

UNINTENDED PATHS: TAIWAN'S PRECEDENTIAL SYSTEM IN COMPARISON WITH GERMANY AND THE UNITED STATES

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ABSTRACT

This Article conducts a historical-comparative analysis of Taiwan's precedential system to examine how its new model, learned from Germany's model of Grand Chamber hearings and consultations, converged with the US model of en banc review. This Article concludes that the path-dependent effects of Taiwan's traditional model of precedential system, characterized by collectivity, opacity, and exclusivity, have distanced the new model away from the German model. On the other hand, by comparing Taiwan's new model with the US model of en banc review, this Article underscores the comparability and identifies similarities between the two in their functions, formation, and participants. However, differences between the two are also noted in their alternative procedures to formal hearings, voting thresholds, and calculation methods, as well as procedural safeguards. Theoretically, this Article makes contributions to comparative legal studies by highlighting the significance of unintended divergence and convergence among different legal systems. Also, unlike prior research emphasizing top-down legal transplants launched by legal elites, Taiwan's new model exemplifies a bottom-up shift accumulated by the daily practice of courts. Taiwan's experience exposes the complex interplay between goals and realities in the process of legal transplantation across borders.

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INTRODUCTION

As with many civil law countries, Taiwan did not entrench the doctrine of *stare decisis* in its original adjudicative system. Instead, Taiwan created its own way to harmonize inconsistent court opinions through *panli* (guiding cases) and *jueyi* (resolutions).¹ Guiding cases are excerpts of a legal opinion extracted from key decisions of the apex courts² with the facts omitted.³ In contrast, resolutions are conclusions reached by judges of the apex courts through discussion of abstract legal questions.⁴

¹ CHANG-FA LO, THE LEGAL CULTURE AND SYSTEM OF TAIWAN 42–43 (2006).

² There are two apex courts in Taiwan: One is the Supreme Court, and the other is the Supreme Administrative Court. The Supreme Court comprises two divisions: the civil division and the criminal division, which handle civil and criminal cases respectively. Rather, the Supreme Administrative Court copes with administrative law cases only.

³ Maria A. Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT'L L. REV. 555, 579–80 (2012).

⁴ See Lo, *supra* note 1, at 43.

Thus, neither guiding cases nor resolutions have precedence, yet they hold precedential value. Guiding cases and resolutions bind lower courts to their precedence, otherwise their decisions, if appealed, would be overturned. This is because any deviation from guiding cases and resolutions could lead to a rehearing.⁵ In this sense, guiding cases and resolutions are more akin to laws because they do not involve any specific facts. Therefore, some Grand Justices of the Constitutional Court criticized guiding cases and resolutions for encroaching upon legislative authority and breaching the separation of powers doctrine.⁶

Inspired by Germany, Taiwan made a seminal change to its precedential system in July 2019 by terminating its traditional model of guiding cases and resolutions and adopting a new model of *dafating* (Grand Chamber hearings) and *zhengxun* (consultations).⁷ This change brings Taiwan's precedential system closer to the doctrine of *stare decisis* by creating precedents on a case-by-case basis. Under Taiwan's new model, if any panel of the court of last resort finds its opinion contradicting an antecedent opinion, the panel must consult the other panels to obtain their endorsement to the contradiction.⁸ If a consensus is reached among all panels, the consulting panel may conclude the case in accordance with the consensus and rule against the precedent.⁹ In contrast, if a consensus cannot be reached, the consulting panel must move for a Grand Chamber

⁵ See *id.* at 42–43.

⁶ Sifayuan Dafaguan Jieshi No. 576 (司法院大法官解釋第576號) [Judicial Yuan Interpretation No. 576] (2004) (Lin, J., Hsu, J., and Yang, J., concurring) (Taiwan); Sifayuan Dafaguan Jieshi No. 687 (司法院大法官解釋第687號) [Judicial Yuan Interpretation No. 687] (2011) (Hsu, J., and Lin, J., dissenting) (Taiwan). See also Oliveira & Garoupa, *supra* note 3, at 580 (explaining that some justices of the Judicial Yuan have criticized the constitutionality of the guiding cases method).

⁷ Wu Can (吳燦), *Yi Zhengxun huo Dafating Caiding Jianjie Suowei zhi Panjue Xianli Dengtong yu Xingshi Tuoshu Shenpan Fa Di 9 Tiao Guiding zhi Panli Zuigao Fayuan Xingshi Dafating 110 Niandu Taishangda Zhi Di 1797 Hao Caiding Pingxi* (依「徵詢或大法庭裁定見解」所為之判決先例，等同於刑事妥速審判法第9條規定之「判例」？——最高法院刑事大法庭110年度台上大字第1797號裁定評析) [*Is the Precedent Which Is Made in Accordance with the Opinions from Consultation or Grand Chamber Hearings Equivalent to the Guiding Cases Stipulated in Article 9 of the Criminal Speedy Trial Act? Review and Analysis of Year 110 Taishangda No. 1797 Ruling of the Criminal Grand Chamber of the Supreme Court*], 3(5) YUEDAN SHIWU XUANPING (月旦實務選評) [J. NEW PERSP. L.] 97, 103 (2023).

⁸ Fayuan Zuzhi Fa (法院組織法) [The Court Organization Act], art. 51–2, sec. 2 (2024) (Taiwan). See also Wu Mingxuan (吳明軒), *Zuigao Fayuan Zeshe Mingxing Dafating Guiding zhi Shiyong* (最高法院增設民刑大法庭規定之適用) [*The Application of the New Statutes of the Civil and Criminal Grand Chambers in the Supreme Court*], 222 YUEDAN FAXUE JIAOSHI (月旦法學教室) [TAIWAN JURIST] 47, 50–51 (2021) (Taiwan).

⁹ Wu, *supra* note 7, at 51.

hearing.¹⁰ The Grand Chamber, consisting of either eleven Supreme Court judges or nine Supreme Administrative Court judges,¹¹ will make a decision by a majority vote between the antecedent and current opinions.¹² The consulting panel shall rule in the case based on the Grand Chamber's decision.¹³ Cases addressed through either the consultation procedure or Grand Chamber hearings have binding effect and become precedents.¹⁴ If a panel wants to challenge a precedent, it must follow the above proceedings; otherwise, the panel shall adhere to existing precedents.¹⁵

Taiwan's new model, as this Article will illustrate, is breaking away from the German model and remaining on its traditional path. Moreover, the new model shares certain key features with the US model of en banc review. To illuminate the nature of the new model, this Article examines Taiwan's precedential system with a historical-comparative approach. On the one hand, a historical inquiry can deepen our understanding of Taiwan's version of stare decisis, informing readers of how the system evolved over time. With a historical stance, this Article seeks to uncover the links between Taiwan's new and traditional models, looking to the historical factors driving Taiwan to diverge from the German model while staying on the traditional path.

On the other hand, a comparative analysis can expand readers' views, giving them a broader depiction of the precedential system of Taiwan in distinctive forms across different locales and empowering readers to better understand the law.¹⁶ With a comparative analysis, this Article strives to unearth similarities and differences between the new

¹⁰ The Court Organization Act, art. 51–2, sec. 1 (2024) (Taiwan).

¹¹ It could be a civil, criminal, or administrative Grand Chamber, depending on the nature of the case. See *Dafating Qu* (大法庭區) [Section of Grand Chambers], ZUIGAO FAYUAN (最高法院) [THE SUPREME COURT], <https://tps.judicial.gov.tw/tw/np-955-011.html> [<https://perma.cc/4W6A-H7YH>] (last visited Aug. 7, 2025) (introducing the civil and criminal Grand Chambers); *Dafating Qu* (大法庭區) [Section of Grand Chambers], ZUIGAO XINGZHENG FAYUAN (最高行政法院) [THE SUPREME ADMIN. CT.], <https://tpa.judicial.gov.tw/tw/np-1675-021.html> [<https://perma.cc/J4GZ-VTX2>] (last visited Aug. 7, 2025) (introducing the administrative Grand Chamber). It must be noted that the Supreme Administrative Court has the same traditional and new models as the Supreme Court with a few minor differences, so the rest of this Article will focus mainly on the Supreme Court and provide some timely details about the Supreme Administrative Court to make a distinction between the two apex courts.

¹² The Court Organization Act, art. 105 (2024) (Taiwan).

¹³ *Id.* art. 51–10.

¹⁴ Wang Meiying (王梅英), *Dafating Xinzhi* (大法庭新制) [*The New Institution of Grand Chambers*], 1948(S) SIFA ZHOUKAN (司法周刊) [JUD. WKLY.] 1, 18 (2019) (Taiwan).

¹⁵ *Id.*

¹⁶ See Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPAR. L. 339, 368–72 (2d ed. 2019).

model and the US model. By conducting this cross-jurisdictional comparison, readers will obtain a deeper understanding of how *stare decisis* operates in Taiwan and the US. This deeper understanding allows for greater appreciation of the potential for and diversity of precedential systems across jurisdictions.

The rest of this Article proceeds as follows: Part I introduces the development of Taiwan's precedential system, detailing (1) the traditional model of guiding cases and resolutions, (2) the new model of Grand Chamber hearings and consultations, and (3) the controversy between the two models. With this background, Part II delves into how the new model diverges from the German model. This Part identifies three key characteristics of the traditional model and explores their effects on the new model, leading the new model to deviate from the German model. Thereafter, the Article shifts to focus on the cross-jurisdictional aspect of the new model. Part III.A introduces the formal *en banc* hearings and the informal alternatives employed by the US courts of appeals to address splits within a circuit and among different circuits. Part III.B explores the similarities and differences between Taiwan's model and the US model, highlighting the lessons Taiwan can learn from its US counterpart. The Article concludes by summarizing its findings and offering a reminder for future studies. Through a historical-comparative analysis of Taiwan's precedential system, the Article reflects on comparative legal studies by highlighting the great potential for unintended divergence and convergence. This is illustrated by Taiwan's new model that breaks away from the German model and moves closer to US *en banc* review.

I. DEVELOPMENT OF TAIWAN'S PRECEDENTIAL SYSTEM

This Part offers a comprehensive overview of *stare decisis* in Taiwan. It traces the evolution of Taiwan's precedential system, and explains how Taiwan's apex courts reconcile conflicting opinions and establish binding precedents for lower courts. Part II.A explores the traditional model, including guiding cases and resolutions, along with the challenges the traditional model encountered. Part II.B shifts the focus to the new model, detailing the functions of Grand Chamber hearings and consultations. Part II.C examines a Criminal Grand Chamber decision by reviewing whether the two models are equivalent in terms of their functions.

A. THE TRADITIONAL MODEL: GUIDING CASES AND RESOLUTIONS

When the Taiwanese Supreme Court was established in 1927, it instituted the guiding cases and resolutions.¹⁷ Since then the Supreme Court had the exclusive authority to harmonize divergent interpretations of legal rules. The Supreme Court began selecting guiding cases and making resolutions in judicial meetings.¹⁸ At first, the meetings did not distinguish criminal cases from civil cases, and only chief judges could take part in the meetings.¹⁹ Chief judges of the Supreme Court, both criminal and civil, came together in a meeting to select guiding cases or make resolutions. In 1972, the meetings were altered to separate the criminal meetings from the civil meetings.²⁰ In 1989, the Court Organization Act formalized this change by stipulating that a meeting could be civil, criminal, or combined.²¹ Additionally, this provision enlarged the scope of participants in the meetings to all judges of the apex courts.²²

Selecting guiding cases involves three steps. First, Supreme Court chief judges select key decisions from their panels and submit them to the chief executive of the Supreme Court.²³ Alternatively, if a Supreme Court judge believes a decision is worthy of being designated as a guiding case, the judge may submit it to the chief executive after securing the support from three other judges.²⁴ Second, after the chief executive receives the key decisions, they form a committee. This committee, consisting of several chief judges and associate judges, reviews the key decisions. If a decision is qualified to become a guiding case, the committee may edit the

¹⁷ Yang Renshou (楊仁壽), *Woguo Teyou Panli Zhidu de Dishan* (我國特有「判例」制度的遞嬗) [*The History of Taiwan's Unique Institution of Guiding Cases*], 1968 SIFA ZHOUKAN (司法周刊) [JUD. WKLY.] 2, 2 (2019) (Taiwan).

¹⁸ Lin Menghuang (林孟皇), *Taiwan Panli Zhidu de Qiyuan Yanghe Wenti yu Gaige Fangxiang Shang Cong Zuigao Fayuan 25 Nian Fei Zi Di 123 Hao Xingshi Panli Tanqi* (臺灣判例制度的起源、沿革、問題與改革方向(上)——從最高法院二十五年非字第一二三號刑事判例談起) [*The Origin, Changes, Problems, and Reform Suggestions for Taiwan's Institution of Guiding Cases (I): Starting with Year 25 Fei No. 123 Criminal Guiding Case of the Supreme Court*], 195 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 127, 143 (2011) (Taiwan); Wang, *supra* note 14, at 1.

¹⁹ Yang, *supra* note 17, at 2 n.11.

²⁰ *Id.*

²¹ The Court Organization Act, art. 57, sec. 1 (1989) (Taiwan). See Lin, *supra* note 18, at 146.

²² *Id.*

²³ Zuigao Fayuan Panli Xuanbian ji Bianqeng Shishi Yaodian (最高法院判例選編及變更實施要點) [Directions for the Supreme Court to Select and Change Guiding Cases], art. 2 (2002) (Taiwan).

²⁴ *Id.* art. 3.

wording of the case and submit it to the chief executive, along with a report detailing the reasons and their decision.²⁵ Third, the chief executive convenes a meeting of judges (criminal, civil, or both) to determine whether the decision deserves to be promoted to a guiding case.²⁶ If the majority votes in favor, the decision becomes a guiding case.²⁷

When an inconsistency in the Supreme Court's decisions has been identified and needs addressing, the chief executive of the Supreme Court convenes a meeting of judges to reach a resolution.²⁸ In these meetings, judges conduct a thorough discussion of the legal issues that are inconsistent in the Supreme Court decisions. These meetings require a quorum of more than two-thirds of the judges, and decisions must be approved by a majority of the judges who are present.²⁹

Scholars have long debated whether guiding cases and resolutions have the same effect as legal rules and, if so, whether they are subject to constitutional review.³⁰ Taiwan recognizes two major forms of legal rules: statutes and ordinances. Congress must pass and the President must enact a statute,³¹ while a government agency issues either *ex officio* or under statutory authorization.³² The Constitutional Court reviews both statutes and ordinances because they are laws with nationwide effect.³³ The Constitutional Court first addressed the nature of guiding cases and resolutions in 1978.³⁴ In his dissenting opinion in Interpretation No. 153, Grand Justice Yao argued that guiding cases are neither statutes nor

²⁵ *Id.* art. 4.

²⁶ *Id.*

²⁷ See The Court Organization Act, art. 80 (1989) (Taiwan); Judicial Yuan Interpretation No. 576. (Lin, J., Hsu, J., and Yang, J, concurring).

²⁸ See Zuigao Fayuan Chuwu Guicheng (最高法院處務規程) [Regulations on the Administrative Affairs of the Supreme Court], art. 32 (1994) (Taiwan).

²⁹ *Id.* art. 33.

³⁰ Wu Congzhou (吳從周), *Zaifang Minshi Panli zhi Jushuli Nanti Jianlun Zuigao Fayuan Jueyi yu Panli zhi Hudong ji Qi Xiaoli* (再訪民事判例之拘束力難題—兼論最高法院決議與判例之互動及其效力) [Revisiting the Issue of Binding Force of Civil Guiding Cases: An Analysis of the Interaction Between Resolutions and Guiding Cases of the Supreme Court and Their Legal Effects], 13 FAGUAN XIEHUI ZAZHI (法官協會雜誌) [J. JUDGES ASS'N] 48, 50–51 (2013) (Taiwan).

³¹ Zhongyang Fagui Biaozhu Fa (中央法規標準法) [The Central Regulation Standard Act], art. 4. (2004) (Taiwan).

³² *Id.* art.7. *Ex officio* means “as a result of one’s position or status.”

³³ See Xianfa Susong Fa (憲法訴訟法) [The Constitutional Court Procedure Act], art. 1 (2023) (Taiwan).

³⁴ Sifayuan Shizi Di 153 Hao Jieshi (司法院釋字第153號解釋) [Judicial Yuan Interpretation No. 153] (1978) (Taiwan).

ordinances and are therefore ineligible for constitutional review.³⁵ The majority responded to Yao's dissent in Interpretation No. 154, stating that guiding cases have a universal binding effect and can serve as primary sources for judgments. Resultantly, guiding cases are equivalent to ordinances issued by the Supreme Court and subject to constitutional review.³⁶ Similarly, in Interpretation No. 374, the Constitutional Court recognized that resolutions are comparable to ordinances issued by the Supreme Court. This treatment is because resolutions are de facto universally binding on lower courts. Therefore, resolutions, like guiding cases, are subject to constitutional review.³⁷

In 2004, three Grand Justices expressed their dissent to the constitutionality of guiding cases in Interpretation No. 576.³⁸ The Justices argued that after the committee's editing process—namely, the second step—guiding cases become mere excerpts of court decisions, since committee removes the facts and preserves only the legal opinions. Once a court decision is assigned precedential value by the committee and its factual background is removed, the decision ceases to be merely a precedent. Instead, the decision becomes a form of law promulgated by the Supreme Court. Therefore, guiding cases encroach upon the authority of the legislative branch. This encroachment violates the doctrine of separation of powers.³⁹

Similarly, in 2011, two Grand Justices later cast doubt on the constitutionality of resolutions in Interpretation No. 687.⁴⁰ Resolutions are conclusions on legal questions reached by judges during meetings. They do not involve any specific cases. Despite not containing facts, resolutions carry precedential effect, as lower court decisions may be overturned if they fail to follow resolutions.⁴¹ Accordingly, the two Grand Justices

³⁵ See Judicial Yuan Interpretation No. 153 (1978) (Yao, J., dissenting) (Taiwan); Lin, *supra* note 18, at 147.

³⁶ Sifayuan Shizi Di 154 Hao Jieshi (司法院釋字第154號解釋) [Judicial Yuan Interpretation No. 154] (1978) (Taiwan); see Lin, *supra* note 18, at 147–48.

³⁷ Sifayuan Shizi Di 374 Hao Jieshi (司法院釋字第374號解釋) [Judicial Yuan Interpretation No. 374] (1995) (Taiwan); Lin, *supra* note 18, at 147.

³⁸ See Judicial Yuan Interpretation No. 576 (Lin, J., Hsu, J., and Yang, J., concurring).

³⁹ *Id.*; Huang Chaoyi (黃朝義), *Panli yu Jueyi Tongyi Falv Jianjie zhi Gongneng Cong Bijiaofa Guandian Lunqi* (判例與決議統一法律見解之功能—從比較法觀點論起) [*The Function of Harmonizing Legal Opinions of Guiding Cases and Resolutions: A Comparative Law Perspective*], 24 中央警察大學法學論集 [CENT. POLICE U. L. REV.] 1, 18–19 (2013) (Taiwan).

⁴⁰ See Council of Grand Justices' Interpretation No. 687, (Hsu, J. and Lin, J., dissenting) (2011); see Huang, *supra* note 39, at 20–21.

⁴¹ Chen Wengui (陳文貴), *Dafating Caiding ji Chengxuntong zhi Jianjie Shifou Dengtong Panli zhi Yanjiu Ping Zuigao Fayuan Xingshi Dafating 110 Niandu Taishangda Zi Di 1791 Hao Xingshi*

argued that the practice of issuing resolutions poses an even greater challenge to constitutionality than guiding cases.⁴²

As a result, both guiding cases and resolutions deviate from the true meaning of *stare decisis* because they are not tied to any specific factual circumstances. Hence, the Supreme Court ceased selecting guiding cases in 2007.⁴³ Instead, since the new model took effect in July 2019, the Supreme Court has restricted the use of resolutions to judicial administrative matters.⁴⁴

B. THE NEW MODEL: GRAND CHAMBER HEARINGS AND CONSULTATIONS

The new model of Grand Chamber hearings and consultations draws on elements of the German legal system.⁴⁵ It came into force in July 2019, succeeding the traditional model of guiding cases and resolutions.⁴⁶ Akin to its predecessor, the new model aims to harmonize inconsistent court opinions and, in doing so, to establish unified precedents. When adjudicating a case, if a panel of the Supreme Court identifies any inconsistencies between its own opinion and previous decisions, it must first undergo an internal consultation procedure.⁴⁷ This involves circulating its opinion, along with the case details and the conflicting decisions, to all other panels to seek their endorsement.⁴⁸ If the panels reach a consensus, the adjudicating panel may decide the case accordingly.⁴⁹ Otherwise, the adjudicating panel must request a Grand Chamber hearing.⁵⁰ Additionally, the parties involved in the pending case may petition for a Grand Chamber hearing.⁵¹ Once a decision is reached, through either a consultation procedure or a Grand Chamber hearing, the

Caiding (大法庭裁定及徵詢庭之見解是否等同判例之研究—評最高法院刑事大法庭 110 年度台上大字第1797 號刑事裁定) [*A Study on Whether Grand Chamber Decisions and Consultation-Based Opinions Are Equivalent to Guiding Cases: Comments on Year 110 Taishangda No. 1797 Ruling of the Criminal Grand Chamber of the Supreme Court*], 69(1) 軍法專刊 [MIL. L. J.] 59, 66 (2023) (Taiwan).

⁴² Council of Grand Justices' Interpretation No. 687, (Hsu, J. and Lin, J., dissenting) (2011).

⁴³ Wang, *supra* note 14, at 3.

⁴⁴ Regulations on the Administrative Affairs of the Supreme Court, art. 32 (2019) (Taiwan).

⁴⁵ See Wu, *supra* note 7, at 103.

⁴⁶ Wu, *supra* note 7, at 47.

⁴⁷ The Court Organization Act, art. 51–2, sec. 2 (2024) (Taiwan).

⁴⁸ *Id.*

⁴⁹ Wu, *supra* note 7, at 51.

⁵⁰ The Court Organization Act, art. 51–2, sec. 1 (2024) (Taiwan).

⁵¹ *Id.* art. 51–4.

adjudicating panel issues a final judgment in accordance with that decision, the case then becomes a binding precedent.⁵²

The new model prioritizes consultations over Grand Chamber hearings because judicial resources are finite and Grand Chamber hearings are resource-intensive. Therefore, the two apex courts need to employ Grand Chamber hearings sparingly.⁵³ Unlike a Grand Chamber hearing, which is held in a public court with all necessary parties and their attorneys present,⁵⁴ consultations are conducted in private among all panels with only the final judgment being publicly disclosed. Consequently, the final judgment contains only a brief statement indicating that all panels reached a consensus and made the decision accordingly.⁵⁵ In contrast, the public can access Grand Chamber decisions, including the majority, concurring, and dissenting opinions.⁵⁶

Judges of the two apex courts may initiate the newly enacted precedential model in two scenarios.⁵⁷ As introduced earlier, the first scenario occurs when a panel reviews a case and finds its opinion contradictory to prior decisions.⁵⁸ This is referred to as “discrepancy.”⁵⁹ The second scenario arises when a panel reviews a case and determines that the disputed legal issue is of fundamental importance, despite the absence of inconsistencies among court decisions. This is known as “significance.”⁶⁰

Two notable differences distinguish these scenarios. The first difference concerns their purposes: the discrepancy scenario addresses existing conflicts among decisions,⁶¹ while the significance scenario prevents inconsistencies from arising in the first place.⁶² The second difference is in their procedures: under the significance scenario, the reviewing panel has discretion to initiate the consultation procedure and a Grand Chamber hearing. The reviewing panel can skip the consultation

⁵² Wu, *supra* note 7, at 50–54.

⁵³ Wang, *supra* note 14, at 8.

⁵⁴ See The Court Organization Act, art. 51–8 (2024) (Taiwan).

⁵⁵ See 最高法院110年度台上字第2523號民事判決 [Year 110 Taishang No. 2523 Civil Judgment of the Supreme Court], Sifayuan Jiansuo Xitong (最高法院) [Supreme Ct.] (2011) (Taiwan).

⁵⁶ See, e.g., 最高法院民事大法庭111年度台上大字第1706號裁定 [Year 111 Taishangda No. 1706 Ruling of the Civil Grand Chamber of the Supreme Court], Sifayuan Jiansuo Xitong (最高法院) [Supreme Ct.] (2012) (Taiwan).

⁵⁷ Wu, *supra* note 7, at 49.

⁵⁸ Wang, *supra* note 14, at 5–8.

⁵⁹ *Id.* at 5.

⁶⁰ *Id.* at 10–11.

⁶¹ *Id.* at 5–8.

⁶² *Id.* at 10.

procedure and proceed directly to a Grand Chamber hearing.⁶³ By contrast, under the discrepancy scenario, panels must go through the consultation procedure first and, if necessary, then proceed to a Grand Chamber hearing.⁶⁴

Since its inception in July 2019, Taiwan’s two courts of last resort have decided a total of 123 cases using the new model as of February 2026.⁶⁵ Table 1 presents the detailed figures. Grand Chamber decisions consistently outnumber consultation-based decisions across all three divisions.⁶⁶ This Article examines these numbers in a later subsection.⁶⁷ Notably, among the 123 cases, not a single one has arisen from the significance scenario. In other words, every case over the past six years has emerged from the discrepancy scenario. This Article discusses the implications of this observation in a later subsection.⁶⁸

Table 1: Cases Resolved by the New Model, July 2019–November 2025⁶⁹

	The Supreme Court		The Supreme Administrative Court
	Civil Division (9 Panels)	Criminal Division (9 Panels)	
Grand Chamber decisions	27	38	15
Consultation-based decisions	11	20	12
Total	38	58	27

⁶³ *Id.* at 11.

⁶⁴ *Id.* at 8.

⁶⁵ See *infra* Table 1.

⁶⁶ The two apex courts have the up-to-date numbers of case resolved by the new model through either consultations or Grand Chamber hearings on their websites. See 大法庭區 [Section of Grand Chambers] & 最高法院 [The Supreme Court], *supra* note 11; 大法庭區 [Section of Grand Chambers] & 最高行政法院 [The Supreme Administrative Court], *supra* note 11.

⁶⁷ See discussion *infra* Part III.C.

⁶⁸ See discussion *infra* Part IV.B.3.

⁶⁹ This table is compiled by the author.

C. CONTROVERSY: WHETHER THE TWO MODELS ARE FUNCTIONALLY EQUIVALENT?

Taiwan's establishment of the new model brings forth a contentious issue about whether the new model is functionally equivalent to the traditional one, especially when comparing precedents in the new model with guiding cases in the traditional one. In February 2022, the Criminal Grand Chamber made a pivotal decision regarding the continuity between the two models.⁷⁰ Pursuant to Article 9 of the Criminal Speedy Trial Act, if a federal appellate court has affirmed a non-guilty verdict rendered by the district court, the judgment can only be appealed to the Supreme Court if the judgment contradicts (1) the Constitution, (2) Constitutional Court Interpretations, or (3) "guiding cases."⁷¹ This provision was enacted in 2011,⁷² when the traditional model was still in effect. But, after the new model succeeded the traditional one in July 2019, lawmakers did not amend this provision accordingly. Thus, the disputed issue was whether the term "guiding cases" in this provision includes the precedents established under the new model.⁷³ Because the panels failed to reach a consensus during consultation, the issue referred to the Criminal Grand Chamber.⁷⁴

The Criminal Grand Chamber employed a functional method to discern whether the functionality of the two models was equivalent.⁷⁵ The Criminal Grand Chamber argued that both harmonize divergent court decisions. Further, the Chamber argued that the new model was established to succeed the traditional one, rather than replace it. Thus, making the two models functionally equivalent.⁷⁶ Resultantly, the Criminal Grand Chamber concluded that the scope of guiding cases includes the precedents made by the new model, through either Grand

⁷⁰ Zuigao Fayuan Xingshi Dafating 110 Niandu Taishangda Zhi Di 1797 Hao Caiding (最高法院刑事大法庭110年度台上大字第1797號裁定) [Year 110 Taishangda No. 1797 Ruling of the Criminal Grand Chamber of the Supreme Court] [Ruling No. 1797], Sifayuan Jiansuo Xitong (最高法院) [Supreme Ct.] (2011) (Taiwan).

⁷¹ Xingshi Tuosu Shenpan Fa (刑事妥速審判法) [The Criminal Speedy Trial Act], art. 9, sec. 1 (2000) (Taiwan).

⁷² See *id.*

⁷³ See Ruling No. 1797, *supra* note 70.

⁷⁴ *Id.*

⁷⁵ See generally Michaels, *supra* note 16 (introducing and reflecting on the functional method in comparative law).

⁷⁶ See Ruling No. 1797, *supra* note 70.

Chamber hearings or consultations.⁷⁷ In other words, guiding cases are equivalent to precedents with regard to their conflict-solving function.

Nevertheless, the functional approach comes at a cost: researchers must simplify the complexity of legal regimes for comparison, as comparativists focus on practical problems and their solutions rather than the rules themselves.⁷⁸ Therefore, the explanatory power of the functional approach is rather limited and requires other methods to explain it, such as the law-in-context method.⁷⁹

If seeing guiding cases in their historical context, readers will notice that Congress regarded them as a special form of law rather than merely decisions of the Supreme Court. Thus, the provision of Section 1 of Article 9 listed guiding cases alongside the Constitution and Constitutional Court Interpretations,⁸⁰ indicating that these three share the same form. Additionally, as the dissenting opinion in the Ruling No. 1797 underscored, courts selected and digested guiding cases without any of the facts.⁸¹ Thus, the guiding cases are akin to statutes and have universally binding effects. By contrast, Taiwan's new model produces case-based precedents that are binding only on later cases with similar factual backgrounds.⁸² Therefore, in light of their functionality together with the historical context, guiding cases operate as law, whereas precedents have only case-specific effects.

Accordingly, the scope of guiding cases should not include the precedents created via the new model, as they are not equivalent in either their forms⁸³ or their functions⁸⁴ from a historical-functional perspective. In other words, because Taiwan's new model has diverged from the traditional model, new precedents cannot be considered a continuation of guiding cases.⁸⁵

⁷⁷ *Id.*

⁷⁸ See Mark Van Hoecke, *Methodology of Comparative Legal Research*, 12 L. & METHOD 1, 11 (2015).

⁷⁹ *Id.*

⁸⁰ The Criminal Speedy Trial Act, art. 9, sec. 1 (Taiwan).

⁸¹ See Ruling No. 1797 (Wu, J. dissenting), *supra* note 70.

⁸² See Ruling No. 1797 (Wu, J. dissenting), *supra* note 70; Chen, *supra* note 41, at 67–69.

⁸³ See Interpretation No. 154, *supra* note 36, and accompanying text.

⁸⁴ Guiding cases had universal binding effects while precedents have case-specific binding effects only.

⁸⁵ See Wu, *supra* note 44, at 101–08; see Chen, *supra* note 40, at 65–70.

II. DIVERGENCE FROM THE GERMAN MODEL

This Part moves into an analysis of how Taiwan's new model diverges from the German model. Part III.A summarizes three key characteristics of the traditional model: collectivity, opacity, and exclusivity. Part III.B explores how these three characteristics have influenced the new model, leading it to deviate from the German model in its consultation procedure. Part III.C identifies another factor contributing to this divergence—the unanimity requirement for decisions based on consultation. This requirement has made Grand Chamber hearings more prevalent than consultations, because of their time-consuming and resource-intensive nature.

A. LEGACIES OF THE TRADITIONAL MODEL

Taiwan's traditional model of guiding cases and resolutions was an integral part of its judicial system for over ninety years, before it was replaced by the new model in 2019. Throughout the long history of the traditional model, it underwent various developments and refinements, yet certain key characteristics remained consistent, shaping its unique operation. The first defining characteristic of the traditional model is the collective approach applied to decision-making. In this model, the selection of guiding cases and the formulation of resolutions are not determined by a single judge or a small panel, but rather through meetings comprising all active judges of the court of last resort.⁸⁶ These meetings play a central role in the decision-making process, reflecting a strong belief in the value of broad judicial consensus. By requiring the participation of all active judges, the traditional model ensures that decisions are endorsed by the full judiciary and not unduly influenced by the opinions of a select few. This collective decision-making process is essential for maintaining consistency and unity, as it incorporates diverse perspectives into the establishment of legal precedents.

Another defining characteristic of the traditional model is its opacity. Judges address legal issues in private meetings rather than in a public courtroom.⁸⁷ Resultantly, discussions among judges remain

⁸⁶ At least two thirds of active judges of the court must be present. *See* REGULS. ON THE ADMIN. AFFS. OF THE SUP. CT., *supra* note 28, at arts. 32–33.

⁸⁷ Dafating Jianjie (大法庭簡介) [Introduction to Grand Chambers], Sifa Yuan (司法院) [Jud. Yuan], <https://www.judicial.gov.tw/tw/cp-1578-58280-8179d-1.html> [<https://perma.cc/AXR5-5LWZ>] (last visited Jan. 14, 2026).

confidential, with only the final decisions made available to the public.⁸⁸ The minutes of these meetings are also inaccessible, leaving the public without insight into the reasoning or deliberations behind the final rulings.⁸⁹ This practice of maintaining confidentiality is intended to protect the integrity of the decision-making process by allowing judges to discuss legal issues openly, free from external pressures or influence.⁹⁰ But, it also creates a shield protecting judges from scrutiny, and raising concerns about transparency and accountability.

The third characteristic of the traditional model is its exclusivity. Meetings and decision-making processes are reserved solely for judges.⁹¹ Even the parties to the pending case are not given the opportunity to present arguments or provide input during the decision-making process. The rationale behind this exclusivity is that only judges, as impartial arbiters of the law, should participate in making decisions about guiding cases and resolutions. This ensures that decisions are based solely on legal considerations, free from external influence. This also means that those most affected by the decisions are unable to directly engage with the decision-making process, raising concerns about due process.

In summary, three characteristics define the traditional model of guiding cases and resolutions: collectivity, opacity, and exclusivity. These elements were integral to the model's operation for nearly a century, shaping both the selection of guiding cases and the resolution of legal issues. While the traditional model helped maintain consistency in Taiwan's precedential system, it also raised concerns about transparency, accessibility, and inclusiveness of the decision-making process.

⁸⁸ Resolutions and guiding cases are publicly accessible via the Judicial Yuan's website. See Sifa Yuan Faxue Ziliao Jiansuo Xitong (司法院法學資料檢索系統) [Legal Database of the Jud. Yuan], <https://lawsearch.judicial.gov.tw/> [<https://perma.cc/YZN4-KM7G>] (last visited Jan. 14, 2026).

⁸⁹ Zhengfu Zixun Gongkai Fa (政府資訊公開法) [The Freedom of Government Information Law], art. 18, sec. 1, subsect. 3 (2005) (Taiwan); see Zhengfu Zixun Gongkai Fa Di 18 Tiao Lifa Liyou (政府資訊公開法第18條立法理由) [The Legis. Grounds for Article 18 of the Freedom of Gov't. Info. L.], Fawubu Zhuguan Fagui Chaxun Xitong (法務部主管法規查詢系統) [The Ls. and Reguls. Retrieving Sys. of the Ministry of Just.] (2005).

⁹⁰ *Id.* This characteristic can be found in other jurisdictions. The United States, for instance, has the deliberative process privilege, which is to preserve a free and frank communication among government officials during their decision-making process. For the introduction to this privilege, see generally Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 289 (1989) (explaining there must be frank and candid internal government communications, and protection of the decision-making process); Shilpa Narayan, *Proper Assertion of the Deliberative Process Privilege: The Agency Head Requirement*, 77 FORDHAM L. REV. 1183, 1184 (2008) (demonstrating the purpose of privilege is to protect the decision-making process and policy discussions prior to adoption).

⁹¹ See REGULS. ON THE ADMIN. AFFS. OF THE SUP. CT., *supra* note 28, at arts. 32–33.

B. THE PATH-DEPENDENT EFFECTS ON THE NEW MODEL

The shift from the traditional model to the new model provides a timely opportunity to understand the effects in Taiwan's precedent-making process. As mentioned earlier, Taiwan's borrowed its new model from Germany, but there are three key distinctions between the jurisdictions' consultation procedures. First, in the German model, the reviewing panel must only consult the panel with which it disagrees.⁹² If multiple panels hold conflicting positions, a majority vote among those panels is required.⁹³ Second, in Germany, panels must issue consultations in the form of rulings, which are made publicly accessible.⁹⁴ Third, before making a ruling, the German model requires the consulting panel to provide the parties with an opportunity to present their views on the disputed issue.⁹⁵ By contrast, Taiwan's new model mandates that the reviewing panel consult all other panels, regardless of whether those panels have differing views.⁹⁶ Further, consultations and responses are circulated within panels and are not publicly accessible.⁹⁷ Finally, parties have no legal basis to express their views on the disputed issue during the consultation procedure.⁹⁸ Table 2 summarizes these three differences between Germany and Taiwan's consultation procedures.

⁹² Wang Shifan (王士帆), *Deguo Dafating Yufang Zuigao Fayuan Caipan Qiyi zhi Fading Fating* (德國大法庭—預防最高法院裁判歧異之法定法庭) [German Grand Chambers: The Court that Prevents Conflicting Decisions of the Supreme Court], 208 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 65, 86 (2012).

⁹³ *Id.*

⁹⁴ Shen Guanling (沈冠伶), *Zuigao Fayuan Dafating yu Tongyi Falv Jianjie Yi Minshi Dafating Wei Zhongxin* (最高法院大法庭與統一法律見解—以民事大法庭為中心) [Grand Chambers of the Supreme Court and Harmonizing Legal Opinions: Focusing on the Civil Grand Chamber], 280 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 32, 44 (2018).

⁹⁵ *Id.*

⁹⁶ Court Organization Act, art. 51-2, sec. 2 (Taiwan); Xingzheng Fayuan Zuzhi Fa (行政法院組織法) [The Administrative Court Organization Act], art. 15-2, sec. 2 (Taiwan).

⁹⁷ See *supra* note 87, 88 and accompanying text; *supra* notes 79, 80 and accompanying text.

⁹⁸ The relevant provisions do not provide any legal basis for parties to express their views during consultation procedure. See Court Organization Act, art. 51-2, sec. 2 (Taiwan); see Administrative Court Organization Act, art. 15-2, sec. 2 (Taiwan).

Table 2: Germany's and Taiwan's Consultation Procedures⁹⁹

	Germany	Taiwan
Whom to Consult	Only the dissenting panel(s)	All rest panels
Consultations and Responses	Publicly accessible	Not publicly accessible
Parties to express their views	Yes	No

The differences in the consultation procedures suggest that the German model resolves conflicts by focusing on parties with opposing views. This approach increases transparency through formal rulings and ensures inclusivity by providing a platform for all parties to express their perspectives. In contrast, Taiwan's new model reflects a preference for broad participation by all active judges, while maintaining secrecy about the consultation process and excluding parties from the decision-making process.

The differences between Germany's and Taiwan's consultation procedures lead to the next question: What is prompting Taiwan's new model to diverge from the German model? To answer the inquiry, we turn to Taiwan's traditional model for potential insights.

The new model's preference for broad participation by all active judges aligns with the traditional model's collective decision-making approach. By ensuring all judges participate in the consultation procedure to Taiwan's new model upholds the tradition of broad judicial engagement. This suggests that the consultation procedure continues to be influenced by the traditional model's prioritization of collectivity. This underscores the continued regard for collectivity as the foundation for legitimate and coherent judicial decision-making.

A further connection between Taiwan's traditional and new models is the non-transparent nature of their meetings and consultation procedure. Whether under the traditional model's meetings or the new model's consultation procedure, discussions of legal matters take place behind closed doors.¹⁰⁰ The practice of conducting private deliberations can be seen as an extension of the opacity that characterized the traditional model. This shared characteristic indicates that the feature of opacity from

⁹⁹ This table is compiled by the author.

¹⁰⁰ See *supra* notes 85, 86, 87, 95, and accompanying text; see *supra* note 87 and accompanying text; see *supra* note 95 and accompanying text.

the traditional model has persisted into the new model, continuing to shape how legal issues are handled at the highest levels of the judiciary.

Taiwan's traditional model and new model both maintain exclusivity in their decision-making process. Both the meetings and the consultation procedure are reserved for judges alone.¹⁰¹ Under either model, judges are the sole participants in shaping legal outcomes. This continuity reflects the enduring influence of the traditional model's exclusivity on the new model's consultation procedure, highlighting the historical continuity between the two models. It also raises an important question about how to safeguard the rights of disputing parties.¹⁰²

C. THE HIGH THRESHOLD OF UNANIMITY

Collectivity diminishes the usefulness of the consultation procedure when it encounters the requirement for unanimity. Although the new model formally prioritizes consultations over Grand Chamber hearings, the latter's time-consuming and resource-intensive nature has not diminished their practical dominance. As Table 1 demonstrates, Grand Chamber decisions are *de facto* more prevalent than consultation-based decisions, with consistently higher numbers across the civil, criminal, and administrative divisions.¹⁰³

What accounts for the preference for Grand Chamber hearings over consultations in practice? One likely explanation for this gap between theory and practice lies with collectivity. Under Taiwan's new model, collectivity requires the reviewing panel to consult all other panels, not just those holding conflicting views.¹⁰⁴ Yet, as experience reveals, broader participation complicates consensus-building. The Supreme Court has nine civil panels and nine criminal panels, while the Supreme Administrative Court has only four panels.¹⁰⁵ Because any consultation decision requires unanimity among all panels, achieving an agreement becomes increasingly more challenging as the number of panels increases. As Table 1 indicates, the civil and criminal divisions of the Supreme Court

¹⁰¹ See *supra* notes 89, 96, and accompanying text; see *supra* notes 89, 96, and accompanying text.

¹⁰² See discussion *infra* Part IV.B.3.

¹⁰³ See *supra* Table 1.

¹⁰⁴ See *supra* note 94 and accompanying text.

¹⁰⁵ Benyuan Zuzhi (本院組織) [The Organization of the Court], Zuigao Fayuan (最高法院) [The Supreme Court], <https://tps.judicial.gov.tw/tw/cp-914-33683-8d97c-011.html> (last visited Aug. 10, 2025); Zuzhi (組織) [Organization], Zuigao Xingzheng Fayuan (最高行政法院) [The Supreme Administrative Court], <https://tpa.judicial.gov.tw/tw/cp-1682-52337-a9cc6-021.html> (last visited Aug. 10, 2025).

show a much wider disparity between Grand Chamber decisions and consultation decisions. The difference is sixteen in the civil division and eighteen in the criminal division. But the difference is only three between Grand Chamber decisions and consultation decisions of the Supreme Administrative Court. This pattern concerning the above differences corresponds closely to the varying number of panels in the two apex courts. Consequently, despite Taiwan's new model's theoretical emphasis on consultations to conserve judicial resources, the stringent unanimity requirement has proven impractical. This impracticality continues to drive the preference for Grand Chamber hearings.

III. CONVERGENCE WITH THE US MODEL OF EN BANC REVIEW

After examining the continuity and discontinuity between the traditional and new models in Taiwan's precedential system, the second half of this Article shifts its focus to the common law regime. This Part explores the details of en banc review in the US Courts of Appeals (Part III.A) and compares Taiwan's new model with the US model (Part III.B). This Part begins with an analysis of en banc hearings in the US. Part III.A.1 focuses on the development of en banc hearings and the challenges they have. In Part III.A.2, the discussion turns to less formal yet more flexible alternatives to the en banc procedure, providing a detailed examination of the informal en banc procedures in DC and Seventh Circuits. Part III.B.1 subsequently explicates the resemblances between Taiwan's apex courts and the US Courts of Appeals in their organizational structures and their respective roles within the judicial hierarchy. Part III.B.2 highlights the similarities between Taiwan's new model and the US en banc review model in their functions, formation, and participants. Finally, Part III.B.3 examines the differences between the two models in their alternative procedures to formal hearings, voting thresholds and calculation methods, and procedural safeguards. This Part also provides recommendations on how Taiwan can learn from these differences.¹⁰⁶

¹⁰⁶ See Michaels, *supra* note 16, at 379–81.

A. EN BANC REVIEW IN THE US COURTS OF APPEALS

1. *En Banc Hearings*

In the US, the court system is structured with multiple levels of courts, each having its own functions and responsibilities. Since their inception in 1891, the US Courts of Appeals have played a critical role in the appellate process. The primary role of the US Court of Appeals is to determine whether the lower court correctly applied the law.¹⁰⁷ Unlike district courts, the US Courts of Appeals typically do not reexamine evidence or hold new trials. Instead, they focus on interpreting legal principles, reviewing trial records, and determining issues of federal law.¹⁰⁸

In most instances, US Courts of Appeals decisions are made by a panel of three judges.¹⁰⁹ In exceptional cases, Federal Appeals Courts may choose to conduct an en banc hearing.¹¹⁰ En banc hearings are a legal procedure where a larger group of judges from the same court hears a case.¹¹¹ It is typical for all active judges of the court to take part.¹¹² While the total number of judges in each federal circuit court varies, it ranges from six (the First Circuit) to twenty-nine judges (the Ninth Circuit).¹¹³ Congress has granted federal circuit courts with more than fifteen judges the authority to delegate en banc review to a smaller group of judges, creating what is known as a “mini” en banc hearing.¹¹⁴ Currently, three circuit courts are eligible to hold “mini” en banc hearings, including the

¹⁰⁷ See Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. For the history of the creation of the circuit courts, see Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 FORDHAM L. REV. 945, 946–48 (2016); Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2007–09 (2014); Erwin C. Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214, 233–35 (1963).

¹⁰⁸ See Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 416 (1987).

¹⁰⁹ 28 U.S.C. § 46(b); see Marin K. Levy & Adam S. Chilton, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 7 (2015).

¹¹⁰ See 28 U.S.C. § 46(c).

¹¹¹ See *id.*

¹¹² *Id.*

¹¹³ 28 U.S.C. § 44(a).

¹¹⁴ See 28 U.S.C. § 46(c); see Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 231 (1999).

Fifth, Sixth, and Ninth Circuits,¹¹⁵ but only the Ninth Circuit has capitalized on this option.¹¹⁶

The history of en banc review in the US appellate process dates back to around the 1940s, a time when some circuit courts debated whether a circuit could deviate from the traditional three-judge panels by convening all its judges to hear a case.¹¹⁷ The Ninth Circuit rejected this argument,¹¹⁸ but the Third Circuit held otherwise.¹¹⁹ The Supreme Court addressed the circuit split by affirming that a three-judge panel is a “permissible complement of judges,” without declaring it the sole valid configuration.¹²⁰ Hence, a circuit court may lawfully conduct hearings with more than three judges, including an en banc review. The Supreme Court also noted that en banc review serves a practical purpose by preventing conflicts within a circuit.¹²¹

In 1948, Congress formally authorized circuit courts to hold en banc hearings in 18 U.S.C. § 46(c).¹²² But, the statute only established a procedural framework for en banc decisions and did not specify substantive criteria for determining which cases should receive such treatment.¹²³ The Supreme Court provided further clarification in 1953 by holding that appearing before an en banc court is a privilege, not a right. The Court stated that the authority to convene en banc is a power vested solely in the federal circuit courts.¹²⁴ Therefore, this judicial prerogative did not allow litigants to bypass the standard practice of resolving cases through three-judge panels. When the Federal Rules of Appellate Procedure were implemented in 1968, Congress referred to Justice Frankfurt’s concurrence in *Western Pacific* and ratified Fed. R. App. P. 35,¹²⁵ which cautions that “rehearing en banc is not favored.”¹²⁶ En banc review has thus become an integral component of the federal appellate process in the United States.

¹¹⁵ 28 U.S.C. § 44(a).

¹¹⁶ Sadinsky, *supra* note 107, at 2014; see Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1375, n.5. Some circuit courts, however, have exercised informal en banc review as an alternative, see discussion *infra* Part IV.A.2.

¹¹⁷ See George, *supra* note 114, at 227 and the following discussion.

¹¹⁸ *Lang’s Est. v. Commissioner*, 97 F.2d 867, 869 (9th Cir. 1938).

¹¹⁹ *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 71 (3d Cir. 1940).

¹²⁰ *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 333 (1941).

¹²¹ *Id.* at 335.

¹²² 28 U.S.C. § 46(c) (1948).

¹²³ Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 34 (1988).

¹²⁴ *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953).

¹²⁵ George, *supra* note 114, at 230–31.

¹²⁶ FED. R. APP. P. 35(a) (1968) (revised and relocated to Rule 40 in 2024).

An en banc hearing is often seen as a vital procedural mechanism in ensuring uniformity and continuity in the interpretation of the law.¹²⁷ This process allows a broader panel of judges to review significant legal issues and provide a more comprehensive and authoritative decision, particularly those that might have wide-ranging implications or involve particularly complex or controversial matters. The process of rehearing en banc is “not favored” and considered exceptional.¹²⁸ It is thus not deployed for every case on appeal.

The en banc procedure is employed primarily through two tests: the uniformity test and the test of exceptional importance. The uniformity test secures consistency of the court’s decisions¹²⁹ or aligns them with the decisions of the Supreme Court,¹³⁰ while the test of exceptional importance addresses the issues as its name indicates.¹³¹ The former test enables circuits to address existing conflicts, and the latter test allows circuits to avoid future conflicts.¹³² Additionally, when a complex legal issue creates a division among circuits, convening en banc can serve as a powerful statement, reinforcing the values of uniformity, mutual respect, and collegiality across the circuits.¹³³ Therefore, while en banc hearings are rare, they are an important tool for maintaining consistency and correcting errors in the appellate process.

The decision to grant an en banc hearing is not automatic. A party wishing to request an en banc review must file a petition.¹³⁴ This petition, typically filed after a panel has issued its decision, asks the full court to rehear the case en banc.¹³⁵ Courts do not grant all petitions that are filed. As recounted earlier, en banc hearings are typically reserved for cases

¹²⁷ *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 690 (1960) (quoting Albert B. Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96 (1954)).

¹²⁸ FED. R. APP. P. 40(a).

¹²⁹ FED. R. APP. P. 40(b)(2)(A) (“[T]he panel decision conflicts with a decision of the court to which the petition is addressed . . . and the full court’s consideration is therefore necessary to secure or maintain uniformity of the court’s decisions”).

¹³⁰ FED. R. APP. P. 40(b)(2)(B) (“[T]he panel decision conflicts with a decision of the United States Supreme Court”).

¹³¹ FED. R. APP. P. 40(b)(2)(D) (“[T]he proceeding involves one or more questions of exceptional importance”).

¹³² Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 876 (1989); Sadinsky, *supra* note 107, at 2013.

¹³³ See FED. R. APP. P. 40(b)(2)(C) (“[T]he panel decision conflicts with an authoritative decision of another United States court of appeals”).

¹³⁴ FED. R. APP. P. 40(a).

¹³⁵ *Id.*

involving important or complex issues of law, or where consistent application of the law is needed.¹³⁶

In most circumstances, a party seeking an en banc hearing must file the petition within a set period, typically fourteen days after the panel's decision.¹³⁷ The petitioner must demonstrate that their case meets certain criteria for an en banc review.¹³⁸ After the petition is filed, active judges in the circuit may grant the petition.¹³⁹ A majority vote is needed to grant the petition and order an en banc hearing.¹⁴⁰ Most en banc re-hearings are denied because re-hearings are typically disfavored by default. The petition will only be granted if one of the above criteria is satisfied.¹⁴¹ The Advisory Committee's Note clarifies that Fed. R. App. P. 40 does not limit a court's authority to initiate en banc hearings or re-hearings sua sponte.¹⁴² In other words, a court may voluntarily commence the en banc process without a party's request.

Despite being costly, time-consuming, and administratively burdensome, an en banc review is justified by its contributions to accuracy, certainty, collegiality, and authority. People believe that a greater number of judges ruling together are less likely to make mistakes in their ruling.¹⁴³ Therefore, equipping a case with more judges will improve the accuracy of legal interpretations.¹⁴⁴ When there is an intra-circuit conflict, en banc hearings increase the certainty of the outcome of factually-similar future cases.¹⁴⁵ If there is a split between circuits, en banc reviews preserve inter-circuit collegiality.¹⁴⁶ It is because the decision is made by the entirety of the court's active judges rather than a single panel, thereby showing the court's respect for the conflicting circuit court.¹⁴⁷ En banc hearings

¹³⁶ See *supra* notes 127–131 and accompanying text.

¹³⁷ FED. R. APP. P. 40(d).

¹³⁸ See *supra* notes 127–131 and accompanying text.

¹³⁹ FED. R. APP. P. 40(c).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Fed. R. App. P. 40 advisory committee's note to 2024 amendment.

¹⁴³ Judah I. Labovitz, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220, 231 (1962); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1036 (1991).

¹⁴⁴ *Id.*

¹⁴⁵ The first and foremost purpose of the en banc process is to resolve conflicts within the circuit. See *Western Pac. R.R. Co.*, 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).

¹⁴⁶ *Air Line Pilots Ass'n, Int'l v. Eastern Air Lines*, 863 F.2d 891, 925 (D.C. Cir. 1988) (Starr, J., concurring).

¹⁴⁷ *Id.*

reinforce the authority of a court's decisions, as the ruling is issued by the full complement of the circuit judges, rather than just a small panel.¹⁴⁸

In summary, the federal courts of appeals en banc process represents a unique feature of the US appellate system. While a three judge panel decides most cases, the en banc procedure allows for broader judicial review in cases that clash with prior decisions or carry exceptional importance. This ensures that legal precedents are carefully examined and appropriately refined, allowing the federal courts of appeals to fulfill their role as both a check on lower court decisions and a critical body for developing American jurisprudence.¹⁴⁹ An en banc decision typically carries greater weight than that of a three-judge panel.¹⁵⁰ Once a court issues its opinion en banc, it serves as the authoritative ruling on the legal issue for the circuit.¹⁵¹

2. Informal En Banc Procedures

While the federal courts of appeals take advantage of en banc hearings to tackle splits and provide clear and consistent interpretations of the law, it is costly and time-consuming to hold such formal court hearings.¹⁵² Therefore, several circuit courts have developed informal en banc procedures that permit a panel to circulate its opinion to the full court for endorsement as an alternative to a formal en banc hearing.¹⁵³ If approved, the panel can publish its opinion with a notation showing the full court's approval.¹⁵⁴

One well-known example of an informal en banc procedure is the “*Irons procedure*,” which the US Court of Appeals created for the District

¹⁴⁸ Hon. Albert Branson Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96 (1954).

¹⁴⁹ *En Banc: Explained*, CLEARLEGAL (Feb. 15, 2026), <https://clearlegal.com/glossary/en-banc/> [<https://perma.cc/8VNZ-TYBQ>].

¹⁵⁰ *En Banc vs. Panel Decisions: How Federal Appeals Courts Work*, GOVFACTS (May 22, 2025), <https://govfacts.org/explainer/en-banc-vs-panel-decisions-how-federal-appeals-courts-work/> [<https://perma.cc/7UBV-297B>].

¹⁵¹ *Id.*

¹⁵² *See, e.g., Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (Edwards, J., concurring) (agreeing with the denial of rehearing en banc). *See generally* Ginsburg & Falk, *supra* note 143, at 1018–22 (providing a detailed estimate of the costs of en banc review).

¹⁵³ Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CAL. L. REV. 989, 999 (2020).

¹⁵⁴ *Id.*

of Columbia.¹⁵⁵ The DC Circuit implemented its informal en banc procedure for the first time in 1977.¹⁵⁶ This procedure was formalized with the name *Irons* procedure, or *Irons* footnote, after the 1981 case of *Irons v. Diamond*.¹⁵⁷ This informal en banc procedure allows the DC Circuit to overrule obsolete or unpopular precedents that are not important enough to trigger a formal en banc review without the administrative hassles of a full court hearing.¹⁵⁸

The *Irons v. Diamond* case involves a Freedom of Information Act request for documents related to approved patent applications.¹⁵⁹ In *Irons*, the DC Circuit panel was faced with resolving a conflict between two of its prior decisions.¹⁶⁰ Instead of convening a formal en banc hearing to settle the intra-circuit split, the panel included a footnote, now known as the “*Irons* footnote.”¹⁶¹ It read, “[t]he foregoing part of the division’s decision, because it resolves an apparent conflict between two prior decisions, has been separately considered and approved by the full court, and thus constitutes the law of the circuit.”¹⁶² This footnote signified that the full court of the DC Circuit had informally reviewed and approved the decision, effectively resolving the conflict.

In 1996, the DC Circuit formally adopted a policy to govern the *Irons* procedure through its “Policy Statement on En Banc Endorsement of Panel Decisions.”¹⁶³ This policy clarified that the *Irons* procedure is appropriate when a formal en banc hearing is not necessary, but the case presents significant legal issues that warrant a resolution.¹⁶⁴ The policy specifies that an informal en banc review is suitable when “action by the court en banc may be called for, but the circumstances of the case or the importance of the legal questions presented do not warrant the heavy

¹⁵⁵ Amy E. Sloan, *The Dog that Didn’t Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 734 (2009).

¹⁵⁶ See *United States v. Sheppard*, 569 F.2d 114 (D.C. Cir. 1977) (rejecting the evidentiary standard applied in some earlier opinions through circulation to full court, which unanimously voted against formal en banc review).

¹⁵⁷ Sloan, *supra* note 153, at 735; see *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

¹⁵⁸ Patricia M. Wald, *The Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 487 n.30 (1986).

¹⁵⁹ *Diamond*, 670 F.2d at 265.

¹⁶⁰ The two decisions are *Irons v. Gottschalk*, 548 F.2d 992 (D.C. Cir. 1976) and *Irons & Sears v. Dann*, 606 F.2d 1215 (D.C. Cir. 1979); see *id.* at 26.

¹⁶¹ *Id.* at 268 n.11.

¹⁶² *Id.*

¹⁶³ D.C. Cir. Ct. of Appeals, *Policy Statement on En Banc Endorsement of Panel Decisions* (Jan. 17, 1996) [hereinafter *Policy Statement*], <https://www.cadc.uscourts.gov/sites/cadc/files/rules-IRONS.PDF> [<https://perma.cc/MN7C-7VFK>].

¹⁶⁴ *Id.*

administrative burdens of a full en banc hearing.”¹⁶⁵ Therefore, when an issue is important but not significant enough to warrant an en banc hearing, the DC Circuit opts for the *Irons* procedure as an alternative.

The DC Circuit’s Policy Statement outlines four circumstances when the *Irons* procedure may be utilized: (1) to resolve a conflict between prior panel decisions, (2) to reject non-binding dicta that could cause confusion, (3) to overrule outdated precedents that have become obsolete due to changes in law or legislation, and (4) to overrule a recent precedent that a panel believes is clearly incorrect because of intervening Supreme Court decisions or significant authority from other circuits.¹⁶⁶ To qualify for the *Irons* procedure, a case must also meet three additional conditions.¹⁶⁷ First, it must be true that extra briefing or oral argument will not provide significant value in resolving the disputed legal question.¹⁶⁸ Second, resolving the legal question must be essential to deciding the case.¹⁶⁹ Third, the parties must have a fair opportunity to address the matter in their briefings or supplemental briefings.¹⁷⁰

If a case meets these conditions and falls within one of the four categories outlined in the DC Circuit’s Policy Statement, the panel must circulate its opinion to the full court.¹⁷¹ The panel must also attach a memorandum, explaining the case’s factual and legal background and the reasons why an informal en banc review is appropriate.¹⁷² Only if a majority of all active DC Circuit judges endorse the panel’s decision and no judges object to it, can the panel publish its opinion with an *Irons* footnote.¹⁷³

The *Irons* procedure is typically useful in resolving intra-circuit conflicts or for overruling outdated precedents.¹⁷⁴ In situations where a prior panel decision has caused confusion or is no longer valid, the DC Circuit can use the *Irons* procedure to resolve the issue without a lengthy en banc process. This procedure also enables the court to address

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* See also Sloan, *supra* note 155, at 745 (explaining how other informal en banc procedures in federal appellate courts have been criticized for the lack of standards to decide when it is appropriate to launch an informal en banc procedure).

¹⁶⁷ Cohen & Cohen, *supra* note 153, at 1001.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1001–02.

¹⁷² *Id.* at 1002.

¹⁷³ *Id.*; see Ginsburg & Falk, *supra* note 143, at 1016.

¹⁷⁴ Cohen & Cohen, *supra* note 153, at 1002.

important legal questions that may not require a full hearing but do require clarification to maintain consistency. Moreover, the *Irons* procedure is not limited to resolving conflicts within the DC Circuit. The DC Circuit can also use the *Irons* procedure to address inter-circuit splits.¹⁷⁵ When a DC Circuit's panel makes a decision which conflicts with rulings from other circuits, and a majority of active DC Circuit judges agree that the panel's decision was incorrect, the DC Circuit can use the *Irons* procedure to overturn that decision.¹⁷⁶ This makes the *Irons* procedure a vehicle for resolving intra-circuit as well as inter-circuit splits when the court believes a change in the law is necessary.¹⁷⁷

Additionally, the Seventh Circuit has its own version of informal en banc review similar to the *Irons* procedure in its Cir R. 40(e).¹⁷⁸ The Seventh Circuit first introduced this procedure in 1969 and it has since been widely adopted.¹⁷⁹ The circuit formalized the procedure in its 1976 local rules.¹⁸⁰ Under this rule, a proposed opinion that would overrule a previous decision or create a circuit conflict cannot be published until it has been circulated to all active judges of the Seventh Circuit and receives the circuit's approval. The Seventh Circuit and the DC Circuit procedures differ in that the *Irons* procedure requires a positive majority and a negative unanimity to make a decision for the informal en banc,¹⁸¹ while the Seventh Circuit needs only a negative majority.¹⁸² In other words, the DC Circuit needs a majority of all its active judges to endorse and none to object whereas the Seventh Circuit needs only a majority of all active judges disfavoring rehearing en banc. Once approved, the opinion is published and becomes part of the Seventh Circuit's precedent.¹⁸³ Like the *Irons* footnote, the panel must include a footnote in the published opinion, indicating the outcome of its circulation among all active judges.¹⁸⁴

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Cohen & Cohen, *supra* note 153, at 1002.

¹⁷⁸ See 7TH CIR. R. 40(e).

¹⁷⁹ United States v. Brown, 411 F.2d 930, 934 n.5 (7th Cir. 1969); see Sloan, *supra* note 155, at 732; Cohen & Cohen, *supra* note 153, at 1000.

¹⁸⁰ See Michael S. Kanne, *The "Non-Banc En Banc": Seventh Circuit Rule 40(E) and the Law of the Circuit*, 32 S. ILL. U.L.J. 611, 617–18 (2008) (explaining this procedure is the only one that is regulated by a promulgated rule rather than by a circuit's policy or precedent, such as the *Irons* footnote); *id.* at 612.

¹⁸¹ Cohen & Cohen, *supra* note 153, at 1002.

¹⁸² Sloan, *supra* note 153, at 732.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Aside from the DC and Seventh Circuits, the First, Second, and Tenth Circuits have also established their own informal en banc procedures and utilize them to resolve conflicts, overrule prior decisions, or establish new precedents.¹⁸⁵ Similarly, the Fourth, Fifth, Sixth, and Eighth Circuits have built their versions of informal en banc procedures, but use them less frequently.¹⁸⁶ By contrast, the Third, Ninth, Eleventh, and Federal Circuits do not appear to have such a procedure.¹⁸⁷

Hence, a majority of the federal appellate courts use an informal en banc proceedings as a more advantageous alternative to formal en banc hearings to obtain full-court agreement and correct erroneous or outdated circuit precedents. Informal en banc proceedings enhance the efficiency and flexibility of the circuit by allowing the circuit to informally resolve panel conflicts, address obsolete precedents, and clarify important legal questions. Additionally, informal en banc proceedings ensure consistency and clarity in the law and serve as a practical substitute for a full en banc review.¹⁸⁸ Further, informal en banc procedures can preserve collegiality within the circuit, as requesting a formal en banc review can create tensions among judges.¹⁸⁹ In contrast, utilizing informal procedures allows off-panel judges to express their views without causing unintended strain among their peers.¹⁹⁰

B. COMPARING TAIWAN'S NEW MODEL WITH THE US MODEL

1. *Why They Are Comparable*

At first glance, one might assume that Taiwan's Supreme Court and Supreme Administrative Court, collectively referred to as Taiwan's two apex courts, are more similar to the US Supreme Court rather than to the federal courts of appeals. This assumption arises from the fact that all three courts serve as courts of last resort within their respective jurisdictions and focus solely on reviewing legal errors in lower court decisions. But this assumption is inaccurate. In effect, the two apex courts

¹⁸⁵ Cohen & Cohen, *supra* note 153, at 999

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See Kanne, *supra* note 180, at 623; see Sloan, *supra* note 155, at 742–43.

¹⁸⁹ Sloan, *supra* note 155, at 743.

¹⁹⁰ *Id.* at 743–44.

in Taiwan are more comparable to the federal courts of appeals in terms of their organizational design and roles in the judicial hierarchy.¹⁹¹

Both the federal courts of appeals and Taiwan's apex courts are organized into multiple panels. By contrast, the US Supreme Court consists of just nine justices and does not operate through panels.¹⁹² However, there are some differences in panel formation between the US and Taiwan. In the federal courts of appeals, panels are assigned randomly on a case-by-case basis when a new one is brought.¹⁹³ 28 U.S.C. §46(b) stipulates that such panels shall convene at the times and places specified by the court and shall hear the cases assigned to them as directed by the court.¹⁹⁴ Consequently, each circuit determines how its panels are organized, leading to varied practices. Some circuits rely on the chief judge to configure the panels, while others delegate this responsibility to the clerk of court or circuit executive.¹⁹⁵ In contrast, Taiwan's two apex courts form their panels *ex ante*, with their membership fixed.¹⁹⁶ In Taiwan, the Supreme Court consists of nine civil and nine criminal panels,¹⁹⁷ and the Supreme Administrative Court consists of four panels.¹⁹⁸ When a new case is brought in, a computer or lottery system randomly assigns it to a civil, criminal, or administrative panel based on the nature of the case.¹⁹⁹

¹⁹¹ Lin Chao-Chun (林超駿), *Falushen Dafating zhi Keneng Moshi Chulun Meiguo Lianbang Shangsù Fayuan Quanyuan Fating* (法律審大法庭之可能模式—初論美國聯邦上訴法院全院法庭) [*The Possible Model for a Grand Chamber in Legal Review: A Preliminary Study of the En Banc Procedure in the U.S. Federal Courts of Appeals*], 216 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 119, 122–24 (2013).

¹⁹² *Id.* at 122–23.

¹⁹³ Levy & Chilton, *supra* note 109, at 9–11. Nonetheless, some research has indicated that the assignment process may not be as random and neutral as expected. See J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037 (2000).

¹⁹⁴ 28 U.S.C. § 46(b).

¹⁹⁵ See Brown & Lee, *supra* note 193, at 1075–78.

¹⁹⁶ See discussion Part III.B.3.

¹⁹⁷ See Faguan Shiwu Fenpei (法官事務分配) [Assignment of Cases to Judges], Zuigao Fayuan (最高法院) [Sup. Ct.], <https://tps.judicial.gov.tw/tw/cp-913-33682-dea5d-011.html> [<https://perma.cc/PA8A-J9WH>] (last visited Aug. 7, 2025).

¹⁹⁸ See Faguan Minglu Zhuanqu (法官名錄專區) [Directory of Judges], Zuigao Xingzheng Fayuan (最高行政法院) [Sup. Admin. Ct.], <https://tpa.judicial.gov.tw/tw/cp-1742-52309-80d45-021.html> [<https://perma.cc/PA8A-J9WH>] (last visited Aug. 7, 2025).

¹⁹⁹ See Zuigao Fayuan Minshi Anjian Fenan Shishi Yaodian (最高法院民事案件分案實施要點) [Directions for the Assignment of Civil Cases of the Supreme Court], arts. 6–7; Zuigao Fayuan Xingshi Anjian Fenan Shishi Yaodian (最高法院刑事案件分案實施要點) [Directions for the Assignment of Criminal Cases of the Supreme Court], arts. 7–8; Zuigao Xingzheng Fayuan Susong Shijian Bianhao Jishu Fenan Baojie Yaodian (最高行政法院訴訟事件編號計數分案報結要點)

Due to the discretionary nature of the writ of certiorari, the US Supreme Court grants review to very few cases.²⁰⁰ Research has demonstrated that the number of cases reviewed by the US Supreme Court has been dropping since the mid-twentieth century, from more than 200 cases to less than eighty cases per term.²⁰¹ Thus, circuit courts have the final say in the vast majority of cases. In other words, the federal courts of appeals effectively function as the courts of last resort for most cases in the US.²⁰² For these reasons, Taiwan's apex courts are more akin to the federal courts of appeals than to the US Supreme Court, as they share certain essential attributes making them commensurate.²⁰³

2. Similarities

The following explores the similarities between Taiwan's new model and the US model of en banc review in the federal courts of appeals. By comparing the two models, readers can identify three notable parallels: functions, formation, and participants.

First, Taiwan and the US designed both models for resolving conflicts in court decisions, as well as addressing issues of exceptional significance. The former function focuses on resolving existing inconsistencies, while the latter function aims to prevent inconsistencies from arising. There are two scenarios in Taiwan's new model for panels to invoke the precedent-making mechanism: discrepancy and significance.²⁰⁴ A scenario of discrepancy exists when a panel reviews a case and finds its opinion contradictory to prior decisions. A scenario of significance exists when a panel reviews a case and finds the disputed legal issue is of fundamental importance despite lacking consistency among court decisions.²⁰⁵ The discrepancy scenario handles existing discrepancies, and the significance scenario prevents inconsistency.²⁰⁶

[Directions for the Numbering, Counting, Assignment, and Closure of Litigation Cases of the Supreme Administrative Court], art. 8, § 2.

²⁰⁰ Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228–33 (2012); Michael Heise, Martin T. Wells & Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1567–69 (2020).

²⁰¹ Owens & Simon, *supra* note 200, at 1228.

²⁰² Sadinsky, *supra* note 107, at 2008.

²⁰³ Lin, *supra* note 187, at 124.

²⁰⁴ See discussion *supra* Part I.B.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

Similarly, the US en banc model promotes uniformity by handling clashing decisions within the circuit, among circuits, and between a circuit and the Supreme Court, as well as addressing issues of exceptional importance.²⁰⁷ This uniformity test targets existing conflicts, whereas the exceptional importance test prevents potential conflicts.²⁰⁸ Therefore, both models address existing inconsistencies and prevent future conflicts.

Second, both models have formal hearings with larger groups of judges than ordinary panels. Taiwan's model features Grand Chamber hearings, while the US model utilizes en banc hearings. However, Grand Chamber hearings do not involve the full participation of the court, as en banc hearings usually do. Instead, Grand Chambers are filled through appointments and elections.²⁰⁹ The Criminal Grand Chamber, for illustration, has eleven members: nine elected from each panel, one appointed by the reviewing panel, and one reserved for the chief executive of the Supreme Court (or the division chief judge designated by the chief executive).²¹⁰ The Civil Grand Chamber is organized in the same manner as the Criminal Grand Chamber.²¹¹ The Supreme Administrative Court employs a similar method to form its Grand Chamber, consisting of nine judges: seven elected from each panel, one appointed by the reviewing panel, and the last being the chief executive of the court.²¹² As such, Grand Chamber hearings are akin to a smaller version of en banc hearings in terms of their formation, such as the one employed by the Ninth Circuit.²¹³

Additionally, both models incorporate more flexible, less formal procedures as alternatives to formal hearings. Taiwan's model includes the consultation procedure, while the US model incorporates informal en banc procedures in most circuits. Both the consultation procedure and informal en banc review serve as less formal versions of the formal hearings, and panels of both circulate opinions and communication among themselves to make decisions.²¹⁴ Moreover, informal en banc procedures involve all active circuit judges, are conducted behind closed doors, and do not permit the participation of disputing parties. Therefore, informal en banc

²⁰⁷ See discussion *supra* Part III.A.1.

²⁰⁸ *Id.*

²⁰⁹ See The Court Organization Act, *supra* note 7, at art. 51–6.

²¹⁰ *Id.*

²¹¹ See *id.*

²¹² The Administrative Court Organization Act, *supra* note 96, at art. 15–6.

²¹³ See discussion *supra* Part III.A.1.

²¹⁴ See discussions *supra* Part I.B, III.A.2.

procedures share the characteristics of collectivity, opacity, and exclusivity with the consultation procedure.

Third, both models allow judges and parties to initiate formal hearings. On one hand, under Taiwan's new model, the reviewing panel, upon finding that the case meets the criteria, can use the consultation procedure, followed by a Grand Chamber hearing. The parties can file for a Grand Chamber hearing as well.²¹⁵ On the other hand, under the US model, a party may petition for an en banc hearing if the criteria are met, and judges may also request an en banc review sua sponte.²¹⁶ By contrast, the US Supreme Court, holding the exclusive power to decide whether to grant a writ of certiorari, does not allow parties to commence the review process of the court of last resort.²¹⁷ In this regard, Taiwan's apex courts are more like the US courts of appeals, rather than the US Supreme Court.²¹⁸

3. Differences

The first difference lies in how Taiwan's apex courts and the US courts of appeals handle their informal alternatives to formal hearings. Under Taiwan's new model, the consultation procedure is now a mandatory step before Grand Chamber hearings in cases involving discrepancy.²¹⁹ This means that every case arising from a scenario of discrepancy must first undergo the consultation procedure before moving to a Grand Chamber hearing. In contrast, informal en banc procedures in the US Courts of Appeals are optional before going for a formal en banc hearing.²²⁰ The mandatory nature of the consultation procedure does not meet the expectation of resolving most cases of discrepancy. Instead, Grand Chamber hearings have addressed more cases than consultations.²²¹ Consequently, the requirement of consultation before a Grand Chamber hearing overburdens Taiwan's precedential system and lead to procedural inefficiencies.

²¹⁵ See discussion *supra* Section I.B.

²¹⁶ See discussion *supra* Part III.A.1.

²¹⁷ See Supreme Court Procedures, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures> [<https://perma.cc/R5GU-9A54>] (last visited Jan. 14, 2026).

²¹⁸ See discussion *supra* Section III.B.1.

²¹⁹ See discussion *supra* Part I.B.

²²⁰ See discussion *supra* Section III.A.2.

²²¹ See *supra* Table 1.

Drawing on the experience of the US model, this Article proposes that Taiwan consider repositioning the consultation procedure from mandatory to optional. By allowing panels to decide when to invoke consultation, they can use this procedure as a more flexible tool to seek consensus when the circumstances suggest it is attainable. This shift enables a more targeted approach, encouraging panels to utilize the consultation procedure only when it is likely to yield productive results, rather than as a blanket requirement in every case involving discrepancy.

The second difference concerns the voting thresholds and calculation methods in their alternative procedures. In Taiwan's model, the consultation procedure requires a positive consensus for the reviewing panel to issue a decision breaking precedent.²²² That is, all other panels must agree with the reviewing panel. In contrast, the US model has different measures in the voting thresholds and calculation methods. The *Irons* procedure in the DC Circuit, for instance, requires a positive majority and a negative unanimity. Additionally, the Seventh Circuit requires only a negative majority.²²³ That is, a majority of judges disfavor an en banc hearing. These examples vividly illustrate the nuances in both the voting thresholds and the ways votes are counted.

Taiwan's new model must reconsider the requirement of positive consensus in consultation. While unanimity may appear more authoritative, it is often impractical given the complexity of disputes and the number of panels. This Article suggests lowering the voting threshold or changing the method of calculation to facilitate decision-making despite dissent. For instance, a positive unanimity could be replaced with a negative one to increase efficiency, or with a majority rule, either positive or negative. This Article also suggests following the German model to allow only panels with conflicting views to be consulted. These adjustments would streamline the process and improve the likelihood of timely decisions without requiring a full concurrence.

The third difference concerns the procedural safeguards for parties' rights. Under Taiwan's new model, panels are not required to provide parties with a fair opportunity to express their views on the disputed matter before initiating the consultation procedure.²²⁴ Instead, the panels have sole discretion over whether to allow parties to address the

²²² See discussion *supra* Part I.B.

²²³ See discussion *supra* Part III.A.2.

²²⁴ See discussion *supra* Part I.B.

disputed issue.²²⁵ This lack of procedural guarantees could potentially lead to concerns about fairness and transparency, as parties may feel excluded from an essential part of the decision-making process. Without a formalized mechanism ensuring their participation, the consultation procedure risks being perceived as unfair and unilateral. Conversely, in the *Irons* procedure in the DC Circuit, parties are afforded a fair chance to address the disputed matter through their briefings.²²⁶ Procedural safeguards ensure the views and arguments of all parties to the dispute are considered and reflect a broader commitment to fairness and inclusivity.

Therefore, this Article recommends that Taiwan's new model adopt similar procedural safeguards to preserve the parties' rights. By establishing a clear requirement for panels to grant parties an opportunity to express their views before any further steps are taken, the rights of parties could be effectively preserved. This change would also reinforce public confidence in Taiwan's precedential decision-making process.

IV. CONCLUSION

By conducting a historical-comparative analysis of Taiwan's precedential system, this Article answers the question of why Taiwan's new model, based on the German model, deviates from the German model and moves closer to the US model. On the one hand, this Article finds that three key attributes of Taiwan's traditional model—collectivity, opacity, and exclusivity—have exerted effects on the new model in its consultation procedure, leading to a divergence from the German model. Collectivity renders the consultation procedure unable to operate as efficiently and productively as anticipated because it makes the requirement of unanimity in the consultation procedure highly difficult to attain. Instead, Grand Chamber hearings have unexpectedly handled far more cases than consultations, despite the time-consuming and resource-intensive nature of Grand Chamber hearings.

On the other hand, this Article compares Taiwan's new model with the US model of en banc review, exploring the similarities and differences between the two jurisdictions. It finds that Taiwan's apex courts and the US courts of appeals are comparable in terms of their organizational design and roles within the judicial hierarchy. This Article also identifies three similarities between the two models: their functions,

²²⁵ *Id.*

²²⁶ See discussion *supra* Part III.A.2.

formation, and participants, which strengthen the comparability between them. Moreover, this Article has described three key differences: whether the alternative procedures are mandatory or optional, their voting threshold and calculation methods, and the procedural safeguards for parties' rights. This Article further suggests that Taiwan will improve its new model by learning from these differences.

Highlighting an important consideration for future studies in comparative law, this Article examines cases of unintended divergence and convergence. Previous research on legal change from a comparative law perspective has largely focused on the theme of legal transplants and how they are received.²²⁷ This approach, however, often supports the view that the spread of legal institutions, ideals, ideologies, doctrines, rules, and similar concepts is typically driven by professional and academic elites, such as judges, lawyers, or legal scholars, in a top-down manner. By contrast, this Article presents an anomaly in the case of Taiwan's precedential system. Despite the shared legal heritage between Taiwan and Germany within the civil law family,²²⁸ Taiwan's new model diverges from the German model and converges with the US model in a bottom-up manner of the daily practice of courts.

²²⁷ See generally Michele Graziadei, *Comparative Law, Transplants, and Receptions*, in THE OXFORD HANDBOOK OF COMPAR. L. 442 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019) ("The treatment of transplants and receptions as general phenomena became a major topic in comparative law only in the last three decades of the twentieth century, after the publication of some early studies that appeared before the 1970s.").

²²⁸ See generally H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in THE OXFORD HANDBOOK OF COMPAR. L. 423 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019) (discussing the shared legal history of several countries adhering to a civil law foundation).