigation through official inquiry and other methods of evidence gathering. As a consequence, there are two categories of evidence: one is presented by the parties and the other is collected by the court. While the court still plays a role as fact finder, it seems less meaningful to discuss the admissibility of evidence because the fact finder will inevitably be in contact with all kinds of evidence. In other words, the fact finder in a continental criminal justice system will be confronted with the out-of-court statement regardless of its admissibility. The rationale behind the common law hearsay rule preventing lay jurors from being presented with unreliable and untrustworthy out-of-court statements is thus not available and persuasive in continental bench trials. Since continental criminal justice systems put a greater reliance on judicial authority, it is fair to say that the exclusionary hearsay rule is not really necessary in an inquisitorial criminal justice system because professional judges are assumed and believed to be capable of finding the material truth. In addition, since jury verdicts are inscrutable in a common law jury trial system, a strict hearsay rule excluding the danger of putting too much weight on unreliable information and avoiding “unfair surprise in light of lack of ability to continuously check foundational factors”²⁵⁹ becomes necessary as “a good prophylactic measure to counteract the defects of derivative informational sources”²⁶⁰. Hence, without the adversarial fact-finding proceedings distrustful of all kinds of government power and the jury trial, there is no need to adopt the whole set of common law hearsay rules in Taiwan. As the court in Taiwan has to decide both legal and factual issues by providing a

²⁵⁶ See Charles T. McCormick, “Law and the Future: Evidence”, 51 *Northwestern University Law Review* 218, 225 (1956).

²⁵⁷ See Roger C. Park, “An Outsider’s View of Common Law Evidence”, 96 *Michigan Law Review* 1486, 1486 (1998).

²⁵⁸ Usually the fact finder knows nothing about inadmissible evidence because the court has already excluded it.

²⁵⁹ See Gordon Van Kessel, “A Summary of Mirjan R. Damaska’s Evidence Law Adrift”, 49 *Hastings Law Journal* 359, 359 (1998).

²⁶⁰ See Mirjan R. Damaska, *Evidence Law Adrift*, 65 (Yale University Press, 1997).

scrutable reasoning in written, and the fact finder will unavoidably be in contact with hearsay evidence, strict enforcement of the common law hearsay rule distinguishing admissible and inadmissible out-of-court statements is less practicable.²⁶¹

As discussed above, while the court as fact finder still has the power to gather material evidence, this study suggests there are two types of hearsay exceptions in the ROC CPC. The adversarial and accusatorial hearsay exceptions, as do those in Articles 159-2 to 159-4 of the ROC CPC, apply only when the parties present the out-of-court statement. When an out-of-court statement is collected by the court's inquisitorial powers of fact investigation, only Article 159-1 of the ROC CPC will apply. In general, when the court finds the parties not presenting sufficient evidence to decide the case because of the adversarial and accusatorial hearsay rule, it may admit any reliable out-of-court statement in evidence ex officio by invoking an inquisitorial hearsay exception. Moreover, while there is no need to prevent lay jurors from hearing hearsay evidence, the meaning of the hearsay rule in the ROC CPC is different from its counterpart in a jury trial jurisdiction. Although the 2003 Advisory Committee Note on the ROC CPC recognizes the purpose of adopting the hearsay rule is to protect the defendant's right to confrontation, the right to confront the witness under the Sixth Amendment to the United States Constitution should not be identical to that in the ROC CPC.

4.4 Exclusionary Approach to the Hearsay Rule

As suggested by this study, there are two categories of hearsay exceptions in the ROC CPC. While Articles 159-2 to 159-4 of the ROC CPC stem from common law hearsay exceptions, which protect the defendant's right to confront witnesses,²⁶² it is expedient to understand what the right of confrontation means in the United States. In other words, recent developments regarding the Confrontation Clause in the Sixth Amendment to the United States Constitution might provide legal professionals in Taiwan with many important clues when determining what the confrontation right means and what rights are protected by the hearsay exceptions in Articles 159-2 to 159-4 of the ROC CPC.

4.4.1 Roberts

Although many hearsay exceptions are provided in the Federal Rules of Evidence, the United States Supreme Court in California v. Green recognized that allowing a hearsay exception in a criminal case might constitute a violation of the Confrontation Clause in the Sixth Amendment.²⁶³ In other words, even an out-of-court statement falling within the scope of the

²⁶¹ See Gordon Van Kessel, "A Summary of Mirjan R. Damaska's Evidence Law Adrift", 49 *Hastings Law Journal* 359, 359 (1998).

²⁶² See the 2003 Advisory Committee Note on the ROC CPC.

²⁶³ The Court ruled: "The issue before us is the considerably narrower one of whether a defendant's constitutional right 'to be confronted with the witnesses against him' is necessarily inconsistent with a State's decision to change its hearsay rules to reflect the minority view described above. While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is

hearsay exceptions might be excluded from evidence at trial, in particular when its admission would violate the defendant's right to confront the witness. As a consequence, the kind of out-of-court statement falling within the scope of the hearsay exceptions that could be admissible without violating the Confrontation Clause in the Sixth Amendment becomes a significant issue.

In Ohio v. Roberts, the United States Supreme Court was asked to consider "the relationship between the Confrontation Clause and the hearsay rule with its many exceptions."²⁶⁴ Recognizing that a literal reading of the Sixth Amendment, as was done in Mattox v. United States,²⁶⁵ would inevitably result in abrogating every hearsay exception that was long rejected as unintended and too extreme, Roberts refused to apply the Sixth Amendment in this way.²⁶⁶ Moreover, without seeking an underlying theory of the Confrontation Clause in deciding the validity of all hearsay exceptions,²⁶⁷ Roberts announced that the Confrontation Clause restricted the range of admissible hearsay in two ways.²⁶⁸ The first was to establish a rule of necessity which required the prosecutors to produce or demonstrate the unavailability of the declarant.²⁶⁹ After establishing the unavailability of a witness, Roberts also required the prior testimony to bear adequate indicia of reliability²⁷⁰, because hearsay rules and the Confrontation Clause stemmed from the same roots.²⁷¹ Generally speaking, according to Roberts, an out-of-court statement would be "admissible only if it bears adequate 'indicia of reliability,'" which might "be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."²⁷² In other words, even though trial by jury the court is not a fact finder, it was entitled to decide whether an out-of-court statement should bear adequate indicia of reliability if the evidence was not within a firmly rooted hearsay exception. The trial court would find and assess evidential reliability at its discretion. The discretionary power of the trial court played a main role in excluding an out-of-court statement not falling within a firmly rooted hearsay exception.

quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." See 399 U.S. 149, 155-6 (1970).

²⁶⁴ See 448 U.S. 56, 62 (1980).

²⁶⁵ It ruled that there "could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations." See 156 U.S. 237, 243 (1895), quoted in Roberts, See 448 U.S., at 63.

²⁶⁶ *Id.*

²⁶⁷ See 399 U.S., at 162.

²⁶⁸ See 448 U.S., at 65.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See Dutton v. Evans, 400 U.S. 74, 86 (1970).

²⁷² It also held: "In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." See 448 U.S., at 66.

Under the Roberts approach, a defendant would have no right to confront the witness if the trial court found the hearsay evidence reliable. The Confrontation Clause in the Sixth Amendment would not apply. In sum, whether the jurors would consider the hearsay evidence was up to the trial court.

4.4.2 Crawford

As a latter-day representative of the Framers, Justice Antonin Scalia, writing for seven members of the United States Supreme Court in Crawford v. Washington, overrules Ohio v. Roberts and its progeny.²⁷³ In determining whether the Washington State Code at issue violates the Sixth Amendment, Crawford turns to the historical background of the Confrontation Clause that does not in itself provide sufficient information to resolve this case.²⁷⁴ While Roberts allowed the reliability test to govern the admissibility of an out-of-court statement, it also deprived the accused of the right to confront the witness, in particular when the trial court found that the out-of-court statement showed specific guarantees of trustworthiness.²⁷⁵ Nonetheless, unlike the civil law tradition which “condones examination in private by judicial officers,”²⁷⁶ Crawford identifies that “the common-law tradition is one of live testimony in court subject to adversarial testing”,²⁷⁷ even though “England at times adopted elements of the civil-law practice.”²⁷⁸ In defending violations of the Stamp Act in inquisitorial admiralty courts, which allowed the judicial officials to examine witnesses by ex parte interrogation before trial, John Adams once pointed out: “Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them.”²⁷⁹ Justice Scalia cites the most notorious instance of civil-law examination in the seventeenth century, the 1603 trial of Sir Walter Raleigh for treason, and some important English judicial reforms to justify his ruling.²⁸⁰ After a thorough study of the

²⁷³ See 541 U.S. 36; 124 S. Ct. 1354 (2004).

²⁷⁴ See 124 S. Ct., at 1359.

²⁷⁵ See 448 U.S., at 66.

²⁷⁶ See 124 S. Ct., at 1359.

²⁷⁷ Id.

²⁷⁸ As Crawford noted: “Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that ‘occasioned frequent demands by the prisoner to have his accusers, *i.e.* the witnesses against him, brought before him face to face.’ Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century. These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. Whatever the original purpose, however, they came to be used as evidence in some cases, resulting in an adoption of continental procedure.” Id., at 1359-60.

²⁷⁹ See John Adams, “Draft of Argument in Sewall v Hancock (1768-1769)”, in *The Legal Papers of John Adams* 194, 207 (K. Wroth & H. Zobel eds. 1965), quoted in Crawford, Id., at 1362.

²⁸⁰ Id., at 1360. (“Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused ‘face to face’ at his arraignment. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. Several authorities also stated that

history of the Confrontation Clause, the Court in Crawford finds that the admissibility of an out-of-court hearsay statement depends on “a prior opportunity for cross-examination.”²⁸¹ Based on this historical finding, two inferences about the meaning of the Confrontation Clause can be drawn.²⁸²

As asserted by Justice Scalia, “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.”²⁸³ Moreover, “[...]the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”²⁸⁴ It was meaningless for Raleigh to confront those who read Cobham’s confession in court.²⁸⁵ Hence, Roberts subjecting “out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”²⁸⁶ To avoid the civil-law abuses of ex parte examinations that “might sometimes be admissible under modern hearsay rules,”²⁸⁷ Crawford mainly applies the Confrontation Clause to “witnesses against the accused” for distinguishing the out-of-court testimonial statement from other styles of hearsay²⁸⁸ without providing a clear definition of “testimonial statements.”²⁸⁹

As to exceptions to the Confrontation Clause, Crawford only admits those exceptions

a suspect’s confession could be admitted only against himself, and not against others he implicated.”)

²⁸¹ *Id.*, at 1363.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ As to this second aspect, the Court also notes: “The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the ‘right . . . to be confronted with the witnesses against him,’ is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.” *Id.*, at 1365-6.

²⁸⁵ *Id.*, at 1364.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ As the Court mentioned: “‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.” *Id.*

²⁸⁹ However, the Court illustrates what might be considered testimonial: “Various formulations of this core class of ‘testimonial’ statements exist: ‘ex parte in-court testimony or its functional equivalent --- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;’ ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;’ ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition--for example, ex parte testimony at a preliminary hearing.” *Id.*

already established at the time of adoption of the Sixth Amendment in that

the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.²⁹⁰

Consequently, since the Framers expressively refused to adopt a civil law system admitting pre-trial ex parte examinations of witnesses in evidence at trial, establishing the unavailability of the declaring witness and a prior opportunity to cross-examine should be necessary conditions for the admissibility of testimonial statements.²⁹¹ In other words, Crawford affirms a 1794 North Carolina ruling, State v. Webb, which held: “[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.”²⁹²

According to this historical analysis of the Confrontation Clause, from which Crawford finds the Roberts test obviously departs, a particular manner of assessing the reliability of a testimonial out-of-court hearsay statement is mandatory.²⁹³ While admitting testimonial statements “deemed reliable by a judge is fundamentally at odds with the right of confrontation,”²⁹⁴ the Confrontation Clause strictly requires cross-examination in determining reliability.²⁹⁵ As a result, Crawford concludes, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”²⁹⁶ The testimonial out-of-court statement without an opportunity for cross-examination will not be considered by the fact finder. A mere judicial determination of reliability cannot replace “the constitutionally prescribed method of assessing reliability”²⁹⁷ even though the trial court acts in utmost good

²⁹⁰ *Id.*, at 1366.

²⁹¹ *Id.*, at 1367. The Court later clearly announces: “Our cases have thus remained faithful to the Framers’ understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Id.*, at 1369.

²⁹² See 2 N. C. 103, 104 (1794). Moreover, Crawford also notes: “Similarly, in State v. Campbell, South Carolina’s highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: ‘[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte*, and, therefore, utterly incompetent.’ The court said that one of the ‘indispensable conditions’ implicitly guaranteed by the State Constitution was that ‘prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination.’” *Id.*, at 1362.

²⁹³ *Id.*, at 1370.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*, at 1371.

²⁹⁷ *Id.*, at 1370.

faith to find reliability.²⁹⁸ Otherwise the fact-finding process in the United States will look much more inquisitorial in that the “Raleigh trial itself involved the very sorts of reliability determinations” which Roberts authorized.²⁹⁹ Since the Roberts test “fails to protect against paradigmatic confrontation violations,”³⁰⁰ the trial judge’s discretionary power to decide the reliability of the testimonial out-of-court statement is no longer decisive to a jury’s consideration of hearsay evidence.

4.4.3 The Proper Exclusionary Approach to the ROC Hearsay Rule

As discussed earlier, Articles 159-2 to 159-4 of the ROC CPC derive from the common law hearsay rule. While they were also designed to protect the defendant’s right to confrontation, it is meaningful to refer to the American experiences with the Confrontation Clause. To date, the United States Supreme Court has tried two different approaches dealing with this issue, as held in Roberts and Crawford. According to Roberts, the admissibility of an out-of-court statement depends on whether it falls within firmly rooted hearsay exceptions or bears particularized guarantees of trustworthiness.³⁰¹ Nevertheless, Crawford emphasizes the method of assessing the reliability of the testimonial statement, which requires the trial court to assess the reliability through cross-examination.³⁰² Even though Crawford now governs how to assess the reliability of testimonial hearsay, it does not necessarily follow that Taiwan has to adopt this exclusionary approach. On the contrary, Crawford probably just illustrates what a civil-law-based criminal justice system should not adopt.

The Sixth Amendment to the United States Constitution clearly provides: “In all criminal prosecutions, the accused shall enjoy the right to [...] be confronted with the witnesses against him.” Consequently, almost all criminal cases have focused on the right to confrontation when admissible hearsay was at issue. Contrary to this American practice, under the civil law tradition focusing heavily on “direct inquisition,” courts in Taiwan rarely addressed the right to confrontation because there is no clear expression of this right in the ROC Constitution. In 1995, Interpretation No. 384 of the Grand Justice Council recognized the defendant’s right to be confronted with the witnesses against him as being constitutional. Nonetheless, compared to the Confrontation Clause in the Sixth Amendment, it is less clear as to what the origins of the right to confrontation in Taiwan are. Moreover, the legislators in Taiwan can still impose restrictions on this constitutional right, not only because Article 23 of the ROC Constitution allows them to do so, but also because the history of the right to confrontation in the ROC does not require judicial officials to assess the reliability of an out-of-court testimonial statement through cross-examination. These legal characteristics of

²⁹⁸ *Id.*, at 1373.

²⁹⁹ *Id.*, at 1370.

³⁰⁰ *Id.*, at 1369.

³⁰¹ See 448 U.S., at 66.

³⁰² See 124 S. Ct., at 1370.

the ROC criminal justice system may justify why Article 159-1 of the ROC CPC, an unknown to the common law hearsay rule, was adopted. Obviously, from a historical viewpoint, the adversarial rationale behind Crawford requiring cross-examination to be the only method (with few exceptions recognized by 1791) of assessing the reliability is not applicable in Taiwan. While Justice Scalia heavily depends on the history of the Confrontation Clause to draw his conclusion, it is not necessary for Taiwan to draw on this historical authority and require the court to assess the reliability of an out-of-court testimonial statement only through cross-examination.

If in Taiwan cross-examination is not the only way to evaluate the reliability of an out-of-court testimonial statement, then Roberts might provide a good approach for deciding the admissibility of testimonial hearsay. In addition to cross-examination, Roberts allows the court to assess the reliability through two more methods. The first method is whether the hearsay statement falls within firmly rooted hearsay exceptions. Even though the civil law tradition does not really address this issue, this method is still applicable in Taiwan. The firmly rooted hearsay exceptions evolved in common law can properly illustrate what kinds of out-of-court statements are considered reliable. They are important clues for the ROC criminal justice system to determine the reliability of the out-of-court statements in any given case. If a hearsay exception provided in the Federal Rules of Evidence might be covered by the residual clause of the ROC CPC,³⁰³ it is probably correct to admit it in evidence at trial in that it is considered reliable in common law. Even in the case of a hearsay exception such as FRE 804 (a) (1) that cannot be covered by the ROC CPC it would be proper to admit an out-of-court statement by exercising an inquisitorial power under Article 159-1 of the ROC CPC because of its highly likely reliability.

The second method allowed by Roberts is whether the out-of-court testimonial statement bears particularized guarantees of trustworthiness. As criticized in Crawford, the reliability test in Roberts is too “amorphous” to provide clear protection from even core confrontation violations.³⁰⁴ It is true that Roberts will inevitably result in the fact-finding process depending heavily on the trial judge’s discretionary power; for instance, what is decisive is “which factors the judge considers and how much weight he accords each of

³⁰³ See Subparagraph 3 of Article 159-4 of the ROC CPC.

³⁰⁴ Crawford reasoned: “Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculcation of the defendant was ‘detailed,’ while the Fourth Circuit found a statement more reliable because the portion implicating another was ‘fleeting.’ The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), while the Wisconsin Court of Appeals found a statement more reliable because the witness was not in custody and not a suspect. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given ‘immediately after’ the events at issue, while that same court, in another case, found a statement more reliable because two years had elapsed.” *Id.*, at 1371.

them.”³⁰⁵ It also seems fair to say that Crawford expressively prevents the trial court from exercising this discretionary power in the fact-finding process. Nonetheless, although admitting core testimonial statements under Roberts is considered to be the unpardonable vice which the Confrontation Clause intends to exclude,³⁰⁶ this rationale is not necessarily true in Taiwan while the civil law tradition has never tried to avoid an inquisitorial fact-finding process such as the Raleigh trial. Besides, it is questionable whether it would be useful to follow Crawford in a civil-law-based criminal justice system.

It is worth mentioning that the fact-finding process is itself discretionary in nature. While evidence X conflicts with evidence Y in determining a factual issue, for example, it is up to the fact finder’s discretionary power to decide which evidence is more reliable. Although Crawford prevents the trial court from assessing the reliability of an out-of-court testimonial statement at its discretion, it allows the fact finder, usually the jury, to employ almost absolute discretionary powers to decide the factual issues with little scrutiny while the jury is not required to justify its decision in writing. Probably, the traditional distrust of judicial officials in common law requires the trial process to be bifurcated in which only the fact finder is allowed to exercise this discretionary power. As a result, the fact finder hears testimonial evidence only when it is made under cross-examination under Crawford. Besides, in a sense it is up to the legislature to admit an out-of-court statement in evidence at trial as a hearsay exception since not all hearsay exceptions evolved in common law have been adopted in the Federal Rules of Evidence.³⁰⁷ Under Crawford, however, even the discretionary power exercised by the state or federal legislators to evaluate the reliability of the out-of-court testimonial statements is not allowed by the Confrontation Clause in the Sixth Amendment.³⁰⁸ The Framers of the Confrontation Clause seemed to declare that only the fact finders, usually lay jurors, should be entitled to exercise discretionary powers in assessing reliability. The

³⁰⁵ Id.

³⁰⁶ Id.

³⁰⁷ As explained in the Advisory Committee’s Introductory Note: “The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions ‘but having comparable [equivalent] circumstantial guarantees of trustworthiness.’ Rules 803(24) and 804(b)(6)[5]. This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.” See Steven I. Friedland, et al., eds., *Evidence Law and Practice*, 2001 Supplement, Appendices: Federal Rules of Evidence, 87 (LexisNexis, 2001).

³⁰⁸ As noted in California v. Green: “While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.” See 399 U.S. 149, 155-6 (1970).

United States Supreme Court in Crawford once again clearly recognizes the common-law distrust of government officials by 1791 and continues to insist on this common law tradition in the twenty-first century. It is fair to say that the original intent of the Confrontation Clause—preventing the judicial and legislative powers from assessing the reliability of testimonial hearsay at its discretion—was built on the bifurcated trial structure. Only when the defendant waives his right to a jury trial will the trial court in the United States be allowed to exercise its discretionary powers to evaluate the credibility of evidence and decide the case.

If, on the other hand, the trial structure is not bifurcated and the court also plays the role of fact finder, it is questionable whether Crawford can stop the trial court from exercising discretionary powers. According to Paragraph 2 of Article 163 of the ROC CPC, the court is allowed to exercise its inquisitorial powers to find the material truth in order to decide a case. It is clear that the fact finder in Taiwan will eventually hear evidence whether or not it is admissible under the hearsay rule. In fact, even following Crawford will not prevent the fact finder in Taiwan from hearing an out-of-court testimonial statement that is not made under cross-examination. When the court in Taiwan is presented with information not allowed by Crawford, either from the dossier or from the victim or the prosecution, it is natural for the court—as a fact finder it is required to explain its decision in writing—to assess if the testimonial hearsay is helpful to the truth-finding process. In a sense, the decision to investigate the fact ex officio under Article 159-1 of the ROC CPC depends on this process of assessing trustworthiness. In reality, evaluating the reliability and credibility of testimonial hearsay depends heavily on the judicial officials' experience. It is impossible for the court to decide if the hearsay information is probative and reliable without exercising discretionary powers. This practice is neither adversarial nor accusatorial while the defense party plays no part in the court's decision-making process. Since the court in Taiwan is assumed to employ its discretionary powers to decide what evidence is more reliable and credible and what additional facts require investigation, the purpose of Crawford to prevent the court from assessing the reliability of the out-of-court testimonial statements at its discretion will not be served in the ROC criminal justice system. Hence, whether or not the out-of-court testimonial statement bears particularized guarantees of trustworthiness, the second method of deciding the admissibility of hearsay evidence provided by Roberts, is a proper standard for determining the admissibility of out-of-court statements in the ROC criminal justice system. It is suitable to follow Roberts instead of Crawford while interpreting Subparagraph 3 of Article 159-4 of the ROC CPC.

Moreover, Crawford seems to prevent the fact finder from hearing inadmissible hearsay. It is less useful to follow Crawford in order to distinguish admissible hearsay from inadmissible hearsay evidence because the fact finder in Taiwan will hear both kinds. While there is an inquisitorial hearsay exception focusing merely on the voluntariness of the

declarant's statement,³⁰⁹ the court is not required to assess the reliability of an out-of-court statement through cross-examination. The court is allowed to evaluate the reliability of the hearsay evidence through any inquisitorial method. If trustworthiness and reliability can be established, regardless of the discretionary powers used to do so, cross-examination is no longer necessary. In other words, the right to confrontation in the ROC criminal justice system is not a constitutional mandate. The significance of the right to confrontation is very different from its counterpart in the United States, as held in Crawford. As a result, the adoption of the hearsay rule referring to the Federal Rules of Evidence would merely results in the ROC trial process becoming less inquisitorial since the court only has to follow the adversarial trial model when Articles 159-2 to 159-4 of the ROC CPC apply. Perhaps this is what the 2003 pro-accusatorial reforms really mean.

4.5 Significance of the Adoption of the Hearsay Rule in the ROC Criminal Justice System

While the ROC hearsay rule does not follow Crawford in excluding testimonial hearsay not made under cross-examination from admissible evidence, it is interesting to establish what the significance of the 2003 legislation is for the ROC criminal justice system. In general, there were two main weaknesses regarding out-of-court statements before 2003. First of all, the prosecutor had no part in the fact-finding process. In the past, after prosecution, the court was obliged to investigate all the material factual issues. The prosecutor's involvement in the trial process was limited to reading the indictment in the final stages of the trial. Sometimes the prosecutor filed an indictment just because the defendant was considered highly suspect, without sufficient evidence. While the prosecutors were absent during the fact-finding process, the defendant had to argue with the court. Usually, the court went through all related evidence whether or not it was presented by the prosecutor. This trial practice looked like a battle between the court and the defendant, which inevitably made the role of the court less neutral.

The second defect resulted from that the fact-finding process depended too much on out-of-court statements, such as police interrogation records. The ROC Supreme Court admitted almost all evidence relating to proving the truth of the matter at issue in the past.³¹⁰ In reality, out-of-court statements played an important part in prosecution. Sometimes the public prosecutor did not interrogate the witness who made a statement during police interrogation before indictment. While the court was only required to read the verbatim transcript made by law-enforcement-officers before pronouncing judgment, the court could summon the declaring witness at its discretion. The defendant had no legal right to present evidence or to ask the declaring witness to be present at trial. Nor did he have the right to be confronted with the witnesses against him. This practice would result in serious injustice, and

³⁰⁹ See Article 159-1 of the ROC CPC.

³¹⁰ See 72 Tai Sun 1332 (1983).

especially so when the court, without further investigation *ex officio*, at its discretion and arbitrarily chose to believe an out-of-court declarant who intended to incriminate the defendant by merely making a statement during police interrogation. Besides, when the law-enforcement-officers might benefit from solving a serious criminal case or be pressured to do so, they had a tendency to find a culprit. This police malpractice made their reports less reliable. Ironically, the defendant had no equal status to argue with the party presenting incriminating evidence, not only because the prosecutors were always absent at the trial but also because doing so would make a bad impression on the fact finder.³¹¹

Although the adoption of the hearsay rule does not necessarily make the ROC criminal justice system non-inquisitorial, the 2003 legislation has resulted in a reduced inquisitorial practice. The ROC hearsay rule has put an end to the pre-2003 weaknesses. With the 2003 hearsay rule, the defendant has acquired the procedural right to argue the admissibility of incriminating out-of-court statements presented at trial. To prevent the defendant from arguing this issue with the court, which makes its role less neutral, the prosecutors are required to be present at trial.³¹² The 2003 legislation requires the prosecutor to participate in the trial process more actively. Since Paragraph 1 of Article 159 of the ROC CPC excludes hearsay information in general, arguing with the prosecutor about the admissibility of out-of-court statement is becoming a regular trial feature. This post-2003 practice makes it possible for the court to play a more neutral role than it did before; the prosecutor rather than the court is responsible for answering the defendant's objections to admitting hearsay evidence. Furthermore, the defendant has finally achieved equal status to argue with the opposing party—whether a public or a private prosecutor—instead of with the fact finder. In sum, without the 2003 hearsay rule, it would have been difficult for the ROC criminal justice system to create pro-accusatorial or mitigated inquisitorial trial proceedings because the prosecutor would have had nothing to do there. With regard to the issues provided in Articles 159-2 to 159-4 of the ROC CPC at least, the defendant can challenge the admissibility of out-of-court statements, and the prosecutor has to respond to this challenge by advocating the admissibility of the hearsay evidence.

While pre-2003 trial proceedings depended too much on verbatim transcripts made by law-enforcement-officers, they often neglected the risks of intentionally false accusations expressed by out-of-court witnesses and some law-enforcement-officers. In the past, when the defendant had been falsely incriminated especially, injustices such as the one in the Raleigh trial,³¹³ where the defendant was convicted following an *ex parte* official inquiry, might occur

³¹¹ This happened when the court collected evidence *ex officio*.

³¹² See Paragraph 2 of Article 159-5 and Paragraph 1 of Article 161 of the ROC CPC.

³¹³ As the Court noted in Crawford: "The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself:

if the court was inclined to consider the initial out-of-court statements reliable and desisted from investigating related evidence *ex officio*. Following the introduction of the 2003 hearsay rule—with regard to the out-of-court statements provided in Articles 159-2 to 159-4 of the ROC CPC in particular—the court can no longer admit out-of-court statements in evidence at trial without providing the defendant with the opportunity to question its admissibility. The prosecutors thus first have to prove these out-of-court statements are reliable. The defendant then has the opportunity to discredit these out-of-court statements. As a result, the 2003 legislation prevents the court from overly relying on verbatim transcripts. In a sense it not only limits the court in the use of its inquisitorial powers of the court, it also provides a clear guide for dealing with some kinds of hearsay evidence in the ROC criminal justice system.

5. Conclusions

Referring to the purpose of a continental criminal justice system, Professor Mirjan Damaska once explained: “[T]he idea that criminal proceedings could justifiably be used for purposes other than those of establishing the truth and enforcing the substantive criminal law is simply not part of the continental legal tradition.”³¹⁴ While finding the truth remains the most important concern in the ROC criminal justice system, without a reasonably persuasive justification, it is not easy for the court to exclude reliable and trustworthy evidence even though human rights protection is also an important issue. It is questionable if people in Taiwan would accept a criminal justice system resulting in the acquittal of a defendant who had clearly committed the offense he was charged with (as in the Simpson case in the United States). Moreover, while the American Bill of Rights defines human rights in more detail, the continental constitutional approach to human rights protection does not clearly specify the scope of human rights. Without a solid historical basis and a clear provision in the ROC Constitution, it is more difficult for an ROC court to draw on the constitution itself to determine what is constitutionally protected. While the persuasive justification for excluding reliable and trustworthy evidence results largely from obvious violation of the constitution, it is also difficult for the court to justify its decision to exclude evidence, when the contents of

‘Cobham is absolutely in the King’s mercy; to excuse me cannot avail him; by accusing me he may hope for favour.’ Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that ‘[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ,’ and, despite Raleigh’s protestations that he was being tried ‘by the Spanish Inquisition,’ the jury convicted, and Raleigh was sentenced to death. One of Raleigh’s trial judges later lamented that ‘the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.’” See 124 S. Ct., at 1360.

³¹⁴ See Mirjan Damaska, *supra* note 123. Moreover, “the trial in a civil law system usually begins with an examination of the defendant by the judge, exploring the defendant’s background as well as his knowledge of, or participation in, the alleged crime. Questions are frequently directed to the defendant throughout the remainder of the trial. While the defendant has the right to refuse to answer any questions, such refusals are exceptional.” See William T. Pizzi, *supra* note 172.

the constitutional rights in a continental-style constitution are less clear especially. Thus, courts in Taiwan have to explain more about how they exercise the balancing test and why they exclude evidence than the American courts do, which merely have to apply a totality-of-the-circumstances test to explain whether or not the governmental activity is illegal.

This study has extensively discussed the related developments of the hearsay rule in Taiwan and the right to confrontation in the United States. An examination of the hearsay rule in Taiwan and the United States has shown that different criminal justice approaches result in different developments of the exclusionary method. In an accusatorial system, such as in the United States, the criminal justice practice is much more party-influenced or party-oriented than the hierarchically controlled continental criminal justice system in Taiwan.³¹⁵ The parties are responsible for investigating the facts and producing evidence at trial.³¹⁶ In a sense, evidential law governs the trial procedure in the accusatorial and adversarial system. As it is impossible to admit only in-court statements in evidence at trial, the hearsay rule provides the parties with a clear guideline for admitting out-of-court statements in evidence at trial. It is fair to say that the hearsay rule protects the defendant's right to confrontation in the Sixth Amendment. Nonetheless, under Crawford, hearsay rule cannot replace cross-examination in assessing the reliability of out-of-court statements. Under this viewpoint, the prosecutor is responsible for any violation of the constitutional right to confrontation³¹⁷ and will lose his case if important evidence is excluded, and the victim of a violation of the Confrontation Clause will benefit from the exclusionary hearsay rule.

However, in a jurisdiction without the accusatorial tradition, such as Taiwan, the public prosecutor is not merely regarded as a party.³¹⁸ And the defendant as a victim of a violation of the constitutional right to confrontation will not automatically benefit from misconduct perpetrated by the opposing party. Although the 2003 hearsay rule refers to the Federal Rules of Evidence, perhaps the different style of hearsay legislation in the ROC CPC results from this pro-civil-law idea. Without the burden of a heavy distrust in the judicial officials instilled by the Raleigh trial³¹⁹ and the bifurcated trial structure, the ROC hearsay

³¹⁵ In fact, this practice results in the following description: "Americans view the state with suspicion and the law as their shield against official transgressions, who expect 'total justice': compensation for every harm suffered, observance of due process when their rights are at stake." See Kuk Cho, *supra* note 4, 298.

³¹⁶ See Renee Lettow Lerner, "The Intersection of Two Systems: An American on Trial for An American Murder in the French Cour d'Assises", 2001 *University of Illinois Law Review* 791, 797 (2001).

³¹⁷ For example, Crawford only admits testimonial out-of-court statements under hearsay in evidence at trial. If the prosecutor or the law-enforcement-officers cannot present the out-of-court declarant to make a statement under cross-examination, and the declarant does not testify at trial, his testimonial out-of-court statement will be inadmissible.

³¹⁸ See Renee Lettow Lerner, "The Intersection of Two Systems: An American on Trial for An American Murder in the French Cour d'Assises", 2001 *University of Illinois Law Review* 791, 797 (2001).

³¹⁹ As mentioned in Crawford: "We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the

rule has created a pro-inquisitorial exception, Article 159-1 of the ROC CPC, based mainly on the court's discretionary powers. In addition, although Articles 159-2 to 159-4 of the ROC CPC provide the defendant with the procedural right to challenge the admissibility of out-of-court statements, they also allow the court to exercise its discretionary powers in assessing the reliability and determining the admissibility of out-of-court statements. As Roberts suggested, cross-examination is merely a preferred method, not the only method, to assess the reliability of out-of-court statements.³²⁰ As a result, in Taiwan, admitting an out-of-court testimonial statement in evidence at trial without cross-examination does not necessarily conflict with the fair trial principle of criminal justice proceedings.

This study concludes that the ROC hearsay rule includes both inquisitorial and adversarial exceptions. As the court is still acting as fact finder under Articles 55 and 56 of the ROC Criminal Law and Paragraph 2 of Article 163 of the ROC CPC, and is required to justify its findings in writing, the accusatorial model and its accompanying rules of evidence should not apply in Taiwan without harmonization. For example, although not all hearsay exceptions in the Federal Rules of Evidence have been incorporated into Articles 159-2 to 159-4 of the ROC CPC, which originate with common law rules of evidence, Article 159-1 of the ROC CPC gives the court the legal power to admit any out-of-court statement presented by the parties in evidence. Moreover, Paragraph 2 of Article 163 of the ROC CPC allows the court to admit out-of-court statements presented by the parties beyond Articles 159-1 to 159-4 of the ROC CPC if the court finds the statements bear particularized guarantees of trustworthiness. While the court collects and investigates evidence *ex officio*, no hearsay rule applies because the court is using its inquisitorial powers to find the truth.³²¹ These powers should not be subject to any accusatorial limitations. It is worth noting that under the accusatorial hearsay rule of Article 159-2 of the ROC CPC, the court cannot admit verbatim transcripts made during police interrogation in evidence if the declarant is not present at trial.³²² Yet, theoretically, the court can employ its inquisitorial powers to find the truth *ex officio* even when the specific truth-finding approach is not allowed as an accusatorial hearsay exception.

people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands." See 124 S. Ct., at 1373.

³²⁰ The Court held: "The historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay. Moreover, underlying policies support the same conclusion. The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.'... The Court, however, has recognized that competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial.... This Court, in a series of cases, has sought to accommodate these competing interests. True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all... hearsay exceptions.' But a general approach to the problem is discernible." See 448 U.S., at 63-5.

³²¹ In a sense, the ROC Supreme Court in 90 Sun Zon Gum One 17 already admitted the out-of-court statement in evidence by investigating evidence *ex officio* before the 2003 legislation came into effect.

³²² This is because the ROC legal system only allows the Grand Justice Council to outlaw any effective positive law, and lower courts cannot ignore an enacted provision by interpreting it in an opposing way.

In other words, this study suggests that the court can admit out-of-court statements presented by the prosecutors but not on the basis of Articles 159-1 to 159-4 of the ROC CPC under its inquisitorial powers. A hearsay exception provided in FRE 803 or 804 but not in Articles 159-2 to 159-4 of the ROC CPC might be admissible under either Article 159-1 or Paragraph 2 of Article 163 of the ROC CPC. Interestingly, it is not clear how the court should exercise its inquisitorial power to find facts when neither of the parties presents any information regarding these facts. At the very least, while the fact finder will inevitably hear all kinds of evidence after indictment, which might provide the court with the information it needs to exercise its inquisitorial power to investigate evidence, the hearsay practice in Taiwan should be more flexible than its counterpart in the United States.

The hearsay practice in Taiwan is not identical to its counterpart in the United States. While the ROC hearsay rule provides the defendant with a procedural right to challenge the admissibility of out-of-court statements and requires the prosecutor to be present at trial to respond to this challenge, it would be inaccurate to say it is meaningless to adopt the common law hearsay rule in the ROC criminal justice system. In fact, it is less meaningful—rather than meaningless—for the ROC criminal justice system to adopt the common law hearsay rule as it is used in the United States, because the American trial structure is bifurcated, the parties are responsible for the presentation of the evidence, and the fact finder is not required to explain decisions in writing. If the ROC criminal justice system intends to build a more markedly accusatorial trial practice similar, but not identical, to its counterpart in the United States, it might be possible to restrict the court in the exercise of its inquisitorial powers for the purpose of investigating evidence so that the parties will be responsible for the presentation of the evidence in most cases. However, it is impossible to prevent the court in Taiwan from hearing inadmissible evidence that might influence its decision and provide sufficient and necessary information to exercise its inquisitorial power to investigate evidence *ex officio*. If the court holds the view that the inadmissible hearsay evidence might possibly reveal the material truth, it will be difficult for the court to stop investigating evidence *ex officio* when it has to justify its decision in writing which will be scrutinized in appeal. In all fairness, it must be noted that the narrower Paragraph 2 of Article 163 of the ROC CPC and Articles 55 and 56 of the ROC Criminal Law are interpreted,³²³ the less inquisitorial and the more accusatorial trial proceedings in Taiwan will be. This study does not offer suggestions for restricting the inquisitorial powers of the court to investigate evidence *ex officio*. That will require further empirical analysis of judicial decisions under the newly enacted Article 55 of the ROC Criminal Law.

³²³ Only the newly enacted Article 55 of the ROC Criminal Law will be applicable on July 1st 2006.

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