

# **IAJ**

## **Study Commission Four-2022**

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**Part 1. What is the impact on judicial independence of the judicial workplace (including nominations and appointments, independence in decision making, governance, assignments, fund, and other resources)?**

### **A. Judge in Taiwan**

With respect to Taiwan, judicial independence is essentially guaranteed by Article 80 of the constitution. In addition, Article 81 also shows that judges shall hold office for life. No judge shall be removed from office unless he has been found guilty of a criminal offense or subjected to disciplinary measures, or declared to be under interdiction. No judge shall, except in accordance with the law, be suspended or transferred or have his salary reduced.

#### **(1) Qualification exam**

Judges Act of Taiwan governs three types of “judges”: Grand Council Justices, Commissioner of the Public Functionary Disciplinary Sanction Commission, and judges of any other courts. Article 5 and Article 6 of the Judges Act list all the qualifications for judges and several different ways to

qualify for judgeship. Fresh graduates from approved law schools may become district court judges after passing a judges or prosecutors qualification exam. In addition, the process of examination, especially the written test, which accounts for 90%, and the oral test only account for 10%, can ensure the independence of the selection of judges.

## **(2) Multiple ways to be a judge**

There are many other methods to be qualified for judgeship besides passing the qualification exam, such as having practiced laws for more than 6 years, having graduated from a law program, and having served as a full-time professor, associate professor, or assistant professor for more than 6 years. The judicial selection committee installed by the Judicial Yuan has the power to select judges. All judges selected are required to go through training from 1.5 years to 2 years at the Judges and Prosecutors Training Institute. The curriculum focuses on practical skills building, legal ethics as well as certain theoretical courses. Trainees may also select courses on a foreign language or foreign law. Trainees must pass final exams with satisfactory scores to graduate from the Training Institute. The Judges Act also provides measures to review, remove, evaluate, reward, and discipline judges to prevent judicial corruption.

Switch between prosecutors and judges is common in Taiwan. In fact, transfers between prosecutors and judges are made easy under certain relevant laws and regulations. For example, under Article 5 of the Judges Act, a tenured prosecutor qualifies to be appointed as a judge automatically.

Judges and Prosecutors are treated substantially the same in terms of the qualifications for appointment and training requirements.

However, judges' power and duties and prosecutors' power and duties are not the same. Procuratorate power includes both investigation power and trial power under the Court Organization Act and the Criminal Procedure Code of Taiwan. Therefore, in the recent judicial reform discussion in Taiwan, separating legal regulations of judges from prosecutors has been brought up frequently. As a result, the most recently enacted Judges Act does not govern prosecutors.

The judicial selection committee installed by the Judicial Yuan, as a collegial committee composed of internal and external members (lawyers and professors) ensures the independence of the judge selection process

## **B. Decision making**

According to article 103 (Review Discussions are not Made Public) of the Court Organization Act. The review discussions of a judgment shall not be made public before the judgment is finalized. That can ensure that the judge does not be intervened before making a final decision in each case.

Nevertheless, Taiwanese judges are selected by examination and promoted according to their seniority. With a lifelong-tenure guarantee, judges lack the incentive to hear cases efficiently and attentively. Inefficiency and inattentiveness could result in public distrust. Normally, promotion metrics incentivize judges to make decisions not based on the parties' situation and needs, but rather on whether their decisions may be overruled by an appellate court. Since decisions are made not based on

litigants' experiences, the system breeds distrust and dissatisfaction. Ideally, judges' incentives and litigants' interests are aligned<sup>1</sup>.

### **C. Governance and retirement**

Regarding the macro level, an overhaul of the organization may be required. This aspect includes front-end recruitment, intermittent training and promotion, and back-end retirement and resignation. The interplay between human-resource management literature and constitutional law would be a new area that worth exploring. For instance, how to promote expertise- and performance-based evaluation and assignment systems while preventing potential manipulation? Should Taiwan impose more strict revolving-door restrictions (The current system restricts retired judges from serving as lawyers in the courts of their jurisdictions for three years) on retired or resigned judges to avoid potential corruption?

**Part 2. Please provide examples in the judicial workplace that foster judicial independence and identify barriers and practices that impede or negatively impact judicial independence.**

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<sup>1</sup> Zhuang Liu(2018), *Does Reason Writing Reduce Decision Bias? Experimental Evidence from Judges in China*, 47 J. LEGAL STUD. 83, 83-118.

The judiciary may be the most conservative institution in Taiwanese society. Almost all areas of Taiwanese society – including political reform movements, environmental movements, student movements, worker movements, and the media – started to change either before or around 1987. The judiciary itself did not make much progress until the end of 1993. Nevertheless, there are several pioneers whose failed actions enlightened some other judges and prosecutors who would become activists in the later judiciary reform movements

#### **A. The Case-assignment Reform**

The Court Organization Law provides the legal regulations governing case assignment and other judicial administration matters. The regulation requires a year-end meeting to be held by the Chief Judge, and all the judges in a court are granted the right to decide on case-assignment matters by vote. However, the Taiwanese judiciary had disregarded the regulation over the course of six decades. Before the case-assignment reform took place in 1993, the Chief Judge at each court had the power to assign lawsuit cases to judges. The Chief Judge could assign some criminal cases – particularly corruption cases – to the judges he or she favored. Consequently, those judges would rule on the cases according to the will of the Chief Judge. Some judges even had to bribe or flatter the Chief Judge so that they can be assigned to some particular cases.

On 29 December 1993, the judges at Taichung District Court voted 41 to 34 in favor of passing a resolution to return the power over case-assignment

decisions to all judges<sup>2</sup>. As a result, all the courts in Taiwan change the old case-assignment system to a new case-assignment system (Randomly assign cases by computer).

## **B. The Personnel Review Council Reform**

The problem of judicial personnel control is a serious one in Taiwan because the initial appointment is a relatively easy occurrence. If someone can pass the judicial exam as well as the training, then he/ she will be assigned to be either a judge or prosecutor. This does not mean that the KMT(Chinese Nationalist Party or Kuomintang) did not control the judicial exam. During the authoritarian era, the oral exam was a part of the judicial exam. As such, it was impossible for someone with an anti-KMT ideology to pass the exam<sup>3</sup>. Also, some parts of the training were similar to certain aspects of military training. The Judge and Prosecutor Training Institute could also change students' grades, which would decide their subsequent assignments. The Judge and Prosecutor Training Institute also employed a few agents from the intelligence apparatus to investigate and monitor students.

The Personnel Review Council reform eventually demolished the promotion map. After the reforms that served to break down the regime's control over personnel, judges no longer relied solely on the Chief Judge's

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<sup>2</sup> Wang, Chin-shou (2010), The Movement Strategy in Taiwan's Judicial Independence Reform, in: *Journal of Current Chinese Affairs*, 39, 3, 134-135.

<sup>3</sup> Winn, Jane Kaufman and Tang-chi Yeh (1995), Advocating Democracy: The Role of Lawyer in Taiwan's Political Transformation, in: *Law and Social Inquiry*, 20, 2, 576-578.

recommendation or the sore judgment of other judges in higher courts for their career advancement.

### **Proposal for 2023 topic:**

Distrust in court has practical implications. It deters people from using the court and further undermines the rule of law. Inefficiency and inattentiveness could result in public distrust. How to solve this problem?

### **Reference answer :**

Borrowing the insights from business administration helps dissect the problem of the Taiwanese judicial system at both micro and macro levels. From the micro aspect, it would be desirable to expand the evaluation metric to incorporate the litigants' experience. By doing so, judges are incentivized to take care of the litigants' feelings. Moreover, the determinants of decision quality should not be limited to the appellate court's rate of upholding decisions. Instead, it should include a cost-benefit analysis<sup>4</sup> that considers the use of judicial resources<sup>5</sup>, the parties' satisfaction, and the opportunity cost of dealing with other cases.

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<sup>4</sup> See Robert S. Gibbons (1998), *Incentives in Organizations*, 12 J.ECON. PERSP. 115, 115–32; Robert S. Gibbons & Michael Waldman (1999), *Careers in Organizations: Theory and Evidence*, in HANDBOOK OF LABOR ECONOMICS, volumes III and IV. (Ashenfelter & Card, eds.), 2373–437.

<sup>5</sup> See Edward P. Lazear(1999), *Personnel Economics: Past Lessons and Future Directions*, 17 J. LAB. ECON. 199, 199–236; Kevin J. Murphy(1999), *Pay, Performance, and Executive Compensation*, in HANDBOOK OF LABOR ECONOMICS, VOLUME 3B. 2485, 2485–563; Canice J. Prendergast(1999), *The Provision of Incentives in Firms*, 37 J. ECON. LITERATURE 7, 7–63.

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