

Article

Beyond Uncertainty: Lower Courts' Defiance in Insider Trading Cases in Taiwan

Ching-Ping Shao *

ABSTRACT

Taiwan promulgated its insider trading law in 1988. Prosecutions against insider traders were rare until the late 1990s. As enforcement actions increase, high-profile cases often shock the public and unsettle the business community about how to implement trading without incurring any legal risks. On the other hand, only a small number of prosecuted defendants are finally convicted. Judgments by the second-instance high courts are often reversed and remanded by the Supreme Court. That the conviction rate and the non-reversal rate are low means that prosecutors and judges from different levels of the judicial hierarchy are often unable to agree on the alleged violations and the interpretation of the law. Hence, legal uncertainty is unreasonably high.

In this paper, conventional wisdom is challenged regarding the causes of difficulties enforcing insider trading laws in Taiwan, arguing that evaluating the defiance of the lower courts can elucidate these enforcement problems. It is suggested that lower courts' obedience to precedents be partly premised on the condition that higher courts are more skillful interpreters of the law and can offer superior solutions to legal questions. From this angle, hierarchical legitimacy has become an increasing challenge since specialized panels were established in lower courts, but not in the Supreme Court. This paper does not favor a specialist court system. Instead, it suggests that, to improve communication between the Supreme

DOI : 10.3966/181263242015091002001

* Professor, National Taiwan University College of Law, J.S.D, University of California, Berkeley, School of Law. Email: cpshao@ntu.edu.tw.

Court and the lower courts, academics can play a much more important role than they do now.

Keywords: *Securities and Exchange Act, Insider Trading, Judicial Hierarchy, Specialist Judge, Principal-Agent Theory*

I. INTRODUCTION

The role of the court cannot be overemphasized in any country that attempts to establish a viable economy and a strong securities market.¹ Classic legal and financial theory posits that the quality of a country's laws has a great impact on the shareholding structure of its enterprises.² Because a good legal environment protects potential investors, it raises their willingness to put their money into the stock market and expands the scope of the capital market. Attentions should also be paid to the differences between the laws in books and the laws put into action. If written laws are inappropriately implemented and enforced, they might make little difference.³ Shareholders can be protected by the laws and need not excessively worry about the potential wrongdoing of corporate insiders and major shareholders. They can only feel this way when active financial regulators and independent courts enforce the law.

Among all the legal mechanisms for protecting securities investors, insider trading law is what attracts the most media and public attention. In the United States, insider trading prohibition is rooted in Rule 10b-5 and Section 10(b) of the Securities Exchange Act of 1934. Under the classical theory of insider trading, a securities transaction made by persons who owe fiduciary duties to the trading parties and know of nonpublic, material information can result in a Rule 10b-5 violation.⁴ Besides, in accordance with the misappropriation theory, persons who trade securities commit an insider trading violation if they misappropriate information in a breach of duties to the source of that information.⁵ From the viewpoint of securities regulators and common investors, this law levels the playing field and promotes fairness in the securities market. However, the covert actions of insider trading offenders who are often highly educated or familiar with the securities market practice present a challenge to law enforcement. The difficult-to-define elements of insider trading exacerbate enforcement problems.

Taiwan promulgated its insider trading law in 1988. Prosecutions against insider traders were rare until the late 1990s. As enforcement actions increase, high-profile cases often shock the public and unsettle the business

1. Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 790-91 (2001).

2. Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 THE JOURNAL OF FINANCE 1131, 1131-50 (1997).

3. John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229 229-311 (2007) (arguing that enforcement intensity, instead of its common law origin, defines the character of the U.S. capital market).

4. *Chiarella v. United States*, 445 U.S. 222 (1980).

5. *United States v. O'Hagan*, 521 U.S. 642 (1997).

community about how to implement trading without incurring any legal risks. On the other hand, only a small number of prosecuted defendants are finally convicted. Judgments by the second-instance high courts are often reversed and remanded by the Supreme Court. That the conviction rate and the non-reversal rate are low means that prosecutors and judges from different levels of the judicial hierarchy are often unable to agree on the alleged violations and the interpretation of the law. Hence, legal uncertainty is unreasonably high. To ease anxiety about the interpretation of the insider trading law, the Financial Supervision Commission (FSA), Taiwan's financial regulator, held two forums in 2007, where senior prosecutors and technocrats lectured regarding insider trading. Numerous famous tycoons and entrepreneurs attended, examining this confusing topic⁶; the unusual presence of such notable persons indicates how problematic it is to enforce insider trading regulations.

In this paper, conventional wisdom is challenged regarding the causes of difficulties enforcing insider trading laws in Taiwan, arguing that evaluating the defiance of the lower courts can elucidate these enforcement problems. Part II introduces the development of Taiwan's insider trading law. Part III describes the findings of recent empirical studies, presenting a review of relevant Supreme Court cases in Taiwan. Previous discussions on the low conviction rate and the low non-reversal rate often ended with proposals to refine the legal text and to establish a specialized court. These proposals have been fulfilled to a certain extent. From 2000 to 2010, Taiwan's Securities and Exchange Act (SEA) has been amended several times. Taipei District Court, the court of first instance located in the political and business capital of Taiwan, has set up specialized financial panels since 2008. The effects of these reforms remain to be seen; however, I suggest the enforcement plight reflects the defiance of the lower courts and might be exacerbated by reforms. Part IV offers two series of cases that were reversed by the Supreme Court as examples of the lower courts' defiance against the legal authority in insider trading cases. Part V scrutinizes the lower courts' defiance in greater depth, and argues that the potential expertise gap between the Supreme Court and the lower courts contributes to the defiance, and, indirectly, the high reversal rate. In Part VI, I propose that the members of the Supreme Court should cite scholarly works in their verdicts to channel the disagreements into healthy discussions. Frequent and enhanced communication should also be promoted among the various levels of courts and the prosecutors before a full reexamination of the establishment of a specialized court can be conducted.

6. The China Post News Staff, *Higher Conviction Rate for Insider Trading Sought*, THE CHINA POST, Dec. 5, 2007, at 1, <http://www.chinapost.com.tw/news/2007/12/05/133560/Higher-conviction.htm>.

II. INSIDER TRADING LAW AND ENFORCEMENT IN TAIWAN

Taiwan's major statute governing securities transactions came into force in 1968. To draft a new law from the beginning, legislators and regulators mainly borrowed from U.S. securities laws⁷ where the concept of insider trading was still emerging and poorly recognized.⁸ The original form of Taiwan's SEA, therefore, included no specific provision to target insider trading.⁹

Article 157-1, which makes the provision to prohibit insider trading, was not written into the SEA until the act was amended in 1988. Those in violation of Article 157-1 would have to cover the damages incurred by other investors, as well as be prosecuted. The then Section 1 of Article 157-1 reads as follows:

“Upon knowing of any information that will have a material impact on the price of the securities of the issuing company, and prior to the public disclosure of such information, the following persons shall not purchase or sell shares of the company that are listed on an exchange or an over-the-counter market:

1. A director, supervisor, and/or managerial officer of the company.
2. Shareholders holding more than 10% of company shares.
3. Any person who has learned the information by reason of occupational or controlling relationship.
4. Any person who has learned the information from any of the persons named in the preceding three subparagraphs.”

Illegal insider trading was not considered a felony because the maximum penalty for offenders was a sentence of 2 years imprisonment in accordance with Article 175 of the SEA. Nonetheless, the SEA amendment

7. Taiwan borrowed from the securities laws of the United States and Japan when Taiwan drafted its own SEA before 1968. For a brief legislative history of the SEA, see Paul S. P. Hsu & Lawrence S. Liu, *Transformation of the Securities Market in Taiwan, the Republic of China*, 27 COLUM. J. TRANSNAT'L L. 169, 174-75 (1988). Japanese law was modeled after the securities regulations of the United States during the Allied Occupation. See Tomoko Akashi, *Regulation of Insider Trading in Japan*, 89 COLUM. L. REV. 1296, 1297-98 (1989).

8. The first SEC action against insider trading was in 1961. See *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961); See also Mirela V. Hristova, *The Case for Insider-Trading Criminalization and Sentencing Reform*, 13 TRANSACTIONS 267, 268-69 (2012) (“Insider trading first came to broad public attention in the mid-1980s with a series of high-profile scandals involving investment bankers and lawyers who were charged with illegally trading in securities or tipping others about the company takeovers planned by their clients.”).

9. To be sure, Section 1 of Article 20 of the SEA, Taiwan's counterpart of U.S. Rule 10b-5, served as a catch-all antifraud provision, and might be interpreted in outlawing the insider trading as Rule 10b-5 did. Whether this broad interpretation on the scope of this Section could be accepted is not without serious doubt.

of 2000 penalized insider trading offenders by using Article 171 instead of Article 175, and the maximal term of imprisonment was drastically increased to 7 years. The penalty stipulated in Article 171 became even harsher in the SEA amendment of 2004. Insider traders can currently be sentenced up to 10 years imprisonment, and can be fined up to NT\$200 million. For serious offenders whose illegal insider trading resulted in gains of over NT\$100 million, the minimum imprisonment is 7 years, and the minimum fine is NT\$25 million. In addition, the maximum fine increases from NT\$200 million to NT\$500 million.

Legislative efforts to amend the SEA apparently reflect the beliefs of lawmakers that insider trading is prevalent in Taiwan and should be imposed with severe penalties.¹⁰ The strong demands of the public to level the investment playing field also affect the construction of laws and the extent to which they are enforced. For example, according to Article 157-1, Section 1, Paragraph 3, persons who obtain material information “by reason of occupational or controlling relationship” will be charged with insider trading if they use such information to trade securities. On one hand, temporary or constructive insiders,¹¹ like lawyers, accountants, or underwriters hired by the issuing companies, who trade on inside information obtained while working for the companies, will be indicted based on the scope of this paragraph. On the other hand, judging from the legal text in context, whether such a paragraph can be applied to the U.S.-style misappropriation theory cases, where the traders violate their duties to the source of information instead of to the issuing companies, is not without doubts. Nonetheless, mainstream contemporary scholars suggest that the aforementioned occupational or controlling relationship should be broadly defined. This “occupational relationship” clause may cast a broader net than the misappropriation theory against insider trading in the United States because it is often easier to confirm the existence of occupational relationships than to meet the “fraud on the source” requirement in the U.S. regime.

Not only lawmakers but also law enforcers stepped up efforts to ferret out illegal insider trading. Since the early 2000s, prosecutors have filed several high-profile cases against prominent businessmen. Even the son-in-law of the former president of Taiwan was indicted.¹² In the wake of disruptive enforcement actions, the business community had advocated for

10. Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 837 (2006) (“There is a burgeoning international consensus that the inherent unfairness of insider trading undermines the integrity of securities markets and discourages regular investors from playing what they perceive as a loaded game.”).

11. *Dirks v. SEC*, 463 U.S. 646, at 655 n. 14 (1983). See also Robert A. Prentice, *Permanently Reviving the Temporary Insider*, 36 J. CORP. L. 343, 348-49 (2011).

12. The China Post Staff, *Chao Insider Trading Profits Much Greater Than Thought*, [THE CHINA POST], Sept. 9, 2006, at 16, <http://www.chinapost.com.tw/print/89972.htm>.

clear and specific rules to obey. As a result, several amendments have been made. The SEA amendment of 2006 revised Section 4 of Article 157-1,¹³ and defines the phrase “information that will have a material impact on the prices of the securities” in Section 1 to the following:

“. . . information relating to the finances and businesses of the company, or the supply and demand of such securities on the market, or tender offer of such securities, the specific content of which will have a material impact on the price of the securities, or will have a material impact on the investment decision of a reasonably prudent investor.”

This Section further empowers the relevant authorities or the FSA, to stipulate a regulation “governing the scope of the information, the means of its disclosure, and related matters.” Sample lists regarding the related matters were provided in resulting regulation designed to provide guidance to law enforcement officials. In addition, in the SEA amendment of 2010, Section 1 of Article 157-1 was revised in several ways. Among them, insider trading is illegal only if the trader buys or sells securities upon “actually” knowing of any material information, and “the information is precise.”

Having been revised three times since its passage in 1988, the current Section 1 of Article 157-1 reads as follows:

“Upon actually knowing of any information that will have a material impact on the price of the securities of the issuing company, after the information is precise, and prior to the public disclosure of such information or within 18 hours after its public disclosure, the following persons shall not purchase or sell, in the person’s own name or in the name of another, shares of the company that are listed on an exchange or an over-the-counter market, or any other equity-type security of the company:

1. A director, supervisor, and/or managerial officer of the company, and/or a natural person designated to exercise powers as representative pursuant to Article 27, Section 1 of the Company Act.
2. Shareholders holding more than 10% of the shares of the company.
3. Any person who has learned the information by reason of occupational or controlling relationship.

13. The then Section 4 of Article 157-1 was renumbered as Section 5 after the SEA was amended in 2010.

4. A person who, although no longer among those listed in the preceding three subparagraphs, has only lost such a status within the last 6 months.
5. Any person who has learned the information from any of the persons named in the preceding four subparagraphs.”

Illegal insider trading results in not only criminal penalties but also civil liabilities. Section 3 and Section 4 of Article 157-1 read as follows:

“Persons in violation of the provisions of paragraph 1 or the preceding paragraph shall be held liable, to trading counterparts who, on the day of the violation, undertook the opposite-side trade with bona fide intent, for damages in the amount of the difference between the buy or sell price and the average closing price for ten business days after the date of public disclosure; the court may also, upon the request of the counterpart trading in good faith, treble the damages payable by the said violators should the violation be of a severe nature. The court may reduce the damages where the violation is minor.

The persons referred to in subparagraph 5 of paragraph 1 shall be held jointly and severally liable with the persons referred to in subparagraphs 1 through 4 of paragraph 1 who provided the information for the damages referred to in the preceding paragraph. However, where the persons referred to in subparagraphs 1 through 4 of paragraph 1 who provided the information had reasonable cause to believe the information had already been publicly disclosed, they shall not be liable for damages.”

It is worth noting that Taiwan has set up a government-sanctioned nonprofit organization (NPO) named Investor Protection Center (IPC) to help victimized investors enforce their private rights of action. In 2002, regulators and legislators strived to pass the Investor Protection Act and created the IPC, which are both dedicated to investor protection. This Act empowers the FSC to require all related exchanges, self-regulatory organizations, and securities finance enterprises to finance the establishment of the IPC. This Act requires consistent, ongoing contributions from securities firms, futures firms, and the exchanges.¹⁴ The IPC’s charter identifies the board of directors consisting of eleven members as its

14. Zhengquan Touziren Ji Qihuo Jiaoyiren Baohu Fa (證券投資人及期貨交易人保護法) [Securities Investor and Futures Trader Protection Act] § 7 (promulgated Jul. 17, 2002, effective Jan. 1, 2003, as amended Feb. 4, 2015) (Taiwan).

decision-making body.¹⁵ At least two-thirds of the directors are scholars, experts, or impartial persons appointed by the FSC, and the remaining directors are selected by the FSC from persons recommended by the contributors.¹⁶

According to the Investor Protection Act, the IPC may bring a securities class action as long as more than twenty investors who are harmed by the same securities incident are willing to delegate their rights to, and be represented by, the IPC.¹⁷ The IPC finances the entire cost of the litigation, and all proceeds arising from the litigation are distributed to the plaintiff-investors after deducting any legitimate expenses paid by the IPC.¹⁸ Those necessary expenses may not include the attorneys' fees or other compensation for the services offered by the IPC, because the IPC is not allowed to charge the plaintiff-investors it represents.¹⁹

The IPC enjoys huge cost advantages in bringing class actions. The Investor Protection Act originally exempted the IPC from paying court fees for the portion of the litigation amount in excess of NT\$100 million. Amended in 2009, the current cap amount was reduced to NT\$30 million.²⁰ The Taiwanese court, with the express authorization of the Investors Protection Act, can exempt the IPC from having to pay the standard deposit for injunctions or attachments applications.²¹ The usual amount set for the deposit is one-third of the claim. However, but for that rule, the deposit required for the court's temporary actions would have prohibited securities class actions with large claim amounts. This NPO model of enforcement is highly regarded²² and has led to securities class actions being initiated more often than before.

III. INSIDER TRADING CASES IN TAIWANESE COURTS

An empirical study completed in June 2013 stated that at least 91 insider trading cases have been initiated by prosecutors and adjudicated by

15. Caituanfaren Zhengquan Touziren Ji Qihuo Jiaoyiren Baohu Zhongxin Juanzhu Zhangcheng (財團法人證券投資人及期貨交易人保護中心捐助章程) [Charter of the Investor Protection Center] § 9 (promulgated and effective Jan. 3, 2003, as amended Apr. 9, 2013) (Taiwan).

16. Zhengquan Touziren Ji Qihuo Jiaoyiren Baohu Fa § 11 (Taiwan).

17. *Id.* § 28, para. 1.

18. *Id.* § 33.

19. *Id.*

20. *Id.* § 35, paras. 1, 2. Court fees for a case with a litigation amount of NT\$30 million are approximately NT\$276,000 for the court of first instance; if the case is appealed, the court fees for both the court of second instance and the court of third instance is about NT\$414,000.

21. Zhengquan Touziren Ji Qihuo Jiaoyiren Baohu Fa § 35, para. 3 (Taiwan).

22. Curtis J. Milhaupt, *Nonprofit Organizations as Investor Protection: Economic Theory and Evidence from East Asia*, 29 YALE J. INT'L L. 169, 169-207 (2004).

first-instance district courts in Taiwan.²³ Of these, 64 cases were finalized, and 27 cases were still being tried in the second-instance high court or deliberated in the third-instance Supreme Court. Compared with the frequent rumors of insider trading disseminated among the business community, the number of prosecutorial actions appears modest at best. However, viewed from a comparative perspective on insider trading enforcement, regulators and prosecutors in Taiwan seem to outperform their counterparts in other jurisdictions.²⁴

What is often baffling is not the sheer number of cases, but how the cases tend to fare in courts. The defendants are acquitted in approximately half of finalized cases (30 of the 64 cases) mentioned.²⁵ In sharp contrast, the so-called rate of prosecutorial correctness in all criminal cases released yearly from 2001 to 2011 by the Ministry of Justice is no less than 90%, which means that more than 90 of 100 defendants prosecuted during the past decade are convicted in the end.

The prosecutorial and judicial branches, and even judges in courts of varying levels, express conflicting views regarding what can be construed as illegal insider trading. A preliminary survey of Supreme Court verdicts in insider trading cases listed in the database maintained by the Judicial Yuan²⁶ indicated that of the 55 verdicts passed by the end of May 2013, 33 of the high courts' decisions were reversed and the cases were remanded, and 19 decisions were upheld. The non-reversal rate is approximately 35%. In comparison, according to the statistics compiled by the Judicial Yuan,²⁷ the non-reversal rate for all high court verdicts each year has risen steadily from 61% to 85% between 2007 and 2011.

The question of explaining the low conviction rate and the low non-reversal rate in insider trading cases remains. Conventional wisdom might suggest that the numbers show how difficult and controversial enforcing the insider trading law can be. Examining the statistics of insider trading cases with the benchmark of overall criminal cases, which are mostly composed of trivial ones, is like a comparison of apples and oranges. The elements of insider trading are somehow vague and pose serious challenges for law enforcers to build their cases. Moreover, Article 157-1, the violation of which entails criminal sanctions, is subject to a strict textual interpretation

23. Ho Chia-Jung (何佳蓉), *Cong Bijiaofa Guandian Lun Neixian Jiaoyi Huomian Guiding Zhi Kenengxing* (從比較法觀點論內線交易豁免規定之可能性) [A Comparative Study on Exemption Clause under Taiwan Insider Trading Law] (2013) (unpublished master thesis, National Taiwan University) (on file with National Taiwan University Library) 33.

24. For example, there are few criminal prosecutions as well as civil actions against insider trading in the United Kingdom. See Coffee, *supra* note 3, at 265.

25. See Ho, *supra* note 23, at 52.

26. This database is <http://jirs.judicial.gov.tw/Index.htm>.

27. The statistics are <http://www.judicial.gov.tw/juds/index1.htm>.

under the *nulla poena sine lege* (no punishment without law) principle. Evidence to buttress prosecutorial decisions might not meet the elevated threshold of “beyond a reasonable doubt” from the judges’ viewpoint. Conversely, the open-ended legal text inevitably leaves room for judges to exercise their legal and factual discretion in insider trading cases. Supreme Court judges might hold a different view from that of lower court judges in any particular case. Thus, these uncertainties and difficulties in enforcing the insider trading law are part of the reasons why some scholars are not supportive of regulating and criminalizing insider trading.²⁸ Hence, the low conviction and non-reversal rates are no surprise.

The decisional unpredictability of prosecutors and judges indicates substantial room for improvement in the insider trading enforcement policies of Taiwan. Judicial specialization is the critical suggestion in the solution offered by the Judicial Yuan. During the first National Judicial Reform Convention in 1999, a consensus was reached that specialized courts should be established to adjudicate certain types of cases. At that time, the major requirement for a person to become a judge or a prosecutor was to pass the judicial examination. Most people who passed the examination were law majors from universities; some had neither practiced law nor accrued other work experience.²⁹ Thus, it was strongly argued that the inefficiency and unprofessionalism found in certain courts resulted from a lack of training or from non-law knowledge among presiding judges. After the consensus was established, the Judicial Yuan enacted efforts to specialize the courts. Various interest groups began lobbying to change the law and to form specialized courts to adjudicate their cases.

Financial crimes are classic white-collar crimes that are inherently complex. Given the trend of specialized courts, it is logical that such criminal cases should be assigned to specifically trained and well-qualified judges. In 2005, legislators amended seven financial codes, including the SEA, adding a clause to allow for court specialization. For example, Article 181-1 of the SEA now states that a court might establish a specialized division or designate a specific person to try criminal cases involving violations of the SEA.

To implement this legislative mandate, the Judicial Yuan took a subsequent step in 2008, ordering the Taipei District Court to establish three specialized financial panels, each comprising three judges to hear financial criminal cases. The means of selecting judges to fill these panels generated

28. See e.g., HENRY G. MANNE, THE COLLECTED WORKS OF HENRY G. MANNE: IN THREE VOLUMES 169-80 (Fred S. McChesney ed., 2009).

29. Chang-Fa Lo, *Taiwan: External Influences Mixed with Traditional Elements to form Its Unique Legal System*, in *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* 91, 111-14 (E. Ann. Black & Gary F. Bell eds., 2011).

controversy. Because financial criminal cases were often time-consuming and high-pressure, balancing the workloads among specialized and generalist judges was a primary concern. As a result, the preferences of the judges were fully respected during the assignment process, and the specialties of the candidates who were asked to serve on the specialized panels were not the top consideration for judicial administrators.

Since these specialized financial panels in the Taipei District Court and other kinds of specialized courts were established, the Judicial Yuan has improved the administrative rules that govern these judicial specializations. Current rules require that judges who acquire specialization certificates issued by the Judicial Yuan are given the priority to serve in specialized courts or panels.³⁰ Those who do not complete academic degrees, publish scholarly works, or write judicial opinions on relevant subjects as required by the Judicial Yuan, cannot be certified.³¹ In addition, specialized judges must complete 12 hours of on-the-job training per year.³² Furthermore, judges who are assigned to the specialized courts or to panels must hold their positions for 3 years; this term can be renewed if a judge is willing to maintain her position.³³ The requirements of earning a specialty certification and the term of service were intended to ensure that specialized judges serve as real specialists.

IV. BEYOND UNCERTAINTY: TWO EXAMPLES OF THE LOWER COURTS' DEFIANCE

Legal certainty is important for the trustworthiness of the judicial system. Under the *nulla poena sine lege* principle, criminal statutes make criminalized behaviors known and allow people to plan their activities without incurring any legal risks. For the same purpose, judges must interpret the law basically according to the legal text and its legislative purpose. To further enhance the predictability of the law and the courts' verdicts, the principle of *stare decisis* requires that judges obey authorities or precedents and prevent, to a large extent, the potential abuses of their

30. Geji Fayuan Faguan Banli Minxingshi Yu Xingzheng Susong Ji Teshu Zhuanye Leixing Anjian Niandu Sifa Shiwu Fenpei Banfa (各級法院法官辦理民刑事與行政訴訟及特殊專業類型案件年度司法事務分配辦法) [Rules on Distribution of Annual Judicial Affairs for Judges at Each Level Court Dealing with Civil, Criminal, Administrative Cases and Cases of Specialization] § 11 (promulgated and effective Oct. 11, 2001, as amended Apr. 28, 2010) (Taiwan).

31. Sifayuan Hefa Zhuanye Faguan Zhengmingshu Shencha Yaodian (司法院核發法官證明書審查要點) [Review Guidelines on Judicial Yuan's Issuance of Specialized Judge Certificate] §§ 3, 4 (promulgated and effective Jan. 12, 2006, as amended Jun. 17, 2013) (Taiwan).

32. Geji Fayuan Faguan Banli Minxingshi Yu Xingzheng Susong Ji Teshu Zhuanye Leixing Anjian Niandu Sifa Shiwu Fenpei Banfa § 12 (Taiwan).

33. *Id.*

discretion.³⁴ Whereas the legal system in Taiwan, with its civil law tradition, does not include the *stare decisis*,³⁵ Taiwan's Supreme Court decisions enjoy a strong de facto binding effect for the lower courts to decide subsequent cases.³⁶ Notwithstanding, in view of the following two examples, it appears that there is insufficient adherence to the rules for securing minimum legal certainty. The lower court judges seem to be more defiant when they hear insider trading cases.

A. *Comparison of the Taiwanese Insider Trading Law Before and After the 2010 SEA Amendment*

According to Article 2 of Taiwan's Criminal Code, when the law is amended after the violator committed an offense, the law in force at the time of its commission applies; provided that the amended law favors the offender, the most favorable law applies. In view of this article and the SEA amendment of 2010, the question of whether the old law or the new law should apply to a particular insider trading case must become the focus of discussion.

Judging from the textual change, the 2010 amendment should be understood as favoring the defendants because they can raise new defenses under the current law that they did not "actually" know any material information, or what they did know was not "precise" information. The original version of the amendment drafted by the securities regulator and submitted to the Legislative Yuan did not make such revisions. The current version of Article 157-1 is what the party caucuses agreed to in a closed-door negotiation during the committee's deliberations. The Legislative Yuan Gazette, the basic record of the activities of the legislature and its committees and statements by legislators, provides scant explanation regarding the revisions. However, none would doubt that the revisions were enacted to benefit potential defendants.

Soon after the passage of the 2010 amendment, some prosecutors and judges suggested that the amendment only reasserted the burden of proof

34. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 849-56 (1994).

35. *Id.* at 826 (a central premise in civil law systems is that "judicial decisions are not a source of law. It would violate the rules against judicial lawmaking if decisions of courts were to be binding on subsequent courts." Hence, "no court is bound by the decision of any other court in a civil law jurisdiction. In theory, at least, even though the highest court has already spoken on the question and indicated a clear view of its proper resolution, the lowest court in the jurisdiction can decide differently.").

36. Lo, *supra* note 29, at 99; See also Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 N.Y.U. J. INT'L L. & POL. 931, 947 (2003) (conceding "that judges in civil law jurisdictions are more constrained in exercising [lawmaking] rights than judges in common law jurisdictions, in part because of legal doctrine, and in part due to other institutional constraints on judges.").

that is borne by the prosecutors against defendants charged with insider trading. In other words, the additions of “actually” and “precise” are simply wording changes that increase the exactness of the legal text. The elements of insider trading have not been modified. Thus, the positions of defendants who are already on trial are neither positively nor negatively influenced by the new law; these cases will be adjudicated based on the old law.

An identical conclusion regarding the application of the old law can be reached using an alternate path. Certain lower court judges indicated that whereas the revisions benefit defendants, the old law applies in the cases they oversee. This is because defendants allegedly committed insider trading before the enactment of the 2004 amendment, which imposed considerably harsher punishments compared with previous penalties. If the new law is applied in such cases, these judges suggested that the entirety of the new law, namely, the elements of insider trading revised in 2010 and the punishments enacted in 2004, should be applied together and cannot be separately considered. Therefore, comparisons of the old and the new laws should specify that the old law substantially favors defendants and the extent to which this new law should be applied.

By June 2013, four Supreme Court verdicts addressed the issue of a comparison of these laws.³⁷ Both the theories of certain lower court judges and the view that the old law should apply were rejected by the Supreme Court. The Supreme Court holds that the 2010 amendment changed the elements of insider trading in favor of the defendants. The defendants will not be subject to any punishment if they are not found guilty under the current Article 157-1. Regarding the comparison of the old and the new laws, the punishment clauses, Article 171 and Article 175, come into play during the sentencing, and not at the conviction stage.

To be sure, how substantial an impact can be made in the outcomes of insider trading cases by replacing the standard of “know” with one of “actually know” in Article 157-1 remains to be seen. Whether the information that the defendants know of is precise remains subject to interpretation and uncertainty. To better guide the law enforcers, the legislators could have allowed the recording of how the draft wording emerged and how it will influence insider trading cases. However, the textual change is clear and specific, as are legislators’ intentions to curb frivolous

37. Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 100 Tai Shang Zi No. 2565 (100台上字第2565號刑事判決) (2011) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 100 Tai Shang Zi No. 7306 (100台上字第7306號刑事判決) (2011) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 101 Tai Shang Zi No. 470 (101台上字第470號刑事判決) (2012) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 101 Tai Shang Zi No. 4243 (101台上字第4243號刑事判決) (2012) (Taiwan).

prosecutions. Downplaying the textual change and undercutting legislative intentions is surprising, simply because it is not what judges usually do. Moreover, lower court judges, as well as prosecutors who share the same view towards the 2010 amendment, did not offer persuasive reasoning to support their view. If the elements of insider trading remain unchanged, the purpose for legislators' amendment of the text remains unanswered. If the legislative purpose is to strengthen the prosecutors' burden of proof, this purpose cannot be achieved without new elements being introduced into the law. In this light, the Supreme Court's reversal on these judgments should be anticipated, and the lower court's defiance deserves further exploration.

B. *Controversy of "Possession" versus "Use"*

Another controversy that reflects the lower court's defiance concerns the choice between the possession standard and the use standard for insider trading. In accordance with the possession standard, the mere possession of material information at the time of trading is sufficient for establishing an insider trading liability. In contrast, to meet the use standard, a causal connection between both the possessed inside information and the trading achieved by the defendants must be proven.

Because Taiwan modeled its SEA after the U.S. regime, developments and debates regarding U.S. securities regulations often draw attention and spark discussions in Taiwan. Taiwanese lawyers frequently cite U.S. cases in their briefs, and such cases often affect the opinions of Taiwanese judges. Thus, it is critical to note that a circuit split exists between the possession and use standards in the United States. Two circuits vital to discussions of securities laws, the Second and Ninth Circuits, have expressed differing opinions. The Second Circuit ruled in favor of the possession standard in 1993 in *the United States v. Teicher*³⁸ by dicta and subsequently reaffirmed its position in 2008 in *the United States v. Royer*.³⁹ In the recent case of *the United States v. Rajaratnam*,⁴⁰ this possession standard remained unchanged. By contrast, in 1998, the Ninth Circuit ruled that mere possession, without further use of inside information was insufficient to establish insider trading liability in *the United States v. Smith*.⁴¹ In addition,

38. *United States v. Teicher*, 987 F.2d 112 at 121 (2nd Cir. 1993) ("It strains reason to argue that an arbitrageur, who traded while possessing information he knew to be fraudulently obtained, knew to be material, knew to be nonpublic, – who did not act in good faith in so doing – did not also trade on the basis of that information.")

39. *United States v. Royer*, 549 F.3d 886 at 899 (2nd Cir. 2008) (the use standard supported by *Teicher* "was arguably dictum," but the Court "consequently adhere to the knowing possession standard articulated in *Teicher*.").

40. *United States v. Rajaratnam*, 719 F.3d 139 158-59 (2nd Cir. 2013).

41. *United States v. Smith*, 155 F.3d 1051 at 1069 (9th Cir. 1998) ("We nonetheless adhere to our view that Rule 10b-5 entails a 'use' requirement. . . . Any number of types of circumstantial evidence

the Eleventh Circuit decided unanimously in favor of the use standard in 1998 in *the United States v. Adler*.⁴² But it seemed to strike a balance by switching the burden of proof to the defendants.⁴³

In Taiwan, a case survey conducted in 2009 indicated that the *mens rea* issue is the most raised defense by insider trading defendants.⁴⁴ In that study, the so-called *mens rea* defenses were inclusive of the claims of defendants that they would have conducted the trading either way, despite not having had such inside information. Consequently, they should not be convicted under the use standard. In 2002, the Supreme Court passed its first verdict on this issue and expressly adopted the possession standard.⁴⁵ Relying mainly on textual interpretation, this verdict states that the subjective purpose of the trader is not one of the elements stipulated in Article 157-1. As long as the trader “knows material information” and “trades the stocks before the disclosure of such information,” the trader commits the violation of insider trading. This verdict has been widely cited, and the possession standard has become the mainstream since then.

Nonetheless, some lower court judges still insist on employing the use standard. They have not hesitated in confronting the Supreme Court. The *Smith* case and the *Adler* case from the United States were explicitly referenced in some of these verdicts. They did not mention the *Teicher* case in their verdicts, nor did the criminal court judges pay attention to the subtle difference on burden of proof discussed in the *Smith* case.⁴⁶

The current findings indicated that 4 of the 36 insider trading verdicts offered by the Supreme Court required that the possession standard be adopted and reversed the cases to a second-instance high court.⁴⁷ It is

might be relevant to causation issue. . . . We are confident that the government would have little trouble demonstrating ‘use’ in . . . situations in which unique trading patterns or unusually large trading quantities suggest that an investor had used inside information.”).

42. *United States v. Adler*, 137 F.3d 1325 at 1337 (11th Cir. 1998) (“We believe that the use test best comports with precedent and Congressional intent, and that mere knowing possession – i.e., proof that an insider traded while in possession of material nonpublic information – is not a *per se* violation.”).

43. *United States v. Adler*, at 1337 (“[W]hen an insider trades while in possession of material nonpublic information, a strong inference arises that such information was used by the insider in trading. The insider can attempt to rebut the inference by adducing evidence that there was no causal connection between the information and the trade – i.e., that information was not used.”).

44. Chuang Chia-Huei (莊嘉蕙), *Neixian Jiaoyi Zhi Shizheng Yanjiu* (內線交易之實證研究) [The Empirical Study of the Insider Trading] (2009) (unpublished master thesis, National Chiao Tung University) 135-37, <https://ir.nctu.edu.tw/handle/11536/82521>.

45. *Zuigao Fayuan* (最高法院) [Supreme Court], *Xingshi* (刑事) [Criminal Division], 91 *Tai Shang Zi No. 3037* (91台上字第3037號刑事判決) (2002) (Taiwan).

46. *United States v. Smith*, at 1069 (in contrast with the *Adler* court, the *Smith* court “deal with a criminal prosecution, not a civil enforcement proceeding, as was the situation in *Adler*. We are therefore not at liberty, as was the *Adler* court, to establish an evidentiary presumption that gives rise to an inference of use.”).

47. 91 *Tai Shang Zi No. 3037*; *Zuigao Fayuan* (最高法院) [Supreme Court], *Xingshi* (刑事)

believed that this use standard is more popular in lower courts than what can be seen from these four cases. Regarding other lower court judgments that have adopted the use standard and still found the defendants guilty, the Supreme Court, which agreed with the guilty finding, would not reverse them on the sole basis of the lower courts' dissent regarding the possession standard. Such judgments might not be appealed to or overturned by the Supreme Court and, hence, are not examined in this study.

That the lower court judges expressed their opinions and were not intimidated by a possible reversal might be lauded as the manifestation of judicial independence. Unrest among lower court judges might induce Supreme Court judges to reevaluate their previous decisions.⁴⁸ However, any consistent, ostensible disagreement between the lower courts and the Supreme Court is an anomaly in any legal system. When judges are deciding a particular case and believe that compliance with prior decisions by a higher court may compel an incorrect decision, they often adopt a judicial strategy of distinguishing the case from the decisions of the higher court.⁴⁹ Authoritative decisions are applied based on the factual similarities between current cases and prior cases. Lower court judges, hence, have the discretion to decide what the facts of the case are and to produce a different outcome from cases heard previously by their counterparts in the higher courts.⁵⁰ To find defendants innocent of insider trading, judges typically base their decisions on the lack or immateriality of information obtained by defendants.

[Criminal Division], 99 Tai Shang Zi No. 4781 (99台上字第4781號刑事判決) (2010) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 99 Tai Shang Zi No. 6864 (99台上字第6864號刑事判決) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 99 Tai Shang Zi No. 8070 (99台上字第8070號刑事判決) (2010) (Taiwan).

48. In at least two recent Supreme Court verdicts, some subtle changes can be found regarding the Supreme Court's attitude toward the use standard. One verdict is Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 101 Tai Shang Zi No. 4351 (101台上字第4351號刑事判決) (2012) (Taiwan). In this case, the second-instance high court followed the possession standard and found the defendant guilty of insider trading. The defendant appealed and argued that the use standard should be adopted. The Supreme Court not only upheld that "use" is not required for insider trading violations, it also opined that the defendant's argument that his transaction is not caused by the knowledge of nonpublic information is not persuasive under the lenient use standard. The other verdict is Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 1420 (102台上字第1420號刑事判決) (2013) (Taiwan). In this case, the second-instance high court believed the use standard is the better law and found the defendant not guilty of insider trading. Prosecutors appealed this case to the Supreme Court. The Supreme Court did not outright reverse the case on the sole basis of the lower court's wrongful interpretation of the insider trading law. Instead, the Supreme Court opined that the transactions made by defendants "seemed to be in connection with the defendants' prior knowledge of material information of the merge."

49. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577-9 (1987); *See also* Caminker, *supra* note 34, at 819.

50. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y. U. L. REV. 383, 423 (2007). ("The discretion inherent in the task of applying legal doctrine to concrete facts primarily gives the lower courts power over the outcome in the particular case before them.")

Resorting to the use standard might be unnecessary to ensure justice. Moreover, regarding defendants who were convicted regardless, it is not practically necessary for lower court judges to insist on using the lenient use standard instead of the strict possession standard. Thus, the adoption of the use standard among lower courts shows that such courts strive to pursue the justice they believe in and to defy the authority of the Supreme Court.

V. EXPLORING THE LOWER COURTS' DEFIANCE

Judicial independence is a characteristic of contemporary democratic governments. Judges make decisions based solely on facts and the law and are not subject to undue influences. Nevertheless, the influences that higher courts exert on lower courts are typically not deemed undue. This is why principal-agent theories are often used to model the judicial hierarchy in U.S. studies.⁵¹ According to these theories, the Supreme Court, as the principal, communicates its preferences in its verdicts to the lower courts as the agents; in addition, lower courts should adhere to the preferences of the Supreme Court in their case-by-case decisions. However, in the U.S. federal judicial system, the principal seems to have only limited power to discipline disloyal agents. The Supreme Court does not control the promotion, demotion, or compensation of lower court judges. It has the power of reversal and can make lower court judges whose judgments are reversed suffer possible reputational damage. However, because of its limited institutional capacity, only a very small number of decisions are subject to the review of the Supreme Court.⁵² Defiant lower court judges can easily avoid the potential sanctions of a reversal. This contrasts with Taiwan. In Taiwan, the Organic Act of the Judicial Yuan requires that promotion of judges be determined by the resolution of Personnel Committee in the Judicial Yuan.⁵³ But tradition has it that any proposal on promotion of lower court judges to the Supreme Court judgeship can be approved only if it is backed by senior Supreme Court judges.⁵⁴ In practice, Supreme Court judges have the power to select their future colleagues. With a low threshold for appeals, the parties in many

51. See e.g. D. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AMERICAN JOURNAL OF POLITICAL SCIENCE 673, 673-96 (1994).

52. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 130-31 (2006).

53. Sifayuan Zuzhi Fa (司法院組織法) [Organic Act of Judicial Yuan] § 20 (promulgated Mar. 31, 1947, effective Jun. 24, 1948, as amended Feb. 4, 2015) (Taiwan).

54. In 2008, the President of Judicial Yuan, Lai Ying-Zhao, proposed to send two judges to the Supreme Court. This proposal was turned down by the Personnel Committee, partly because senior Supreme Court judges were not consulted. See Huang Jin-Lan & Liu Feng-Qin (黃錦嵐、劉鳳琴), *Lai Yingzhao Ti Renshian Zaizao Foujue* (賴英照提人事案再遭否決) [*Lai Yingzhao Proposes Personnel Change, Rejected Again*], ZHONGGUO SHIBAO (中國時報) [CHINA TIMES], July 23, 2008, at A13.

cases have the right to appeal to the Supreme Court. Under such circumstances, we can imagine that the lower court judges in Taiwan have been better disciplined than their counterparts in the United States and should be less inclined to offer different opinions from those made by the Supreme Court. In short, the relationship between the Supreme Court and the lower courts in Taiwan can be better described as a principal-agent relationship than it can be in the U.S.

This raises questions regarding verdicts made by the Supreme Court judges that are not popular among lower court judges. It is suggested that lower courts' obedience to precedents be partly premised on the condition that higher courts are more skillful interpreters of the law and can offer superior solutions to legal questions.⁵⁵ In this light, many judges might ask whether the Supreme Court is, functionally or structurally, more suitable than the lower courts at appreciating the incomprehensible insider trading law. Although lower court judges are neither as senior nor as experienced as Supreme Court judges, they generally have greater exposure to recent scholarly productions and comparative legal developments about insider trading law, a field that has not been sufficiently nurtured in Taiwan until the past decade.

Hierarchical legitimacy has become an increasing challenge since specialized panels were established in the Taipei District Court. These panels have gained respect from their colleagues within and outside the Taipei District Court for various reasons in recent years. Service on such panels is increasingly considered prestigious, whereas when the panels were established, few judges volunteered to take these positions. Criminal court judges were concerned about managing a heavy workload and hesitated to participate in the panels. However, the challenge of trying financial criminal cases can also be viewed as attractive to highly qualified judges. Hearing arguments from sophisticated counsels, adjudicating vexing issues, and proposing novel opinions is satisfying to numerous judges. Outsmarting white-collar criminals, imposing penalties, and bringing justice to the victims should engender a sense of achievement among judges; thus, judges should compete to secure positions on specialized panels and the quality of specialized judges should not be a concern.⁵⁶ Regarding specialization, the

55. Caminker, *supra* note 34, at 845-49; Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1624 (1995) (strict vertical precedent is required "because the appellate court invests more resources in legal deliberation, the quality of this trial-level signal is less accurate than that provided by appellate review.").

56. Cf. Richard Posner, *Will the Federal Courts of Appeals Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 779-780 (1983) ("Another Implication of what I have called specialization of function concerns job satisfaction, and in turn the caliber of people willing to accept appointment to the federal courts of appeals. One does not have to be a Marxist, steeped in notions of anomie and alienation, to realize that monotonous jobs are

judges who currently sit on specialized panels have undergone the training offered by the Judicial Yuan. These judges have qualified by pursuing advanced studies or producing extensive publications in their field. Handling high-profile cases not only offers them the best opportunities to learn and accumulate experience, but also makes their opinions well publicized. These judges often become famous figures throughout the nation. When considering the legitimacy of judges in lower courts, the quality, specialties, and nationwide recognition of these judges seems to upend traditional judicial hierarchy.

It does not seem coincidental that the same opinions of the judgments of the lower courts in the two examples discussed in Part IV were first mentioned or strongly concurred within the publications written by one particular specialized judge of the Taipei District Court.⁵⁷ It is highly likely that this prolific judge and his colleagues on the specialized panels have become opinion leaders among the community of lower court judges.⁵⁸ Special expertise and the experts' self-esteem would make it difficult for them to change their firm positions on controversial questions. For better or worse, following the Supreme Court's opinions is not always the best strategy for judges who wish to contribute more substantially to the law.⁵⁹ In summary, without the full respect for the Supreme Court judges' knowledge and expertise, lower court judges become more willing to challenge the authority of the higher court, and legal certainty is, hence, damaged.

Furthermore, the different levels of expertise obtained by the lower court judges, some of whom are specialists, and by the Supreme Court judges, all of whom are generalists, might produce different understandings of the same set of facts. The Supreme Court in Taiwan reviews only questions of law. However, the division between the questions of law and of fact is ill-defined. Deconstructing insider trading elements such as materiality and knowledge often includes interpretations that involve

unfulfilling for many people, especially educated and intelligent people, and that the growth of specialization has given to many white-collar jobs a degree of monotony formerly found only on assembly lines. . . . I do not think it would be easy to maintain a high quality of federal appeals bench on such a diet.”). But see Rachele Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377, 427 (1990) (“[I]t is important not to exaggerate the potential problem with attracting qualified judges to serve on specialized courts. However persuasive these problems may seem in theory, the quality of the judges willing to serve has, in the past, been high.”).

57. LIN MENG-HUANG (林孟皇), JINRONG FANZUI YU XINGSHI SHENPAN (金融犯罪與刑事審判) [FINANCIAL CRIME AND CRIMINAL TRIAL] 258-60 (2011); Lin Meng-Huang (林孟皇), *Neixian Jiaoyi Zhongda Xiaoxi De Mingquexing Yu Shijizhixi – 2010 Nian Xinxiuzheng Neixian Jiaoyi Gouchengyaojian De Jiexi* (內線交易重大消息的明確性與實際知悉——二〇一〇年修正內線交易構成要件的解析) [*Preciseness and Knowledge of the Material Information in Insider Trading*], 184 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN LAW REVIEW] 141, 155(2010).

58. Dreyfuss, *supra* note 56, at 380 (1990) (suggesting courts with generalist judges “might tend to defer to the expertise of the special bench.”).

59. Anthony D’Amato, *Legal Uncertainty*, 71 CAL L. REV. 1, 19-20 (1983).

questions of law. When lower court judges identify and apply relevant legal information, Supreme Court judges might express differing views. Conversely, judges with special expertise might suffer from an overconfidence bias and overlook the details of a situation.⁶⁰ It would be difficult for them to take the cue from the Supreme Court's opinion even if its reversal is correct.

The expertise gap might also explain, to an extent, why lower court judges think that the 2010 amendment, which was drafted and concluded in a closed door meeting by lawmakers, does not change the elements of insider trading after all. The quality of lawmaking in Taiwan has been subject to criticism. It is fair to say that the unexpected textual change, without a full discussion and the experts' input, is a product of rush and haste. Lower court judges can easily discount the meaning of the amendment by saying that current legal practice, with which lawmakers are unfamiliar, has already met the threshold that the new legal text appears to raise.

In addition to the expertise gap, the interest group theory and the possibility of legislative capture might be another reason lower court judges tend to ignore or downplay the amendment favorable to potential entrepreneur defendants. Judges in Taiwan are not appointed by politicians, but mostly selected through highly competitive examination. Their life tenures are guaranteed by the Constitution. However, the insulation from interest group pressure does not demonstrate that judges are better policy makers.⁶¹

VI. RESTORING THE AUTHORITY OF THE SUPREME COURT

Judicial expertise is critical, but it is not the only means of sustaining judicial legitimacy. Regardless of the expertise of a judge regarding his or her specialization, the judge is typically no more educated than the sophisticated parties involved in the case. Administrative decisions made by governmental entities are subject to judicial review not because judges exhibit superior understanding of regulations compared to administrative officials, but rather, because an impartial third party must limit governmental power.⁶² Explicit or implicit conflicts among the opinions of various judges must be addressed by a unified court. Judgeship is limited in the highest level court in any country, and judges should not be promoted within the

60. Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 883-84 (2012).

61. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 84-87 (1991).

62. However, because of the specialization of administrative officials, judges may defer to the officials' fact-finding when they hear cases. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 41-42 (1991).

judicial hierarchy based solely on their specialties. Hence, establishing panels within the Supreme Court based on field specialties is impractical.⁶³ It is both expected and structurally unavoidable that generalist judges sit on the Supreme Court to review the opinions of lower court judges, some of whom may be deemed specialists. Some proponents of specialized courts also support the idea that specialization be confined to trial-level courts and higher courts should comprise generalists. It is suggested that generalist judges serve as “a check on the possible detriments of specialization.”⁶⁴

The Taiwanese Supreme Court could suppress the defiance of lower courts against its opinions and reassert its authority in the strongest form. In other words, the opinions of the Supreme Court, which have been or will likely be defied by the lower courts, could be established “precedents.” As previously mentioned, Supreme Court opinions in Taiwan are only de facto binding when lower court judges deliberate their cases. The Supreme Court is empowered by Article 57 of the Court Organization Act to make its opinions de jure binding by rendering the formal status of precedent to any opinion if the Court determines such opinion is of great reference value for future cases. In Taiwan, the right to appeal to the Supreme Court is limited to certain grounds, one of which is that the verdict of the lower court is determined to violate relevant “laws and regulations.”⁶⁵ The Supreme Court has long held that precedents fall under the scope of “laws and regulations.” Therefore, all such verdicts would certainly be brought to and reversed by the Supreme Court, and lower court judges would carefully consider disobeying a formally adopted precedent as opposed to a typical Supreme Court opinion. However, the Supreme Court opinions which lower court judges dare to defy are controversial. The Supreme Court may find it difficult to justify if it makes those opinions precedents. The reputation of the Supreme Court may be harmed if the choice of precedents backfires.

Thus, rather than additional power clashes, the judiciary system requires additional communication. Judges rarely discuss specific cases. They communicate to the public and their colleagues mostly by using their reasoned verdicts. Defiance against Supreme Court verdicts can suggest that the opinions of the Supreme Court are unsatisfactory from the viewpoints of lower court judges. As indicated, this dissatisfaction may result from serious doubts regarding the specialties of judges, rather than the reasoning these judges offer in their opinions.

63. By the end of 2012, the Taiwanese Supreme Court had 71 judges. Information is <http://www.judicial.gov.tw/juds/index1.htm>.

64. Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 114-15 (1995).

65. Xingshi Susong Fa (刑事訴訟法) [The Code of Criminal Procedure] § 377 (promulgated Jul. 28, 1928, effective Sept. 1, 1928, as amended Feb. 4, 2015) (Taiwan) (reads as follows: “Appeals to the court of third instance may only be filed where the judgment is in contravention of the laws and regulations.”).

To improve communication, Supreme Court judges should consider citing academic publications and scholarly works in their opinions; this is rarely done in Taiwan, and the reasons judges refrain from citing remain unclear. This may result from informal rules passed through generations of the judicial community; it is also likely that judges seek to show that they are free from outside influences to avoid the appearance of conflicts of interest. A judge who cites relevant works may leave a negative impression of that judge's lack of creativity. However, these reasons are not sustainable. Justices of the Constitutional Court of Taiwan, which is a judicial body distinct from the Supreme Court and responsible for interpreting the Constitution, typically offer citations along with their opinions.

The controversy between possession and use in insider trading law serves as an effective example. Regardless of whether they are cited, notable works of academics and experts should be familiar to Supreme Court and lower court judges. Several leading scholars have suggested that the possession standard should be adopted when legal texts, legislative history, and the problems facing legal enforcement are all accounted for. The failure of judges to acknowledge this scholarship has downplayed the role of academics, burdening them with the task of offering comprehensive reasoning in their own names. If the works of leading and other scholars are cited, specialized authority could be assigned to the opinions of the Supreme Court judges. Thus, people who support disparate standards cannot use the lack of specialty of the Supreme Court judges as an argument to disobey Supreme Court opinions. Additional attention must be paid to substantive reasoning. Lower court judges who disagree with the possession standard cannot ignore cited works and must respond by referencing these sources. Scholars whose publications are cited should feel both honored and obligated to strengthen or defend their positions, and their academic colleagues should be eager to participate in this debate, igniting high-quality discussion among scholars and practitioners. In the wake of such debate and deliberation, judges are likely to reevaluate their original opinions and reach consensus regarding complex issues.

The Supreme Court could hold academic conferences, serving as a platform for exchanging ideas. Although conferences are ubiquitous among academic institutes, judges, and particularly Supreme Court judges, rarely attend these events unless they are invited as guest speakers. If the Supreme Court established such a platform for exchange, scholars and judges of various levels would be encouraged to attend. An academic atmosphere and the presence of scholars may facilitate dialogues among judges. The Supreme Court of Taiwan has previously hosted conferences, inviting well-known professors to present research regarding the Court opinions. To enhance the productivity of such sessions, lower court judges should be

encouraged to participate.

Exchanges between judges and scholars have long been demanded by members of the legal community in Taiwan. It is often emphasized that judges and law professors can learn from each other. However, such exchanges not only bridge the gap between legal practice and legal scholarship, but also facilitate conversations between lower court judges and Supreme Court judges. Because passing the judicial exam is the primary requirement of judgeship in Taiwan, numerous district court judges are relatively young and remain strongly influenced by the legal educations they have received. These judges certainly have no obligation to follow their teachers' opinions, but they may also have less doubt on the specialty of their teachers than that of their senior colleagues in the Supreme Court. Thus, the tripartite dialogue with law professors in between may play a substantial role in easing the friction embedded in the judicial hierarchy.

VII. CONCLUDING REMARKS

Although the conviction rate is extremely low, insider trading enforcement actions have caused panic in the Taiwanese business community. Specialized divisions in lower courts are created to ensure that the decisions of the lower court are correct. However, during the investigation and prosecution period, insider trading cases have long been often prescreened by regulatory agencies and handled by specialized prosecutors. If their efforts in the past few years have not considerably helped increase the conviction rate, it might be time to reexamine the proposals focusing on judicial specialization. What is even worse is that the specialization of judges might be the cause, not the cure, of the low non-reversal rate in insider trading cases. More communications and substantive discussions are needed between the judges of the Supreme Court and their colleagues in lower courts. To this end, the Supreme Court can use some help from academics and scholarly works.

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超越法律解釋的不確定性：臺灣 內線交易案件中下級審法院的堅持

邵慶平

摘要

臺灣對於內線交易的明文規範始於一九八八年，但對於內線交易的追訴直到一九九〇年代末期才逐漸增加。近年之內線交易案件雖多，定罪率則相當低。因此，內線交易規範常被批評是存在著過高的不確定性。

相對於傳統上對於內線交易規範不確定性的探討，本文則嘗試從下級審法院的堅持，提供另一種觀點。本文認為，在下級審法院逐漸設立專業法庭、指定專業法官的情形下，司法階層下法律見解上行下效的體制受到極大的挑戰。要緩解此一問題，必須強化最高法院與下級審法院的溝通，而學術研究的重視與引用，應在溝通過程中扮演重要的角色。

關鍵詞：證券交易法、內線交易、司法階層、專業法官、代理理論