

An Uncommon Case of Bigamy; An Uncommon Constitutional Interpretation

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I. INTRODUCTION

On June 23, 1989, the Council of Grand Justices (Council) of the Republic of China (ROC) declared a Supreme Court Judgment unconstitutional for the first time in ROC history.¹ Earlier, the Supreme Court had upheld the District Court's nullification of a mainlander's thirty-year marriage to a Taiwanese wife on grounds of bigamy.² Although the facts probably typify many cases in which spouses were separated by the 1949 split between Taiwan and mainland China, this was the first case in which the constitutional tribunal had an opportunity to review such a legal dilemma.³ In its review of

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The authors served as counsel for the petitioners in the subject case of this article.

1. Council Interp. Shih-242, [31] 8 SSU-FA YÜAN KUNG-PAO [hereinafter JUDICIAL YUAN GAZETTE] 1 (1989). Under the ROC Constitution, the Council of Grand Justices has final authority to interpret the Constitution. See CHUNG-HUA MIN-KUO HSIEN-FA (Constitution of the Republic of China)[ROC CONST.] 1 (promulgated Jan. 1, 1947, effective Dec. 25, 1947) art. 78, 1 CHUNG-HUA MIN-KUO HSIEN-HSING FA-KUI HUI-PIEN (Collection of Current Laws and Regulations of the Republic of China)[hereinafter CCLRRC] 1 (the Judicial Yuan is empowered to interpret the Constitution and other laws and regulations); *id.* art. 79 (Grand Justices of the Judicial Yuan with powers under art. 78 are to be nominated and appointed by the President with the approval of the Control Yuan). Council Interpretations bear the appellation "Shih" and are numbered chronologically. For a more detailed explanation of the Council and its functions, see Newton and Wang, *A Research Guide to Taiwan (ROC) Law*, 3 J. OF CHIN. L. 259 (Fall 1989).

2. There were actually two Supreme Court judgments reviewed by the Council in this case: Supreme Court Judgment, 76-T'ai-Shang-2607 of Dec. 8, 1987 and Supreme Court Judgment, 77-T'ai-Tsai-104 of Dec. 9, 1988. The latter judgment, rendered upon the defendants' application to reopen the case and annul the former judgment, upheld the former judgment. For the lower court decisions involving Deng, see Taiwan High Court Judgment, 76-Chia-Shang-42 of Sept. 14, 1987 and Taichung District Court Judgment, 75-Chia-Su-62 of Feb. 10, 1987.

3. See Grand Justice Chen's dissenting opinion in Council Interp. Shih-242, *supra* note 1 at 4.

that Supreme Court decision, the Council established a landmark precedent in ROC constitutional jurisprudence that significantly impacts not only the substantive law, but also the procedural law of the ROC.

II. THE FACTS

According to the facts established by the District Court, Y.C. Deng was first married on the Mainland in 1949. During the Communist takeover, Deng left the Mainland for Taiwan; his wife stayed behind.⁴ In 1960, Deng married again, this time in Taiwan, even though his first marriage had never been legally dissolved.⁵ Deng and his second wife had three sons and several grandchildren.⁶

In 1986, Deng's first wife, who was residing in Hong Kong, filed suit in the Taichung District Court seeking to nullify the second marriage under article 992 of the ROC Civil Code.⁷ The District Court, the High Court and the Supreme Court all ruled in favor of the plaintiff-appellee, Deng's wife. In 1989, the Supreme Court ruled against Deng's motion for retrial.⁸ Deng and his second wife then petitioned the Council to review their case.

4. Deng disputed the validity of his first marriage on grounds that it lacked various required formalities such as a public ceremony and two witnesses, but this argument was never accepted by the lower courts.

5. Under the ROC Civil Code, divorce can be accomplished either by agreement or by court judgment. Ch'ing-chu Pien (Civil Code Book of Family)[Civil Code], 34 CCLRR 19895, art. 1049, (1930) (amended June 3, 1985). Article 1052 of the Civil Code enumerates limited grounds for divorce by judgment, among which the following two are relevant to the case:

1. One spouse maliciously abandons the other and such abandonment continues;
2. One spouse has disappeared for more than three years and it is unknown whether he/she is dead or alive.

Deng could not divorce his first wife on the first ground because the abandonment was the result of an unfortunate event rather than a malicious abandonment. As for the second ground, according to Sup. Ct. Precedent, 43-T'ai-Shang-538, 1 TSUI-KAO FA-YÜAN P'AN-LI YAO-CHIH [hereinafter PRECEDENT SYNOPSES] 511, one spouse cannot be regarded as having disappeared simply because correspondence ceases or where the discontinuance of correspondence is the result of war or prohibition by law. Furthermore, as early as 1964 Deng knew that his first wife was alive.

6. Deng's first marriage had produced no offspring.

7. The Civil Code, *supra* note 5, art. 985 prohibits a married person from entering into another marriage. The applicable version of Civil Code art. 992 provided sanctions for violation of art. 985, permitting an interested party the right to apply to the court for annulment of the later marriage at any time prior to dissolution of the prior marriage. The applicable version can be found at 32 CCLRR 1985 (1st ed. 1981). Article 992 was deleted in the June 3, 1985 amendment of the Book of Family. Under the amended articles, the second marriage would be void, not merely voidable. *See* Civil Code, *supra* note 5, arts. 985, 988.

8. Supreme Court Judgment, 77-T'ai-Tsai-104 of Dec. 9, 1988.

III. THE COUNCIL INTERPRETATION

In Interpretation Shih-242, the Council rejected the argument that article 992 of the Civil Code was unconstitutional for failing to impose a statutory limitation upon the first wife's right to annul her spouse's second marriage. Instead, the Council affirmed the constitutionality of article 992 on the ground that the establishment of a system of monogamy requires having a nullification mechanism unlimited by a statute-based time period.

The Council held, however, that if a married couple was separated as the result of a "national tragedy" (*i.e.*, the Communist take-over of the Mainland), the second marriage would be deemed an "uncommon case" of bigamy. According to the Council, Deng's second marriage could be termed an "uncommon case" of bigamy because the separation of the spouses of the first marriage, who lived without communication or knowledge of the other's survival following the "national tragedy," constituted an element beyond the control of the parties.

Under these circumstances, application of article 992 to annul the second marriage would "seriously jeopardize daily family life and consanguinity established under the long-enduring second marriage"—a result which could ultimately "impair the social order" of the nation. The Council concluded that nullification of the second marriage would violate fundamental human rights as guaranteed by article 22 of the ROC Constitution by depriving private persons of a "normal" life.⁹ In dictum, the Council reasoned that article 992 should never apply where one spouse enters into a second marriage after the parties to the first marriage have been long separated by a "national tragedy."¹⁰ In this way, the Council explicitly affirmed the petitioner's right to institute an action for retrial by the Supreme Court.¹¹

9. ROC CONST. art. 22 provides: "All other freedoms and rights of the people that are not detrimental to social order or the public welfare shall be guaranteed under the Constitution." This article resembles U.S. Constitution, amend. 9.

10. According to article 17 of the *Ssu-fa Yüan Ta-fa-kuan Hui-yi Fa* (Law Governing the Council of the Grand Justices of the Judicial Yuan) [Governing Law](promulgated July 21, 1958) 33 CCLRRC 19783, interpretations made by the Council shall be composed of three parts: a main text, reasons, and dissenting opinions, if any.

11. Though Deng raised a constitutional challenge to the minimum quorum requirement for interpretations established by Governing Law, *supra* note 10, art. 13, para. 1, (a quorum of three-fourths), the issue remains unresolved by Interpretation Shih-242. Deng argued that the quorum requirement is an undue legislative restriction on the Council's power to interpret the Constitution. Although no justice expressed an opinion on this issue in Shih-242, the Judicial Yuan, at its meeting on December 14, 1989, resolved to lower the three-fourths super-majority voting requirement to two-thirds of sitting justices. For interpretations declaring regulations unconstitutional, the voting requirement was lowered still further to a simple majority. The

A. *Dual Dissents*

In ROC judicial opinions, no distinction is made between dissenting and concurring opinions.¹² Opinions concurring with the conclusion reached by the majority but based on different grounds are classified as dissenting opinions. Therefore, although Justice J. T. Chen's opinion is the only true dissent, the separate concurring decision of Grand Justice T. C. Liu can also be technically considered a dissenting opinion.

Grand Justice Liu agreed with the majority that the second marriage should be upheld. However, his rationale was entirely distinct from the majority's opinion. Justice Liu adopted the view that the absence of any time limit on the right to annul the second marriage in article 992 rendered the statute unconstitutional. He argued that despite the fact that the second marriage was legally voidable, the well-being of the family relationship built upon that marriage must be afforded constitutional protection. Regardless of the motives of Deng in marrying again, he said, after the second marriage has existed for a considerable period, it deserves to be respected and preserved by the law.

Buttressing his argument, Justice Liu pointed out that all other Civil Code provisions that provide a right to legally annul a marriage limit that right by time. Moreover, he contrasted the Civil Code's imposition of a statute of limitations with regard to property rights with the lack of such a limitation in article 992. Justice Liu pointed out that ensuring certainty in family relationships (created here under the second marriage) was more important than ensuring certainty in the area of property rights.

Finally, Grand Justice Liu stated that because marriage and family relationships are constitutionally protected, any restriction upon them must meet a less-restrictive-means test. Under the test, a prescriptive limitation on the right to annul the second marriage would not hamper the purpose of article 992 —the deterrence of bigamy. At the same time, it would impose less of a restriction on marriage than a requirement to annul regardless of the duration and circumstances of the second marriage. Justice Liu concluded that article 992 failed the test and was therefore unconstitutional.

In his dissent, Grand Justice J. T. Chen agreed with the majority that the lack of a time limitation in article 992 alone did not render it unconstitutional. Nonetheless, he argued that the Supreme Court had

three-fourths quorum requirement remains unchanged. See, SSU-FA CHOU-K'AN (Judicial Weekly), Dec. 20, 1989, at 1.

12. Governing Law, *supra* note 10, art. 17.

appropriately applied article 992 to the case and that an unrestricted nullification mechanism was indeed a legitimate means of stopping bigamy. He also argued that the judiciary should refuse to stretch its authority over legal construction to accommodate the extraordinary facts of the case. He criticized the majority opinion as being vague and logically inconsistent for failing to squarely face the issues presented by the petitioners.

Justice Chen further challenged the procedural basis for the Council's review of the Supreme Court Judgment. In his view, the Council could review the legal rules applied in a case but not the substance of the Judgment itself.¹³ He agreed with the petitioners' protest that article 992 could not be constitutionally applied to the instant case although it may be constitutionally applied to annul a second marriage after a reasonable period of time. In Justice Chen's view, such a petition was obviously a request for review of the substance of the Supreme Court Judgment. Therefore, the case was in his view improperly accepted for review by the Council. He concluded that by affirming the constitutionality of article 992, yet declaring the Supreme Court Judgment unconstitutional, the Council had in effect adopted an "as applied scrutiny" approach, superseding its legal authority.¹⁴

B. *A Reluctant Retrial*

Following the Council's interpretation, petitioner Deng sought retrial by the Supreme Court. On November 3, 1989, the Court overturned its earlier Judgment annulling the second marriage.¹⁵ In its decision, the Supreme Court took the position that its previous Judgment should be vacated solely on the basis of the constitutional interpretation of the Council. The Court specifically stated, however, that its earlier Judgment had conformed to the Civil Code. By virtue of this reluctant Supreme Court Judgment on retrial, the Dengs had their marriage legally reinstated.¹⁶

13. Citing the Governing Law, *supra* note 10, art. 4(I)(2).

14. Council Interp. Shih-242, *supra* note 3, at 2.

15. Supreme Court Judgment, 78-T'ai-Tsai-111 of Nov. 3, 1989 (on court file).

16. Commentators have proposed various approaches to the reinstatement of Deng's second marriage. One scholar suggested the use of special legislation to exempt bigamy under similar circumstances from the application of Civil Code arts. 985 and 992 and to reinstate marriages annulled under these two provisions. See Y. C. Su, *Shih-tse Er-sso-er Hao Chieh-shih Chi Hou*, Lian-ho Pao (United Daily News), June 30, 1989, at 9. Dissenting Grand Justice Chen argued against the use of special legislation to overrule an irrevocable final court judgment on the grounds that such an approach is incompatible with the basic premise of the separation of powers.

Article 13 of the first draft bill entitled "Provisional Statute on the Relationship Between

IV. SUBSTANTIVE SIGNIFICANCE OF THE INTERPRETATION

A. *Natural Law vs. Positive Law*

The Council's decision reflects the tug-of-war between natural law and positive law in ROC constitutional interpretation. In his dissent, Justice Chen stated the positivist view. While expressing sympathy toward Deng, he argued that the judiciary should be bound by written laws and that those laws should not be compromised even in exceptional situations. According to Justice Chen, if the law had failed to respond to social needs, the proper remedy was for the legislature, not the judiciary, to change the law.¹⁷

The majority of Grand Justices rejected Chen's positivist view in favor of a naturalist approach. The majority's rhetoric regarding the overriding merit of the second marriage is evidence of the Council's endorsement of a common-sense approach to justice. This attitude is further reflected in the Council's unusual action of labeling the second marriage an "uncommon case" of bigamy. Interpretation Shih-242 is perhaps one case where natural law prevailed over positive law.

While the Civil Code does not call for a judicial balancing of interests in marriage nullification cases, the Council should arguably balance interests when considering constitutional questions. It is in constitutional interpretation that positive law could yield to a more common-sense, naturalist approach to justice. In his concurrence, Justice Liu recognized this need. Referring to language in the Bill of Rights of the United States Constitution, he termed the nullification of the marriage of nearly thirty years a "cruel and unusual punishment." He then applied a "less-restrictive-means" test to evaluate the statute at issue, arguing that the test required a balancing of interests. In this case, such a balancing would favor Deng and his second wife.¹⁸

It bears noting that a legal positivist could reach the same result as the Council majority and still reject the view that Interpretation Shih-242 represents a triumph of natural law. That is, the Council could be understood as having merely followed the civil law method of eliciting principles already embedded in a civil code. Here, the principle would be that monogamy is founded upon actual consan-

the Peoples of Taiwan and the Mainland" (on file with the Executive Yuan Mainland Affairs Council) as prepared prior to Council Interp. Shih-242 by a committee under the Executive Yuan, adopted the former approach. After Council Interp. Shih-242, however, this provision was abandoned.

17. See, *supra* note 16.

18. Deng's second wife was unaware of his previous marriage at the time they married. Thus, while it is unfortunate that Deng's first wife lost her husband, it runs counter to common sense to deprive the second wife of her spouse of nearly thirty years. Deng, who was obviously aware of the earlier marriage, may be less deserving.

guinity and not mere legal formality. Furthermore, Interpretation Shih-242 defends the institution of family by force of the written Constitution, the ultimate source of law in a positivist legal system.

To some extent, the positivist and naturalist views may be reconciled. One may consider the written Constitution the "outer shell" of natural law philosophy. This philosophy simply states that any positivist legal system must yield to certain fundamental norms of justice.¹⁹ But whether considered a victory of the naturalist view or the positivist view, Interpretation Shih-242 is a triumph of the ROC Constitution itself.

B. Constitutional Protection for an Unenumerated Human Right: "The Right to Family"

The Council's decision represents the first instance in ROC history where the rights of marriage and family were given constitutional protection. Significantly, though the petitioners cited several provisions of the Constitution to support their argument, the Council relied only on article 22 to reach its decision.²⁰ By doing so, the Council seems to have set a precedent for recognizing and safeguarding unenumerated human rights under article 22.

It is too early to conclude that the Council has shifted from its traditionally conservative posture to one more progressive and sensitive to individual rights.²¹ Nonetheless, the Council's willingness to defend such rights is becoming increasingly evident.²²

19. See, E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 89 (1976).

20. In addition to article 22, the petitioners cited ROC CONST. arts. 10, 14, 15, and 156 to support their assertion of the right of marriage and family:

Article 10:

The people shall have freedom of residence and of change of residence.

Article 14:

The people shall have freedom of assembly and of association.

Article 15:

The right of existence, the right of work, and the right of property shall be guaranteed to the people.

Article 156:

The State, in order to consolidate the foundation of national existence and development shall protect motherhood and carry out a policy of promoting the welfare of women and children.

21. See, J. P. FA, *A COMPARATIVE STUDY OF JUDICIAL REVIEW UNDER NATIONALIST CHINESE AND AMERICAN CONSTITUTIONAL LAW* 159-68 (1980).

22. Council Interp. Shih-242 marked the first time that the Council specifically directed the petitioner to apply for retrial. It was the second to lean toward the protection of fundamental non-economic human rights. See, Council Interp. Shih-166 of Nov. 7, 1980, SSU-FA

C. *The Promotion of Monogamy*

Interpretation Shih-242 clearly placed the quality and substance of family life above the mere legal formality of marriage. Deng was thus not a "common bigamist" because his first marriage was a legal shell without "consanguineous" substance.²³ Based on this choice of priorities, Deng should not be considered a bigamist, as only his second marriage had both legal formality and consanguineous substance.

In its opinion, the Council pronounced a compromise decision, labeling the second marriage "bigamous" and yet avoiding nullification. Moreover, rather than striking down the statutory provision at issue and challenging the monogamy system called for by the Civil Code, the Council stated that the case was an exceptional one that merited extraordinary judicial treatment. By distinguishing the Deng case from instances of "common" bigamy, the Council reinforced the monogamy system by emphasizing the nature of the spouses' actual relationship.

V. PROCEDURAL SIGNIFICANCE OF INTERPRETATION SHIH-242

The Council of Grand Justices examined a number of important substantive constitutional issues in Interpretation Shih-242. Its ruling also raised numerous procedural issues that are significant in the maturing judicial system of the ROC.

A. *The Council's Authority to Review a Supreme Court Judgment*

As mentioned, Council Interpretation Shih-242 was the first case in which the Council directly reviewed and overturned a Supreme Court Judgment.²⁴ To reach a decision favorable to Deng, the Council could simply have declared article 992 unconstitutional. Instead, it overturned the Supreme Court's Judgment on grounds that the Court had not properly applied article 992 to the facts. The procedural regulations governing the Council limit the scope of its review

YÜAN TA-FA-KUAN HUI-I CHIEH-SHIH HUI-PIEN (Compilations of Interpretations of the Council of Grand Justices, Judicial Yuan) [hereinafter CIC] 188-89 (Supp. I 1981).

23. Cf., T. S. Dai, *28 Nien Te Lao-kung Tze-me Mei-le?*, 133 FA-HSÜEH TSUNG-K'AN (China Law Journal) 25 (1989).

24. ROC CONST. art. 78, authorizes the Judicial Yuan to interpret the Constitution without any reference to "case and controversy." Therefore, unlike the U.S. Supreme Court, the Council may issue advisory opinions. As a matter of practice, advisory opinions in the absence of adversarial settings have been the standard form of Council interpretations.

Though the Constitution is silent in this regard, Governing Law art. 4(I)(2) of the Council establishes a case-and-controversy rule for private petitioners seeking constitutional interpretation by the Council. Despite this rule, the Council has long refused to deliver "judgments" in the ordinary connotation of that term (*i.e.*, the Council has not reversed or upheld Judgments), but has insisted on rendering only abstract rulings.

to "laws and regulations."²⁵ The crux of the procedural issue is thus whether a judicial decision, specifically a Supreme Court Judgment, falls within the meaning of "laws and regulations."

The petitioners in the case relied on Council Interpretation Shih-154,²⁶ which held that a Supreme Court Precedent falls within the meaning of "laws and regulations" and is therefore subject to the Council's review.²⁷

The petitioners also argued that the creation of selected "Precedent Synopses" under the Rules for Precedent Reconciliation Conferences was an unconstitutional practice because article 25 of the Organic Law of the Courts, on which the Reconciliation Conference Rules were based, did not distinguish between "Precedents" and "Judgments." They maintained that the intent of article 25 was to define each and every Supreme Court Judgment that could be considered a binding precedent. They therefore specifically requested the Council to declare the Reconciliation Conference Rules unconstitutional.²⁸ It follows that any Supreme Court Judgment, viewed as a "Precedent," would be subject to the Council's review under Council Interpretation Shih-154.²⁹

In the Council Interpretation Shih-242 opinion, the Council did not comment on how a Supreme Court Judgment could be subject to Council review under the "laws and regulations" limitation.³⁰ With-

25. Governing Law, *supra* note 10, art. 4(I)(2).

26. Council Interp. Shih-154 of Sep. 29, 1978, CIC, *supra* note 22, 65-75 (Supp. I 1981).

27. Judgments have been distinguished from Precedents under ROC law. Although under the civil law tradition, judicial determinations theoretically do not have mandatory precedential value for later cases, statute does allow review of prior Judgments to settle conflicts among Supreme Court decisions. Fa-yüan Tsu-chih Fa (Organic Law of the Courts)[Law of the Courts] art. 25 (promulgated Oct. 28, 1932, effective July 1, 1935, last amended Jun. 29, 1980) 33 CCLRRC 19579. Law of the Courts art. 25 was used to support the selection of particular Supreme Court Judgments for use as Precedents, and, in Council Interp. Shih-154, the Council cited it as its legal basis for including a "precedent" in the category of "laws and regulations." *But see* Council Interp. Shih-154, *supra* note 26, (Yao, Grand Justice, dissenting) (arguing that the common meaning of the term "laws and regulations" does not embrace a court Judgment.)

28. Petitioner's argument for finding the Reconciliation Conference Rules unconstitutional was that the promulgation of the Rules had not been intended by the makers of the Organic Law and that therefore, in promulgating them, the Judicial Yuan crossed the boundary demarcating the separation of powers by selecting Precedent Synopses at its unfettered discretion. Such a practice, the petitioners argued, clearly deviated from the original legislative intent behind article 25 of the Organic Law.

29. *See id.* It is interesting that the majority opinion in Council Interp. Shih-154 reasoned that had precedents not been meant to have binding force on later cases, there would have been no need to establish the Reconciliation Conference Rules which set forth a formal legal procedure to change a precedent.

30. The Council also did not address the constitutionality of the definition of Precedent under the Reconciliation Conference Rules.

out attempting to justify its decision, the Council simply held that the Supreme Court Judgment nullifying the marriage was unconstitutional. By failing to address the issue, the Council apparently adopted the petitioners' definition of "Precedent," whereby all Supreme Court Judgments are to be included. It remains to be seen whether the Council's decision will be cited in the future as authority for direct review of other Supreme Court Judgments.

It should be noted that the Organic Law of the Courts was amended following announcement of the decision in Council Interpretation Shih-242. Article 25 was replaced with article 57, a provision that allows the selection of the Supreme Court Judgments which are to be deemed "Precedents."³¹ It also remains to be seen whether the new article 57 will affect the Council's attitude toward review of other Supreme Court Judgments.

B. Abstract Review or Constitutional Litigation?

The Council of Grand Justices has historically functioned as a semi-judiciary body. It does not hear oral arguments,³² but merely reviews documentary evidence, thereby preserving a tradition of making only abstract interpretations. Its decisions ordinarily do not take the form of judicial holdings in concrete cases and controversies. Moreover, the legislature does not consider Grand Justices to be judges.³³

Although the Council did break new ground in reviewing a Supreme Court Judgment, it did not reverse the Judgment outright to reinstate the marriage as the petitioners requested. The Council ignored the petitioners' argument that if it only conducts abstract

31. As amended December 22, 1989, the new Law of the Courts, *supra* note 27, art. 57 provides:

Where it is necessary, legal opinions adopted in Supreme Court Judgments may be compiled into Precedents by resolution of the Supreme Court Symposium composed of Supreme Court judges of the Civil Chambers, the Criminal Chambers, or both, and the President of the Supreme Court, and the same shall be filed with the Judicial Yuan.

In reviewing cases and with respect to legal opinions, where it is necessary to change a Precedent, the same procedure stated in the preceding paragraph shall be followed. *See also*, Council Interp. Shih-153 of July 7, 1978, CIC, *supra* note 22, 47-64 (Supp. I 1981).

32. The petitioners in Council Interp. Shih-242 requested permission to have counsel present the case before the Grand Justices in an adversarial style proceeding like that in a lower ROC court. Although the Governing Law art. 12 authorizes the Council to invite petitioners to present their cases, the Council ignored the request and delivered its decision on the basis of written memoranda.

33. ROC CONST. art. 81 grants judges life tenure but under the Ssu-fa Yüan Tsu-chih Fa (Organic Law of the Judicial Yuan) art. 5, (promulgated Mar. 31, 1947, last amended June 29, 1980) 33 CCLRR 19569, Grand Justices have a term of nine years.

reviews, then it cannot be differentiated functionally from the legislature. In fact, the Council's self-imposed limit to review cases only in the abstract may have been initiated as a functional mechanism to link the Council and the Supreme Court. Further, it is generally accepted that a Council interpretation is not as binding as a legislative enactment.³⁴ Tension between the Supreme Court and the Council began to mount when the Council imposed its interpretations as binding in cases at issue.³⁵ While a concrete Supreme Court Judgment had never been the subject of review before Council Interpretation Shih-242, the key issue that emerged from the earlier cases was whether Council interpretations have any direct binding effect upon the cases at issue.

One conclusion can be reached by evaluating the cases leading up to Council Interpretation Shih-242. If the legal opinion expressed in an irrevocable final Judgment contravenes a Council interpretation of laws or regulations, the interpretation may be asserted as grounds for retrial.³⁶ In Council Interpretation Shih-188, for example, the Council announced that an interpretation of laws and regulations requested by government agencies³⁷ to unify contradictory agency positions is applicable not only to the case in question, but also to other similar cases. Interpretation Shih-188 prompted a private party to seek a new trial in the Supreme Court on this basis. In that case, however, the Supreme Court refused to overturn its own Judgment and denied a request for retrial with a vague and unconvincing excuse.³⁸

The Supreme Court's feeble reaction signaled concern among ROC legal scholars that the Council would become a "tribunal above the Supreme Court,"³⁹ and that the stability of the law and the finality of Judgments would be compromised.⁴⁰ In practice, however, the Council is the only institution in the ROC judiciary that effectively

34. See, e.g., Council Interp. Shih-188, of Aug. 3, 1984, CIC, *supra* note 22, 1-4 (Supp. 1988). For further discussion of the "general norm" concept, see H. Kelsen, *PURE THEORY OF LAW* 193-278 (*trans.* by M. Knight, rev. 2d. ed. 1967 reprint 1978).

35. See Council Interp. Shih-177, of Nov. 5, 1982, CIC, *supra* note 22, 44-67 (Supp. II 1984); Council Interp. Shih-185, of Jan. 27, 1984, CIC, *supra* note 22, 111-17 (Supp. II 1984); Council Interp. Shih-188, *supra* note 34.

36. See Council Interp. Shih-185, *supra* note 35.

37. ROC CONST. art. 78; *Governing Law*, *supra* note 10, art. 4, para. 1, sub-para. 1.

38. For a concise introduction on the background of Council Interp. Shih-188, see W. S. CHU, *KUNG-FA CHÜAN-TI YEN-CHIU* (1988).

39. Under the present ROC legal system, a Supreme Court Judgment becomes final and irrevocable upon delivery to the litigants. There is no limitation for filing a petition to the Council for judicial review on a Supreme Court Judgment. See *Min-shih Su-sung fa* (Code of Civil Procedure), art. 231 (promulgated Dec. 26, 1930; last amended Apr. 25, 1986) 34 CCLRR 19935.

40. *Id.* See also Su, *supra* note 16.

exercises constitutional review. Moreover, since the Council only reviews constitutional issues, it is arguably an overstatement to suggest that the Council constitutes a tribunal above the Supreme Court. Finally, the abstract form in which the Council presents its opinions clearly distinguishes it from the Supreme Court. Nonetheless, despite the differences between the Council and the Supreme Court, the Council's decisions have created the impression that a Council interpretation will automatically trigger new trials of cases already adjudicated by the Supreme Court.

It should be recognized that the Council also exhibited tremendous self-restraint in Interpretation Shih-242, especially given its vaguely defined role. This is demonstrated by the fact that every subject of review in its previous decisions was an abstract general norm.⁴¹ In Interpretation Shih-242, the petitioners' request that the Council directly reinstate the second marriage presented it with a golden opportunity to raise itself above the Supreme Court, if that were indeed its goal. In fact, the Council merely shrugged at this opportunity and delivered its decision in the usual abstract format, directing the petitioners to the Supreme Court for retrial. Of course, though the Council left the case for the Supreme Court to reconsider, it left the Court with little decisional latitude. This may have been a "face-saving" approach to avoid intensifying tensions between the Council and the Supreme Court.

In ruling as it did, the Council opened up its potential workload. In fact, experts predict that Interpretation Shih-242 will generate a flood of petitions to the Council for review of Supreme Court Judgments.⁴² The Council's refusal to directly reverse a Supreme Court Judgment also may increase the workload of the Supreme Court by requiring it to conduct retrials.

Unlike the result following Council Interpretation Shih-188, the

41. For instance, in Council Interp. Shih-177, *supra* note 35, the Council reviewed Precedent 60-T'ai-Tsai-170, [1971-74] TSUI-KAO FA-YÜAN MIN HSING SHIH P'AN-LI CH'ÜAN-WEN HUI-PIEN (Compilation of the Complete Texts of the Supreme Court Civil and Criminal Precedents) 417, and announced that it was no longer binding to the extent that it contravened the Council Interpretation. The Council further held that its interpretation is binding upon the very case that triggers the petition to the Council. In Council Interp. Shih-185, *supra* note 35, the Council reviewed Administrative Court Precedent 62-P'an-610, 2 HSING-CHENG FA-YÜAN PAN-LI YAO-CHIH HUI-PIEN (Compilation of Precedent Synopses of the Administrative Court) 1001, and declared it no longer binding to the extent that it contravened the Interpretation. In Council Interp. Shih-188, *supra* note 34, rendered at the request of the Control Yuan, the subject matter was again the effect of the Council's Interpretation, *i.e.*, whether an interpretation may be asserted by an individual as the grounds for reopening a settled case where the Interpretation is rendered at the request of a governmental agency. The Council decided the issue in the affirmative.

42. See Su, *supra* note 16.

Supreme Court in Council Interpretation Shih-242 decided to conform its decision on retrial to the Council's decision. It overturned its prior Judgment solely on the basis of Interpretation Shih-242, even though it maintained that its original Judgment had not deviated from the Civil Code.⁴³ This has major implications. By admitting that it misapplied the law and using the Council's interpretation as the exclusive source for reinstituting Deng's second marriage, the Supreme Court appeared to accept the Council as a tribunal above it.

One may wonder whether the Council is a legislative or a judicial tribunal, especially following Interpretation Shih-242. Since the Constitution places the Grand Justices within the chapter on the judiciary,⁴⁴ and specifically vests them with the power to conduct judicial review of constitutional issues, the Council need not be timid in acting as a tribunal above the Supreme Court on constitutional issues. In fact, its adherence to the abstract review format seriously undermines its nature as a judicial body. Indeed, the Council has foregone a golden opportunity to prove itself as a judicial institution by delivering Interpretation Shih-242 in an abstract form instead of directly deciding the case.

V. CONCLUSION

Following Interpretation Shih-242, Professor Y. C. Su expressed concern that the existing judicial system may not be able to afford an aggressive Council conducting constitutional judicial review of Supreme Court Judgments.⁴⁵ He may be correct that the existing ROC judicial system was not originally structured to allow the Council to function as a tribunal for constitutional litigation. He may also be correct that Interpretation Shih-242 has nearly transformed the Council itself into a litigation tribunal. A more optimistic view than that of Professor Su, however, suggests that the Council can function as a driving force in constitutional litigation, a form of adjudicature long overdue in the ROC.

Interpretation Shih-242 represents a significant landmark demonstrating how far the judicial system has come, and if its past is any indication of its future, constitutional adjudication in the ROC will certainly offer many dramatic and important developments. Interpretation Shih-242 is but one milestone.

43. See Supreme Court Judgment, 78-Tai-Tsai-111, *supra* note 15.

44. ROC CONST. ch. 7.

45. See Su, *supra* note 16.

