

Grand justices fail to take a stand

Written by Chang Wen-chen 陳文成
Monday, 02 November 2009 07:30

Constitutional Interpretation No. 665 of the Council of Grand Justices deals with the decision to replace the judges handling the corruption cases against former president Chen Shui-bian (陳水扁) and some of his family members and associates when they were already underway. It also deals with the question of whether the Taipei District Court's guidelines for assigning criminal cases, on which the decision was based, are in line with the Constitution.

Two of the grand justices found these to be unconstitutional, and one said that they should be reviewed, but the other grand justices found them to be constitutional. This is a most regrettable decision that obscures a number of ethical issues.

First of all, the decision to replace the judges handling the Chen case was made after the collegiate panel presided over by Judge Chou Chan-chun (周昌春) had twice ruled that the defendants could be released from detention. It was not an ordinary and straightforward matter of related cases needing to be merged. The grand justices failed to address the issues concerning the timing of the switch and its infringement of the defendants' right to a fair trial.

This failure may be partly because of their institutional constraints in having only abstract reviewing powers over laws and regulations, but not over individual cases and related facts. Such institutional constraints, however, should not be an excuse for their having completely ignored key facts, particularly regarding the timing of the substitution of the judge in Chen's case.

The majority opinion among the grand justices was that switching judges in criminal cases is a straightforward matter of trial management and has no influence on the rights of the accused to a fair trial. That may be true, but does it mean that all connected cases, no matter how far the parties to the case have gone through the process of accusation and defense, can be abruptly reassigned according to the available judicial resources — for example, because a judge retires, resigns or falls ill?

Can the procedural guarantees that the accused is supposed to enjoy be ignored entirely? What about the accused's confidence in the fairness of the process, and the time, effort and money they have spent on presenting their case?

Before 1966, the US Federal Rules of Criminal Procedure, to ensure the procedural rights of the accused, did not allow judges to be replaced at all during the course of criminal cases.

This rule originated from judgments made by several circuit appeals courts in the early 20th century. It was later realized, however, that if this ruling was strictly followed, even when judges fell ill or died, or in other circumstances where a judge really had to be replaced, it would hamper the conduct of the trial and violate the procedural rights of the accused.

Only in 1966 was the regulation revised to allow judges to be replaced in mid-trial under

Grand justices fail to take a stand

Written by Chang Wen-chen 陳文成

Monday, 02 November 2009 07:30

certain circumstances, but this is on condition that the procedural rights of the accused are protected.

The timing of the switch, the impartiality of the judges, their familiarity with the case and other factors must be taken into consideration. There have been plenty of cases at both federal and state levels of litigation in which the accused objected to judges being replaced during the course of a trial.

The majority opinion in Constitutional Interpretation No. 665 is that the Taipei District Court's practices are not very different from the systems of other countries. It is hard to tell how much the grand justices really know about other legal systems.

What we do know, however, is that US academics of jurisprudence and political science have written several open letters regarding the Chen case, pointing out that substituting judges when a case is already underway infringes on the right of the accused to a fair trial and casts doubt on the impartiality of the judiciary. Their opinion is based on their own intimate understanding of constitutional government and human rights practices in the US.

So why did those grand justices who held the majority opinion not look into these criticisms?

The majority opinion expressed in the interpretation is also that it is not unconstitutional to authorize the leading judge of a divisional court or the presiding judge of a panel to form a team to investigate and decide the matter when judicial officials fail to agree through consultation on merging cases.

The grand justices were of the opinion that leading judges of divisional courts and presiding judges of panels are also judges, so there is no question of judicial administrative interference in the trial if they are authorized by the body of judges to handle the matter.

If that is the case, however, why has criticism been raised in the past about the many administrative powers held in practice by court presidents and presiding judges of panels in Taiwan? Why was it necessary for the grand justices to issue their Interpretation No. 539, which repeatedly states that leading judges of divisional courts and presiding judges of panels and those holding other administrative positions in the judiciary are different from judges?

It is indeed not necessary for regulations governing matters of judicial administration to be decided by all judges, but if such matters are put in the hands of leading judges of divisional courts and presiding judges of tribunals instead of entrusting them to teams in which different judges take part in turn, or conferences of judges, it is bound to be seen by some as violating the independence of the judiciary and equality among judges.

The grand justices' own investigative panel is chaired in rotation by different grand justices who are on duty for a month at a time, not solely by the chief justice. Shouldn't the same notion be extended to the lower courts?

Not long ago, in March this year, Taiwan ratified the International Covenant on Civil and

Grand justices fail to take a stand

Written by Chang Wen-chen 陳文成

Monday, 02 November 2009 07:30

Political Rights, Article 14 of which calls for protection of the right of the accused to a fair trial.

On Aug. 23, 2007, the UN Human Rights Committee issued its General Comment No. 32, an 18-page document regarding Article 14 of the convention. The comment states that where the accused is treated with clear animosity by the media or the public while a criminal process is underway, the procedure in the court cannot be impartial and this is a serious violation of the accused's right to a fair trial.

The disputed facts of the Chen case should be decided by an impartial judiciary through a fair and unbiased legal process. The protection of the right of the accused to a fair trial is the cornerstone that ensures that all parties can have faith in courts' judgments.

If the grand justices fail to defend the bottom line of our country's judicial system and human rights, then one cannot but be anxious about the future of democracy, constitutional government and human rights in Taiwan.

Chang Wen-chen is an assistant professor of law at National Taiwan University's College of Law.

TRANSLATED BY JULIAN CLEGG

Source: [Taipei Times - Editorials 2009/11/02](#)