

The Organization and Function of the Council of the Grand Justices in the Republic of China

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I. The Constitutional Interpretational System of the Republic of China

a. The Constitution is the fundamental law of a nation as well as the guarantor of human rights. The most effective means of keeping the Constitution is a meaningful system for the interpretation of Constitution, especially the judicial review of the legislations and judicial decisions. When we observe the Constitutional Interpretation of each democratic nation of the world, even though the organizations and procedures of their respective interpretational institutions are somewhat different, the main purposes are the same—keeping order according to the Constitution and protecting human rights. From this point of view, the interpretation system of the Republic of China is certainly no exception.

b. The origin of the Republic of China's judicial system for the interpretation of the Constitution arose from the questioning of the interpretation system of the judicial institution prior to the implementation of the Constitution. Since the Ching Dynasty reformed the legal system, editing of the modern laws and codifications has been done according to the Western legal system. But these legal reforms were not fully accomplished before the outbreak of the Civil War, which ended the Ching Dynasty. After the establishment of the Republic of China in 1911, many affairs had to be attended to, and the legal system was not fully settled. However, because of the practical need for predictable judicial decisions, the whole country was ordered to follow the codes set up in the Ching Dynasty, along with some statutory amendments.

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Many parties felt dissatisfied with the newly-instituted legal system which could not be well understood by the people. From the period of the 'Da-Li' Yuan under the control of the Peking Government to the Judicial Yuan of the Republican Government, all applied the interpretational system based upon the inquiry (ask and answer) Structure. Under this system, whenever there was a doubt concerning the meaning of fundamental laws; ordinances, orders or inferior law conflicting with superior law, either an individual or institution could apply for a legal interpretation. Such interpretations added value and power to the already existing laws. Since interpretations occurred in great numbers, this system became the most principal resource of law before current laws were put into effect.

c. According to the aforesaid tradition of inquiry interpretation, Article 78 of the contemporary constitutional law of the Republic of China, stipulated: "The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders."; the Section 2 of Article 79 goes on to state: "The Judicial Yuan shall have a certain number of Grand Justices to take charge of matters specified in Article 78 of this Constitution, who shall be nominated and, with the consent of the Control Yuan, appointed by the President of the Republic." Furthermore, Article 171 stipulated "Laws that are in conflict with the Constitution shall be null and void." The Republic of China borrowed from all these regulations which clarified the interpretation rights of the Constitution, especially the judicial right of review which exclusively belonged to the Judicial Yuan. This right constitutes a unique part of the judicial system of the Republic of China.

II. The Law and Organization of the Council of Grand Justices.

A. The Promulgation and Amendment of the Law of the Organization of Judicial Yuan.

The Constitution of the Republic of China was promulgated by the National Government on January 1, 1947, and became effective on December 25, 1947.

For the purpose of complying with the Constitution, however, the National Government had already adopted the Law of the Organization of the Judicial Yuan in March of the same year. This law required that the Judicial Yuan should establish the Council of Grand Justices, with 9 Grand Justices, for the purpose of interpreting of the Constitution and the laws and orders in a unified manner. But in that law, there was no clear statement regarding the qualifications to be a Grand Justice. It was also weak in other respects and, therefore, the National Government amended it on Decembers 25, 1947 and put it into effect. By the amendments the number of Grand Justices was increased to 17 and qualifications and terms of the Grand Justices were regulated by special Articles. This law was put into effect on June 24, 1948. In July of the same year, the President of the Republic of China, according to the Constitution and the Law of the Organization of the Judicial Yuan, appointed 17 persons to serve as the first Grand Justices. Application for these seventeen appointees was made to the Control Yuan for its approval. But after voting, the Control Yuan approved only twelve of them and two never took their postions. Therefore, during the first term of the Council of Grand Justices, there were only ten Grand Justices actually serving in that capacity. Nevertheless, the interpretation system of the Council of Grand Justices in the Republic of China finally started its legal function and this was significant indeed.

B. The Oualifications and Terms of Grand Justices

According to Article 4 of the current Law of the Organization of the Judicial Yuan, the qualifications and terms of Grand Justices are set forth:

- a. One must have: served as a judge on the Supreme Court for more than ten years with a distinguished record; or,
- b. served as a member of the Legislative Yuan for more than nine years with a distinguished contribution; or,
- c. been a professor at any major law school in a university for more than ten years and been the author of specialized works in the field of law; or,

d. been a judge of an international tribunal or been the author of authoritative publications on public law or comparative law; or

e. been a person distinguished in legal knowledge and law and political experience.

The number of Grand Justices with qualifications of any one of the foregoing five categories was not to exceed one-third of the total number of Grand Justices. Article 5 states that the maximum term for each Justice is nine years.

In case of a vacancy, the term of succession should be carried out until the end of the regular term. Article 4 regulates the qualifications of Grand Justices in each term. Its purposes are to let all legal intellectuals participate in the Council and to get a balance representing different levels of law, in order to keep a fair and equitable representation of perspectives. The main purpose of Article 5 was to achieve a substantial benefit in the qualified interpretation of the Constitution of the Republic of China.

C. The Survey of Grand Justices

Since the First term's Council of Grand Justices in July 1948, until present, we have had five terms of the Council. Among these Grand Justices over 40 years, only the first term did not work regularly. This was because of political conflict when the Republican Government moved to Taiwan and most of the Grand Justices stayed in mainland China. At this time, the Council of Grand Justices had to be temporarily stopped. In April, 1952, President Chang Kai-Shek nominated seven new successor justices and, having gotten the consent of the Control Yuan, the council finally began meeting. During these five terms, one hundred Grand Justices have been appointed by president and consented by the Control Yuan. However, there were seven appointees who never took their posts and another two resigned. There have been three female Grand Justices. At the conclusion of their first term, 27 Grand Justices have been re-appointed and gotten the approvals of the Control Yuan. Since the Fifth term, whenever one's age is over 65, he may not be renominated

by the president to serve as a Grand Justice. Because of this age restriction, of the fourth term's Grand Justices, only, eight had the opportunity to become Grand Justices, during the fifth term, which meant the other eight in the Fifth term's Council were newly-appointed by the President. The principal reason for the age restriction is to create an opportunity for junior and senior Grand Justices to work together. On the one hand, this process puts new blood into the Council of Grand Justices; on the other hand, it extends the input of experienced Justices on the Council.

D. Duties and Rights of Council of Grand Justices.

Under Constitution of the Republic of China, the right of interpreting the Constitution and the right of unifying the interpretation of laws and orders are given to the Council of Grand Justices. Interpretation of the Constitution includes not only the meaning of Constitution, but also the judicial review of laws and orders. However, at the present time, the Law of the Council of Grand Justices of the Judicial Yuan, only permits interpretation when there is a doubt or conflict between national and local governmental entities. The individual person also may apply for judicial review of laws (ordinances) and orders under certain specified conditions. Current regulations are as follows:

a. A national or local government entity may request an interpretation under the following circumstances:

(a) where an entity, in carrying out its duty, has doubt as to the proper application of the Constitution;

(b) where an entity, in carrying out its duty, has a dispute concerning the application of the Constitution with another government entity carrying out its own duty;

(c) where an entity, in applying a law or regulation, has doubt as to whether the law or regulation is at variance with the Constitution.

b. An individual, whose constitutional right has been infringed and who has instituted legal proceedings in accordance with law, may request an in-

terpretation on whether the law or certain orders applied in the final decision of his case by the court of last appeal is in conflict with the Constitution.

Furthermore, an individual person, applying for constitutional interpretation, should be aware on the following points:

(a) The request is not limited to natural persons (citizen) but is available to any legal person.

(b) There must be an allegation that an individual's constitutional rights have been violated and that final judgements have already been rendered.

(c) The subject for interpretation is limited to the laws or orders upon which the final judgement is based and the allegation that there is a conflict with the Constitution. Precedents of law should also be the subject of a party's request for interpretation, because the precedents of law have enforcing power and could be relied upon as the basis of the judgement of the court. Equal to the laws or orders in importance, precedents should be open to interpretation whenever there is a conflict between precedent and Constitution. We should carefully look into the purpose for having the precedent and should apply for its interpretation under certain regulatory conditions, in order to substantially protect human rights.

In Article 6 of the Law of the Grand Justices, it states that an interpretation of the Constitution may be made only upon receipt of written requests from government organizations or individuals. It is also required that the applicants identify the following points:

(a) the reason for the request for the interpretation of the Constitution, how it will resolve constitutional doubts or conflicts, and the specific Article of the Constitution under which the request is being made;

(b) the positions of the parties and the contentions of the applying party;

(c) the major governmental documents concerned in the case and its description; and

(d) the purpose for applying for constitutional interpretation.

III. Unified Interpretation of Laws and Orders

The system of the unified interpretation of laws and orders appears to be unique to the Republic of China. It may be traced back to the starting period of the Republican Government, when the Peking Government used to make a similar kind of unified interpretation. At that time the legal system had just been put into effect and the system was not thoroughly understood; therefore, when the law was applied, there remained doubts concerning its application. So, the judges of 'Da-Li' Yuan attempted, in their interpretations to give a clear meaning of laws and also to forbid the misuse. When the Constitution was created, this unified interpretation system was made a part of it in Article 78, which states, "The Judicial Yuan...shall have the power to unify the interpretation of laws and orders." The goal of a unified interpretation of laws and orders is to preserve the sequence and order of laws. With respect to this, Article 7 of the Law of the Council of Grand Justices contains the following requirement, "When a central (national) or local governmental institution differs with another governmental institution concerning the application of laws or orders under their jurisdiction, they may apply for unified interpretation; however, in the event that one institution should follow the opinion of the other institution by law, they may not apply for unified interpretation." If the institution is by law required to follow its supervisory institution, it may not apply for unified interpretation. In Article 8 of the above-mentioned Law, applies whenever there is a superior institution of an inferior institution which is applying for interpretation. Its application should be transmitted by the superior institution. In case of non-qualified application, the superior one should not transmit the application and the rules for the resolution by the superior institution are the same.

Therefore, it seems clear that the unified interpretation has the following characteristics:

- (a) the appropriate party for applying for a unified interpretation is a

governmental institution;

(b) either central (national) or local governmental institutions may apply for unified interpretation, and on occasion, may be the object or respondent institution of a constitutional interpretation which has been applied for.

(c) in principal, the applying institution and the respondent institution should be on equal footing, that means there should be no directive or supervisory relationship between two institutions; and

(d) the unified interpretation is to be enforced upon both the applying institution and the respondent institution.

IV. The Procedure for Employing the Interpretation Power by Grand Justices

Grand Justices meet together in the council in order to undertake the interpretation of the Constitution and laws. The meeting is divided into two types: the All-Members Review Meeting and Grand Justices Council

A. All-Members Review Meeting

According to the rules governing the Council of Grand Justices, three Grand Justices must vote for reviewing the application before the Grand Justice Council may consider it. In addition, no interpretation will be made for those applications which are inconsistent with the specific reasons submitted to the Council for decision. A case for judicial interpretation must be considered by the Council within a specific limited period of time. As the case is considered by the Council for discussion, the principles of the case are reviewed first. Three Grand Justices are appointed for preparing a draft of the content of its interpretation, which is then printed and distributed to the all Grand Justices. The matter is then considered by the member of the Council for discussion and a final decision is reached by a vote. If there are disagreements among the Grand Justices to the aspects of the draft, the dissenter may prepare his written dissenting opinion within five days after the final decision has been reached by the All-Members Review Meeting.

The dissenting opinion is published with the Interpretation Statement. If the written dissenting opinion is not prepared in time, the oral disagreement by dissenter will be void.

B. Grand Justices Council

Under Article 79 of the Constitution of the Republic of China, the Judicial Yuan is designed to have a certain number of Grand Justices in charge of interpreting the Constitution and unifying the interpretation of other laws and orders during each session of the Grand Justices Council. A session of the Council of Grand Justices is presided over by the President of the Judicial Yuan, or in the event the President can not preside, by the Vice President of the Judicial Yuan. The Secretary General of The Judicial Yuan should also be present at The Council of The Grand Justices. The Grand Justices Council is held once every two weeks. If necessary, an interim council may be held.

An applicant and a representative of the applicant for interpretation may be present at the meeting of the council for purposes of presenting an explanation of their application in accordance with the laws. In the event that a Grand Justice has a personal interest in the application, he should withdraw from the Council's consideration of that particular interpretation application.

Article 11 and Article 13 of the Law of the Council of Grand Justices regulate the voting methods and procedures. Article 11 states: "A decision by the Council of Grand Justices is ordinarily made by the members raising their hands. By agreement of the majority of those present at the session, a secret ballot may be the means to reach a decision." Article 13 says: "An interpretation of the Constitution may be achieved only when it has been approved by three-fourths of the Grand Justices present at a meeting which is attended by a quorum of three-fourths of the total number of the Grand Justices. The unified interpretation of laws and orders by the Council of Grand Justices may be decided only with the majority of the total of Grand

Justices attending and with the consent of the majority present. When there is a tie vote, the chairman may cast the deciding vote.”

The voting regulations for reaching a constitutional interpretation are rather restrictive. The primary purpose of such restrictions is to prevent the Grand Justices Council from procedural gamesmanship. The system, as implemented, encourages Grand Justices on the majority side of an interpretation to have to work with the minority dissenting side in opinions, on occasions, the majority may even have to alter their positions.

C. The publication of Interpretations of the Grand Justice Council.

The draft of the decision and the logical reasoning of the interpretation decided upon at the All-Members Review Meeting are raised at the Grand Justices Council for discussion. The Council then decides whether to accept the case application. If the application is accepted, the principles upon which the interpretation rests must be determined. According to the Article 17 of the Law of the Council of Grand Justices, The interpretation of The Grand Justices Council is attached with a statement of the reasons for the interpretation together with any dissents or additional concurring statements by other Grand Justices. These are then published by The Judicial Yuan and notice is furnished to the original applicant and related persons. Generally, the date of publication is the same day that the interpretation decision is passed by Grand Justices Council, even though there is no specific rule or regulation regulating the publication date. Under the amended Rules governing the Law of the Council of Grand Justices, any dissenting opinion should be attached with name or names of the Grand Justices who wrote or joined in the dissent to ensue the integrity of those who dissented.

V. Constitutional Development under the Constitutional Interpretation System of the Republic of China

In the course of the forty year history of the Council of Grand Justices, from September 1948 to August 1988, there have been more than 230

Constitutional Interpretations. While these numbers are not as great as the number of decisions of ordinary courts, these interpretation cases are extremely valuable and have helped greatly in preserving individuals rights and the constitutional function of the nation. In reviewing the history of the constitution interpretation system in the Republic of China, it is interesting to observe the main contributions of the Council of Grand Justices:

A. It has strengthened the function and effect of the Constitution through increasingly modern and more useful interpretations. The Grand Justices Council, with this aim as a protestor of its fiduciary duty, is always seeking to find the spirit, purposes and principles of the Constitution of the Republic of China. This also means the Grand Justices Council is always trying to reenforce the function of the Constitution as a fundamental monitor of the nation as well as to establish the primary rules between the government and the people it secures.

A few examples will indicate how Interpretations may be used to strengthen the function of the Constitution. The first example involves Interpretation No. 3 and Interpretation No. 175. The same issue at stake in both cases is whether or not the Control Yuan and the Judicial Yuan have the right to introduce legal bills concerning affairs under their authority. There is no clear language in the Constitution on this issue. If we were to argue that neither Yuan has this right, then, conceivably, the other constitutional rights which are expressly given to Control Yuan and Judicial Yuan may not put into action anymore. Consequently, the Grand Justices Council, seeking to achieve a spirit of equality among the Five Yuans, rendered the No. 3 and the No. 175 Interpretations.

Interpretation No. 3 states: "... the five Yuans, with the rights authorized by the Constitution, each within its own authority, are the highest organs of the nation. They fulfill their duties, independent and equal, with no one superior to the others... With respect to the affairs of the Control Yuan, it may bring legal bills which are consistent with the spirit of the Constitution."

However, in Interpretation No. 162, within the reasoning of the statement, it is mentioned that the justices of Administrative Court and members of the Committee on the Discipline of Public Functionaries should be considered as judges of the Constitution and enjoy the same protection. The reason why the Grand Justices Council rendered this broad definition of judges is to ensure compliance with the purpose of Article 81 of the Constitution, which states: "Judges shall hold office for life. No judge shall be removed from office unless he has been found guilty of a criminal offense subjected to disciplinary measure, or declared to be under interdiction. No judge shall, except in accordance with law, be suspended or have his salary reduced during his term in office."

B. The Constitution is the fundamental law of a nation. The changes in political institutions and society itself should comply with the adopted interpretations of the Constitution. Otherwise, it could not fulfill its responsibility to carry out the constitutional goals. With the huge change of the national conditions of the Republic of China, which could not be foreseen by the Founders of the Constitution, there have necessarily been certain interpretations by Grand Justices Council established under changing circumstances. Without this, the regular process and constitutional function of the nation may have become impossible.

For instance, Interpretation No. 31 and Interpretation No. 85 were specifically focused upon the numbers and the terms of Central Representatives. The members of the Council made a rational interpretation after they thoroughly reviewed the facts and purposes for enacting the Constitution. By relying upon these interpretations, the Republic of China was released from political crisis and the Central Representative system was firmly maintained in a constitutional sense.

C. Protection of the Rights of the Individual

Most Interpretations over the past forty years are concerned with the freedom and rights of people. We can look at several specific examples.

(1) Freedom from improper arrest or imprisonment

Interpretation No. 38 states: "... When it is applying its legislative power, the City Council should not promulgate rules which would restrict the freedom of citizens."

In Interpretation No. 130, related the language of the Section 2, Article 8 of the Constitution sets forth the requirement that the grounds for the arrest or detention of an individual shall be made available within 24 hours of the arrest or detention. No. 130 sets forth a precise interpretation for calculating this time limitation.

Interpretation No. 166, an interpretation in which the Council considered the regulation of Law of Punishment for Police Offences, stated: "Punishment should be rendered by Courts under due process of law instead of being decided by the authority of the police."

(2) Protection of Legal Rights

Interpretation No. 86 confirmed that the trial system and the prosecution system should be two independent legal structures. This interpretation has created great legal interest among litigators.

Interpretations No. 9, No. 177, No. 185, No. 188 and No. 216, all ensure that, in the event there is an unconstitutional interpretation of a law or an order made by the Council and adopted by a final decision of the Court, the afore-said interpretation may be the basis for a Retrial or an Extraordinary Trial.

(3) Property Rights Protection

Interpretation No. 218 declared that the governmental taxation institution applied an irrational method for collecting personal income after people sold their real property was unconstitutional. Interpretation 214 asserted that the Financial Department's regulation which required an individual to have to pay a certain fee for the purpose of re-examining the correctness of taxes was unconstitutional.

VI. Conclusion

In conclusion, the maintenance of the Constitutional order and the protection

of human rights are inseparable. The Grand Justices Council interpretation system of the Republic of China has from the beginning been granted the role of maintaining the constitutional order through by its own interpretation function. The Council has gradually enlarged its power to include the preservation of primary human rights and this extra assignment has become a particularly substantial and successful accomplishment. In comparison with interpretation systems of other nations, Council of Grand Justices has enjoyed an especially important and creative governmental and judicial role.