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## **J.Y. Interpretation No. 618 (November 3, 2006)\***

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### **Exclusion of Mainland Chinese Migrants from Civil Service Case**

#### **Issue**

Are the provisions in Article 21, Paragraph 2, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area unconstitutional?

#### **Holding**

[1] Article 7 of the Constitution provides that all citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law. Thus, the people, who have the right to take public examinations and hold public office under Article 18 thereof, shall also be equal under the law in this regard. The concept of “equal” as expressed thereunder shall refer to substantive equality. In light of the value system of the Constitution, the legislative branch may certainly consider the differences in the nature of the various matters subject to regulation and accordingly adopt rational differential treatment among people. The foregoing has been made clear in the reasoning of J.Y. Interpretation No. 205 rendered by this Court. Furthermore, the restrictions imposed by law on the fundamental rights of the people based on any rational differential treatment should also satisfy the test of the principle of proportionality under Article 23 of the Constitution. Article 10 of the Amendments to the Constitution as promulgated on May 1, 1991 (as amended and renumbered as Article 11 on July 21, 1997) provides, “The rights and obligations between the people of the Chinese mainland area and those of the

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\* Translation by Vincent C. KUAN

free area, and the disposition of other related affairs, may be specified by *sui generis* law.” The Act Governing Relations between People of the Taiwan Area and Mainland Area (hereinafter referred to as the “Cross-Strait Relations Act”) is the *sui generis* law enacted to regulate the rights and obligations between the people of the Chinese mainland area and those of the free area, as well as the disposition of other related affairs, prior to the nation’s reunification.

[2] Article 21, Paragraph 1, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area as amended and promulgated on December 20, 2000, provides that no person from the Mainland Area who has been permitted to enter into the Taiwan Area may serve as a public functionary unless he or she has had a household registration in the Taiwan Area for at least ten years. The said provision is an extraordinary one with reasonable and justifiable objectives in that a public functionary, once appointed and employed by the State, shall be entrusted with official duties by the State under public law and owe a duty of loyalty to the State, that the public functionary shall not only obey the laws and orders but also take every action and adopt every policy possible that he or she considers to be in the best interests of the State by keeping in mind the overall interests of the State, since the exercise of his or her official duties will involve the public authorities of the State; and, further, that the security of the Taiwan Area, the welfare of the people of Taiwan, as well as the constitutional structure of a free democracy must be ensured and preserved in light of the status quo of two separate and antagonistic entities which are on opposite sides of the Strait and the significant differences in essence between the two sides in respect to the political, economic and social systems. Given the fact that a person who came from the Mainland Area but has had a household registration in the Taiwan Area for less than ten years may not be as familiar with the constitutional structure of a free democracy as the people of the Taiwan Area, it is not unreasonable to treat such a person differently from the people of the

Taiwan Area with respect to the qualifications to serve as a governmental employee, which is not in conflict with the equality principle as embodied in Article 7 of the Constitution, nor contrary to the intent of Article 10 of the Additional Articles of the Constitution. In addition, the said provision, which requires a person who originally came from the Mainland Area to have had a household registration for at least ten years before he or she may be eligible to hold a public office, is based on the concerns that those who originally came from the Mainland Area may have a different view as to the constitutional structure of a free democracy and may need some time to adapt to and settle into the Taiwan society. Moreover, it also may take time for the Taiwanese people to place their trust in a person who came from the Mainland Area if and when he or she serves as a public functionary. Therefore, the ten-year period as specified by the provision at issue is nonetheless a necessary and reasonable means. No manifest and gross flaw is found in the legislators' considered judgments in that regard. Hence there is no violation of the principle of proportionality under Article 23 of the Constitution.

## **Reasoning**

[1] The subject matter of this petition for interpretation is the Cross-Strait Relations Act. The petition is for Article 21, Paragraph 1, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area as amended and promulgated on December 20, 2000, to be declared unconstitutional. Article 21, Paragraph 1, First Sentence of said Act provides that no person from the Mainland Area who has been permitted to enter into the Taiwan Area may register as a candidate for any public office, serve in any military, governmental or educational organization or state enterprise, or organize any political party unless he or she has had a household registration in the Taiwan Area for at least ten years. It should be noted, however, that the

outcome of the judgment giving rise to this matter merely concerns the part of the said provision in respect of governmental service, so this Court, having examined the intent of J.Y. Interpretations Nos. 371, 572, and 590, will limit its constitutional review of the matter to the said part of the provision without touching upon the other parts thereof.

[2] Article 7 of the Constitution provides that all citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law. Thus, the people, who shall have the right to take public examinations and hold public office under Article 18 thereof, shall be equal under the law. The concept of “equal” as expressed thereunder shall refer to substantive equality. In light of the value system of the Constitution, the legislative branch may certainly consider differences in the nature of the various matters subject to regulation and accordingly adopt rational differential treatment among people. The foregoing has been made clear in the reasoning of J.Y. Interpretation No. 205 rendered by this Court. Furthermore, the restrictions imposed by law on the fundamental rights of the people based on any rational differential treatment should also satisfy the test of the principle of proportionality under Article 23 of the Constitution. Nevertheless, dealing with cross-Strait affairs requires considerations and judgments on numerous factors relating to politics, economics, and society. The constitutional interpreters, who are in charge of the judicial review of the law, should rightfully defer to the decisions made by the legislative branch, which represents the diverse opinions of the people and has ample information on hand in that regard, unless there has been a manifest and gross flaw in the decision-making of the legislative branch.

[3] Article 10 of the Additional Articles of the Constitution as promulgated on May 1, 1991 (subsequently amended and renumbered as Article 11 on July 21, 1997) provides, “The rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related

affairs may be specified by *sui generis* law.” The Act Governing Relations between People of the Taiwan Area and Mainland Area as promulgated on July 31, 1992, is the *sui generis* law enacted pursuant to the intent of the said article of the Amendments to the Constitution to regulate the rights and obligations between the people of the Chinese mainland area and those of the free area, as well as the disposition of other related affairs, prior to the nation’s reunification. Article 21, Paragraph 1, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area as amended and promulgated on December 20, 2000, provides that no person from the Mainland Area who has been permitted to enter into the Taiwan Area may serve as a public functionary unless he or she has had a household registration in the Taiwan Area for at least ten years (as was provided in Article 21 of said Act as enacted and promulgated on July 31, 1992). The said provision is an extraordinary one with reasonable and justifiable objectives in that a public functionary, once appointed and employed by the State, shall be entrusted with official duties by the State under public law and shall owe a duty of loyalty to the State, that the public functionary shall not only obey the laws and orders but also take every action and adopt every policy possible that he or she considers to be in the best interests of the State by keeping in mind the overall interests of the State, since the exercise of his or her official duties will involve the public authorities of the State; and, further, that the security of the Taiwan Area, the welfare of the people of Taiwan, as well as the constitutional structure of a free democracy, must be ensured and preserved in light of the status quo of two separate and antagonistic entities which are on opposite sides of the Strait and significant differences in essence between the two sides in respect to the political, economic, and social systems. Given the fact that a person who came from the Mainland Area but has had a household registration in the Taiwan Area for less than ten years may not be as familiar with the constitutional structure of a free democracy as the Taiwanese people, it is not

unreasonable to treat such a person differently from the people of the Taiwan Area with respect to the qualifications to serve as a governmental employee, which is not in conflict with the equality principle as embodied in Article 7 of the Constitution, nor contrary to the intent of Article 10 of the Additional Articles of the Constitution. In addition, the said provision, which requires a person who originally came from the Mainland Area to have had a household registration for at least ten years before he or she may be eligible to hold a public office, is based on the concerns that those who originally came from the Mainland Area may have a different view as to the constitutional structure of a free democracy and may need some time to adapt to and settle into the Taiwan society. Moreover, it may also take a while for the Taiwanese people to place their trust in a person who came from the Mainland Area if and when he or she serves as a public functionary. If the review is conducted on a case-by-case basis, it would be difficult to examine an individual's subjective intentions and character, as well as his or her level of identification with the preservation of the constitutional structure of a free democracy. Besides, it would also needlessly increase the administrative costs to a prohibitive level with hardly any hope of accuracy or fairness. Therefore, the ten-year period as specified by the provision at issue is nonetheless a necessary and reasonable means. As to cross-Strait affairs, in considering which types of public functionaries and public offices may affect the security of the Taiwan Area, the welfare of the people of Taiwan, as well as the constitutional structure of a free democracy, the constitutional interpreters should defer to the decisions made by the legislative body in that regard. Although the law at issue does not differentiate between the types of offices and thus impose different restrictions, we find no manifest and gross flaw therein. Hence, there is no violation of the principle of proportionality under Article 23 of the Constitution.

[4] Where a petition is made by a judge of any of the various levels of courts to

this Court in regard to the constitutionality of a law, J.Y. Interpretation No. 371 should govern. As for the formality of a petition, the said Interpretation has made it clear that Article 8, Paragraph 1 of the Constitutional Court Procedure Act should apply. This petition for constitutional interpretation has been filed pursuant to the intent of J.Y. Interpretation No. 371 (*see* II (iv) on p. 3 of the Petition). As such, Article 252 of the Administrative Court Procedure Act is not the law which is applicable to the original case for which the petitioning court rendered its judgment, nor is it the law to be applied by this Court in rendering an interpretation. Therefore, as far as the said provision is concerned, the petition in regard to the constitutionality thereof should be dismissed based on the intent of J.Y. Interpretations Nos. 371, 572, and 590.

### **Background Note** by Hsiu-Yu FAN

The plaintiff of the original case, [redacted]-Mei HSIEH (“HSIEH”), had originally been a resident of mainland China and subsequently married a Taiwan citizen in 1990. HSIEH was first admitted to reside in Taiwan in 1996 and then granted permanent residency with household registration in 1998. HSIEH further passed the Elementary Civil Service Examination, finished the required training, and received from the Examination Yuan a certificate of qualification to work in the civil service in 2001. However, when in 2002 HSIEH applied to the Taipei City Government for a post open to applicants holding the same certificate of qualification, the City rejected her application for the reason that she had not maintained her household registration for longer than ten years, as required by Article 21, Paragraph 2, First Sentence of the Act Governing Relations between People of the Taiwan Area and Mainland Area (“the provision at issue.”) HSIEH then first filed an administrative appeal and later an action before the Taipei High Administrative Court. Assured that the provision at issue and Article 252 of the Administrative Court Procedure Act, which provides that only the Supreme

Administrative Court may petition to the Constitutional Court for an interpretation, were both in conflict with the Constitution, the Taipei High Administrative Court petitioned to the Constitutional Court for an interpretation based on J.Y. Interpretation No. 371.

J.Y. Interpretation No. 618 is the first time the Constitutional Court reviewed the constitutionality of a discriminatory law based on national origin, or to be precise, jurisdictional origin, as mainland China, albeit actually occupied and governed by the People's Republic of China, is still nominally part of the Republic of China under the Constitution. Under the Constitution, nominally, a mainland immigrant is inherently a citizen of the Republic of China. A distinction in the qualification required for the civil service was drawn by the provision at issue between an ordinary Taiwanese permanent resident/citizen and a mainland immigrant who had not maintained his or her permanent residency in Taiwan for more than ten years. To review this discriminatory law, the Constitutional Court adopted a lenient rational basis review and held the provision at issue to be constitutional in light of its purpose to safeguard the free democratic constitutional order in the Taiwan Area. As the Court found no manifest and gross flaw in the legislature's decision-making, it deferred to this legislative decision, which does not consider individual differences in the identification with a free democracy or the nature of different positions in the civil service.